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Creating Change Together

# **SIGMA**

# **Public Procurement**

# **Training Manual**

## **Update 2015**

## **Module D**

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## **Module D1 Contracting Authorities (Classical Sector)**

### **Section 1 Introduction**

#### **1.1. Objectives**

The objectives of this chapter are to identify:

1. The national and sub-national bodies that must apply the public procurement rules in the award of their works, supplies and services contracts
2. Those bodies that are part of the state, at the executive, legislative and judicial levels of government
3. Those bodies that do not fall within the general definition of state but which must nonetheless follow the procurement rules
4. The effect of falling within the definitions
5. The effect of a change in the constitution of a body that changes its position in respect of the definitions of the Directives (*e.g.* a public authority becoming a “body governed by public law” and vice versa)

#### **1.2. Important issues**

The most important issues in this chapter are understanding:

- That the procurement rules apply to “public” procurement, and that this is defined widely to cover the defined purchases of all public authorities
- That the European Court of Justice (ECJ) defines the concept of public authorities independently of any national definition, and makes that definition a functional one
- The way that each type of public authority is defined
- The conditions that apply to the different types of public authority before they are covered by the public procurement rules
- The possibility that the ability of a body to meet those conditions may change over time

This means that it is critical to understand fully:

- The definitions of the Directives in respect of the state and other public authorities
- The definition of the Directives in respect “bodies governed by public law”
- The interpretation given to these definitions by the ECJ
- The conditions that apply to a body before it may become a “body governed by public law”

#### **1.3. Links**

There is a particularly strong link between this chapter and the following modules or sections:

- Module A3 on the international regulation of procurement, where there is some overlap in the definitions used

- Module A4 on the economic benefits of centralised procurement
- Module B1 on the organisation of centralised procurement
- Module D2 on the contracting entities in the utilities sector
- Module E, to the extent that different procedures apply to contracting authorities in the classical sector and to contracting entities in the utilities sector

#### **1.4. Relevance**

This information will be of particular relevance to the senior management of the body in question, since the status of the body under the Directives determines whether or not the provisions of those Directives apply. It will also be of particular relevance to those involved in procurement planning and strategic decision making, especially where the body at issue is a “body governed by public law” or where it may be possible to envisage the creation of publicly owned companies to carry out the functions of the public authority.

#### **1.5. Legal information helpful to have at hand**

In **2014 Directive (2014/24/EU)**, please look at article 2(1) to (4).

Localisation: In national law, please look at:

## Section 2 Narrative

### 2.1. Introduction

In this chapter, we will be looking at the definition of ‘contracting authorities’ for the purposes of the procurement rules. The major distinction that must be made is between the two main categories of public or contracting authority, as defined in Directive 2014/24/EU (the 2014 Directive), namely:

- state, regional or local authorities (‘public authorities’)
- bodies governed by public law

Contracting authorities may also be made up of associations formed by one or more such authorities or one or more such bodies governed by public law.

The 2014 Directive introduced the distinction between:

- central government authorities – contracting authorities listed in Annex I and, in so far as corrections or amendments have been made at national level, their successor entities; and
- sub-central contracting authorities – all contracting authorities that are not central government authorities.

This distinction is relevant because sub-central contracting authorities enjoy a slightly more relaxed procurement regime under the 2014 Directive. In particular:

- sub-central contracting authorities can use a prior information notice as a means for calling for competition (in the case of the restricted procedure and competitive procedure with negotiation) – this provision is optional for Member States,
- sub-central contracting authorities may establish the time period for receipt of tenders (initial tenders) by mutual agreement between the contracting authority and selected candidates (in the case of the restricted procedure and competitive procedure with negotiation) – this provision is optional for Member States.

**Note:** *In the case of the classical sector, the preferred term is ‘contracting authorities’ because the bodies involved are public ‘authorities’ in the sense that they are, formally or informally, part of the state apparatus. In the utilities sector, on the other hand, the preferred term is ‘contracting entities’ since, as we will see in Module D2, whilst they may also be public authorities, they can be private sector companies that happen to operate in the utilities sector under privileged conditions.*

The importance of understanding these definitions is that they affect the applicability of the procurement rules that form the subject matter of this training. These rules only apply if a body falls within one of the definitions of the Directive. If the body in question does not fall within those definitions, its procurement will not be subject to the Directive. If the body does not fall within the definition but it nevertheless tries to follow the rules, this does not mean that any breach of the Directive’s provisions that it commits would be open to challenge. The Directive either applies or does not apply; there is no ‘in-between’.

Furthermore, once a body falls within the definition of 'contracting authority', *all* of its purchases of goods, works and services will be subject to the procedural requirements of the Directive, even if these purchases are made for the purposes of tasks that are not, or even mostly not, in the general interest. Once covered by the Directive, the authority is covered for all purchases within the definition of the Directive.

Especially in the case of a body governed by public law, the status of a contracting authority can change over time as a result of a change of its functions or a change in its legal status. The financing of the contracting authority may also change over time. These all have an effect on the inclusion of the body within the definition of the Directive, and therefore it is not possible to say, once and for all, whether a body is covered or not covered by the Directive. The situation may require review.

## 2.2. Public authorities

Public authorities are defined as 'state, regional or local authorities'. This definition covers all state entities and not only the executive authority of the state, i.e. state administrations and regional or local authorities. The term 'the state' also encompasses all of the bodies that exercise *legislative, executive* and *judicial* powers. The same applies to bodies that, in a federal state, exercise those powers at federal level.

**Case note:** In the *Vlaamse Raad* case, the European Court of Justice (ECJ) also dismissed the argument that the procurement rules did not apply to legislative bodies because of the independence and supremacy of the legislative authority. (Case C-323/96 *Commission v Belgium* [1998] ECR I-5063)

The definition of the state is broad and the ECJ has taken a particularly functional approach. It thus looks more at the actual function of the entity concerned than at the formal categorisation that the entity has been given by internal law. In the famous *Beentjes* case, the awarding authority was a body with no legal personality of its own, whose functions and composition were governed by legislation and its members appointed by the provincial executive of the province concerned. It was bound to apply rules laid down by a central committee established by royal decree, whose members were appointed by the Crown. The state ensured observance of the obligations arising out of measures of the committee and financed the public works contract awarded by the local committee in question. The ECJ held that the term 'state' must be interpreted in functional terms. As a result, a body such as the awarding authority – whose composition and functions are laid down by legislation and which depends on state authorities for the appointment of its members, the observance of the obligations arising out of its measures, and the financing of the public works contracts that it is its task to award – was held to fall within the notion of the state, even though it is not part of the state administration in formal terms.

**Case note:** The term 'contracting authority' will be defined according to the functions of the body in question. (Case 31/87 *Gebroeders Beentjes BV v Netherlands ('Beentjes')* [1988] ECR 4635)

The state, regional or local authorities (the 'public authorities') are, by definition, contracting authorities for the purposes of the Directive. The Directive makes no distinction, in this

respect, between public contracts awarded by a contracting authority for the purposes of fulfilling its task of meeting needs in the general interest and those contracts that are unrelated to such a task. There is thus no need, as in the case of bodies governed by public law, to distinguish between activities meeting needs in the general interest that are of an industrial or commercial character and those tasks that are not. All contracts awarded by a public authority are to be covered by the Directive, whatever their character.

[Localisation required: In [xxx], the concept of 'public authorities' would include...]

An 'association' of contracting authorities is not different from a contracting authority; it is merely a term used to describe the mechanism whereby public contracts are awarded by 'entities' that do not have their own legal personality or identity but are based on co-operation between public law bodies subject to the Directive, such as purchasing consortia between territorial public bodies. It means a group of contracting authorities.

### **2.3 Bodies governed by public law**

A 'body governed by public law' does not have a simple definition; it depends rather on whether it has certain characteristics. These characteristics are expressed as conditions that need to be met in order for the body in question to be considered as a body governed by public law. It is similar in approach to the functional test adopted by the ECJ in respect of the definition of public authorities.

The main question centres on the three *cumulative* conditions required by the Directive to indicate the existence of a body governed by public law. The ECJ has consistently held that a body must satisfy all three of these conditions to fall within the definition. These conditions, as now set out in article 2(1)(4) of the 2014 Directive, are that a body governed by public law is a body:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
- having legal personality, and
- financed, for the most part, by the state, or regional or local authorities, or by other bodies governed by public law; or subject to management supervision by those authorities or bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities or by other bodies governed by public law.

The concept of a body governed by public law must be interpreted as having a broad meaning and its legal and factual situation must thus be determined in each individual case in order to assess whether or not it meets, for example, a need in the general interest.

[Possible localisation: where [XXX] becomes a member, insert: 'For [XXX] the list of such bodies includes OR is contained in [xxx]']

### 2.3.1 Condition 1: defining needs in the general interest

The term 'needs in the general interest' is not defined in the Directive, but the need for uniform application of Community law and of the principle of equality require that the terms of a provision of Community law must normally be given a consistent interpretation throughout the Community. The ECJ has, therefore, held that this term has to be given an autonomous and uniform interpretation throughout the Community. There are two main issues that are relevant, and these include the definition of (i) needs in the general interest and (ii) general interest needs not having an industrial or commercial character.

#### 2.3.1.1 Needs in the general interest

'Needs in the general interest, not having an industrial or commercial character' are *generally* needs that are satisfied otherwise than by the availability of goods and services in the marketplace and that, for reasons associated with the general interest, the state chooses to provide itself or over which it wishes to retain a decisive influence. In general, the ECJ has looked towards state requirements with regard to the specific tasks to be achieved; the explicit reservation of certain activities to the public authorities; the obligation of the state to cover the costs associated with the activities in question; the control of prices to be charged for the services; the degree of monitoring or security required; and the 'public interest'.

There have been several examples:

- One example is of an entity established to produce, on an exclusive basis, official administrative documents, some of which required secrecy or security measures, such as passports, driving licences and identity cards, whilst others were intended for the dissemination of legislative, regulatory and administrative documents of the state. The public authorities fixed the prices, and a state control service was responsible for monitoring the security measures, where necessary. The documents were closely linked to public order and required guaranteed supply and production conditions that ensured the observance of standards of confidentiality and security. The body had been established for the specific purpose of meeting those needs in the general interest. (C-44/96 *Mannesmann* [1998] ECR I-73)
- An entity that was a public limited company set up by two municipalities, which was specifically entrusted with a series of tasks defined by law in the field of waste collection and cleaning of the municipal road network, carried out a need in the general interest. (Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821)
- The activities of funeral undertakers could be regarded as meeting a need in the general interest, especially since the exercise of the activity was subject to the issue of prior authority and the public authorities could fix the maximum prices for funeral services. (Case C-373/00 *Adolf Truley* [2003] ECR I-1931)

- In other examples, it was found that regional development agencies and other more specialised undertakings that were designed to attract investment to a particular location could fall within the definition of general interest since, by bringing together manufacturers and traders in one geographical location, they were not acting solely in the individual interest of those manufacturers and traders but were also providing consumers who attended the events with information that enabled them to make choices in optimum conditions. The resulting stimulus to trade was considered to fall within the general interest. (Cases C-223/99 and C-260/99 Agorà [2001] ECR 3605; case C-18/01 Korhonen [2003] ECR I-5321)
- An entity that was a company wholly owned by the city of Vienna and had responsibility for providing heating for an urban area by means of an environmentally friendly process (disposal of waste) was established with an aim in the general interest. The ECJ confirmed that needs might be considered to be in the general interest even though the activities were also undertaken by private companies. (Case C-393/06 Inq. Aigner)

### 2.3.1.2 General interest needs not having an industrial or commercial character

The additional criterion for the purposes of this definition is that the general interest needs should not have an industrial or commercial character. These are generally activities that are carried out for profit in competitive markets. The ECJ (Case C-360/96 Gemeente Arnhem [1998] ECR I-6821) held that

- (i) the absence of an industrial or commercial character was a criterion intended to clarify and not limit the meaning of the term 'needs in the general interest';
- (ii) the term creates, within the category of needs in the general interest, a sub-category of needs that are not of an industrial or commercial character; and
- (iii) the legislature drew a distinction between needs in the general interest not having an industrial or commercial character and needs in the general interest having an industrial or commercial character.

This does not mean, however, that a body governed by public law may *only* carry out tasks in the general interest not having an industrial or commercial character. It may do both. In the Mannesmann case, for example, the entity involved had the task of providing the public authorities with official documents (a need in the general interest) but was also in the business of acting as a commercial printing company. It is also immaterial that an entity carries out other activities *in addition* to tasks in the general interest.

However, once an entity falls within the definition of a body governed by public law, any contract, of whatever nature, entered into by that entity is to be considered to be a public contract within the meaning of the Directive, and all of the entity's contracts are covered by the Directive. Even the fact that meeting needs in the general interest constitutes only a



relatively small proportion of the activities actually pursued is irrelevant, provided that the entity continues to attend to the needs that it is specifically required to meet.

This also means that bodies governed by public law can carry out activities that are pursued for profit, provided they continue to carry out the general interest needs that they are specifically required to meet.

On the other hand, if a body governed by public law carries out other activities and these are provided in a competitive market, this may, in fact, indicate the absence of a need in the general interest, not having an industrial or commercial character. If an entity falls into this category, then the Directive will not apply.

This is a conceptually difficult distinction because whilst the existence of significant competition does not in itself prevent there being a need in the general interest not having an industrial or commercial character to be met, the very existence of such competition may be an indication that a need in the general interest does have an industrial or commercial character.

In the last resort, the problem is solved by looking more closely at the nature of the entity concerned rather than at the activity it carries out. The question becomes one of whether the entity is operating in an industrial or commercial manner. Thus, in the *Korhonen* case, the ECJ held that if the body:

- (i) operates in normal market conditions,
- (ii) aims to make a profit, and
- (iii) bears the losses associated with the exercise of its activity,

it is unlikely that the needs that the body aims to meet are not of an industrial or commercial nature.

In the preamble, the 2014 Directive refers to the rich case law of the ECJ. Recital 10 stipulates: “The notion of ‘contracting authorities’ and in particular that of ‘bodies governed by public law’ have been examined repeatedly in the case law of the Court of Justice of the European Union. To clarify that the scope of this Directive *ratione personae* should remain unaltered, it is appropriate to maintain the definitions on which the Court based itself and to incorporate a certain number of clarifications given by that case law as a key to the understanding of the definitions themselves, without the intention of altering the understanding of the concepts as elaborated by the case law. For that purpose, it should be clarified that a body that operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a ‘body governed by public law’ since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character.”

The relevant legal and factual circumstances have to be taken into account in each case, especially those prevailing when the body concerned was formed but also the conditions in which it carries out its activity, including the level of competition on the market, the issues

of whether its primary aim is or is not the making of profits and whether it bears the risks associated with the activity, and any public financing of the activity.

### 2.3.2 Condition 2: legal personality

The existence of a legal personality is generally the clearest distinction between bodies that form part of the state, regional or local authorities and those that are considered to be bodies governed by public law. Most government ministries, departments and divisions do not have a separate legal personality. If a separate body is created as a company or enterprise, then it will have a legal personality that is separate from the state and it is likely to be seen as a body governed by public law if the other two conditions are also met.

It does not matter whether the body in question is subject to public or private law. The only issue is whether it has a legal personality.

**Case note:** *Under Spanish law, public bodies constituted under private law (a category composed, in the Spanish legal system, of commercial companies under public control) were excluded from the scope of the Spanish rules governing procedures for awarding public contracts. The ECJ held that it was necessary to establish only whether or not the body concerned fulfilled the three conditions for establishing the existence of a body governed by public law and that a body's status as a body governed by private law did not constitute a criterion capable of excluding its being classified as a contracting authority for the purposes of the Directives. (Case C-214/00 Commission v Spain [2003] ECR I-4667)*

### 2.3.3 Condition 3: dependency on the state

This third condition is contained in article 2(1)(4)(c) of the 2014 Directive:

**Article 2(1)(4)(c) of the 2014 Directive:** *"...they are financed, for the most part, by the state, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the state, regional or local authorities, or by other bodies governed by public law;"*

This condition is used primarily to determine the degree of dependency of the body on the state. This dependency may, alternatively, be

- financial,
- managerial, or
- supervisory.

This condition is satisfied where only one of these three criteria is met.

### 2.3.3.1 Financial dependency

The term 'financed for the most part' means financed by 'more than half', but the term 'financed' is not as clear as it seems. The question concerns the actual degree of state dependency implied by the level of state financing. Not all payments made by a contracting authority have the effect of creating or reinforcing a specific relationship of subordination or dependency between that authority and another body. Only payments that are made to finance or support the activities of the body concerned, without any specific consideration, may therefore be described as public financing.

#### ***Example from case law:***

In the case of a university, payments in the form of awards or grants for the support of research work that go to the institution as a whole may be regarded as financing by a contracting authority. Similarly, the payment of student grants in respect of tuition fees collected by the universities may also be classified as public financing. Since there is no contractual consideration for those payments, they are not to be regarded as financing by a contracting authority in the context of its educational activities. On the other hand, the position is quite different in the case of payments made, in the form of consideration, by one or more contracting authorities for the supply of services comprising research work or for the supply of other services, such as consultancy or the organisation of conferences. These 'sources of financing' are, in fact, sums paid by one or more contracting authorities as consideration for contractual services provided by the university, and it also does not matter that those activities of a commercial nature happen to coincide with the teaching and research activities of the university. The contracting authority has in fact an economic interest in providing the service.

(Case C-380/98 *The Queen v HM Treasury, ex parte The University of Cambridge* [2000] ECR 8035)

In a case concerning a public broadcasting authority, the ECJ concluded that direct financing by the state was not required, since the Directive did not lay down this rule and it was not a relevant condition in light of the purpose of the rules. When the activities of public broadcasting bodies were financed indirectly through the payment of fees by persons who possessed television receivers, the ECJ concluded that there was financing, for the most part, by the state. In that circumstance the fee was imposed, calculated and collected in accordance with rules of public law rather than through contractual arrangements with customers. The ECJ referred to the purpose of the rules, which was to cover bodies that were dependent on the state.

(Case C-337/06 *Bayerischer Rundfunk and Others*)

If the degree of dependency varies according to the sources of funding, then a change in the source of funding will affect the degree of dependency. Accordingly, the decision as to whether a body is a contracting authority must be made annually, and the budgetary year during which the procurement procedure is commenced is the appropriate period for calculating how that body is financed. Therefore, if at the beginning of the budgetary year in

question it is estimated that more than half of the body's funding will be public financing, procurement for that year will be covered by the Directive.

***Good practice note: The importance of predicting sources of funding***

*When working in an institution that is only partially funded by the state it would be wise to ensure that accurate funding forecasts are prepared whenever the proportion of state funding is likely to fluctuate. Compliance with the procurement procedures of the Directive is not without cost, and in those years when there is not a majority of state funding it might sometimes be possible to reduce those costs by adopting more flexible procedures.*

### **2.3.3.2 Managerial dependency**

This condition relates in effect to the direct participation of public authorities and officials in the management of the entity in question. The condition will be fulfilled, for example, where a body has been established by a government minister, where its memorandum and articles and any amendments must be approved by the minister, where the chairman and other directors are appointed and their remuneration determined by the minister, where the appointment of the body's auditors must be approved by the minister, and where the body is obliged to comply with state policy and any ministerial directives with regard to the remuneration, allowances and conditions of employment of its employees.

***Example from case law:***

*Even where there is no legal provision expressly providing for state control over the award of public supply contracts by the body in question, the ECJ found that the state could nonetheless exercise such control, at least indirectly. It was the state that had set it up and entrusted it with specific tasks, and it was the state that had the power to appoint its principal officers. Moreover, the minister's power to give instructions to the entity, in particular requiring it to comply with state policy, and the powers conferred on that minister and on the minister of finance in financial matters gave the state the possibility of controlling its economic activity.*

(Case C-306/97 *Connemara Machine Turf Co Ltd v Coillte Teoranta* [1998] ECR I-8761)

### **2.3.3.3 Supervisory dependency**

This condition goes further than mere general supervision of an administrative or financial nature, and it must give rise to a dependency on the public authorities equivalent to the dependency that exists whenever one of the other alternative criteria is fulfilled. Namely, an equivalent dependency exists whether the body in question is financed, for the most part, by the public authorities or whether the latter appoint more than half of the members of the body's administrative, managerial or supervisory organs, thereby enabling the public authorities to influence the decisions of these organs in relation to public contracts.

The criterion of managerial supervision is not satisfied in the case of mere review since, by definition, such supervision does not enable the public authorities to influence the decisions of the body in question in relation to public contracts. Where the supervision of the activities of the body exceeds that of a mere review, the position will be different. That could be the case, for example, where the public authorities supervise not only the annual accounts of the body but also its conduct from the point of view of proper accounting, regularity, economy, efficiency and expediency and where those public authorities are authorised to inspect the business premises and facilities of that body and to report the results of those inspections to a public authority that holds all of the shares in the body concerned.

It is also appropriate to consider whether the various controls to which entities are subject render them dependent on the public authorities in such a way that the latter are able to influence the decisions of these bodies in relation to public contracts. It thus requires a degree of managerial supervision that permits the public authorities to influence or interfere with procurement procedures.

## **2.4 Central and joint purchasing**

The 2014 Directive has now strengthened the provisions on centralised purchasing techniques increasingly used in a number of EU Member States. Public purchasers have recognised that they can benefit from economies of scale by buying their requirements in bulk. Even where the procurement needs of a single procuring contracting authority are relatively modest in respect of a given product or service, the combined needs of a number of such government purchasers may be significant. Government departments operating in similar sectors or in neighbouring locations have often found it beneficial to group together jointly to purchase specific items. This is most likely to be the case of products used daily, where the various purchasers do not have any requirements that are specific to the contracting authority or differential technical requirements. In some cases, joint purchasing could also be used as a means of purchasing more specialised equipment where technical compatibility is needed. In some cases, the task of making such bulk purchases may be entrusted to a single purchaser, with either one of the group of purchasers acting as agent for the others, or to a specially created contracting authority established with that function on permanent basis in mind: a central purchasing body.

For more information concerning the benefits of aggregating demand by means of centralised purchasing between several contracting authorities, see Module A 4. For the organisation of centralised procurement within a contracting authority, see Module B1.

For the purposes of the 2014 Directive, a central purchasing body is a “contracting authority providing centralised purchasing activities and possibly ancillary purchasing activities”.

The 2014 Directive [article 2(1)(14)] defines centralised purchasing activities as “activities conducted on a permanent basis, in one of the following forms:

- a) the acquisition of supplies and/or services intended for contracting authorities;

b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities.”

Ancillary purchasing activities are defined in the 2014 Directive [article 2(1)(15)] as “activities consisting of the provision of support to purchasing activities, in particular in the following forms:

- a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
- b) advice on the conduct or design of public procurement procedures;
- c) preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned”.

To ensure that a central purchasing body passes on the costs of its procurement to other contracting authorities, the 2014 Directive (article 37) also provides that:

(i) “Member States may provide that contracting authorities may acquire supplies and/or services from a central purchasing body offering the centralised purchasing activity referred to in point (a) of point (14) of article 2(1).” – In this case, the central purchasing body acts as wholesaler by buying, stocking and reselling.

(ii) “Member States may also provide that contracting authorities may acquire works, supplies and services by using contracts awarded by a central purchasing body, by using dynamic purchasing systems operated by a central purchasing body or, (...), by using framework agreements concluded by a central purchasing body offering the centralised purchasing activity referred to in point (b) of point 14 of article 2(1).” – In this case, the central purchasing body acts as intermediary.

(iii) “Member States may provide that a specific procurement is to be made by having recourse to central purchasing bodies or to one or more specific central purchasing bodies.”

The 2014 Directive also lays down the rules for allocating responsibility for the observance of the obligations pursuant to the Directive between the central purchasing body and the contracting authorities procuring from or through it. Where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it is also solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should be responsible for the stages of procedure it conducts.

Contracting authorities are allowed to award a public service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures provided for in the Directive. It is also permitted for such public service contracts to include the provision of ancillary purchasing activities.

*In Italy, for example, Consip (originally the abbreviation of Concessionaria Servizi Informatici Pubblici) operates as a central purchasing body by running the Programme for the*

*Rationalisation of Public Administration Purchases of goods and services. CONSIP utilises ICT and innovative tools for public administration purchases (contract agreements, Public Administration e-Marketplace, framework agreements, Dynamic Purchasing System, calls for tenders). For information on how CONSIP operates, see: [http://www.consip.it/en/about\\_us/](http://www.consip.it/en/about_us/)*

**Localised Example?: XXX**

*...Information on how this system operates can be downloaded from:*

It is also possible that a number of contracting authorities will simply choose to aggregate their requirements and agree to perform specific procurement jointly. This form of joint purchasing could be carried out (1) in its entirety and jointly in the name and on behalf of all of the contracting authorities concerned, or (2) by one contracting authority acting on its own behalf and on the behalf of the other contracting authorities concerned, or (3) for only parts of the procurement procedure, in the name and on behalf of the contracting authorities concerned.

The 2014 Directive has explicit rules as regards the responsibility in case of joint procurement. In the first two scenarios, all contracting authorities are jointly responsible for fulfilling their obligations pursuant to the Directive. In the third scenario, contracting authorities are jointly responsible for only those parts of the procurement procedure carried out jointly; in respect of the other parts – those that each contracting authority conducts in its own name and on its own behalf, each contracting authority shall have sole responsibility for fulfilling its obligations pursuant to the Directive.

See Module B2 for further discussion of co-operation arrangements between contracting authorities.

**Example: Eastern Shires Purchasing Organisation (ESPO)**

*Again in the UK, ESPO is a joint committee of regional local authorities. It acts as a purchasing agent for its member authorities and other customers and provides a procurement and supply service (offering goods and services) to its members for a value of approximately 700 million GBP per annum. Information on how this system operates can be downloaded from: [www.espo.org](http://www.espo.org).*

**Localised Example?: XXX**

*...Information on how this system operates can be downloaded from:*

## **2.5 Contracting authorities and the WTO's Government Procurement Agreement (GPA)**

**Important note:** On 30 March 2012 the GPA Parties reached an agreement and adopted a Protocol amending the 1994 GPA. The revised WTO GPA entered into force on 6 April 2014. The revised GPA opens up the public procurement markets of each of the Parties. The narrative below has not been updated, referring to the 1994 GPA and not to the revised GPA that entered into force on 6 April 2014.

As discussed in Module A3, the EU is a signatory of the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO). As a result of the negotiating approach taken by the EU (consisting of using the coverage of the Directives as a basis for GPA coverage), all contracting authorities that are public authorities for the purposes of the public sector Directive, namely public authorities and bodies governed by public law, are also covered by the GPA.

In practical terms, compliance with the Directives ensures compliance with the provisions of the GPA in respect of those entities that are also covered by the GPA. Since the Directives will apply in any event, no further action needs to be taken in respect of *compliance* with the procedural rules. The only obvious difference in application consists in the different threshold values that apply to contracts for goods and services awarded by the central government authorities listed in Annex 1 and in the differential treatment accorded to certain defence products and services.

In terms of granting *access* to EU procurement markets, however, and of compliance with EU contract award procedures, for GPA purposes contracting authorities are obliged to do so only in respect of those entities, products and/or services of other GPA signatory states, as covered in the various country appendices to the GPA, that are not otherwise subject to the exclusion or reciprocity requirements set out in the notes to the appendices. This would only become an issue if a GPA contracting authority decided to exclude such a beneficiary on grounds that would otherwise constitute a breach of the Directives and/or the GPA. To determine the extent of access, it would be necessary to consult the specific country annexes.



## Section 3 Exercises

### Exercise 1 – Class Case Study

Arcadia municipality decides it wants to develop a business and commercial zone on an attractive plot of land at the edge of town, which it is calling Evergreen Park. It is considering setting up a non-profit organisation in the form of a private company, Apple Inc., in which it would own the majority of the shares to undertake the development in the hope that this will reduce the administrative burden of creating Evergreen Park. A neighbouring municipality, Eden Town, which has experience in such developments decides that, when the arrangements are in place for the development, it would itself like to bid for the contract to design the overall architectural scheme and undertake the general planning of Evergreen Park. Eden Town does not, however, have in-house capability for the landscaping requirements of the park. Having used them in the past, Eden Town decides that, before bidding for the contract, it should make sure that it can rely on the services of Greenfingers, a private landscaping company. It therefore enters into a contract with Greenfingers to supply the required landscaping services when and only if Eden Town wins the design contract.

You are the legal adviser to Arcadia municipality, and it has asked you to set its mind at rest on a number of issues that have been raised by the various parties during the negotiations. Prepare an opinion on each of the questions asked, supporting your arguments with relevant case law.

- (a) Does it make any difference to the application of the procurement rules whether Evergreen Park is developed by Arcadia municipality directly or by Apple Inc.?
- (b) Eden Town is a potential bidder. Does that mean that its contract with Greenfingers is not subject to the procurement rules?

You have enough information to answer (b) from the general principles. However, you might want to consider a further case: C-126/03 *Commission of the European Communities v Federal Republic of Germany* (“*City of Munich*”) ECR [2004] I-11197

## Exercise 2 – Individual Case Study

Until now, the municipality of Cleverton has provided municipal waste disposal services by way of an autonomous service unit of the municipality called the Cleanup Team. Although Cleanup Team was not set up formally as a company, it operated as if it were an independent company – despite the fact that its management was governed by rules put in place by Cleverton, and that traditionally all its funding came from the treasury department of Cleverton. Indeed, the Cleanup Team believed it was just like a company, and would also provide services to private sector clients and other municipalities in return for payment. By its 2008 year-end, it transpired that its receipts from these latter services accounted for 51% of all the income it received for that year (roughly EUR 3 million), an increase of more than 20% over the previous year. This was expected to increase further in 2009.

Having seen the projected financial results, Cleverton believed that it should put the Cleanup Team on a more proper financial footing and decided to create a limited liability company to take over its functions. It created Cleanup Limited, a wholly owned subsidiary, on 5 November 2008 and signed with it, on 10 November, a contract for the supply of municipal waste disposal services for 2009 to begin on 1 January 2009. The value of these services was in the order of EUR 1.5 million.

On 25 November 2008, the central government introduced much stricter and more sophisticated environmental regulations that would apply to the transport and disposal of municipal waste. The Cleanup Team had previously contracted out its routine environmental compliance work to a private sector company, Opportune Limited. In 2008, the value of this work had been about EUR 150 000. Realising that it did not have the expertise to meet these new regulations, the management of Cleanup Limited approached Opportune Limited directly to provide the services without following the procurement directives.

In February 2009, you are approached by Superclean Limited, a private waste disposal company with expert environmental knowledge, which feels that Cleverton has acted unlawfully. In particular, Superclean Limited believes that

- (i) the Cleanup Team should never have contracted directly with Opportune Limited in any event; and
- (ii) Cleanup Limited should have awarded the contract to Opportune Limited according to the procurement directives.

How do you reply?

### **Exercise 3: Centralised and Joint Purchasing**

Split into 4 groups.

Using the Internet, 2 groups will search for organisations offering centralised procurement and 2 groups will search for organisations offering joint purchasing.

Search for these systems in your country, in neighbouring countries or in European member states.

Consider the following issues:

1. Is the purchase organised through a lead contracting authority, or by way of special purpose company?
2. What is the common feature of the participating organisations? For example, geographical proximity; sectoral cohesion; common use items, etc.
3. What services do they offer?
4. Do they use catalogues and/or framework arrangements?
5. What are the benefits of using these systems?
6. What might be the disadvantages? Consider, for example, technical specifications, time and place of delivery, terms of sale, etc.

Each group is to prepare a short report to be presented to the class.

## Section 4

## Chapter Summary

### Self-test questions

1. Why do we need to define contracting authorities?
2. What is the difference between contracting *authorities* and contracting *entities*?
3. Name the two broad categories of contracting authority.
4. What branches of government are covered?
5. What is the position in a federal state?
6. Explain the European Court of Justice's "functional" approach to the definition of public authorities.
7. Do public authorities need to be providing a service in the public interest before they are covered by the Directive? Yes/No
8. Is the position of bodies governed by public law any different?
9. Name the conditions that need to be met before an entity will be considered to be a body governed by public law.
10. Which of the conditions must be met? Are any optional?
11. Describe "needs in the general interest" using examples from case law.
12. Are "needs in the general interest" inconsistent with "needs having an industrial or commercial character"?
13. Are the activities of meeting "needs in the general interest" and "meeting needs in the general interest not having an industrial or commercial character" mutually exclusive? Can a body governed by public law do both?
14. If the body in question is mainly carrying out a commercial activity and only meets a need in the general interest incidentally, does that mean the Directive does not apply?
15. Explain the impact of the existence of competitive markets for the products or services provided by a body governed by public law.
16. What, in practice, is the means of deciding whether a body is pursuing needs in the general interest not having an industrial or commercial character?
17. Describe the different means of imposing state dependency on a body governed by public law.
18. Must all the state dependency conditions be satisfied?

19. Are the conditions of state dependency applied once and for all? Illustrate your answer by way of example.
20. What is meant by (i) centralised and (ii) joint purchasing? Describe their benefits and indicate when they might be used.

## Module D2 Contracting Entities in the Utilities Sector

### Section 1 Introduction

#### 1.1. Objectives

The objectives of this chapter are to identify:

1. The bodies that must apply the public procurement rules in the award of their works, supplies and services contracts that operate in the utilities sector
2. Which of those bodies form part of the state and which fall outside the definition of “contracting authorities”
3. The mechanisms used to bring bodies other than “contracting authorities” within the scope of the 2014 Utilities Directive (**Directive 2014/25/EU**)
4. The reasons for bringing such bodies within the scope of the Directive
5. The different utility activities (“relevant activities”) that fall within the definition of the “utilities sector”
6. The effect of falling within and outside the definitions
7. The reasons why such bodies are not subject to the 2014 Directive

#### 1.2. Important issues

The most important issues in this chapter are understanding:

- That the Utilities Directive also applies procurement rules to entities that may not be public but that can be wholly private
- The logic behind application of the procurement rules, albeit more flexibly, to this sector
- The extent to which the rules apply in each of the defined utility sectors
- The central role played by the definition of “relevant activities”
- That the logic of including these sectors within the rules also gives way, in appropriate circumstances, to their exemption from the Utilities Directive

This means that it is critical to understand fully:

- The motivation for inclusion of the utilities sectors into the EU procurement regime
- The mechanism used to bring these sectors within the system
- The definitions of the covered entities
- The definition of “relevant activities”
- The specific and general exemption mechanisms

#### 1.3. Links

There is a particularly strong link between this chapter and the following modules or sections:

- Module D2 on the contracting authorities in the classical sector

- Module E, to the extent that different procedures apply to contracting authorities in the classical sector and to contracting entities in the utilities sector
- Module A3 on the international regulation of procurement where there is some overlap in the definitions used

#### **1.4. Relevance**

This information will be of particular relevance to the senior management of the body in question, since the status of the body under the Utilities Directive determines whether or not the provisions of the Directive apply.

#### **1.5. Legal information helpful to have at hand**

For this chapter, reference will be made to the 2014 **Utilities Directive** (2014/25/EU). For the purposes of the scope of application discussed here, the relevant recitals and articles are:

Recital 1,	Article 3,
Recital 2,	Article 4,
Recital 16,	Article 6,
Recital 19,	Article 7,
Recital 20,	Article 8,
Recital 21,	Article 9,
Recital 22,	Article 10,
Recital 23,	Article 11,
Recital 24,	Article 12,
Recital 25,	Article 13,
Recital 43,	Article 14,
Recital 44,	Article 19,
Recital 45,	Article 34,
Recital 46,	Article 35.
Recital 47,	
Recital 48	
Recital 49,	
Recital 50	

You may also find the following European Commission explanatory notes useful:

[EXPLANATORY NOTE – UTILITIES DIRECTIVE DEFINITION OF EXCLUSIVE OR SPECIAL RIGHTS](#)

(Document CC/2004/33 of 18.6.2004)

[EXPLANATORY NOTE – UTILITIES DIRECTIVE CONTRACTS INVOLVING MORE THAN ONE](#)

[ACTIVITY](#) (Document CC/2004/34 of 18.6.2004)

For localisation: In national law, please look at:

## Section 2 Narrative

### 2.1. Introduction

As the name of the EU Directives suggests, the procurement directives were originally intended to cover *public* procurement, that is, contracts awarded by *public* authorities or other *public* bodies. As a result, the new Directive 2014/24/EU (as well as all of the previous directives that applied to the public sector) – hereafter referred to in this module as ‘the 2014 Directive’ – specifically excludes from its scope of application all public contracts that, under the 2014 Utilities Directive (Directive 2014/25/EU), are awarded by contracting authorities exercising one or more of the defined activities in the utilities sector (in the fields of water, energy, transport and postal services) and that are awarded for the pursuit of those activities (see article 7 of the 2014 Directive).

This exclusion was not made because the Community authorities did not want to cover public authorities operating in these sectors (they did), but because the bodies awarding such contracts were not always ‘public entities’. Indeed, they were and are often wholly private undertakings, even though, in many EU Member States, activities in these sectors are entrusted to government agencies or to a combination of both private and public entities.

In some member states, it is (or was) the public authorities that also operated in these sectors, and so there was no reason, *in principle*, why these sectors should not also be covered by the public procurement system set up by the Public Sector Directive. However, this system did not ‘capture’ (i.e. cover) private companies, and there was some reluctance to covering these companies in the first place. The Community authorities could not simply impose the rules on the ‘public’ utilities because this would have created an uneven playing field, since the utilities would then only be covered in those member states where they were in public hands and not in member states where they were in private hands. This would have distorted competition, and the member states were not ready to take such half-measures.

By 1990, however, the Community regulator had come up with a means of applying the procurement rules to the utilities sector. It did so in a separate Utilities Directive, where it was made clear that not only were ‘public’ entities bound to follow Community rules with regard to their procurement of goods, works and services, but so were those private undertakings operating on the basis of special or exclusive rights. The paramount consideration in both public and private sectors is the extent to which contracting entities are subject to state influence, whether this influence is exercised directly or indirectly (e.g. the state's power to control the granting and operation of special or exclusive rights to private undertakings).

The rules were adopted in a separate directive because the provisions for the utilities sector were more flexible than those in the classical (public) sectors. It was recognised that the entities in these sectors were operating in a more commercial market so that, although the main principles of the public procurement rules needed to be respected, it was also necessary to provide some flexibility in order to take account of the reality of the environment in which their activities took place.

### 2.2. Definition of entities operating in the utilities sector



The entities covered by the Community procurement rules fall within two broad categories. The first category consists of entities over which the state may exercise direct control. These are public authorities and bodies governed by public law. The second category, referred to, for the sake of convenience, as 'utilities', consists of defined *public* bodies and those *private* entities that operate in their relevant sectors on the basis of special or exclusive rights granted by a member state of the Community.

It is important to remember that, unlike in the case of the Public Sector Directive, where contracting authorities once caught by the definition must carry out all of their procurement according to that directive, public authorities, bodies governed by public law and other entities covered by the Utilities Directive are covered *only* to the extent that they carry out a relevant activity defined in the Utilities Directive. To fall within the scope of application of the Utilities Directive, they must (i) fall within the definition of an entity operating in a utility sector, and (ii) carry out a relevant activity (only or as one among many relevant and/or non-relevant activities).

***Important note***

*Entities operating in the utilities sector, as defined in the Utilities Directive, are covered by the directive only to the extent that they carry out a relevant activity defined in the Utilities Directive.*

As stated above, the Public Sector Directive excludes from its scope of application all public contracts that are awarded by contracting authorities under the Utilities Directive. It also makes clear that contracts that are excluded from the Utilities Directive do not, at the same time, re-enter the scope of application of the Public Sector Directive. As a result, public authorities carrying out relevant activities in the utilities sector are covered by the Utilities Directive, not by the Public Sector Directive.

There are three types of defined entity: (i) contracting 'authorities', (ii) public undertakings, and (iii) entities (usually privately owned) operating on the basis of special or exclusive rights.

**2.2.1 Contracting 'authorities'**

The definition of 'contracting *authority*' is the same in both the Public Sector and Utilities Directives. There are two main types of contracting authority, and the case law on this issue has resulted in a flexible definition. The two types are: 'public authorities' and 'bodies governed by public law'.

Refer to Module D1 for an understanding of the scope of the definition of 'contracting *authorities*'.

**2.2.2 Public undertakings**

Public undertakings are defined in article 4(2) of the 2014 Utilities Directive as any undertaking over which contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of the undertaking, their financial participation therein, or the rules that govern it. A dominant influence on the part of the contracting authorities is to be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the major part of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

The distinction between public authorities and public undertakings flows from the recognition that the state may act either by exercising public powers or by carrying on economic activities of an industrial or commercial nature by offering goods and services in the market. In order to make such a distinction, it is necessary, in each case, to consider the activities exercised by the state and to determine the category to which those activities belong. In this respect, the European Court of Justice (ECJ) also takes a functional approach to the definition.

***Example from case law***

*The concepts of 'bodies governed by public law' and 'public undertakings' are not mutually exclusive. The objective of the Utilities Directive is to extend the procurement rules to utilities not covered by the public sector directives and thus ensure that all the contracting entities operating in the utilities sectors are included within its scope, regardless of their legal form and the rules under which they were formed.*

Case 283/00 *Commission v Spain* [2003] ECR I-11697

[Localisation possible: In (XXX), this might/will include entities such as (xxx)...]

### **2.2.3 Entities operating on the basis of special or exclusive rights**

A critical reason for the exclusion of certain sectors from the scope of the earlier public sector directives (on works, supplies and services, respectively) was that the contracting entities involved in those sectors could not simply be classified as 'public' entities. Indeed, their legal status ranged from purely government-owned undertakings to private companies holding exclusive concessions. The task of the Community regulator was, therefore, to find a way of going beyond the traditional public/private distinction and to adopt a solution that would address the situations that led to the possibility of protectionist procurement procedures, regardless of the formal legal definition of the entities carrying out activities in those situations.

### 2.2.3.1 Rationale

One of the primary objectives of the EU procurement system is to protect the interests of economic operators established in an EU Member State that wish to offer goods or services to contracting authorities in another member state and to avoid the risk of preference being given to national tenderers or applicants whenever a contract is awarded by contracting authorities. This objective is not limited to the purely public sector but applies equally to the utilities sector, where both public and private entities are active. The European Commission, after researching the position in the sectors that were excluded at the time, came to the conclusion that there were, in essence, two objective factors that led to nationalistic purchasing attitudes.

#### **Commission Communication**

*“...as regards the field of application, the proposal is based on the identification of those underlying, objective conditions which lead entities in the sectors to pursue procurement policies that are uneconomic in the sense that they do not ensure that the best offer from any supplier or contractor in the Community is systematically preferred but privilege national suppliers.”*

**(COM (88) 376 final: Communication from the Commission on a Community Regime for Procurement in the Excluded Sectors: Water, Energy, Transport and Telecommunications)**

The **first condition** identified refers to the ‘qualified competitive environment’ that exists in a situation where the entity concerned, whether public or private, is insulated from normal market forces. This means that the entity is in a position where it is able, and is often encouraged, to pursue goals that do not necessarily rely on purely commercial objectives. This position of relative privilege can arise in a number of ways, the main example being the grant to an entity of a formal legal monopoly of a geographical nature.

The **second condition** is the result of a situation where the services provided are made available by means of a technical ‘network’ that has a natural tendency to develop into a monopoly (a natural monopoly). This tendency is likely to be reinforced by the allocation of special rights or powers relating to the management of the network by the state. The ownership of an entity by the state and the control of its management or its financing are obvious indicators of state influence. However, private entities can also be subject to such influence. This may be the result, in particular, where the principal activity of the entity depends on state approval, for example by means of a concession or authorisation that grants to the entity concerned an exclusive right to carry out that activity within a specified geographical area or particular sector.

For the Community regulator, therefore, it is this type of approval that differentiates these privileged undertakings from ‘ordinary’ undertakings, which benefit from no special or

exclusive rights and operate on a normal commercial basis in a completely open and competitive environment.

To overcome those objective conditions permitting the continued existence of uneconomic and protectionist procurement procedures, the Commission found its solution in a formula consisting of the identification of those situations in the relevant sectors in which, whatever the public or private status of the entities concerned, the objective conditions leading to nationalistic purchasing practices can be identified.

The Commission identified those situations by relying on the concept of special or exclusive rights.

### **2.2.3.2 Existence of special or exclusive rights**

Articles 3 and 4 of the 2014 Utilities Directive identifies the contracting entities that are covered and group the contracting entities in three categories, namely contracting authorities as the first category, public undertakings (as above) as the second category, and undertakings operating on the basis of special or exclusive rights as the third category.

Article 4(1)(b) provides that the provisions of the 2014 Utilities Directive are to apply to:

- contracting entities that are not contracting authorities or public undertakings; and
- that have as *one* of their activities any of those referred to in articles 8 to 14 (discussed below) or any combination thereof; and
- that operate on the basis of special or exclusive rights granted by a competent authority of a member state.

Article 4(3) of the 2014 Utilities Directive states that, for the purpose of the directive, special or exclusive rights are to mean rights granted by a competent authority of the member state, by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities defined in articles 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

No 'special or exclusive rights' exist where they have been conferred upon the undertaking as a member of a class of undertakings carrying on an economic activity that is open to anyone. Indeed, the 2014 Utilities Directive in article 4(3) clarifies that rights that have been granted by means of a procedure (1) in which adequate publicity has been ensured; and (2) where the granting of those rights was based on objective criteria, shall not constitute special or exclusive rights within the meaning of article 4. Such procedures include:

(a) procurement procedures with a prior call for competition, in conformity with the 2014 Directive, the Defence Directive, the 2014 Concessions Directive or the 2014 Utilities Directive;

(b) procedures pursuant to other legal acts of the Union listed in Annex II, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

**Note: Annex II**

*Annex II lists procedures based on other EU legal acts which do not constitute ‘special or exclusive rights’ within the meaning of Article 4 of the 2014 Utilities Directive:*

*(a) granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 2009/73/EC;*

*(b) authorisation or an invitation to tender for the construction of new electricity production installations in accordance with Directive 2009/72/EC;*

*(c) the granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved;*

*(d) a procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC;*

*(e) public service contracts within the meaning of Regulation (EC) No 1370/2007 for the provision of public passenger transport services by bus, tramway, rail or metro which have been awarded on the basis of a competitive tendering procedure in accordance with Article 5(3) thereof, provided that its length is in conformity with Article 4(3) or (4) of that Regulation.*

The Commission is empowered to modify the list of legal acts set out in Annex II, when new legal acts are adopted, repealed or modified.

**Note: Grant of rights**

Compare this approach to the approach taken by the regulator under the general exemption mechanism found in article 34 of the 2014 Utilities Directive and discussed below in section 2.3.6.

For further explanation in the context of the previous Utilities Directive, see the Commission’s *Explanatory note – Utilities Directive: definition of exclusive or special rights* (Document CC/2004/33 of 18 June 2004).

### **2.3 Definition of relevant activities**

Unless exempted under article 34 (see section 2.3.6), contracting entities falling within the above definitions are covered by the 2014 Utilities Directive, but only to the extent that they carry out a relevant activity and only in relation to contracts awarded for the purpose of carrying out that activity. The relevant activities are discussed below.

**Note: Definitions of ‘relevant activities’ – changes in the previous directive**

*Until the adoption of the 2004 Utilities Directive, **telecommunications** was a relevant activity, but it was removed from the list. Following the success of the Union’s telecommunications liberalisation initiative to introduce effective competition into the sector, the Commission no longer considered it necessary to regulate purchases by entities operating*

*in this sector. With the adoption of the 2004 Utilities Directive, **postal services** were also included as a relevant activity.*

### **2.3.1 Water**

The relevant activity consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of drinking water, or the supply of drinking water to such networks.

**Note: The term 'supply'**

*The 2014 Utilities Directive in article 7 clarified that the term 'supply' included generation/production, wholesale and retail sale.*

In the case of a contracting 'authority', the supply of drinking water to networks that provide a service to the public is always a relevant activity for the purposes of the 2014 Utilities Directive. As for other contracting entities, whenever the supply of drinking water to such networks is one of their principal activities, only then is it covered by the 2014 Utilities Directive.

The supply of drinking water to fixed networks is not considered as a principal activity and is not covered where:

- the production of drinking water by that entity takes place because its consumption is necessary for carrying out an activity other than a relevant activity; and
- the supply to public networks depends only on the entity's own consumption of drinking water and has not exceeded 30% of the entity's total production of drinking water on average for the preceding three years, including the current year.

In addition, the Utilities Directive also covers the award of contracts connected with hydraulic engineering, irrigation or land drainage, as well as the disposal or treatment of sewage. It applies in the context of hydraulic engineering, irrigation or land drainage provided that the volume of water intended for the supply of drinking water represents more than 20% of the total volume of water made available by such projects or by irrigation or drainage installations.

**Exclusion**

*Contracts for the purchase of water awarded by contracting entities engaged in one or both of the activities relating to drinking water referred to above are not covered since procurement rules are inappropriate for the purchase of water, given the need to procure water from sources near the area where it will be used.*

### **2.3.2 Energy**

This activity concerns:

- the provision of electricity, gas or heat; and

- the exploitation of a geographical area for the purpose of extracting oil or gas and exploring for, or extracting, coal or other solid fuels.

### **2.3.2.1 Electricity, gas or heat**

This activity consists of the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat, or the supply of electricity, gas or heat to such networks.

**Note: The term 'supply'**

*The 2014 Utilities Directive in article 7 clarified that the term 'supply' included generation/production, wholesale and retail sale.*

In the case of a contracting authority, the supply of electricity, gas or heat to networks that provide a service to the public is always a relevant activity for the purposes of the 2014 Utilities Directive.

As indicated above concerning water, in the case of other contracting entities, the supply of electricity, gas or heat to such networks is covered only where that activity is one of their principal activities. However, this condition applies differently to electricity, on the one hand, and to gas or heat on the other.

In the case of other contracting entities that supply electricity to fixed networks, this supply is not covered, where:

- the production of electricity by that entity takes place because its consumption is necessary for carrying out an activity other than a relevant activity; and
- the supply to public networks depends only on the entity's own consumption of electricity and has not exceeded 30% of the entity's total production of energy on average for the preceding three years, including the current year.

In the case of other contracting entities that supply gas or heat to such networks, this supply is not covered where:

- the production of gas or heat is the unavoidable consequence of carrying on an activity other than a relevant activity; and
- the supply of gas or heat to the public network is aimed only at the economic exploitation of such production and amounts to not more than 20% of the entity's turnover on average for the preceding three years, including the current year.

**Exclusion**

*The 2014 Utilities Directive does not apply to contracts awarded by contracting entities themselves that are active in the energy sector by being engaged in an activity relating to electricity, gas or heat, as referred to above for the supply of energy or fuel for the production of energy. This exemption was included in the 2004 Utilities Directive and*

*retained in the 2014 Utilities Directive because of the lack of liberalisation in the Union energy market, which meant that energy could effectively not be traded across EU borders. The exemption refers to the purchase of fuels for the production of energy; it does not exclude the purchase of fuels for other purposes, such as transport.*

### **2.3.2.2 Exploitation of a geographical area**

The 2014 Utilities Directive applies to contracting entities that exploit a geographical area for the purpose of extracting oil or gas, or exploring for and extracting coal or other solid fuels.

#### **Note: Exploring for oil or gas**

Under the 2004 Utilities Directive, exploring for oil or gas was a relevant activity. It is excluded from the 2014 Utilities Directive because that sector has consistently been found to be subject to such competitive pressure that the procurement discipline brought about by the Union procurement rules is no longer needed.

The extraction of oil and gas continues to fall within the scope of the 2014 Utilities Directive.

‘Exploration’ should be considered to include the activities that are undertaken in order to verify whether oil and gas is present in a given zone, and, if so, whether it is commercially exploitable, whereas ‘extraction’ should be considered as the ‘production’ of oil and gas. In line with established practice in merger cases, ‘production’ should be considered to also include ‘development’, i.e. the setting up of adequate infrastructure for future production (oil platforms, pipelines, terminals, etc.).

#### **Exclusion**

*As with the energy sector in general, the 2014 Utilities Directive does not apply to contracts awarded by contracting entities that are themselves active in the energy sector by being engaged in an activity relating to extraction and exploration, as referred to above for the supply of energy or of fuels for the production of energy.*

### **2.3.3 Transport services**

The provisions of the Utilities Directive apply not only to the operation of transport networks but also to the operation of transport terminal facilities.

#### **2.3.3.1 Transport networks**

This activity consists of the provision or the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolleybus, bus or cable.

A transport network is considered to exist where the service is provided under operating conditions laid down by a competent authority of an EU Member State, such as conditions concerning the routes to be served, capacity for the transport to be made available, or frequency of the service.



Previously, the provision of bus services was not covered whenever other entities were permitted to provide those services, either in general or in a particular geographical area, under the same conditions as those provided by the contracting entities. In practice, this meant that other entities were obliged not only to be authorised to operate in the market for the services in question, without any legal barriers to entry for the provision of those services, but they also had to be in a position to actually provide those services under the same conditions as provided by the contracting entity. This exemption has been removed from the 2014 Utilities Directive with the result that bus transport services are covered, unless the Commission adopts a decision exempting them with regard to a specific Member State, in accordance with article 34.

### **2.3.3.2 Terminal facilities**

The exploitation of a geographical area for the purpose of providing airport, maritime or inland port, or other terminal facilities to carriers by air, sea or inland waterway is also a relevant activity.

However, the Utilities Directive covers only the operators of these terminal facilities. Carriers using such facilities are not covered.

On the other hand, contracts awarded by carriers that are also contracting authorities for the purposes of the Public Sector Directive, are subject to the provisions of that directive.

### **2.3.4 Postal services**

Prior to the adoption of the 2004 Utilities Directive (2004/17/EC), contracts awarded for postal services to the public fell within the scope of the Public Sector Directives, to the extent that the entities in question were contracting ‘authorities’ for the purposes of those directives.

The difference, which arose with the adoption of the 2004 Utilities Directive and is retained in 2014 Utilities Directive, is that these entities became subject to the more flexible regime of the Utilities Directive and are also in a position to benefit from the general exclusion procedure (see section 2.3.6 below), which could apply where postal services are provided in a competitive market.

The 2014 Utilities Directive applies to activities relating to the provision of:

- postal services *[services consisting of the clearance, sorting, routing and delivery of postal items]; and*
- ‘other services than postal services’ *[mail service management services (services both preceding and subsequent to despatch, including ‘mailroom management services’) and services concerning postal items not included in the main definition, such as direct mail bearing no address].*

<p><b>Note:</b> Some categories of ‘other services than postal services’ are removed from the scope of the 2014 Utilities Directive:</p>
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Philatelic services, logistic services, added-value services linked to and provided entirely by electronic means, and financial services were removed from the 2014 Utilities Directive, with the effect they are now not covered by that directive.

Additionally, the 2014 Directive clarifies that public contracts intended for the pursuit of these (removed) activities are also excluded from the scope of the 2014 Directive when they are awarded by a contracting authority that provides postal services.

This second category of services is covered only to the extent that the entity in question also provides 'postal services' *and* that the conditions provided for in the general exclusion of article 34 are not satisfied in respect of those 'postal services'. As a result, the 2014 Utilities Directive applies only where the services are not provided on a competitive basis.

### **2.3.5 Scope and necessity of 'relevant activities'**

A utility is covered only where it carries out a 'relevant activity', as defined above.

#### ***Exclusion***

The 2014 Utilities Directive does not apply to contracts that contracting entities award for purposes other than the pursuit of the relevant activities or for the pursuit of such relevant activities in a third country, in conditions that do not involve the physical use of a network or geographical area within the Union. Such activities must be notified to the European Commission for information purposes.

*What happens when an entity carries out a number of activities and awards a contract for a non-relevant activity?*

Article 6 of the 2014 Utilities Directive provides a mechanism for distinguishing between various situations. In the case of contracts intended to cover several activities, contracting entities may choose to award separate contracts for the purpose of each separate activity. In this case, the decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned. A contracting entity may also choose to award a single contract. This article describes essentially four situations in the case where a contracting authority chooses to award a single contract:

- A contract that is intended to cover several activities is subject to the rules applicable to the activity for which it is *principally intended*.
- If one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other to the 2014 Directive, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the 2014 Directive.
- If one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other to the 2014 Concessions Directive, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the 2014 Utilities Directive.

- If one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other is not subject to either the 2014 Utilities Directive, the 2014 Directive or the 2014 Concessions Directive, and if it is objectively impossible to determine for which activity the contract is principally intended, the contract is to be awarded in accordance with the 2014 Utilities Directive.

Article 6(1) of the 2014 Utilities Directive also includes an anti-avoidance provision. It provides that the choice between awarding a single contract and awarding a number of separate contracts may not be made with the objective of excluding the contract(s) from the scope of either the 2014 Utilities Directive or, where applicable, the 2014 Directive or the 2014 Concessions Directive. This provision, which is clearly based on the intention of the contracting entity, would prevent a contracting entity from bundling together *all* contracts under the pretence that they were for the purposes of non-relevant activities when in fact only some were for the purposes of non-relevant activities.

For further explanation on this issue in the context of the previous Utilities Directive, see the Commission's *Explanatory note – Utilities Directive: contracts involving more than one activity* (Document CC/2004/34 of 18 June 2004).

### **2.3.6 General exclusion of Article 34**

Given the degree of liberalisation in various sectors, the 2014 Utilities Directive contains a more general exclusion provision, which grants an exclusion from the provisions of the directive to those contracting entities carrying out an activity that, in the Member State in which it is performed, is:

- directly exposed to competition;
- in a market to which access is not restricted.

The test of whether markets are competitive necessarily takes account of both the legal and factual situations in the member state in question and necessarily is to be addressed on a case-by-case basis.

#### **2.3.6.1 Existence of competitive markets**

When looking at the question of whether an activity is directly exposed to competition, the existence of alternative goods or services considered to be substitutable on the supply side or the demand side, the prices and the actual or potential presence of more than one supplier of the goods or services in question. This indicates very clearly whether the tests to be applied are the same as those applied when making the market analyses required by articles 101 and 102, as well as article 106, of the Treaty.

Consideration is given to both legal and *de facto* barriers to entry. Since the liberalisation directives in the various sectors are designed to remove any remaining legal barriers to entry, the actual removal of those barriers through compliance with the various directives is sufficient to demonstrate the absence of any legal restrictions on access to the market for the activities in question. Access to a market is therefore deemed to not be restricted if the EU Member State has implemented and applied the provisions of Union legislation

mentioned in Annex III of the 2014 Utilities Directive, which contains a list of Union legislation designed to liberalise various utility sectors.

Currently the list refers to legislation in the following sectors: transport or distribution of gas or heat (Directive 2009/73); production, transmission or distribution of electricity (Directive 2009/72); contracting entities in the field of rail services (Directive 2012/34 for rail freight and international rail passenger transport), contracting entities in the field of postal services (Directive 97/67); and extraction of oil or gas (Directive 94/22).

No liberalisation legislation is currently listed for the production, transport or distribution of drinking water; contracting entities in the field of rail passenger transport; contracting entities in the field of urban railway, tramway, trolleybus or bus services; exploration for and extraction of coal or other solid fuels; contracting entities in the field of seaport or inland port or other terminal equipment; or contracting entities in the field of airport installations.

If free access to a given market cannot be presumed on the basis of the liberalisation legislation, it must be demonstrated that access to the market in question is free *de facto* and *de jure*.

### **2.3.6.2 Exclusion procedure under Article 35**

The exclusion is granted by means of an implementing act by the European Commission, which is prompted by an application by an EU Member State or a contracting entity.

#### **Application by an EU Member State**

When an EU Member State intends to apply for an exclusion for a given activity, it must submit a request to the Commission and inform it of all relevant facts, in particular of any law, regulation, administrative provision or agreement that demonstrates that the activity in question is directly exposed to competition in markets to which access is not restricted.

If appropriate (i.e. where such a body exists and has issued such an opinion), it will include the position adopted by an independent national authority that is competent in the activity concerned. The exclusion becomes effective (i.e. contracts intended to enable the activity concerned to be carried out are no longer subject to the Utilities Directive) if the Commission has either:

- adopted the implementing act establishing the applicability of the conditions for exclusion within the set time limit; or
- not adopted the implementing act concerning such applicability within that period.

The Commission is given a period of 90 working days to adopt the implementing act where free access is presumed on the basis of the liberalisation legislation. In other cases, the time period for a decision is 130 working days, commencing on the first working day following the date on which it receives the request or, where the request is incomplete, on the working day following the receipt of the complete information. Those periods may be extended by 15 working days where the request is not accompanied by a reasoned and substantiated position of an independent national authority. Those periods may also be extended by the Commission, with the agreement of the Member State.

### **Application by a contracting entity**

When the legislation of the EU Member State concerned so provides, contracting entities may also submit a request to the Commission for an exclusion. Unless a request by a contracting entity is accompanied by a reasoned and substantiated position, adopted by an independent national authority, the Commission shall immediately inform the Member State concerned. The Member State shall in such cases inform the Commission of all relevant facts and in particular of any law, regulation, administrative provision or agreement that demonstrates that the activity in question is directly exposed to competition in markets to which access is not restricted. The same procedure for adopting the implementing act and the same time limits apply.

**Note:**

*All Commission Decisions adopted prior to the entry into force of the 2014 Utilities Directive concerning the applicability of the corresponding provisions set out in article 30 of Directive 2004/17/EC continue to be applicable.*

### **2.4 Contracting entities and the WTO's Government Procurement Agreement**

**Important note:** On 30 March 2012 the GPA Parties reached an agreement and adopted a Protocol amending the 1994 GPA. The revised WTO GPA entered into force on 6 April 2014. The revised GPA opens up the public procurement markets of each of the Parties.

As discussed in Module A3, the EU is a signatory of the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO). It is to be recalled that entity coverage under the GPA was generally based on the idea of reciprocity so that each member (signatory) would offer to the other members *equivalent* access to its government procurement in proportion to its size and to the size of the economy as a whole based on negotiations. Whilst this is not always obvious in the case of the public sector, the negotiations for coverage in the utilities sector were far more specific and sought to measure equivalence and reciprocity more accurately. As a result, not all of the utilities covered by the Utilities Directive are covered by the GPA. They are covered only where they have been explicitly included in the EU's Appendix to the GPA.

In the case of the utilities sector, only contracting authorities and public undertakings are covered, and not those entities operating on the basis of special or exclusive rights, which operate in defined activities. Even then, not all of the utilities sectors are covered. In the case of the utility sectors in the EU, the EU negotiated access to the contracts awarded only by public authorities and public undertakings defined in the Utilities Directive that carry out one or more activities in the fields of water, electricity, urban transport, and terminal facilities in ports and airports. In the case of the EU, the revised GPA does not apply to activities in the fields of gas and heat, extraction of oil, gas and solid fuels.

The EU's General Notes to Appendix I to the GPA also set out some more significant exceptions in respect of certain contracts in the utilities sector. For example, until such time as reciprocal access is given to EU suppliers and service-providers, the EU will not extend the

benefits of the GPA to, for example, Canada and the USA in respect of water activities; Canada and Japan in respect of electricity activities; and Canada, Korea and the USA in respect of airport terminal facilities.

In practical terms, compliance with the Directives ensures compliance with the provisions of the GPA in respect of those entities that are also covered by the GPA. Since the Directives apply in any event, no further action needs to be taken in respect of *compliance* with the GPA procedural rules. However, in terms of granting *access* to EU procurement markets, contracting entities for GPA purposes are obliged to do so only in respect of (1) those entities, and (2) those products and/or services from other GPA members as are covered in the various country appendices to the GPA and which are not otherwise subject to exclusion or reciprocity requirements set out in the notes to the appendices. As the exceptions are more significant in the utilities sector than in the public sector, in order to accurately determine the extent of access it would be necessary to consult the specific country appendices.

## Section 3 Exercises

*Note on amendments to Exercises: the Trainer's Manual has not been updated to reflect the amendments below.*

### Exercise 1: Group Discussion on Public and Private Sector Procurement

Split into groups of about 6 for a debate on the merits of public or private sector procurement practices in the utilities sector.

Half of the groups will take the position that all utilities should follow public procurement rules.

The other half will take the position that all utilities should be permitted to follow private sector procurement practices.

Issues to be addressed include (but are not limited to):

- the impact of state influence over the ability for the utility to operate in the sector;
- the mode of granting authorisations/licences to operate;
- the effect of the existence of a monopoly position (*de facto* or *de jure*)
- the nature of a natural monopoly;
- the fact that utilities may need to compete for customers in competitive markets;
- the commercial outlook of utilities.

The presentations should also consider why it is that private sector operators do not need procurement regulations such as those contained in the procurement Directives in order to be encouraged to pursue economic and efficient procurement practices.

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

## Exercise 2: Case Study – Summercliff Bus & Tour Co.

You are the procurement officer for Summercliff Bus & Tour Co., a bus transport company that provides two types of service, namely a bus service for the general public along an established route in a city centre, and a coach hire service for holiday trips or to attend special events.

You are contemplating two procurement activities in the forthcoming financial year:

- (i) You intend to purchase a new fleet of buses and, to get the most out of the buses, you intend to use them both for the city route and for hire to local schools for transport to sports events.
  - Are you obliged to follow the Utilities Directive?
  - Would it make any difference if you decided not to use the buses for both purposes?
  - Why?
  
- (ii) The business is outgrowing the administration building you currently use and you are considering expanding by constructing new office space.
  - What questions should you ask to determine whether you should follow the Utilities Directive?
  - Your boss does not know whether to simply build a new headquarters to house the whole company, or whether he should build an annex to house part of the operations. Would you have any opinion from a procurement perspective?

Your boss is not sure whether he wants to comply with the procurement rules at all. He had heard that there was a special exemption for buses operating on competitive routes, which is the case for Summercliff. Is he right?



## Section 4 Chapter summary

*Note on amendments to Self-Test Questions: the Trainer's Manual has not been updated to reflect the amendments below.*

### Self-test questions

1. What are the three types of contracting entity in the utilities sector?
2. Why was the utilities sector originally excluded from the scope of the EC public procurement rules?
3. Was the original exclusion a matter of principle or a matter of practicality?
4. Explain the relevance of government influence.
5. How did the Community regulator bring the utilities sector within the ambit of the rules?
6. In the case of contracting "authorities", are the Public Sector and Utilities Sector Directives mutually exclusive?
7. Is there a difference between "bodies governed by public law" and "public undertakings"?
8. What are "special" or "exclusive" rights? Are "special" rights different from "exclusive" rights?
9. Is it enough that a contracting entity falls within the definition of "utility"?
10. What is the purpose of considering "relevant activities"?
11. Name the four main relevant activities.
12. Why were telecommunications dropped from the list of "relevant activities"?
13. If a contracting entity also carries out non-relevant activities, is it still covered by the Directive for purchases for those activities?
14. Explain the reasons for including the general exemption mechanism.
15. What considerations will apply to the award of the exemption?
16. Who may apply for the exemption, and how?

## **Module D3 Contracts Covered**

### **Section 1 Introduction**

#### **1.1. Objectives**

The objectives of this chapter are to explore, explain and understand:

1. The different types of contract that are covered by the rules
2. The contracts not covered by the procurement rules
3. The means of distinguishing between the different types of contract
4. The general treatment given to the different types of contract

#### **1.2. Important issues**

The most important issues in this chapter are understanding:

- The essential characteristics of a “procurement contract”
- The nature of the contracts covered
- The scope of the contracts covered
- The effect of combining contract types

This means that it is critical to understand fully:

- The elements of a contract
- The characteristics of arrangements that do not constitute contracts
- The aim or purpose of a contract

#### **1.3. Links**

There is a particularly strong link between this chapter and the following modules or sections:

- Module C4 on the award of concession contracts
- Modules D1 and D2 on the internal structure of the contracting authorities and contracting entities
- Module D3 on contracts that are exempted from the rules
- Module D4, applying value thresholds to the contracts that become subject to the rules
- Module E – all parts, on procedures that apply to the various contract types

#### **1.4. Relevance**

This information will be of particular relevance (i) at a strategic level where decisions as to the type of contract to be employed may be used to affect the type of contract and, therefore, type of procedure that is appropriate and (ii) at the operational level, where the type of contract at issue will determine the applicable thresholds, possible exemptions, and types of procurement methods to be used.

### **1.5. Legal information helpful to have at hand**

In addition to the provisions of the Directives, it may also be useful to have at hand:

- [Localise: the (national law relating to concessions);
- The section of the applicable local law that applies to services contracts]

## Section 2 Narrative

### 2.1. Introduction

Note: This narrative discussion has general application for both the Public Sector and Utilities Directives, and so the term “Directives” is used except where the context requires otherwise.

The Directives cover three main types of contract:

- works
- supplies
- services (other than works), including design contests

There is no separate category for consultancy services, which are dealt with essentially in the same way as are other services.

Some contracts will often contain elements of one or more of the above types of contract. Thus, a contract to construct a building might include design services and certain necessary supplies. Similarly, a supply contract may include siting and installation services. The Directive contains specific rules that are used to classify these ‘mixed contracts’.

A number of contracts are entirely excluded from the scope of the directives (but not necessarily of the Treaty), either because of their nature (i.e. where it would be inappropriate to apply the provisions of the Directives) or because they are the subject of different systems of regulation or administration. Some contracts, like the ‘reserved contracts’, receive special treatment as a result of the identity of those supplying the goods, works or services under them. These exempted and reserved contracts, which are subject to specific eligibility requirements, are discussed in Module D4.

When not excluded, contracts will only be subject to the provisions of the directives where their value exceeds the relevant monetary value set out in the directives – the EU financial threshold. These thresholds reflect the level at which it was assumed by the Community Legislator that cross-border trade was likely (although it is possible that, depending on the circumstances, tenderers may be interested in below-threshold contracts in other EU Member States – it is to be recalled that the general principles apply to the award of these contracts in any event). In order to prevent creative methods of calculating the value of the contracts to be awarded, the Directives also apply rules and methods of calculation as well as prohibition of methods designed to circumvent the Directives by splitting, aggregating or packaging contracts in such a way that the contracts do not properly fall within the appropriate provisions. Thresholds are discussed in Module D5.

One important distinction made by the directives is between “contracts” and “concessions”, the latter being treated differently from contracts. Special rules apply to the award of works and services concessions. The 2014 Directive no longer contains provisions governing the award of public works concessions, as a new directive covers the award of both works and services concession contracts - the 2014 Concessions Directive (2014/23/EU).

Finally, it should be mentioned that the 2014 Directive also regulates framework agreements, which - although they may still be contracts for works, supplies or services (or

treated as such) and are therefore no different in nature by reason of their method of award – require separate treatment.

## **2.2 ‘Procurement’ contracts**

The 2014 Directive includes a definition of a ‘procurement’ in article 1(2). Procurement, within the meaning of the 2014 Directive, is “the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose”. The definition of ‘procurement’ in the 2014 Utilities Directive differs in that the contracts are intended for the pursuit of one of the relevant activities. The Directives refer to ‘public works’ contracts, ‘public supply’ contracts and ‘public services’ contracts, [Localisation may be required if the definitions in the local law are different] but there are some general characteristics that are common to all types of contract covered by the Directives.

The Directives apply to contracts for pecuniary interest concluded in writing between an economic operator and a contracting entity, as follows:

- The contract must be for pecuniary interest, i.e. for money or money’s worth. There must be a financial consideration, no matter how it is paid.
- The contract must be in writing. In the very unlikely event that a contract that falls within the Directives is not in writing, it will be subject to the general application of the rules contained in the Treaty, as discussed in Module A1.
- The contract must be between two parties: the economic operator and the contracting entity. There are situations in the public sector, however, where agreements are not made between two separate and distinct parties, and therefore there is no contract according to this definition. Arrangements made between departments of the same organisation, for example, would not ordinarily be covered by the procurement rules. This is because there would normally not be any contractual relationship between the various departments of a single organisation. This part of the definition has attracted some interest recently and is considered in the next sub-section.

### **2.2.1. Internal arrangements within the contracting entity**

Where there is a purely internal arrangement between departments of the same public sector organisation, there will generally be no contract. However, as indicated in Module D1, even public sector organisations can make use of private sector structures, such as companies, to carry out public services. These structures/companies can also be used to provide services directly to the public organisation that controls them. Where they are part of the same legal structure, these arrangements are not ‘contracts’ for the purposes of the Public Sector Directive (in the utilities sector, the existence and treatment of separately owned affiliated undertakings is specifically foreseen, and therefore the issue concerns mainly the public sector). As soon as these structures become separate legal entities, however, any arrangement between them becomes a ‘contract’ between two parties, with one being a contracting entity, and the other an economic operator.

When this happens, the procurement of goods, works and services between the ‘parent’ contracting entity and the ‘owned’ economic operator becomes a procurement contract between those parties. This means that the contract must be awarded using the provisions of the Public Sector Directive so that the contracting entity may not make a direct award of a contract to its own company.

Based on the extensive case law of the ECJ, which is described below, the 2014 Directive introduces an explicit exclusion in article 12 concerning “in-house” or public-public contracts. The contracts covered by this exclusion are collectively referred to in the Directive as “public contracts between entities within the public sector” and are described in detail in Module D4.

First, the exclusion covers the situation where a contracting authority sets up a separate legal person and then awards contracts to that legal person – the controlled legal person. For the exclusion to apply, three requirements must be satisfied:

- Control: the controlling authority must exercise sufficient control over the controlled legal person;
- Activity: the controlled legal person must carry out the essential part of its activities for its owner authority;
- Private capital: there is no direct private capital participation in the controlled legal person.

Second, the 2014 Directive permits the establishment, in certain circumstances, of co-operation arrangements between contracting authorities without the need to follow EU procurement rules. The arrangements must be genuinely co-operative and non-commercial in nature.

A similar situation has been explicitly recognised in the utilities sector for a number of years, where it is often the case that a contracting entity owns a number of subsidiaries. Under the Utilities Directive, there is an explicit ‘affiliated undertakings’ exemption. The effect of this exemption is to exclude the intra-group (i.e. between the parent and subsidiary or between the various subsidiaries) that is providing goods, works and services from the scope of the Utilities Directive, subject to certain conditions. There was no equivalent provision in the 2004 Public Sector Directive prior to the adoption of the 2014 Directive. This meant that, under the 2004 Public Sector Directive, where there was a contract, the award of that contract, whether or not it was to a wholly-owned company, would be subject to the procedural rules.

**Background to the new provisions in article 12 of the 2014 Directive:** In order to understand the new provisions in article 12, it is helpful to know some of the background as well as the thinking of the ECJ. The ECJ first considered the issuing of an “in-house” award in detail in the *Teckal case*. The ECJ held that it was sufficient to apply the arrangements set out in the directive “if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority”. It then went on to say, however, that the situation would be different if, in effect, the contracting entity controlled the company as if it were one of its departments. This would take the arrangement outside the scope of the Public Sector Directive.

**Case note:**

*“The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises over its own*

*departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities.”*

(ECJ Case C-107/98 *Teckal Srl v Comune di Viano and AGAC di Reggio Emilia* [1999] ECR I-8121)

This decision has also been applied to inter-administrative agreements, that is to say, not to contracts between a contracting authority and a company in which it has a financial interest but to contracts between different public authorities. Thus contracts between two public authorities are not excluded simply because both parties are public authorities; to be excluded, one of the authorities must also satisfy the *Teckal* test, i.e. it must exercise over the other public authority a control that is similar to the control that it exercises over its own departments, and the latter authority must carry out the essential part of its activities under the control of the controlling local authority or authorities.

In a subsequent case, the private company (economic operator) at issue was only partly owned by a public authority, while the remaining shares were held by private parties. It was argued that the very small minority share held by the public authority (24.9%) still gave the contracting entity control over the company, which was sufficient to take the contract outside the Public Sector Directive. The ECJ disagreed because the existence of a private interest was incompatible with the public interest objectives presumed to be pursued by public authorities and because the capital presence of a private undertaking would give that undertaking an advantage over its competitors and thus risk distorting competition and violating the principle of equal treatment (in respect of other tenderers).

**Case note:**

“The participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant *excludes in any event* the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments.”

(ECJ Case C-26/03 *Stadt Halle* [2005] ECR I-1)

### **2.2.2 When does a contract arise?**

When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, it is not obvious. For example, an existing contract might be modified during its execution. As a result, new obligations arise between the parties and may change the terms of the original contract. All of these situations give rise to new obligations between the parties and may change the terms of the original contract.

If the result of the modifications is so extensive that the modified contract is fundamentally different from the original contract, then it may be the case that a new contract will be established. If there is a new contract and all of the elements of a contract are present, then the contract should be subject to the procurement rules, i.e. it must be awarded according

to the provisions of the Directives. Therefore a simple extension, renewal or other modification might not be permitted if it is made without competition.

The practical difficulty will be to determine when a modification in the contract will give rise to a new contract, thus resulting in an obligation to apply the directives, and when it will not. The directives were silent on the issue until the adoption of the 2014 directives. The 2014 directives codified ECJ case law, as described below, concerning modifications of public contracts and introduced provisions directly governing existing contracts and framework agreements. The purpose of the provisions is to describe the changes that require a new contract award procedure (substantial modifications) and the changes that do not require such a new procedure (permitted modifications). For more information on modifications of contracts during their term, see Module G1.

In some cases, the Directives also allow the use of options. Options can be included in contracts, and these options might foresee an extension or renewal of the contract following satisfactory performance, for example. If the value of the option or the renewal is taken into account in the calculation of the estimated price of the original contract, it will be covered by the original competition and there will be no need to apply the Directives again. See Module D5.

Similarly, some contracts can be renewed automatically until terminated by one party or the other or by mutual agreement, or they may simply be concluded for an indefinite period of time. These are 'indefinite' contracts, and the Directives provide a mechanism for calculating the value of such contracts for the purposes of the applicable thresholds. See Module D5.

The case of contract modifications (i.e. where the contract needs to be modified during its execution) is less clear. Even where modifications are anticipated, as is often the case with works contracts, there will still be a question of whether those modifications are acceptable as part of the original contract or whether they go beyond the terms of the original contract and become, in effect, a new contract.

The issue came before the ECJ in the case of *Presstetext* (Case C-454/06 *Presstetext v Austria* [2008] ECR I-4401), where the ECJ provided a number of indicators:

- Amendments (the text of the judgement uses the term *amendment* and the 2014 Directive uses the term *modification*) to the provisions of a public contract during the execution of the contract constitute a new award of a contract when they are *materially different* in character from the original contract and therefore demonstrate the intention of the parties to renegotiate the essential terms of that contract.
- An amendment may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.



- An amendment may also be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered.
- An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner that was not provided for in the terms of the initial contract.

### **2.2.3 Contracts and concessions**

A concession is

- a contract for pecuniary interest concluded in writing;
- the means by which one or more contracting authorities or contracting entities entrust the execution of works or the provision and management of services to one or more economic operators;
- the consideration for which consists either solely of the right to exploit the works or services that are the subject of the contract or of that right together with payment.

A concessionaire often accepts the operational and financial risk of providing a public service, in the broadest sense, in return for the chance of making a profit through the exploitation of the 'service'. A contractor seeks to make a profit by means of the fixed payment received for the execution of the contract. Public-private partnerships (PPPs) will sometimes include the award of a concession.

Concessions are used, for example, to carry out and finance major infrastructure projects, notably in respect of the construction of a road network, bridges or tunnels, where the concessionaire is remunerated by way of tolls charged to users. They are also used, however, simply to provide for the operation and maintenance (rather than construction) of facilities by concessionaires, such as where an operator is given the concession to operate an existing railway or underground railway infrastructure. The former types of concession are examples of works concessions; the latter is an example of a services concession.

Both works and services concessions are dealt with comprehensively in the 2014 Concessions Directive. The 2004 Public Sector Directive, however, dealt with works concessions only, while services concessions, even though subject to general principles of the Treaty, were explicitly excluded from its scope.

### **2.2.4 Framework agreements and contracts**

Under article 33(1), a framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms – in particular with regard to prices and, where appropriate, the quantity envisaged – governing the contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

Such agreements are used frequently in practice where a purchaser has a continuing or recurring need to purchase the same or similar products or services and wishes to avoid the costs associated with awarding a new contract each and every time that it needs to purchase additional supplies.

The difficulty raised by the definition of framework agreement is that it may or may not be a 'contract' for the purposes of the Directives, i.e. the parties to the agreement do not always undertake binding commitments to buy or sell but merely set out the terms that would apply to any future contracts that they might conclude. Whether there is a contract or not will depend on national law. Indeed, the 2014 Directive in recital 61 confirms this position by stating that contracting authorities should not be obliged under that framework agreement, pursuant to this directive, to procure works, supplies or services that are covered by a framework agreement.

If there is no binding contract at the stage of the framework agreement, the issue of establishing a contract would arise when orders are placed under the agreement so that each agreement call-off would amount to a separate contract. Ordinarily, therefore, the Directives would apply to each call-off above the threshold. These individual orders could also be aggregated if individually they fell below the thresholds (see Module D5).

What the Directives do is to effectively enable a non-binding framework agreement to be treated in the same way as a binding framework contract. Thus, if the contracting entity chooses to award the framework agreement under the provisions of the Directives as if it were a binding contract, then the subsequent call-off 'contracts' may be awarded without competition.

Where the non-binding framework agreement has not been awarded pursuant to the provisions of the Directives, however, each contract above the threshold value will be treated as a contract falling within the terms of the Directives and will be subject to their procedures. Individual contracts that have been awarded pursuant to a framework agreement are subject, as any other contract that has been awarded subject to the Directives, to the requirement of the publication of a contract award notice in the *Official Journal of the EU*. In addition, a framework agreement could be entered into with multiple suppliers, followed by a mini-tender when call-offs were required. The procedures for awarding framework agreements are covered in Module C4.

The Directives further provide that contracting entities may not misuse framework agreements in order to hinder, limit or distort competition, although they do not refer to any particular cases of misuse. The duration of framework agreements is limited to four years, or eight years in the case of utilities, except in exceptional circumstances justified by the subject of the framework agreement.

### **2.3 Works contracts**

Works contracts are defined as those contracts that have as their object:

- either the execution or both the execution and design of works related to one of the activities referred to in Annex II; or
- the execution or both the design and execution of a work; or
- the realisation, by whatever means, of work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.

The possibility of including design works in a works contract means that ‘design and build’ contracts may fall within the definition of a works contract. This could include, for example, contracts covering the planning and financing of a project as well as its execution. Where design and construction are awarded separately, the design services would be a service contract or could, alternatively, be awarded by means of a design contest.

For the second and third part of the definition, a ‘work’ is the outcome of building or civil engineering works taken as a whole that is sufficient in itself to fulfil an economic and technical function (see 2.3.2 below for details). This definition is relevant for a number of reasons, notably in the context of the realisation of works by any means and for the purposes of assessing the threshold values and, consequently, when deciding whether a single requirement for works has been split up with a view to bringing contracts below the relevant threshold value.

### **2.3.1 Building and civil engineering activities**

Annex II of the 2014 Directive (Annex I of the 2014 Utilities Directive, Annex I of the 2014 Concessions Directive) gives a list of professional activities as set out in the general industrial classification of economic activities within the European Communities (NACE). The Common Procurement Vocabulary (CPV) is often recommended for use in the contract award notices, and the annexes to the 2014 Directives provide for each NACE code a corresponding reference to the relevant CPV code, even though the CPV is not binding. Annex II of the 2014 Directive explicitly provides that, in the event of any difference of interpretation between the CPV and the NACE, the NACE nomenclature will apply. The following list, contained in the annexes, covers building and civil engineering. In summary, the list includes:

- general building and civil engineering work and demolition work;
- construction of flats, office blocks, hospitals and other buildings, both residential and non-residential (to include such activities as roofing, construction of chimneys, waterproofing, restoration and maintenance of outside walls, etc.);
- civil engineering: construction of roads, bridges, railways, etc. (to include such activities as earth-moving, hydraulic engineering, irrigation, and sewage disposal);
- installation: fittings and fixtures (to include activities such as gas fitting and plumbing, installation of heating and ventilating apparatus, electrical fittings, etc.);
- building completion works (to include such activities as plastering, joinery, painting and tiling).

See Module E2 on the use of NACE and CPV codes in the contract notice.

### 2.3.2 Realisation of a work by whatever means

A works contract would also fall within the definition of the Directives where the party signing the agreement was not, in fact, the contracting entity itself, but a company acting as an agent on its behalf. This would apply, for example, in the construction industry where an engineering and construction company was taken on as management contractor providing engineering design, procurement, construction and project management services to the contracting entity. The management contractor would be obliged to follow the procurement rules when awarding contracts for works since it would be providing work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work. The contracting entity would obtain such work “by whatever means”.

This provision concerning the realisation, by whatever means, of work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work also covers other arrangements that are common among developers, whereby a developer or builder constructs buildings on its own land and subsequently transfers or agrees to transfer the land together with the buildings to the contracting entity. This might, at first sight, appear to be a contract for the acquisition of land (a type of contract that is excluded from the Directives – see Module D4), but the fact that the buildings are often constructed according to the contracting entity’s specifications would bring the arrangement within this definition of a works contract.

This provision also covers situations where a contracting entity is in some way obliged to purchase works from a developer who owns the particular land. In some respects, a public purchaser has no possibility of contracting with anyone else, and so the idea that it can apply the procurement rules appears to be purely academic. Such would be the case, for example, with urban regeneration and development projects, which often involve complicated relationships between local authorities and developers and which are regulated by a series of national and local planning laws and regulations. Development may be undertaken by the public authorities on land that they do not own or it may be undertaken by the private sector in areas designated by the public authorities for development.

The relationships are complicated and raise problems in the procurement context because, even in the case of private development, there will inevitably be public intervention since, as designated development areas, developers will often be required, in return for planning consent, to contribute to consequential ‘public’ requirements, such as by providing feeder roads or even major highways, parking spaces, sewerage and utility networks, street lighting, and leisure parks and gardens. In some cases, there will be requirements concerning the provision of social or affordable housing.

The question is essentially to determine the degree of intervention by the public authority that would imply that it was requiring and paying for works (by whatever means) that complied with its own ‘public’ requirements. Where the degree is determinative, then the procurement rules will apply. In practice, however, the public authority may not be able to

select the private sector partner because the developer who owns the land and development will be able, legally, to insist on carrying out the work.

This issue arose in the case of La Scala (Case C-399/98, [2001] ECR I-5409), where a private developer was restoring the La Scala opera house as part of a wider urban development project. The ECJ made several findings (in respect of the public sector works directive at issue):

- The fact that the direct execution of infrastructure works forms part of a set of urban development regulations is not sufficient to exclude the direct execution of works from the scope of the Directive when the elements required to bring it within the scope of the Directive are present.
- Therefore, once there is a contract for pecuniary interest between two independent parties for public works above the threshold, those works will fall within the scope of the Directive.
- The fact that the works were directly executed did not preclude the existence of a contract since, where infrastructure works are executed directly, a development agreement must always be concluded between the municipal authorities and the owner or owners of the land to be developed.
- In this case, there was a public works contract that should have been put out to tender, even though the works could only be executed by the owner of the land.
- The Directive could still be given full effect if the national legislation allowed the municipal authorities, in order to discharge their own obligations under the Directive, to require the developer holding the building permit, in accordance with the agreement it had concluded with them, to carry out the work contracted for in accordance with the procedures laid down in the Directive.

The legal solution, therefore, when the contracting authority was in effect captive to the developer, was for the authority to require the developer to comply with the Directive so that it would in turn be able to discharge its own obligations under the Directive. In other words, the solution would be to make the developer the agent of the procuring entity and force it to apply the provisions of the Directive.

However, even if the developer itself happened to be a contracting entity obliged, in any event, to follow the Directives, it would not mean that the authority awarding the initial contract could avoid applying the rules of the Directives. The Directives apply at both stages.

**Case note:**

“A contracting authority is not exempt from using the procedures for the award of public works contracts laid down in the Directive on the ground that, in accordance with national law, the agreement may be concluded only with certain legal persons, which themselves have the capacity of contracting authority and which will be obliged, in turn, to apply those procedures to the award of any subsequent contracts.”

(ECJ Case C-220/05 *Auroux* [2007] ECR I-385)

### 2.3.3 Works and services concessions

As indicated above, both works and services concessions are covered by the 2014 Concessions Directive.

#### 2.3.3.1 Definition

A 'works concession' is "a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely of the right to exploit the works that are the subject of the contract or of that right together with payment".

A 'services concession' is "a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works ..... to one or more economic operators, the consideration for which consists either solely of the right to exploit the services that are the subject of the contract or of that right together with payment."

In considering 'exploitation', significant weight will be given to the element of risk transfer between the public authority and the concessionaire. The absence of risk transfer will suggest the existence of a contract subject to the full rigour of the 2014 Directive or the 2014 Utilities Directive rather than a concession subject to the 2014 Concessions Directive.

The 2014 Concessions Directive clarifies that the concept of a concession requires the transfer of an operating risk to the concessionaire in exploiting those works or services, encompassing demand risk or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services that are the subject matter of the concession.

The 2014 Concessions Directive does not define what is to be understood as "normal operating conditions". However, the part of the risk transferred to the concessionaire must result in the concessionaire being exposed to the vagaries of the market. The operating risk must stem from factors that are beyond the control of the parties. Risks linked to bad management, contractual defaults by the concessionaire, or instances of *force majeure* are not decisive for the purpose of classifying the works/services as a concession, since those risks are inherent in every contract.

As a consequence, where sector-specific regulations eliminate the risk by providing a guarantee to the concessionaire of breaking even in terms of the investments and costs incurred for operating the concession, the contract cannot qualify as a concession. Equally, a contract where the contractor is remunerated on the basis of regulated tariffs that are calculated in such a way as to cover all costs and investments borne by the contractor for providing the service does not qualify as a concession but rather as a public contract.

The 2014 Concessions Directive stipulates that the duration of a concession must be limited, although it does not lay down a maximum duration. It does clarify that the contract period is not to be unduly lengthy, with a view to preventing market closure and restriction of competition. Concessions of a very long duration are likely to result in the closure of the market and may thereby hinder the free movement of services and the freedom of establishment. Therefore, for concessions lasting more than five years, the maximum duration of the concession must not exceed the estimated time that a concessionaire could

reasonably be expected to take in order to recoup the investments made in operating the works or services together with a return on invested capital, taking into account total investment, the asset's capacity to generate revenue, user tariffs, and the asset's operation and maintenance costs.

Modern 'concessions' often contain a mix of works and services, i.e. they include not only the construction of infrastructure or facilities but also the operation of those facilities. The means of distinguishing between these different elements is discussed further in section 2.7 below.

### **2.3.3.2 Procedure for the award of works services concessions**

Unlike the 2014 Directive, the 2014 Concessions Directive does not set out specific procedures to be followed when awarding a concession. Member States are not hindered from making use of the procedures allowed by the 2014 Directive. The 2014 Concessions Directive establishes a basic framework reflecting the general principles and procedural guarantees derived from ECJ case law aimed at ensuring transparency and equal treatment. Minimum co-ordination should be sufficient, from the view of the EU legislator, to achieve the objectives pursued by the 2014 Concessions Directive. In whatever way or form contracting authorities or contracting entities choose to organise the procedure leading to the choice of the concessionaire, they are bound to respect at all times the principles of equal treatment, non-discrimination and transparency *vis-à-vis* economic operators.

### **2.3.3.3 Subcontracting by concessionaires**

The 2014 Concessions Directive contains specific rules on subcontracting, which are similar to those provided in the 2014 Directive. It allows or requires contracting authorities to ask a tenderer to indicate any share of the concession that it may intend to subcontract and any proposed subcontractors. The concessionaire is required to provide information concerning the subcontractors (name, contact details, legal representative) and of any changes in subcontractors working at a facility under the direct oversight of the contracting authority. This requirement, which applies for works concessions and services concessions, must be fulfilled following the award of the contract and at the latest at the beginning of the execution of the contract. Contracting authorities have discretion to extend these requirements, for example to subcontractors further down the subcontracting chain.

See Module C4 for further information.

### **2.3.4 Subsidised works or services contracts**

The 2014 Directive makes special provision in respect of works or services contracts that are subsidised by contracting authorities for more than 50%.

#### **2.3.4.1 Contracts subsidised by more than half**

Where a private entity does not fall within the definition of a body governed by public law, it may still in certain circumstances be treated as if it were such a contracting authority when it awards a contract that is subsidised by a public authority.

This is the case when certain works or services contracts are subsidised by public authorities for more than 50%.

In such cases, contracting authorities providing subsidies are required to ensure compliance with the directive whenever the contract is awarded by one or more entities other than themselves or where they award that contract for and on behalf of other entities.

This provision only applies to certain contracts:

- works contracts (falling within the definition of the civil engineering activities contained in Annex II to the 2014 Directive) whose value meets or exceeds the normal threshold value for works contracts; and
- services contracts, connected to such a works contract, whose value meets or exceeds the normal threshold value for services contracts.

However, the Directive applies *only* in respect of activities where the contracts involve building work or connected services with a 'public' dimension. Those activities are defined as works and connected services for hospitals, facilities intended for sports, recreation and leisure, school and university buildings, and buildings used for administrative purposes.

See Module C4 for information on the detailed requirements.

## **2.4 Supplies contracts**

The definition of supplies is rather more straightforward than that of works or services. 'Public supply contracts' are defined in article 2(1)(8) of the 2014 Directive as contracts having as their object the purchase, lease, rental or hire purchase of products, with or without the option to buy. In addition, the delivery of such products may include siting and installation operations, as an incidental matter.

The range of products covered by the Directives can be seen in the various nomenclatures used to describe products for the purposes of advertising. See, for example, the Common Procurement Vocabulary (CPV).

## **2.5 Services contracts**

The term 'services contracts' essentially refers to contracts other than works contracts that have as their object the provision of services. A number of services are specifically excluded, mainly because they are not amenable to purchase through the rules provided by the directives. These services are described in Module D4.

The 2014 Directives abolished the distinction between priority (Part A) and non-priority (Part B) services. All services are fully regulated unless they are 'light regime services' or fall within one of the exclusions.

The light regime services are listed in Annex XIV of the 2014 Directive by reference to the relevant CPV code. See section 2.5.3 below.

See Module E2 for further information on CPV and CPC.



### 2.5.1 Light regime

The results of the 2011 'Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation' suggested that the exclusion of certain services from the full application of Directive 2004/18/EC should be reviewed. As a result, the full application of the 2014 directives has been extended to a number of services.

Certain categories of services, namely services known as services to the person, such as specific social, health and educational services, are provided within a particular context that varies widely amongst Member States due to different cultural traditions and by their very nature they have a limited cross-border dimension.

A specific light regime was therefore established in the 2014 directives for awarding contracts for those services, with the threshold of 750 000 EUR and above (1 000 000 EUR in the case of utilities), which is higher than the threshold that applies to fully regulated services.

The way in which the procurement process is run is not regulated in detail in the directive. Given the importance of the cultural context and the sensitivity of these services, Member States are given wide discretion to organise the choice of the service providers in the way that they consider to be the most appropriate. Member States are nevertheless required, in implementing their own rules on procurement processes for light regime services contracts, to comply with transparency and equal treatment principles and some other limited provisions. These provisions are established in articles 74 to 76 of the directive:

- Light regime services contracts equal or above the threshold must be advertised in the *Official Journal of the European Union (OJEU)*, using standard form notices.
- All contracting authorities may use either a Contract Notice to advertise in the *OJEU* or an enhanced Prior Information Notice, which can be published a year or more in advance and which can cover multiple contracts.
- Contracting authorities must publish a contract award notice in the *OJEU* by using a standard form. They have the option to group notices together and publish them quarterly within 30 days of the end of each quarter.
- Rules must allow contracting authorities to take into account the specificities of the services in question.
- Rules shall ensure that contracting authorities take into account the need to ensure the quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of various categories of users including disadvantaged and vulnerable groups, the involvement and empowerment of users, and innovation.

Member States may provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for light regime services.

Such services with values below the threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects.

### **2.5.2 Light regime services**

The light regime services are listed in Annex XIV of the 2014 Directive by reference to the relevant CPV codes (Annex XVII of the 2014 Utilities Directive, Annex XIV of the 2014 Concessions Directive). The light regime services described in Annex XIV are as follows:

- Health, social and related services
- Administrative social, educational, health care and cultural services
- Compulsory social security services
- Benefit services
- Other community, social and personal services, including services furnished by trade unions, political organisations, youth associations and other membership organisation services
- Religious services
- Hotel and restaurant services
- Legal services, to the extent that they are not excluded pursuant to point (d) of article 10 [of the 2014 Directive]
- Other administrative services and government services
- Provision of services to the community
- Prison-related services, public security and rescue services, to the extent that they are not excluded pursuant to point (h) of article 10 [of the 2014 Directive]
- Investigation and security services
- International services
- Postal services
- Miscellaneous services

**Note:** It is important to look very carefully at the individual CPV codes used in Annex XIV. These codes provide a detailed list of the light regime services falling under the general headings above. The CPV codes must be consulted in order to establish precisely which services are, or are not, classified as light regime services.

### **2.5.3 Mixed contracts containing fully regulated services and light regime services**

The 2014 Directives apply an explicit value test to services contracts that contain both fully regulated services and light regime services.

In the case of mixed contracts consisting partly of fully regulated services and partly of light regime services, the main subject shall be determined in accordance with which of the estimated values of the respective services is the highest.

A contract will therefore be classified as a fully regulated services contract where the value of the fully regulated services contained in the contract is greater than the value of the light regime services.

In other cases, it will be a light regime services contract, so that a contract in which the share of light regime services is equal to or greater in value than the share of fully regulated services will be a light regime services contract.

There is no obligation to separate out the fully regulated and light regime services and to award them as separate contracts, which could lead to a contract for largely light regime services, even if it contained a large proportion (say 49%) of fully regulated services, being awarded as a contract for light regime services. Such a separation of services could also turn out in the opposite way, so that the value of fully regulated services would be greater than the value of light regime services. The result would be the full application of the procedures of the 2014 Directives to even the light regime services.

This provision cannot be used, however, to avoid the application of the Directives.

Therefore, when assessing whether fully regulated and light regime services have been packaged together correctly or split up, consideration will be given to the artificiality of the exercise as well as to the intention of the contracting entity. If the services naturally combine to achieve a single purpose, then splitting them up would be artificial. In other cases, where the services do not naturally combine to achieve a single purpose, then there can be no objection to awarding them separately.

## **2.6 Design contests**

Design contests are those national procedures providing the contracting entity with a plan or design that is selected by a jury on the basis of a competition, with or without the award of prizes.

Such contests are held mainly in the fields of town or area planning (with particular regard for the public sector), architecture, civil engineering and data processing. They are often used in the case of the construction of notable public buildings and are being used more and more frequently for the design of projects such as IT infrastructure projects.

These contests may be part of a procedure leading to the award of a service contract or may be held independently under a separate procedure since there are no inevitable results when undertaking a design contest.

The rules only apply where the total amount of contest prizes and payments to participants meets the appropriate threshold.

On the other hand, where the contests form part of a procedure for the award of other contracts, the threshold value consists of both the value of contest prizes and payments *and* the value of the services contract that might be awarded to the winner where the rules of the competition provide that the resulting services must be awarded to one or the other of the winners of the design contest. The resulting services must be a 'direct functional link' between the contest and the contract concerned, and therefore a mere connection in terms of the subject matter of the contract does not suffice. Furthermore, this provision applies only where the rules of the competition specify that the resulting services *must* be awarded to one or the other of the winners of the design contest.

See Module C4 for further information on such contests.

## **2.7 Mixed contracts**

The Directives contain provisions on how to categorise a contract containing elements of works and/or supplies and/or services.

The distinctions are relevant in the case of mixed supplies and services contracts, notably where the services included are light regime services. If the contract can be categorised as a light regime services contract, then it would be only lightly regulated, in accordance with the light regime provisions, even if it also contained supplies.

It is an issue also in the case of works contracts that contain elements of supplies or services, given the much higher thresholds that apply to works contracts. The way in which mixed contracts are categorised depends on the mix.

Contracts that have as their subject two or more types of procurement (works, services or supplies) shall be awarded in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question.

### **2.7.1 Supplies/services**

Essentially, contracts containing elements of both supplies and services will be treated as one or the other type of contract depending on the value represented by each element.

The contract will be considered to be a services contract where the value of the services performed is greater than the value of the products supplied. Where the value is equal, the contract shall be awarded in accordance with provisions applicable to the type of procurement that characterises the main subject of the contract in question.

The definition makes no distinction between fully regulated services and light regime services, with the effect that, where the value of light regime services in a mixed contract is greater than the value of supplies, the whole contract will be treated as a contract for light regime services.

Supplies contracts that also cover, as an incidental matter, siting and installation operations, will be defined as supplies contracts.

### 2.7.2 Works/services

In the case of works and services, the directives do not provide for a value test, as above, but include a test based on the type of procurement that characterises the main subject of the contract, as opposed to considerations that are merely incidental to that subject.

A contract having as its subject services (either fully regulated or light regime services) and including activities within the definition of 'works', where the works are not the main subject of the contract, is to be considered to be a service contract.

The requirement of the 2014 Directive to identify the type of contract in accordance with the provisions applicable to the type of procurement that characterises the main subject of the contract in question is derived from the 'principal object' test used in the 2004 Directive.

The 'principal object' test is clearly inspired by the decision of the ECJ in the *Gestión Hotelera* case, as discussed below.

#### Case note:

The case concerned two invitations to tender, one in respect of the installation and opening of a casino, the other in respect of the operation of a hotel. The contracting authority intended to arrange for the installation of a casino in the premises of a hotel owned by the municipality. It wanted, however, to award the contract to the company that, following competitive selection, would assume responsibility for the operation of the hotel business. Despite the works component, it was clear for the ECJ that the main object of the award of the contract was, first, the installation and opening of a casino and, secondly, the operation of a hotel business. Those objects constituted services concessions and thus were outside the scope of the Directives.

(Case 331/92 *Gestión Hotelera* [1994] ECR I-1329)

### 2.7.3. Mixed contracts that have as their subject matter procurement covered by the 2014 Directive and procurement covered by other legal regimes

Article 3 of the 2014 Directive introduces new rules governing the award of mixed contracts where the subject matter is covered by the 2014 Directive as well as other legal regimes (other directives, or outside the scope of any directive). Here everything depends on whether the different parts of a given contract are objectively separable or not.

If the different parts of a given contract are objectively separable, the contracting authority has two options:

- (1) to award separate contracts for separate parts, or
- (2) to award a single contract.

When the contracting authority chooses to award separate contracts for separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

When the contracting authority chooses to award a single contract, the 2014 Directive is applicable to such a mixed contract, irrespective of the value of the parts that would

otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of a mixed contract containing elements of supply, works and services contracts and of concessions, such a contract shall be awarded in accordance with the 2014 Directive. This application of the directive, however, is provided that the estimated value of the part of the contract that constitutes a contract covered by that directive is equal to or greater than the relevant threshold set out in the directive (article 4).

In the case of a contract that has as its subject both procurement covered by the 2014 Directive and procurement for the pursuit of an activity that is subject to the 2014 Utilities Directive, the applicable rules are determined, notwithstanding the rules described above, pursuant to the 2014 Utilities Directive (see note below).

If the different parts of a given contract are objectively not separable, the applicable legal regime should be determined on the basis of the main subject of that contract.

Article 16 of the 2014 Directive applies in the case of mixed contracts that have as their subject matter procurement covered by that directive as well as procurement covered by article 346 TFEU or by the Defence Directive (2009/81/EC).

In the case of such mixed contracts, once again everything depends on whether the different parts of a given contract are objectively separable or not. If they are objectively separable, the contracting authority has two options:

- (1) to award separate contracts for the separate parts, or
- (2) to award a single contract.

If the contracting authority decides to award separate contracts for the separate parts, the application of the relevant legal regime depends on the characteristics of a given part.

On the other hand, if the contracting authority opts for one single contract, then the applicable legal regime is determined on the basis of the following criteria:

- part of contract is subject to article 346 TFEU – the contract may be awarded without applying the 2014 Directive, provided that the award of a single contract is justified for objective reasons;
- part of a contract is covered by the Defence Directive – the contract may be awarded in accordance with the provisions of the Defence Directive, provided that the award of a single contract is justified for objective reasons.

The decision to award a single contract shall not, however, be taken for the purpose of excluding contracts from the application of either the 2014 Directive or the Defence Directive.

If the parts of the mixed contract are objectively not separable, then it depends on whether the contract includes elements that are subject to article 346 TFEU – if so, then it may be awarded without the application of the 2014 Directive. If there are no elements subject to article 346 TFEU, the Defence Directive may be applicable. In either case, the 2014 Directive is not applied.

**Note: Mixed contracts – 2014 Utilities Directive**

**Mixed procurement covering the same activity**

Article 5 of the 2014 Utilities Directive establishes rules governing the award of mixed contracts where the subject matter is covered by the 2014 Utilities Directive as well as other

legal regimes (other directives, or outside the scope of any directive). Here, everything depends on whether the different parts of a given contract are objectively separable or not.

If the different parts of a given contract are objectively separable, the contracting entity has two options:

- (1) to award separate contracts for the separate parts, or
- (2) to award a single contract.

Where the contracting entity chooses to award separate contracts for the separate parts, the decision as to which legal regime applies to any one of such separate contracts shall be taken on the basis of the characteristics of the separate part concerned.

Where the contracting entity chooses to award a single contract, the 2014 Utilities Directive is applicable to such a mixed contract, irrespective of the value of the parts that would otherwise fall under a different legal regime and irrespective of which legal regime those parts would otherwise have been subject to.

In the case of a mixed contract containing elements of supplies, works and services contracts and of concessions, such a contract shall be awarded in accordance with the 2014 Utilities Directive, but provided that the estimated value of the part of the contract that constitutes a contract covered by that directive is equal to or greater than the relevant threshold set out in the directive (article 15).

If the different parts of a given contract are objectively not separable, the applicable legal regime should be determined on the basis of the main subject of that contract.

#### **Procurement covering several activities**

The 2014 Utilities Directive in article 6 establishes rules governing the award of mixed contracts that are intended to cover several activities.

In such cases, contracting entities may choose:

1. to award separate contracts for the purposes of each separate activity, or
2. to award a single contract.

Where contracting entities choose to award separate contracts, the decision as to which rules apply to any one of such separate contracts shall be taken on the basis of the characteristics of the separate activity concerned.

Where contracting entities choose to award a single contract, the following rules apply:

1. A contract that is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.
2. In the case of a contract for which it is objectively impossible to determine the activity for which the contract is principally intended, the applicable rules shall be determined in the following way:
  - (a) the contract shall be awarded in accordance with the 2014 Directive, if one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other activity to the 2014 Directive;
  - (b) the contract shall be awarded in accordance with the 2014 Utilities Directive, if one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other activity to the 2014 Concessions Directive;

(c) the contract shall be awarded in accordance with the 2014 Utilities Directive, if one of the activities for which the contract is intended is subject to the 2014 Utilities Directive and the other activity is not subject to the 2014 Utilities Directive, the 2014 Directive or the 2014 Concessions Directive.

However, the choice between awarding a single contract or awarding a number of separate contracts must not be made with the objective of excluding the contract or contracts from the scope of application of the 2014 Utilities Directive or, where applicable, the 2014 Directive or the 2014 Concessions Directive.

#### **2.7.4 Works/supplies**

Under the Directives, supplies contracts that also cover, as an incidental matter, siting and installation operations, are defined as supplies contracts. For example, in the case of the purchase of a crane to be installed on a dockside, the object of the contract is the *supply* of the crane and not the works required to site it, even if those works are considerable.

This 'principal object' test, which mirrors the way in which works and services contracts are to be distinguished, would appear to apply even if the value of siting or installation services is greater than the value of the supplies itself, since it is a test based on the object of the contract and not the value-based test applied to distinguish between supplies and services.



## Section 3 Exercises

*Note on amendments to Exercises: the Trainer's Manual has not been updated to reflect the amendments below.*

### Exercise 1A – Class Case Study

These are the original facts from the Class Case Study (Exercise 1) for Module D1:

Arcadia municipality decides it wants to develop a business and commercial zone on an attractive plot of land at the edge of town which it is calling Evergreen Park. It is considering setting up a non-profit organisation in the form of a private company, Apple Inc., in which it would own the majority of the shares to undertake the development in the hope that this will reduce the administrative burden of creating Evergreen Park. A neighbouring municipality, Eden Town, which has experience in such developments decides that, when the arrangements are in place for the development, it would itself like to bid for the contract to design the overall architectural scheme and undertake the general planning of Evergreen Park. Eden Town does not, however, have in-house capability for the landscaping requirements of the Park. Having used them in the past, Eden Town decides that, before bidding for the contract, it should make sure that it can rely on the services of Greenfingers, a private landscaping company. It therefore enters into a contract with Greenfingers to supply the required landscaping services when and only if Eden Town wins the design contract.

*Additional facts for this exercise are as follows:*

The land on which Evergreen Park is to be built is owned by Monolith, a private developer who had previously begun a similar project but ran out of money. There are some buildings and amenities on the land but it is mostly an evergreen site. It tells Arcadia that it will only sell the land if it is given the construction contracts for the development.

**Question:** Since Arcadia has no option but to give the construction contracts to Monolith, does that mean that it can avoid the procurement rules?

## Exercise 1B – Case Study

*These are the original facts from the Individual Case Study (Exercise 2) for Module D1:*

Until now, the municipality of Cleverton has provided municipal waste disposal services by way of an autonomous service unit of the municipality called the Cleanup Team. Although not set up formally as a company, the Cleanup Team operated as if it were an independent company, despite the fact that its management was governed by rules put in place by Cleverton and that traditionally all its funding came from the treasury department of Cleverton. Indeed, the Cleanup Team believed it was just like a company and would also provide services to private sector clients and other municipalities in return for payment. By its 2008 year-end, it transpired that its receipts from these latter services accounted for 51% of all the income it received for that year (roughly EUR 3 million), an increase of more than 20% over the previous year. This was expected to increase further in 2009.

Having seen the projected financial results, Cleverton believed that it should put the Cleanup Team on a more proper financial footing, and decided to create a limited liability company to take over its functions. It created Cleanup Limited, a wholly owned subsidiary, on 5 November 2008 and signed with it, on 10 November, a contract for the supply of municipal waste disposal services for 2009, to begin on 1 January 2009. The value of these services was in the order of EUR 1.5 million.

On 25 November 2008, the central government introduced much stricter and more sophisticated environmental regulations that would apply to the transport and disposal of municipal waste. The Cleanup Team had previously contracted out its routine environmental compliance work to a private sector company, Opportune Limited. In 2008, the value of this work had been about EUR 150 000. Realising that it did not have the expertise to meet these new regulations, the management of Cleanup Limited approached Opportune Limited directly to provide the services without following the procurement Directives.

*Additional facts for this exercise are as follows:*

Rather than risk simply selling its know-how in this new area, however, Opportune Limited offered to enter into partnership with Cleanup Limited, which would protect its know-how. As a result, it agreed to provide ongoing environmental services to Cleanup Limited at the going market rate (of approximately EUR 300 000 per annum), but in return for a 10% stake in Cleanup Limited. The transfer of shares took place in the middle of December 2008 and the contracts were in place by 30 December 2008.

**Question:** Superclean also believes that Cleverton should not have given a contract to Cleanup Limited without following the provisions of the procurement Directives. How do you respond?

Note: You have enough information to answer this question from the general principles. However, you might want to consider a further case: *C-29/04 Commission of the European Communities v Republic of Austria (“Mödling”)* [2005] ECR I-9705.

## Exercise 2: Mixing and Matching

Provide 1 example each of practical situations where you would find a mix of:

- supplies and services
  - works and supplies
  - works and services
1. Explain why these components are mixed.
  2. Consider whether they could be separated, and why.
  3. Devise procurement plans that will, legitimately,
    - (i) maximise and
    - (ii) minimiseapplication of the Directives.

## Section 4 Chapter summary

*Note on amendments to Self-Test Questions: the Trainer's Manual has not been updated to reflect the amendments below.*

### Self-test questions

1. Are oral contracts covered by the Directives? Explain what principles apply.
2. Who are the parties to a public contract?
3. Can a public sector authority be a party?
4. Can a company owned by public sector authority be a party?
5. What is the test that applies when a public authority wishes to contract with a company it owns without following the procurement rules?
6. Does an extension to a contract have any effect on the application of the procurement rules?
7. If a contracting authority wants to provide for a renewal on the basis of good performance, is there anything that should be done when awarding the original contract to make that easier?
8. Explain how the European Court of Justice (ECJ) would look at a contract variation under the procurement rules.
9. Explain the fundamental difficulty of dealing with framework "arrangements" under the procurement rules. How do the Directives deal with this difficulty?
10. Describe a works contract.
11. What is the significance of the phrase "the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority"?
12. What are the problems associated with urban regeneration projects? How does the ECJ deal with them?
13. What rules apply?
14. Describe supply contracts.
15. Describe services contracts.
16. What are mixed contracts?
17. How do you classify a mixed supplies/services contract?

18. How do you classify a mixed works/services contract?
19. How do you classify a mixed works/supplies contract?

## **Module D4 Exempted Contracts**

### **Section 1 Introduction**

#### **1.1. Objectives**

The objectives of this chapter are to explore, explain and understand:

1. Which contracts are not covered by the procurement rules
2. Why some contracts are exempted and others not
3. The mechanisms for determining when contracts are exempted
4. The connection between the exemption and type of contract at issue
5. How exemptions will be interpreted by the European Court of Justice

#### **1.2. Important issues**

The most important issues in this chapter are understanding:

- The reasons for exclusion
- The scope and extent of the exclusions
- The specific nature of the exclusions

This means that it is critical to understand fully:

- The primary purposes of the procurement rules that underpin the inclusion and/or exclusion of contracts
- The limits of exclusion
- The effects of particular exclusions

#### **1.3. Links**

There is a particularly strong link between this chapter and the following modules or sections:

- Modules D1 and D2 on the internal structure of the contracting entities
- Module D3 on contracts that are covered by the rules
- Module E – all parts, on procedures that apply to the various contract types

#### **1.4. Relevance**

This information will be of particular relevance (i) at a strategic level, where decisions as to the type of contract to be employed may be used to affect the type of contract and, therefore, type of procedure that is appropriate; and (ii) at the operational level, where the type of contract at issue will determine the applicable thresholds, possible exemptions, and types of procurement methods to be used.

#### **1.5. Legal information helpful to have at hand**

In addition to the provisions of the Directives, it may also be useful to have at hand:

- [Localise: the provisions of national law relating to exemptions;
- If applicable, reference to any national law that applies to defence procurement]

Further, reference should be made to **Directive 2009/81** on the co-ordination of procedures for the award of certain public works contracts, public supply contracts, and public service contracts in the fields of defence and security

## Section 2 Narrative

### 2.1. Introduction

Even where contracts fall within the general definition of a public contract, some of these contracts will be excluded from the scope of the Directives for a number of reasons. Some are excluded because they are not, by their nature, amenable to competition. Some are excluded because governments wish to exclude them from competition for specific reasons. Some of the exclusions apply only to contracts of a specific type. There is also a category of 'reserved' contracts that, although not excluded, do benefit from preferential treatment.

In addition, article 7 of the 2014 Directive provides an exclusion for those public contracts that are otherwise covered by the Utilities Directive or for public contracts that, although covered by the 2014 Utilities Directive in principle, are excluded from the provisions of that directive. Contracts specifically excluded in the utilities sector will be discussed separately.

#### **General note**

*As exemptions from the normal rules of the Directives, any exemption will be interpreted strictly by the European Court of Justice (ECJ).*

(Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609)

### 2.2 Exemptions by reason of choice

This section concerns procurement of a military nature, procurement requiring secrecy, and procurement that, by agreement, is subject to different procurement rules. All three types of exemption concern the Public Sector Directive.

#### 2.2.1 Defence procurement

Defence procurement has not been entirely exempt from the procurement rules since they were introduced, but the public sector directives have always provided for a partial exemption for this kind of procurement. However, it was not and still is not the identity of the contracting authority that determines whether or not procurement is to be exempt from the procurement rules. Thus, the exemption is not given because it is the Ministry of Defence carrying out the procurement; the exemption applies only to the subject matter of the procurement, i.e. to products that are of a military nature.

Until 2009, certain military products were explicitly exempt from the provisions of the Public Sector Directive and were not subject to any alternative provisions. Since 2009, however, those exempt products and related services are now covered by Directive 2009/81, which applies a more flexible and confidential regime to the procurement of military supplies and



related works and services (although EU Member States have until August 2011 to transpose this directive).

***Important note***

*The procurement of certain military supplies and related works and services is now covered by Directive 2009/81. All other public contracts awarded in the fields of defence and security remain covered by the Public Sector Directive.*

The 2014 Directive applies to “public contracts awarded in the fields of defence and security, with the exception of contracts to which Directive 2009/81/EC applies and of contracts to which Directive 2009/81/EC does not apply”. This provision does not change, however, the substance of the exclusion. Directive 2009/81 applies essentially the same definitions to the contracts that are excluded from the 2014 Directive. It merely provides an alternative procurement regime so that the procurement of such products is no longer entirely excluded from the scope of EU procurement rules and principles.

Whilst the provision of security devices and equipment, such as weaponry and surveillance equipment, is more clearly susceptible to exclusion on the basis of security arguments, many supplies are less easily excluded on the same basis. The supply of uniforms, pharmaceuticals and medical equipment are examples of purchases that may not be so easily justified, although there may be particular instances where, even for such purchases, security is an issue.

The exclusion thus applies (and Directive 2009/81 now applies) to contracts awarded by contracting authorities in the field of defence, where the products to be supplied are subject to the provisions of article 346(1)(b) [formerly article 296(1)(b)] of the Treaty.

According to that article, a member state may take such measures as it considers necessary for the protection of the essential interests of its security, which are connected with the production of or trade in arms, munitions and war materials. The article is subject to the condition that the measures do not adversely affect the conditions of competition in the common market regarding products that are not intended for specifically military purposes.

This article makes a clear distinction between purely military equipment and equipment that, although used in the context of defence, is not specifically ‘military’, such as dual-use products (i.e. products that may have both civil and defence applications, e.g. computers, clothing, blankets, food and medicine).

The provision does not apply to works or services, although it probably applies to such activities as repair and maintenance services *connected with* the procurement in question, and only to those products that are specifically subject to article 346(1)(b).

A list of such products was included in a Council Decision of 15 April 1958, which was not published but is readily available. Whilst Directive 2009/81 also makes explicit reference to this list,

it also does not reproduce the list. Products that appear on the list but are nevertheless not intended for specifically military purposes and all other products not covered by the list are subject to the procurement rules.

**European Court of Justice:**

*“It is for the member state which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases.”*

(C-414/97 *Commission v Spain* [1999] ECR I-5585)

Unlike the Directives, the Government Procurement Agreement (GPA) of the World Trade Organisation (WTO) generally exempts purchases of military equipment by defence departments or ministries, except in the case of specified ‘dual-use’ products listed in the relevant annexes (reproduced in Annex V of the Directive). All products not specifically listed are exempt, and this exemption continues to apply under Directive 2009/81.

In addition, article III of the GPA states that the agreement does not prevent a party from “taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement *indispensable for national security* or for national defence purposes” [emphasis added]. This provision may also be relied upon under Directive 2009/81.

In terms of compliance with GPA obligations of European central government authorities, the dual-use items referred to in Annex V of the Directive are subject to procurement under the terms of the Directive, subject to the application of the exemption.

Directive 2009/81 extends the exemption of both that Directive and the Public Sector Directive to contracts awarded in a third country, with local economic operators, for the deployment of military forces or for the conduct of or support to a military operation outside the territory of the European Union.

### **2.2.2 Contracts requiring secrecy measures**

Where the contracts are not otherwise exempted under Directive 2009/81, the 2014 Directives do not apply to public contracts to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures. Such measures may include, for instance, imposing on economic operators requirements aimed at protecting the confidential nature of information that the contracting authority makes available in a contract award procedure.

Furthermore, in conformity with article 346(1)(a) TFEU, the 2014 directives do not apply to public contracts that are not otherwise exempted under Directive 2009/81, to the extent that the application of the 2014 directives would oblige a Member State to provide information the disclosure of which it considers to be contrary to the essential interests of its security.

According to that Treaty article, no Member State shall be obliged to provide information the disclosure of which it considers to be contrary to the essential interests of its security.

Finally, where the procurement and performance of the public contract are declared to be secret or must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State, the 2014 directives do not apply. This exclusion is allowed only in the case where the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures. Such measures may include, for instance, imposing on economic operators requirements aimed at protecting the confidential nature of information that the contracting authority makes available in a contract award procedure.

### **2.2.3 Contracts governed by other rules**

The 2014 directives and the 2014 Concessions Directive do not apply to contracts that the contracting authority or entity is obliged to award in accordance with various procurement procedures established by any of the following:

- a legal instrument creating international law obligations, such as an international agreement concluded in conformity with the Treaties between a Member State and one or more third countries or their subdivisions and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory states;
- an international organisation.

The last provision refers to organisations in which states are members. It would include, for example, organisations such as the United Nations, European Bank for Reconstruction and Development, or World Bank. The World Bank, in particular, provides grants and credits to various countries for the procurement of works, goods and services. The procurement of these items is generally subject to the World Bank's own procurement guidelines, except where the national procurement systems are considered to be equivalent and, therefore, acceptable. Many of the new EU Member States have benefited from World Bank assistance and may still be beneficiaries of World Bank financing. To the extent, therefore, that the World Bank continues to impose its own guidelines, this provision will provide the requisite exemption from the Directives.

The 2014 directives and the 2014 Concessions Directive do not apply to contracts that are awarded in accordance with procurement rules provided by an international organisation or an international financial institution where the contracts are fully financed by that organisation or institution. In the case of public contracts co-financed for the most part by an international organisation or an international financial institution, the parties shall agree on applicable procurement procedures.

See Module A3 for further information on procedures of international organisations, such as the World Bank.

In the case of defence procurement, the public contracts subject to Directive 2009/81 benefit from this exclusion by virtue of article 12 of that directive.

## 2.3 Exemptions due to the nature of the contract

### 2.3.1 Contracts for the acquisition of land

The Directives exclude contracts for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or for the acquisition of rights thereon.

These contracts are excluded because they relate to immovable property, which is naturally dependent on the geographic location. Such contracts take place essentially in local markets and their objects generally rule out any real prospect for cross-frontier competition. The exclusion applies only to contracts concerning the purchase of land or buildings, however.

#### **General note**

*In practice, this exemption often becomes relevant in cases of urban regeneration, where the public and private sectors are jointly executing development projects that contain public elements. This issue is described in more detail in Module D3.*

The 2014 directives and the 2014 Concessions Directive cover any other associated services, such as contracts for the sale of land or property on a fee basis (estate agency contracts). In the case of defence procurement, the public contracts otherwise subject to Directive 2009/81 now benefit from this exemption by virtue of article 9(a) of that directive.

In the case of defence procurement, the public contracts subject to Directive 2009/81 benefit from this exclusion by virtue of article 13(e) of that directive.

### 2.3.2 Exclusions relating specifically to services

These exclusions apply to specific circumstances, based on the award of exclusive rights to certain authorities to carry out certain services as well as on the nature of a number of specified services.

- **Services contracts provided on the basis of exclusive rights**

The Directives do not apply to services contracts awarded to contracting authorities or to an association of contracting authorities on the basis of an exclusive right, which they enjoy pursuant to a published law, regulation or administrative provision that is compatible with the Treaty. This exclusion does not apply to those situations in which the contracting authority provides the service in-house (effectively to itself) since, in those cases, there is no contract (see Module D3).

Rather, the exclusion covers situations where the right to provide a service to a contracting authority is granted exclusively to another contracting authority. Thus there is no

competition at all from private service-providers, either from within the member state itself or from other member states. Since such services may be provided in return for remuneration and on the basis of an agreement between the contracting authorities concerned, they would be contractual arrangements falling within the terms of the Directives, were it not for this explicit exemption.

The exclusion depends on the granting of an exclusive right, pursuant to a published law, regulation or administrative provision that is compatible with the Treaty. It applies to an ongoing provision of services that has been reserved to a specific public authority. Examples might be public auditing authorities, which other contracting authorities are obliged to employ to conduct audits of their activities, or public inspection authorities, which provide technical inspection services of works acquired by contracting authorities.

- **Programme material and broadcasting time**

The 2014 Directive and the 2014 Concessions Directive (which is not relevant in the utilities sector) excludes contracts for the acquisition, development, production or co-production of programme material intended for audio-visual media services or radio media services that are awarded by audio-visual or radio media service providers.

The purpose of this exclusion is explained in recital 23 of the 2014 Directive.

“The awarding of public contracts for certain audio-visual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account, which renders the application of procurement rules inappropriate. For those reasons, an exception should therefore be made for public service contracts, awarded by the media service providers themselves, for the purchase, development, production or co-production of off-the-shelf programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme. It should also be clarified that the exclusion should apply equally to broadcast media services and on-demand services (non-linear services). However, that exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.”

In principle, the contracting-out of audio-visual production, for example for information, training or advertising purposes, would be covered, but it is granted an exclusion insofar as it is connected with the activities of audio-visual or radio media service providers that are public authorities.

The 2014 directives (in this case it is relevant for the utilities sector as well) and the 2014 Concessions Directive also exclude contracts for broadcasting time or programme provision that are awarded to audio-visual or radio media service providers.

The provision of broadcasting time or programmes is also, in principle, covered by the directives, but it is again excluded from the scope of the directives insofar as it is assumed by audio-visual or radio media service providers, since the need to obtain broadcasting may have implications with regard to public security or health protection. Broadcast information on crime prevention and detection, traffic conditions, civil emergencies and communicable

diseases, for example, may need to be disseminated as widely and as quickly as possible. Given the nature of these examples, there may be no contractual basis at all for the use of broadcasting time, which is likely to be provided on the basis of the exercise of the member state's official authority.

**Note: Definitions provided by the 2014 Directive**

For the purpose of this exclusion, the following definitions apply.

'Audio-visual media services' means:

(i) a service, as defined by articles 56 and 57 of the Treaty on the Functioning of the European Union, that is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes to the general public, in order to inform, entertain or educate, by means of electronic communication networks, within the meaning of point (a) of article 2 of Directive 2002/21/EC. Such an audio-visual media service is either a television broadcast, as defined in point (e) of this paragraph, or an on-demand audio-visual media service, as defined in point (g) of this paragraph;

(ii) audio-visual commercial communication.

'Media service provider' means the natural or legal person having editorial responsibility for the choice of the audio-visual content of the audio-visual media service and determining the manner in which it is organised.

'Programme' means a set of moving images with or without sound constituting an individual item within a schedule or catalogue established by a media service provider, the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama.

'Programme' shall also include radio programmes and radio programme materials.

'Programme material' has the same meaning as 'programme'."

- **Arbitration and conciliation services**

The recitals of the 2014 directives state that arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals agreed on, or selected, in a manner that cannot be governed by procurement rules. The 2014 directives and the 2014 Concessions Directive do not apply to service contracts for the provision of such services, whatever their denomination under national law. The parties to such disputes would, in any event, want to select arbitrators and conciliators on the basis of their competence and experience and within relatively short time frames.

- **Certain legal services**

Recital 25 of the 2014 Directive states that "a certain number of legal services are rendered by service providers that are designated by a court or tribunal of a Member State, involve representation of clients in judicial proceedings by lawyers, must be provided by notaries or

are connected with the exercise of official authority. Such legal services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules, such as for instance the designation of State Attorneys in certain Member States.”

As a result, the following legal services are excluded from the 2014 directives and the 2014 Concessions Directive:

(i) legal representation of a client by a lawyer in:

— an arbitration or conciliation held in a Member State, a third country or before an international arbitration or conciliation instance; or

— judicial proceedings before the courts, tribunals or public authorities of a Member State or a third country or before international courts, tribunals or institutions;

(ii) legal advice given in preparation of any of the proceedings referred to in point (i) of this point or where there is a tangible indication and high probability that the matter to which the advice relates will become the subject of such proceedings, provided that the advice is given by a lawyer;

(iii) document certification and authentication services that must be provided by notaries;

(iv) legal services provided by trustees or appointed guardians or other legal services, the providers of which are designated by a court or tribunal in the Member State concerned or are designated by law to carry out specific tasks under the supervision of such tribunals or courts;

(v) other legal services in the Member State concerned that are connected, even occasionally, with the exercise of official authority.

- **Certain financial services**

The 2014 directives and the 2014 Concessions Directive exclude contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, central bank services, and operations concluded with the European Financial Stability Facility and the European Stability Mechanism. This exclusion refers to contracts that constitute transactions concerning government bonds, for example, and activities related to public debt management.

‘Financial instrument’ means those instruments specified in Section C of Annex I of Directive 2004/39/EC (please refer to that directive for the list of specified instruments).

**Note: The European Financial Stability Facility and the European Stability Mechanism**

The European Financial Stability Facility (EFSF) was created as a temporary crisis resolution mechanism by the euro area Member States in June 2010. The EFSF has provided financial

assistance to Ireland, Portugal and Greece. The assistance was financed by the EFSF through the issuance of bonds and other debt instruments on capital markets.

A permanent rescue mechanism, the European Stability Mechanism (ESM), started its operations on 8 October 2012. The ESM is currently the sole mechanism for responding to new requests for financial assistance by euro area Member States. It has provided loans to Spain and Cyprus.

The EFSF will not provide financial assistance to any additional countries. The final, ongoing EFSF assistance programme (for Greece) has been extended to 28 February 2015. However, even after this date, the EFSF will continue to operate in order to:

- receive loan repayments from beneficiary countries;
- make interest and principal payments to holders of EFSF bonds;
- roll over outstanding EFSF bonds, as the maturity of loans provided to Ireland, Portugal and Greece is longer than the maturity of bonds issued by the EFSF.

The mission of both the EFSF and ESM is to safeguard financial stability in Europe by providing financial assistance to countries in the euro area. The two institutions share the same staff and offices, located in Luxembourg.

Also excluded are loans, whether or not they are in connection with the issue, sale, purchase or transfer of securities or other financial instruments.

- **Employment contracts**

Whilst the Community protects those persons in employment relationships and guarantees the right of Community citizens to move freely throughout the Community for the purposes of taking up employment and establishing themselves, such relationships do not fall within the scope of the procurement rules.

Even if employees may be recruited from all over the Community, the employment market is generally a localised one and subject to local conditions of employment, taxation and social regimes. These relationships are usually permanent (full or part-time) relationships, even if they are entered into for short periods of time.

These relationships are not entered into for the purposes of trade. The Directives are concerned with cross-border trade and thus with the freedom of individuals and companies to provide services throughout the Community and, where appropriate, to establish themselves in other member states, with a view to providing services to purchasers in those member states.

- **Research and development contracts**

The 2014 directives and the 2014 Concessions Directive apply only to service contracts for research and development services that are covered by CPV codes 73000000-2 to 73120000-



9, 73300000-5, 73420000-2 and 73430000-5, provided that both of the following conditions are fulfilled:

- the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
- the service provided is wholly remunerated by the contracting authority.

All other research and development services contracts are excluded from the directives. This provision means that research and development contracts of an altruistic nature, which are for the benefit of society as a whole, are excluded. The directive will apply, on the other hand, where the benefits accrued exclusively to the contracting authorities themselves.

The recitals to the directives state that the co-financing of research and development (R&D) programmes by industry sources should be encouraged. Recital 35 to the 2014 Directive states: “It should consequently be clarified that this Directive applies only where there is no such co-financing and where the outcome of the R&D activities go to the contracting authority concerned. This should not exclude the possibility that the service provider, having carried out those activities, could publish an account thereof as long as the contracting authority retains the exclusive right to use the outcome of the R&D in the conduct of its own affairs. However, fictitious sharing of the results of the R&D or purely symbolic participation in the remuneration of the service provider should not prevent the application of this Directive.” The same explanation is provided in recital 42 to the 2014 Utilities Directive.

The negotiated procedure without publication may be used with regard to supply contracts when the products involved are manufactured solely for the purpose of research, experimentation, study or development. See Module C4 for further information on the availability and use of this procedure.

This provision does not extend to quantity production so as to establish commercial viability or recover research and development costs.

- **Electronic communications**

The 2014 Directive and the 2014 Concessions Directive, which is not relevant in the utilities sector, excludes contracts for the principal purpose of permitting the contracting authorities to provide or exploit public communications networks or to provide to the public one or more electronic communication services.

Following the liberalisation of the electronic communication sector and effective market competition in that sector, public contracts in that area are excluded from the scope of the Directives insofar as they are intended primarily to allow contracting authorities to exercise certain activities in the electronic communication sector.

**Note: Definitions**

For the purpose of this exclusion, the following definitions apply.

‘Public communication network’ means an electronic communication network used wholly or mainly for the provision of publicly available electronic communication services.

‘Electronic communication service’ means a service normally provided for remuneration that consists wholly or mainly in the conveyance of signals on electronic communication networks, including telecommunication services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted by using electronic communication networks and services; it does not include information society services, as defined in article 1 of Directive 98/34/EC, that do not consist wholly or mainly in the conveyance of signals on electronic communication networks.

- **Civil defence, civil protection and danger prevention services**

The 2014 directives and the 2014 Concessions Directive do not apply to contracts for civil defence, civil protection, and danger prevention services that are provided by non-profit organisations or associations. The services that are excluded are covered by the following CPV codes:

- 75250000-3 (fire brigade and rescue services),
- 75251000-0 (fire brigade services),
- 75251100-1 (firefighting services),
- 75251110-4 (fire prevention services),
- 75251120-7 (forest firefighting services),
- 75252000-7 (rescue services),
- 75222000-8 (civil defence services),
- 98113100-9 (nuclear safety services),
- 85143000-3 (ambulance services), except patient transport ambulance services.

The particular nature of non-profit organisations or associations would be difficult to preserve if the service providers had to be chosen in accordance with the procurement procedures set out in the directives. However, the exclusion should not be extended beyond what is strictly necessary. It is therefore explicitly set out that patient transport ambulance services are not excluded. Services that are covered by CPV code 85143000-3, consisting exclusively of patient transport ambulance services, are subject to the special regime set out for social and other specific services (the ‘light regime’). Consequently, mixed contracts for the provision of ambulance services in general would also be subject to the light regime if the value of the patient transport ambulance services were greater than the value of other ambulance services (see Module D3 on mixed contracts).

- **Public passenger transport services by rail or metro**

The 2014 directives generally do not apply to public passenger transport services by rail or metro.

Those services are excluded from the scope of the 2014 directives due to the fact that Regulation (EC) No. 1370/2007 of the European Parliament and the European Council covers public service contracts for public passenger transport by rail or metro. Insofar as the regulation leaves it to national law to depart from the rules laid down in that regulation, Member States are able to provide in their national law that public service contracts for public passenger transport services by rail or metro are to be awarded by a contract award procedure in accordance with their general public procurement rules.

- **Political campaign services**

The 2014 Directive and the 2014 Concessions Directive do not apply to political campaign services covered by CPV codes 79341400-0 (advertising campaign services), 92111230-3 (propaganda film production), and 92111240-6 (propaganda videotape production) when awarded by a political party in the context of an election campaign.

It should be noted that this exclusion by no means signifies that political parties have become contracting authorities under the directives. Quite the contrary, as clarified in recital 29 of the 2014 Directive:

It is appropriate to recall that the 2014 Directive applies only to contracting authorities of Member States. Consequently, political parties in general, not being contracting authorities, are not subject to its provisions. However, political parties in some Member States might fall under the category of bodies governed by public law.

The directives are applicable to political parties only to the extent that they are bodies governed by public law. In the overwhelming majority of Member States this is probably not the case.

In those Member States where political parties are bodies governed by public law and therefore subject to the rules of public procurement, the exclusion for certain services may be useful. Services such as propaganda film and videotape production are so inextricably connected to the political views of the service provider, when provided in the context of an election campaign, that the service providers are normally selected in a manner that cannot be governed by procurement rules.

### **2.3A Public contracts between entities within the public sector**

Over a number of years the ECJ has developed two “in-house” or “public-public” exclusions to the EU procurement rules. Where these exclusions apply, contracting authorities are able to award contracts directly to other legal persons without following an EU procurement process. The two exclusions are often referred to as the “Teckal” and “Hamburg” exclusions, referring to the ECJ cases in which they were first established.

The 2014 directives and the 2014 Concessions Directive codified the Teckal and Hamburg exclusions. These exclusions are now covered by:

- Article 12 of the 2014 Directive, under the heading “Public contracts between entities within the public sector”;
- Article 28 of the 2014 Utilities Directive, under the heading “Contracts between contracting authorities”; and
- Article 17 of the 2014 Concessions Directive, under the heading “Concessions between entities within the public sector”.

### **Situation 1 – “In-house” with sole control**

The first situation is where a contracting authority sets up a separate legal person governed by private or public law and then awards contracts to that legal person – referred to as the “controlled legal person”. For the exception to apply, three requirements must be satisfied.

**1. Control:** The contracting authority must exercise over the legal person concerned a control that is similar to the control exercised by the contracting authority over its own departments.

Such control is deemed to exist where the contracting authority exercises a “decisive influence over both strategic objectives and significant decisions” of the controlled legal person. Such control may also be exercised by another legal person that is itself controlled in the same way by the contracting authority.

**2. Activity:** The controlled legal person must carry out the major part of its activities for its controlling contracting authority.

More than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority. Sometimes a contracting authority will own more than one controlled legal person. The calculation of the +80% figure in that case also includes activities undertaken by a controlled legal person for another legal person(s) controlled by the same contracting authority.

**3. Private capital participation:** There must not be any “direct private capital participation” in a controlled legal person.

An exception to this general rule permits “non-controlling and non-blocking forms of private capital participation” (1) where it is required by national legislation, in conformity with the Treaty; and (2) where those participants do not exert a decisive influence on the controlled body.

### **Situation 2 – Contracts between controlled legal persons and “reverse in-house”**

A specific provision permits one controlled legal person to award a contract to another controlled legal person where both are controlled by the same contracting authority.

The same provision also permits a controlled legal person to award a contract to its controlling contracting authority.

### **Situation 3 – “In-house” with joint control**

New provisions also confirm the principle established in case law that there can be more than one controlling contracting authority. For the exclusion to apply, three requirements have to be satisfied:

**1. Control:** the contracting authority exercises jointly with other contracting authorities a control over the legal person concerned that is similar to the control that they exercise over their own departments.

The exercise of joint control is deemed to exist where all of the following conditions are fulfilled:

- The decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities.
- The participating contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person.
- The controlled legal person does not pursue any interests that are contrary to those of the controlling contracting authorities.

**2. Activity:** The controlled legal person must carry out the major part of its activities for its controlling authorities.

The provisions on joint control mean that where there is more than one controlling contracting authority the levels of activity can vary for each authority. The requirement for more than 80% activity is satisfied by calculating the activity carried out for all of the controlling authorities. Sometimes several contracting authorities will own more than one controlled legal person. In such cases, the calculation of the +80% figure also includes activities undertaken by a controlled legal person for another controlled legal person(s).

**3. Private capital participation:** There must not be direct private capital participation in a controlled legal person.

An exception to this general rule permits “non-controlling and non-blocking forms of private capital participation” (1) where it is required by national legislation, in conformity with the Treaty; and (2) where those participants do not exert a decisive influence on the controlled body.

The exclusion for contracts between controlled legal persons and “reverse in-house” do not seem to apply to controlled legal persons that are jointly controlled by more than one contracting authority.

### **Situation 4 – Inter-authority co-operation (the Hamburg exception)**

The “Hamburg” exclusion, developed by the CJEU, permits the establishment, in certain circumstances, of co-operation arrangements between contracting authorities, without the need to follow EU procurement rules. The arrangements must be genuinely co-operative and non-commercial in nature.

The directives have clarified the circumstances where this exclusion will apply. First, the arrangements must be concluded exclusively between two or more contracting authorities; no private participation is permitted. Further, there are three conditions that must all be satisfied:

1. The contract establishes or implements co-operation between the participating contracting authorities, with the aim of ensuring that the public services that they have to perform are provided with a view to achieving objectives that they have in common;
2. The implementation of that co-operation is governed solely by considerations relating to the public interest; and
3. The participating contracting authorities perform on the open market less than 20% of the activities concerned by the co-operation.

#### **Calculation of activity levels**

The directives also contain provisions concerning the calculation of the required +80%/-20% activity levels. The calculations are to be based on average total turnover or “an appropriate alternative activity-based measure” over the three years preceding the contract award.

There are also provisions covering the situation where data for the preceding three years is not available or is no longer relevant because the organisation concerned had not yet been created, was not active or had been reorganised. In these cases “it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections”. These rather vague provisions leave considerable room for interpretation of precisely what evidence is needed to establish the required levels of activity.

#### **2.4 Reserved contracts**

The 2014 directives and the 2014 Concessions Directive regulate a specific category of ‘reserved’ contracts, which are not excluded from the scope of the directives but are subject to the imposition of specific conditions of eligibility on the participants.

EU Member States may reserve the right to participate in public contract award procedures to sheltered workshops and economic operators that have as their main aim the social and professional integration of disabled or disadvantaged persons or that may provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers. For further details, see Module C5.

The 2014 directives introduced a new category of reserved contracts for certain services.

Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for

the health, social and cultural services that are listed by reference to CPV codes in article 77 of the 2014 Directive.

The maximum duration of the reserved contracts shall not be longer than three years.

Organisations eligible to participate in the reserved contract procedure must fulfil all of the following conditions:

(a) Their objective is the pursuit of a public service mission linked to the delivery of the services listed above;

(b) The profits are reinvested with a view to achieving the organisation's objective; any distribution or redistribution of the profits should be based on participatory considerations;

(c) The structures of management or ownership of the organisations performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and

(d) The organisations have not been awarded a contract for the relevant services by the contracting authority concerned pursuant to this procedure within the past three years.

## **Utilities**

### **Exclusions specific to the utilities sector**

The 2014 Utilities Directive provides for sector-specific exclusions in a number of utility sectors, based essentially on the degree of competition in these markets. Such exclusions apply in respect of the purchase of fuel and energy for the production of energy and purchases of water. The 2014 Utilities Directive has also a general exclusion mechanism for activities exposed to competition in markets to which access is not restricted. These exclusions are discussed in Module D2.

The 2014 Utilities Directive also contains a series of other exclusions that are specific to the utilities sector:

- **Non-relevant activities and activities in a third country**

The 2014 Utilities Directive does not apply to contracts awarded by contracting entities for purposes other than the pursuit of their relevant activities, or the pursuit of such activities in a third country, in conditions that do not involve the physical use of a network or geographical area within the European Union.

The contracting entities must notify the Commission, at its request, of any activities that they consider to be excluded under this provision. The Commission may periodically publish, for information purposes, lists of the categories of activities that it considers to be covered by this exclusion, and it will respect any sensitive commercial aspects that the contracting entities may point out when forwarding this information.

- **Affiliated undertakings and joint venture exclusion**

Where 'undertakings' are made up of a number of mutually owned or mutually dependant companies, the 2014 Utilities Directive provides for a specific exclusion for purchases made between these companies under certain conditions. These purchases are treated as 'in-house' contracts, known as intra-group transactions. The contracts excluded are those that have been awarded to affiliates, whose essential purpose is to act as central service-providers to the group to which they belong, rather than selling their services commercially on the open market.

The 2014 Utilities Directive excludes two categories of contracts. The first category concerns contracts that are awarded:

- by a contracting entity to an affiliated undertaking; or
- by a joint venture, formed exclusively by a number of contracting entities, for the purpose of carrying out relevant activities, with an undertaking that is affiliated to one of these contracting entities.

This provision relates, for example, to the provision of common services, such as accounting, recruitment and management; the provision of specialised services embodying the know-how of the group; and the provision of a specialised service to a joint venture.

This exclusion is subject, however, to two conditions:

- (i) *the economic operator must be an undertaking affiliated to the contracting entity:* an affiliated undertaking, for the purposes of article 29 of the Utilities Directive, is one in which the annual accounts are consolidated with those of the contracting entity, in accordance with the requirements of the Accounting Directive 2013/34/EU. In the case of contracting entities not subject to that Directive, an affiliated undertaking is any undertaking over which the contracting entity may exercise, directly or indirectly, a dominant influence, in the same way as a public authority may exercise a dominant influence over a public undertaking. This will also be the position where it is the undertaking exercising a dominant influence over the contracting authority or where both the undertaking and the contracting entity are subject to the dominant influence of a third undertaking.
- (ii) *the economic operator must exist essentially to provide services to the group and not to sell them on the open market:* since a number of such economic operators do, in fact, have their own marginal commercial activities, the Directive lays down criteria according to which the acceptability of such commercial activities may be gauged. The exclusion only applies if at least 80% of the average turnover of the affiliated undertaking achieved within the Community for the preceding three years has been derived from the provision of works, supplies or services to undertakings with which it is affiliated. The 'average turnover' relates to that turnover resulting from the works, supplies or services provided and not from the general or total turnover of the undertaking. Where more than one



undertaking affiliated to the contracting entity provides the same or similar services, supplies or works, the above percentages are calculated by taking into account the total turnover derived respectively from the provision of services, supplies or works by those affiliated undertakings.

The second category of contracts excluded from the 2014 Utilities Directive concerns contracts awarded:

- by a joint venture, formed exclusively by a number of contracting entities for the purpose of carrying out relevant activities, to one of those contracting entities; or
- by a contracting entity to such a joint venture of which it forms a part.

This exclusion is subject to the condition requiring that the joint venture has been set up in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the joint venture stipulates that each of the contracting entities forming the joint venture will be part thereof for at least the same period.

It has to be noted that both categories of exclusion may be applied notwithstanding the exclusion provided in article 28 of the Utilities Directive (contracts between contracting authorities – see section 2.3A above).

The Commission is empowered by article 31 to monitor the application of this article and to require the notification of certain information:

- names of the undertakings or joint venture concerned;
  - nature and value of the contracts involved;
  - such proof as may be deemed necessary by the Commission that the relationship between the undertaking(s) or joint venture to which the contracts are awarded and the contracting entity meet the required conditions of the exclusion.
- **Purchases for re-sale or hire**

The Directive excludes from its scope of application any contracts that have been awarded for purposes of re-sale or hire to third parties. This exclusion is intended to include contracts for goods where the contracting entity intends to sell or hire the equipment purchased in a competitive market.

These contracts will only be excluded if the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and if other entities are free to sell or hire the same goods under the same conditions as the contracting entity.

The contracting entities must inform the Commission, at its request, of the categories of products that they regard as excluded under this provision. The Commission may also periodically publish lists of the categories of activities that it regards as excluded by this provision whilst respecting any sensitive commercial aspects that the contracting entities

may point out when forwarding the information.

## **Concessions**

### **Exclusions specific to the 2014 Concessions Directive**

The 2014 Concessions Directive provides for some specific exclusions in a number of sectors, based essentially on the specific features of the services concerned.

- Services concessions awarded on the basis of exclusive rights
- Concessions for air transport and public passenger transport service
- Concessions for lottery services
- Exclusions in the field of water services

See Articles 10 to 17 of the 2014 Concessions Directive for further details.

## Section 3 Exercises

### Exercise 1 – Individual Case Study On Defence Procurement

You are the procurement officer for the Ministry of Defence. You have been asked by your commanding officer to purchase a number of items. Explaining your reasons, which rules and which procurement procedures would you use for the purchase of the following items (or which questions would you ask to determine the outcome):

1. Blankets
2. Uniforms
3. Radar equipment
4. Guns and ammunition for general use
5. Guns and ammunition for use by your soldiers in Afghanistan
6. Guns and ammunition for use in joint operations with the United States in Iraq
7. Guns and ammunition for use in joint operations with NATO forces of which you form part
8. Repair and maintenance services for your transport vehicles
9. Repair and maintenance services for your combat vehicles
10. Construction of new storage facilities at your bases in Europe
11. Construction of secure munitions storage facilities at your bases in Europe
12. Purchase of housing estate to house your soldiers at their base

## **Exercise 2 – Class Case Study**

Look once more at the case study referred to in Exercise 1 of Module D3.

Explain how the exemption of contracts for the acquisition of land and existing buildings might affect the outcome of this case study.

### **Exercise 3: Group Discussion on Reserved Contracts**

Split into groups of no more than 6 for a debate on the question of reserved contracts.

Half of the groups will take the position that use of reserved contracts applies positive discrimination in a way that distorts the primary purposes of the Directives.

The other half will take the position that use of reserved contracts is a legitimate secondary objective that can be achieved while maintaining the integrity of the Directives.

Issues to be addressed include (but are not limited to):

- what are the secondary objectives sought
- whether the pursuit of such objectives have an economic impact
- whether this implies a trade-off between the economic goals of the Directives and pursuit of the secondary objective
- whether this is relevant to the procurement rules
- what other similar objectives might be contained in the Directives that have a similar effect
- whether this is a political objective
- whether national policies with similar objectives can also be pursued by procurement legislation

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

## Section 4 Chapter summary

*Note on amendments to Self-Test Questions: the Trainer's Manual has not been updated to reflect the amendments below.*

### Self-test questions

1. Provide three reasons to explain why some contracts are excluded from the scope of the Directives.
2. How does the European Court of Justice interpret exclusions?
3. Why do you think defence purchases have always been excluded?
4. Explain what difference of approach took place in 2009.
5. Does the defence procurement exclusion apply automatically to contracting authorities of a military nature?
6. What is the difference between defence procurement and secret procurement?
7. Why are contracts related to the acquisition of land excluded?
8. Why are contracts of employment excluded?
9. Why are conciliation and arbitration services excluded?
10. Explain the treatment of research and development contracts, *i.e.* when are they excluded and when are they not excluded?
11. List the contracts excluded in the utilities sector.
12. What are affiliated undertakings and why are contracts with such undertakings excluded?
13. What are the conditions that apply to the affiliated undertakings exemption?
14. Give an example of a product that a utility might purchase for resale or hire.
15. What are "reserved" contracts?
16. Are reserved contracts excluded from the scope of the Directives?

## Module D5 Thresholds

### Section 1 Introduction

#### 1.1. Objectives

The objectives of this chapter are to explore, explain and understand:

1. How and why EU financial thresholds are set
2. What the EU financial thresholds are
3. How the EU financial thresholds are calculated

The focus of this module is on understanding the EU financial thresholds rather than national financial thresholds for lower-value contracts (*i.e.* those contracts below the EU financial thresholds). Please see the comment in Section 2 of this module on low-value contracts below the EU financial thresholds.

In this module, references to “thresholds” and “financial thresholds” are to the EU financial thresholds unless otherwise specified.

#### 1.2. Important issues

The most important issues in this chapter are understanding:

- That the financial thresholds differ according to both 1) the type of authority awarding the contract and 2) the type of contract to be awarded
- The starting assumption for the calculation of thresholds is to include all payments (financial and non-financial) for the maximum potential period of the contract
- That the method for calculation of thresholds is constructed to prevent contracting authorities from splitting contracts or requirements in an effort to avoid application of the Directive

This means that it is critical to understand fully:

- What the financial thresholds are
- The different types of contracting authority, the different types of contract (see Module D3), and how those factors combine for the purpose of calculating thresholds
- The basic principles applying to the calculation of thresholds
- The detailed rules applying to the calculation of thresholds, particularly for repeat purchases and purchases of a similar type

If this is not properly understood, you may select the wrong threshold and so fail to award a contract in accordance with the requirement of the Directive.

### **1.3. Links**

There is a particularly strong link between this chapter and the following modules or sections:

Module D1 on contracting authorities

Module D3 on contracts covered

Module E2 on advertisement of contract notices

### **1.4. Relevance**

This information will be of particular relevance to those procurement professionals who are responsible for procurement planning and involved in the preparation of contract notices.

It will also be of particular relevance to those persons who, within the line management of a contracting authority, have the responsibilities and decision-making powers, including delegation powers, with regard to procurement (e.g. to decide on the packaging of the procurement).

### **1.5. Legal information helpful to have at hand**

#### **Adapt for local use**

The legal requirements relating to thresholds are set out in the **2014 Directive (2014/24/EU)** in chapter 1, articles 4 to 6 and 13:

- Article 4
  - confirms that the Directive applies to contracts that are of a value equal to or greater than the specified thresholds
  - states that the value is calculated exclusive of VAT
  - specifies different threshold levels for different types of contracting authority and for different types of contracts
- Article 5 sets out the methods for calculating the estimated value of public contracts, framework agreements, dynamic purchasing systems and innovation partnerships;
- Article 6 contains provisions on the revision of the thresholds;
- Article 13 contains provisions relating to the application of financial thresholds for contracts that are subsidised by contracting authorities at a level in excess of 50%

Commission Regulations are also published regularly to amend the 2014 Directive, updating the financial threshold levels each time that they change (see narrative section). See, for example, Commission Regulation (EU) No. 1336/2013, which entered into force on 1 January 2014.

Utilities and concessions



A short note on the key similarities and differences applying to utilities and concessions is set out at the end of section 2 of this module.

## Section 2 Narrative

*Note: Except where specified otherwise, the narrative in Module D5 discusses the rules applying to contracts that are of a certain type and value, which means that they are subject to the full application of Directive 2014/24/EU ('the 2014 Directive'), and the term 'contract' should be interpreted accordingly. For commentary on contracts falling outside the application of the Directive or only partially covered by the Directive, see Module D3. For low-value contracts under the EU thresholds, please see the comment box below.*

### 2.1 Introduction

Adapt all of this section for local use – using relevant local legislation, references to local thresholds where relevant, processes and terminology.

The EC Treaty can affect all public procurement, however small, but the Directive only applies to contracts of a specified type and of a value that meets or exceeds the relevant EU financial threshold.

Module D3 explains the types of contracts that are covered (and not covered) by the Directive. This module D5 explains what the financial thresholds are and how the value of contracts is calculated in order to establish whether the financial thresholds are met.

#### Note

In this module, unless otherwise specified, the terms 'financial threshold' and 'threshold' refer to the EU financial thresholds and not to national financial thresholds, except to the extent that they match the EU financial thresholds.

In this module, where reference is made to 'sub-threshold' contracts, this means contracts that are below the EU financial thresholds.

See the comment below on sub-threshold contracts.

The EU financial thresholds are set with the aim of identifying contracts for which there is likely to be interest and competition from economic operators functioning across the borders of EU Member States (and economic operators in countries that are signatories to the Agreement on Government Procurement (GPA) of the World Trade Organisation (WTO), where the type of contract is covered by the GPA and where GPA thresholds are met – see Module A3 for further information on the interaction between the GPA and EU procurement requirements).

The EU financial thresholds are also set so as to ensure that the administrative costs of applying a full EU tender procedure are justified as being proportionate to the value of the contract being advertised.

There are a number of financial thresholds; different thresholds apply to different types of contracting authorities and also to different types of contracts. Contracting authorities therefore need to understand which type of contracting authority they are and what they are purchasing.

The main aims of the provisions relating to the calculation of the value of the contracts are to ensure (1) that there is a genuine and transparent pre-estimate of the value of the contract to be awarded, and (2) that the contracting authority does not attempt to avoid the application of the Directive, for example by splitting a requirement or a contract into smaller sub-threshold packages or contracts.

There are some quite complex provisions governing the calculation of the value of contracts. These provisions are different for works contracts and supply and service contracts.

The provisions cover how the value of an individual contract is calculated and also how similar or repeated requirements are treated. These include provisions covering the situation where a contracting authority awards a number of contracts for a particular project or a number of contracts for similar supplies or services. The term often used to refer to the requirements involved when taking into account a number of contracts or a number of repeated or similar requirements is 'aggregation'.

There are also specific provisions covering the calculation of the value of framework agreements, dynamic purchasing systems, design contests, and innovation partnerships.

#### **Low-value contracts (sub-threshold contracts)**

Adapt all of this section for local use – using relevant local legislation, local thresholds, processes and terminology. Briefly set out the requirements of the local legislation for sub-threshold contracts.

This module describes the requirements for calculating whether contracts are of a value that signifies that they must be advertised using a contract notice published in the *Official Journal of the European Union* (see Module D3 for more information on the types of contract covered).

These requirements are therefore relevant for all contracts, even those that may appear to be below the EU financial thresholds, in order to establish whether or not the Directive applies.

It is particularly important to bear in mind the implications of the aggregation provisions. These provisions mean that, for example, a number of similar contracts, all of which are below the EU financial threshold, may still be subject to the Directive. This is because the total value of all of the contracts must be aggregated if certain conditions are met, and the total value may then exceed the EU financial threshold. The Directive will then apply to each of the contracts.

Statistics demonstrate that the majority of contracts that are awarded by contracting

authorities are not subject to the requirement to advertise in the *Official Journal of the European Union (OJEU)*. For example, they may be a type of contract that is not subject to those obligations or they are of low value and therefore do not meet the EU financial thresholds.

EU Member States have generally opted to introduce their own rules for sub-threshold contracts and other contracts that are not subject to the detailed procurement requirements of the Directive. Individual contracting authorities may also be permitted or required to publish and follow their own internal purchasing rules, which may include the introduction of additional national and/or local financial thresholds.

**Amend/adapt to reflect national and local thresholds and the type of process required.**

National and/or local financial thresholds may trigger different types of requirements in terms of advertising and tender processes. For example:

- Direct invitations, which may be allowed for very low-value contracts;
- Simplified procedures, such as competitive quotes or requests for proposals from a specified number of economic operators, or local advertising and a local competitive process for medium-value contracts that are below the EU threshold levels.

## **2.2 Statutory financial thresholds**

### **2.2.1 Setting the financial thresholds**

The financial thresholds are listed in article 4 and are expressed in euros (EUR). The financial thresholds are generally fixed for a period of two years and are amended every two years, with effect from 1 January. The amendments are made by means of European Commission Regulations.

See the Additional Note below on the setting of thresholds for further information on why the thresholds are set every two years and then applied for a fixed period.

The current financial thresholds can be found on the Commission's website: [www.simap.europa.eu](http://www.simap.europa.eu). The table below, from the simap website, indicates all of the financial thresholds.

*Insert screen grab of current threshold table on [simap.europa.eu](http://simap.europa.eu) website.*

### Additional notes on setting of thresholds

**Alignment with GPA thresholds:** When the thresholds are set, usually every two years, they are re-aligned with the GPA threshold levels. The GPA thresholds are set using the GPA currency, which is called 'Special Drawing Rights' (SDR). The re-alignment involves rounding some of the EUR equivalents to the SDR down to the nearest 1 000 EUR. See Modules A3 and D1 for information on the link between the GPA and the EU procurement regime.

**EU Member States outside the euro zone:** For EU Member States that are not in the euro zone, the thresholds are converted into the national currency at the time of publication of the new thresholds, which is usually every two years. The European Commission publishes in the OJEU the revised thresholds and their corresponding values in the national currencies at the beginning of October. The threshold is then fixed at that rate and does not change until the thresholds are next changed, which will normally be in two years. There is therefore no ongoing variation to reflect changes in currency exchange rates.

The following sections explain each of the thresholds in more detail.

#### 2.2.2 General thresholds for works, supplies and services contracts

The table below shows the current general thresholds for work, supply and services contracts (amounts shown are as at 1 January 2014 – they may need to be updated to reflect revised thresholds). These are not the only thresholds, but they are the thresholds that are most commonly referred to in practice, as they apply to the majority of types of contracts advertised by contracting authorities.

The table includes notes, which are explained below.

Type of contract (see note 2)	Type of contracting authority (see note 1)	
	Central government authorities	Sub-central authorities
<b>Works</b>	EUR 5 186 000	EUR 5 186 000
<b>Supplies</b>	EUR 134 000 (with some exceptions for defence purchasers – see note 3)	EUR 207 000 (and defence purchasers for certain supplies – see note 3)
<b>Services</b> (for full regulated services – see note 4)	EUR 134 000	EUR 207 000
<b>Light regime services</b> (– see note 5)	EUR 750 000	EUR 750 000

**Note 1: Type of contracting authority:** There are two types of contracting authority for the purposes of the financial thresholds.

**Central government authorities:** Contracting authorities that are classified as central government authorities are listed in Annex I of the 2014 Directive.

The financial thresholds are generally lower for these central government authorities than for other contracting authorities. This is because the World Trade Organisation's Government Procurement Agreement (GPA), which is binding on EU Member States, applies lower thresholds to central government bodies that award contracts covered by the GPA. See Module A3 for further information about the GPA and contracting authorities.

**Sub-central contracting authorities:** The 'sub-central contracting authorities' are contracting authorities, as defined by the 2014 Directive, that are not central government authorities, as listed in Annex I. This category normally includes regional and local authorities and bodies governed by public law.

**Note 2: Types of contract:** The thresholds are different for works contracts and supplies and services contracts, as the thresholds are far higher for works contracts. This difference reflects the aim of ensuring that the administrative burden of a full EU process is proportionate to the contract and the need to identify contracts that will be of cross-border interest. The thresholds are referred to in article 4(a), (b), (c) and (d) of the 2014 Directive.

**Note 3: Supply contracts in the defence sector:** Where a central government authority is operating in the field of defence and is purchasing supplies that are not listed in Annex III, then the higher supplies threshold applies. This is because these types of supplies are not subject to the GPA.

Where a central government authority is operating in the field of defence and is purchasing supplies that are listed in Annex III, then the lower supply threshold applies, as these types of supplies are subject to the GPA. See article 4(b) and (c).

**Note 4: Fully regulated services:** The thresholds referred to in the table for service contracts apply to all fully regulated services. See Module D3 for further information on fully regulated services and light regime services.

**Note 5: Light regime services:** Module D3 explains that the 2014 Directive applies fully to all fully regulated service contracts but only partially to the services listed in Annex XIV ('light regime services').

The limited provisions relating to light regime services are triggered by the same threshold for both central government authorities and sub-central contracting authorities. See article 4(d) of the 2014 Directive.

### 2.2.3 Subsidised contracts (article 13)

The thresholds for subsidised work contracts are the same for central government authorities and sub-central contracting authorities. See Modules C4 and D3 for further information on these types of contracts.

For subsidised service contracts, the higher threshold applies for both central government authorities and sub-central contracting authorities. See Modules C4 and D3 for further information on subsidised service contracts.

Type of contract	Type of contracting authority	
	Central government authorities	Sub-central authorities
Subsidised work contracts	EUR 5 186 000	EUR 5 186 000
Subsidised services contracts	EUR 207 000	EUR 207 000

### Summary tables of thresholds

Type of contract	Type of contracting authority	
	Central government authorities	Sub-central authorities
<b>Works</b>	EUR 5 186 000	EUR 5 186 000
<b>Supplies</b>	EUR 134 000 (with some exceptions for defence purchasers)	EUR 207 000 (and defence purchasers for certain supplies)
<b>Services</b> (for fully regulated services)	EUR 134 000	EUR 207 000
<b>Light regime services</b>	EUR 750 000	EUR 750 000
<b>Subsidised work contracts</b>	EUR 5 186 000	EUR 5 186 000
<b>Subsidised services contracts</b>	EUR 207 000	EUR 207 000

## 2.3 Calculating the financial thresholds – basic principles (article 5)

The methods for calculating the estimated value of public contracts, framework agreements, dynamic purchasing systems, and innovation partnerships are set out in article 5 of the 2014 Directive.

There are a number of core principles that apply to the calculation of the estimated value of all contracts:

### **2.3.1 Total amount payable/total value**

The calculation is based on the total amount payable or the total value of the contract. The assumption is that all financial and non-financial elements that may be paid will be included.

#### **2.3.1A Separate operational units within one contracting authority**

Where a contracting authority is comprised of separate operational units, for example various departments within a ministry, account must be taken of the total estimated value for all of the individual operational units.

However, where a separate operational unit is independently responsible for its procurement or certain categories of procurement, the value may be estimated at the level of the individual unit. This estimation of value can be assumed where the separate operational unit:

- independently runs the procurement procedures and makes the buying decisions,
- has a separate budget line at its disposal for the procurement concerned,
- concludes the contract independently, and
- finances the contract from a budget at its disposal.

A subdivision is not justified where the contracting authority merely organises procurement in a decentralised way.

### **2.3.2 Calculation of the total amount payable includes third-party payments**

The total amount payable is not limited to the total amount payable by the contracting authority.

When applicable, payments to be made by other contracting authorities, organisations and individuals also need to be included when calculating the estimated value of a contract.

### **2.3.3 Calculation of the total amount payable is not limited to just financial payments**

Calculation of the total amount payable is not limited to just financial payments but also includes non-financial payments, such as part-exchange.

#### **Example**

A contracting authority awards a contract for the provision of lease vehicles. As part of the overall arrangement, the supplier will take any old vehicles owned by the contracting authority and dispose of them, with the supplier retaining the sale proceeds.

The value of the contract must be calculated to include the estimated sale proceeds of the old vehicles as well as any payments to be made by the contracting authority to the



supplier.

In practice, where this occurs a supplier may offer lower lease payments for the new vehicles in order to take into account any sale proceeds from old vehicles.

#### **2.3.4 Options and renewals**

The estimated value of the contract must take into account the estimated total amount, including any form of options and renewals of the contract, as explicitly set out in the procurement documents, even if those options or renewals are not subsequently exercised [article 5(1)].

##### **Example**

A local authority proposes to enter into a contract for architectural services for an initial period of three years, at an estimated value of 50,000 EUR per year. The local authority includes a provision in the contract allowing the contracting authority to renew the contract on expiry of the initial three-year period for up to two further 12-month periods. The total period of the contract could therefore be three, four or five years, at an estimated value of 50,000 EUR per year.

The local authority must take into account the maximum potential value of the contract, which is five years at 50,000 EUR per year. The total value of the contract is 250,000 EUR and therefore over the financial threshold for service contracts for local authorities, and so the Directive will apply.

#### **2.3.5 Value-added tax excluded**

The estimated value of the contract is based on the total amount payable (or total value) excluding value-added tax [article 5(1) of the directive].

#### **2.3.6 Prizes and other payments**

The estimated value of the contract must take into account the estimated total amount, including all prizes and other payments made to all candidates or tenderers [article 5(1)].

#### **2.3.7 Timing**

The estimate must be valid at the moment when the call for competition is sent to the Office of the *Official Journal of the European Union (OJEU)* or, where a call for competition is not foreseen, at the moment when the contracting authority commences the contract award procedure, for example, by contacting economic operators in relation to procurement [article 5(4)].

#### **2.3.8 No sub-division to avoid application of the directive**

No procurement may be subdivided in order to prevent that procurement from entering into the scope of the directive, unless the subdivision is justified by objective reasons [article 5(3)]. Possible objective reasons justifying the subdivision are provided in section 2.3.1A above.

#### **Comment**

Care does need to be taken about assumptions regarding the nature of payments to be made, as can be seen from the following case of the European Court of Justice (ECJ). In this case it was argued that a contract with a charitable organisation that had only been established for the reimbursement of costs was not a public contract for the purposes of the procurement directive in force at the time.

#### **Case note: The nature of payments**

The case of *Commission v Italy C119-06* concerned the award of framework contracts for the provision of health care-related transport services.

In 1999 the region of Tuscany and public health organisations in the region awarded a number of framework contracts to charitable (non-profit) organisations, including the Italian Red Cross, for the provision of health-related transport services. The contracts were for a combination of Annex A and Annex B transport services. The contracts were subsequently renewed for a period for four years (2004 to 2008).

The ECJ considered a number of issues, including an argument that, as the contracts only involved the direct reimbursement of costs, there had been no payment or consideration for the purposes of the procurement rules and therefore no public contract had been awarded.

The ECJ decided that, even though a contract may only involve the reimbursement of costs, this did not mean that it fell outside the application of the procurement directive. The obligations under the contract need to be considered as a whole, and the contract can still be regarded as a public contract for the purposes of the procurement directive even if the payment is merely for the reimbursement of costs.

Based on the facts of the case, the ECJ held that payments under the contract were not limited to the reimbursement of costs alone. The fixed payments under the contract meant that the providers were more than reimbursed for costs incurred.

## **2.4 Calculating the financial thresholds – rules applying to specific contracts and circumstances**

### **2.4.1 Works contracts – works and related supplies and services must both be taken into account**

When calculating the estimated value of a work contract, the contracting authority must take into account both the cost of the works plus the estimated value of the supplies and

services necessary for executing the works that are placed at the economic operator's disposal by the contracting authority [article 5(7)].

#### **Example**

A local authority intends to award a public works contract for the construction of a new office building. The estimated value of the works is 4,500,000 EUR. The authority intends to provide 1,000,000 EUR worth of building materials for the economic operator to use on the project.

The total estimated value of the contract must take account of both the works and the estimated value of the related supplies made available by the contracting authority. The total value is therefore 5,500,000 EUR, which means that the contract is over the works threshold and therefore the Directive will apply.

#### **2.4.2 Contracts awarded in lots – works, supplies and services [article 5 (8) and (9)]**

**Works:** Where there is a proposal for a particular work, which may result in a number of related works contracts being awarded in the form of separate lots, then the estimated value, for the purposes of calculating the relevant financial thresholds, is the total value of all of the lots.

**Supplies:** Where a proposal for the acquisition of similar supplies may result in a number of supply contracts being awarded in the form of separate lots, then account must be taken of the total estimated value of the lots for the purposes of calculating the relevant threshold.

**Services:** Where there is a proposal for the acquisition of services, which may result in a number of services contracts being awarded in the form of separate lots, then the estimated value, for the purposes of calculating the relevant financial thresholds, is the total value of all of the lots.

Where the aggregate (total) value of the lots is equal to or exceeds the relevant financial threshold, then the Directive applies to the award of each lot. This is the case even if some or all of the individual lots are under the relevant financial threshold.

#### **Comment**

In this context the term 'lots' is not limited to lots that are identified as lots by the contracting authority in the *OJEU* notice. The term includes separate contracts, which are not necessarily referred to as 'lots' in the contract notice but which are for similar types of purchases.

#### **Case note**

Case *C-412/04 Commission v Italy* concerned an Italian law regulating the award of works

contracts.

Under Italian building permit and planning arrangements, a private person/company could carry out works infrastructure and other works on behalf of a local authority as part of a development arrangement. The value of the works contract could then be set off against the cost of the contributions payable by the private person/company to the local authority in respect of the relevant building permits for that development.

The law required the private person/company to award the works contract in accordance with the public procurement directive, where the value of the works contract, assessed individually, exceeded the EU financial threshold.

The ECJ held that the law was in breach of the procurement directive in force at the time and that the value of the contracts should be the total value of all of the works contracts to be awarded by the private person under a particular building permit or planning arrangement.

### 2.4.3 The small-lot exemption [article 5(10)]

**Review carefully and amend to reflect local law and the way in which the EU procurement rules link with local thresholds for contracts below the EU thresholds. The waiver for small contracts is not always included in national legislation implementing the Directive.**

There is a waiver to this general rule for ‘small’ contracts in the context of lots where the aggregate value of all of the lots means that the financial thresholds are exceeded. The provisions of the Directive can be waived for one or more individual lots where:

- the estimated value of the individual lot is less than 80,000 EUR for supplies and services contracts; or
- the estimated value of the individual lot is less than 1,000,000 EUR for works contracts;

and where in both cases:

- the total (aggregate) value of those small lots to which the waiver is applied does not exceed 20% of the value of all of the lots.

**Amend if new thresholds mean that the exercise does not work.**

#### **Example**

A local authority wishes to award a number of contracts for the cleaning of schools, civic buildings and council offices. Each contract will be for two years. It intends to advertise by using a single contract notice and to split the requirements into six lots. The estimated values below represent the total value for the two-year contracts:

- Lot 1: four secondary schools for an estimated value of 75,000 EUR

- Lot 2: six primary schools for an estimated value of 85,000 EUR
- Lot 3: five primary and three secondary schools for an estimated value of 90,000 EUR
- Lot 4: two nursery schools for an estimated value of 40,000 EUR
- Lot 5: two office buildings for an estimated value of 35,000 EUR
- Lot 6: one main civic building for an estimated value of 85,000 EUR

The total value of all six lots is 410,000 EUR.

Lots 1, 4 and 5 are below the 80,000 EUR threshold.

20% of 410,000 EUR is 82,000 EUR.

The contracting authority could therefore apply the small-lot exemption to: Lot 1 only, Lot 4 only, Lot 5 only or Lots 4 and 5 combined. In each case the total value of the lot or lots would not exceed 82,000 EUR.

#### **Good practice note**

It is important to note that the value of the small lots to which the exemption is applied must still be taken into account when calculating the total value of all of the lots for the purposes of establishing whether the threshold has been met or exceeded. The small-lot exemption cannot be used to bring the total value below the threshold.

#### **Example**

A contracting authority wishes to award works contracts for the construction of a new civic building. The total value of the works is EUR 5 300 000 and the works are split into two lots; one contract for EUR 4 800 000 (below the works financial threshold) and one contract for EUR 500,000 (also below the works financial threshold and also less than 20% of the total contract value). The contracting authority must aggregate the two contracts, which means that the total value exceeds the financial threshold for works contracts and therefore the Directive applies in full.

#### **2.4.4 Calculating the value of supply contracts [article 5(11) and (12)]**

There are specific rules covering the way in which the value of supply contracts is calculated for the purposes of establishing the total estimated contract value.

- **For supply contracts relating to the lease, hire, rental, or hire-purchase of products**
  - **Where the term is fixed**, then the total value is expressed in the Directive as the total estimated contract value for contracts up to 12 months long, and as the total estimated contract value including residual payments for contracts in excess of 12 months. This means that in all cases the total estimated contract value applies.
  - **Where there is no fixed term or where the term cannot be defined**, then the value is the estimated monthly value multiplied by 48.

### Example

A health organisation enters into a contract for the hire of a mobile x-ray machine. The mobile x-ray machine is required to provide extra capacity while a new hospital is being built. The building programme for the new hospital has been unexpectedly delayed due to unforeseen problems on the site.

At the start of the hire contract it is not certain for how long the mobile x-ray machine will be required; the period of hire will end when the new hospital is completed, but a final building completion date has not been agreed.

The hire contract is for an initial period of 24 months and is then automatically renewable by the health organisation after the initial 24-month period on a quarterly basis.

In this case the estimated value will be the monthly value of the hire contract multiplied by 48.

- **For supply contracts that are regular in nature or are expected to be renewed** within a given period, the calculation is based on either of the following two approaches. The contracting authority has a choice:
  - **Either** the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, such value being adjusted if possible to take account of the changes in quantity or value that might occur in the course of the 12 months following the initial contract;

### Note

This method is only available if the contracting authority has actually had a requirement for this type of supply in the previous 12 months.

- **Or** the total estimated value of the successive contracts awarded during the first 12 months following the first delivery or during the financial year if that period is longer than 12 months.

The choice of method applied must not be made with the intention of excluding the contracts from the application of the Directive.

### Example

A local authority has a requirement for a regular supply of recycled paper for use in its photocopiers and printers. Last year it purchased recycled paper every eight weeks from a number of suppliers. The total value of these purchases amounted to just below the EU financial threshold for supplies.

The authority expects its requirements in the next 12-month period to be double the value of last year's requirements. It intends to make purchases every four

weeks from a number of suppliers.

The authority has a choice about how to calculate its requirements. If it uses last year's figures, then the estimated value will not exceed the EU procurement thresholds. However, if it adds up the total value of the successive contracts that it intends to award in the next 12 months, the EU procurement threshold will be exceeded.

If the authority relies on last year's figures, knowing that next year's requirements will be in excess of the EU financial thresholds, then it is likely to be regarded as acting with the intention of avoiding the application of the Directive. It must therefore use the total estimated value of purchases of recycled paper from all suppliers over the next 12-month period as the basis for calculating the total value of the contract.

**Practical note:** In these circumstances it would be sensible for the authority to consider setting up a framework agreement if that option is available under national law.

#### 2.4.5 Calculating the value of specific types of service contracts [article 5 (13)]

There are specific rules covering the way in which the value of service contracts is calculated for the purposes of establishing the total estimated contract value:

- **Insurance services:** the value includes the premium payable and any other forms of remuneration;
- **Banking and other financial services:** the value includes the fees, commissions, interest and other forms of remuneration;
- **Design contests:** the value includes fees, commission payable and other forms of remuneration; where a design contest is run, then the value includes all prizes or other payments to candidates and tenderers.

#### 2.4.6 Calculating the value of service contracts [article 5 (11) and (14)]

- **For service contracts that are regular in nature or intended to be renewed** within a given period, the calculation is based on one of two possible approaches. The contracting authority has the option to take into account:
  - **Either** the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, such value being adjusted if possible to take account of the changes in quantity or value that might occur in the course of the 12 months following the initial contract;

##### Note

This method is only available if the contracting authority has actually had a requirement for this type of service in the previous 12 months.

- **Or** the total estimated value of the successive contracts awarded during the first 12 months following the first delivery or during the financial year if that period is longer than 12 months.

**For contracts that do not indicate a total value but for which the term is fixed for 48 months or less**, then the total price is the total estimated value of the full term of the contract.

#### **Example**

A fire authority intends to enter into a maintenance contract for fire engines for a period of 24 months. The contract cost is made up of (1) a fixed monthly payment, which is paid irrespective of how much work is undertaken; plus (2) a variable payment based on actual maintenance work undertaken. The total value of the contract is therefore uncertain.

The total value of all of the fixed monthly payments to be made over the 24-month period amounts to just below the EU financial threshold for services.

The fire authority uses information from previous maintenance contracts to estimate the likely value of the variable payments. It then calculates the total estimated price by adding (1) the total value of the fixed payments over 24 months, plus (2) the genuine pre-estimate of the variable payments over 24 months. The total estimated price is above the EU financial threshold and therefore the Directive applies.

**For service contracts that do not indicate a total value and are either without a fixed term or the fixed term is more than 48 months**, then the value is the total estimated monthly value multiplied by 48.

The choice of method applied must not be made with the intention of excluding the contracts from the application of the Directive.

#### **Comment: Contracts for a similar supplies or for the same type of supplies and services**

Article 5 refers to the requirement to aggregate contracts that are for 'similar' supplies [article 5(9)] or for the 'same type' of supplies or services [article 5(11)].

Recital 19 of the directive clarifies that, for the purpose of estimating the thresholds, the notion of similar supplies should be understood as products that are intended for identical or similar uses, such as supplies of a range of foods or of various items of office furniture. Typically, an economic operator active in the field concerned would be likely to include such supplies as part of its normal product range.

Indeed, a sensible approach would be to consider the nature of the supplies and services



required and to establish whether those requirements could normally be supplied by the same supplier or service-provider.

For example, in a contract for the lease of cars, it would be common for leasing companies to provide a range of various types of vehicles, and so it would be commercially reasonable to package the requirement in a single contract or in a series of aggregated supplies.

For specialist vehicles, such as ambulances, fire engines or rubbish collection vehicles, there is a separate specialist supplier market, and so each type of vehicle could be the subject of a separate procurement procedure.

Similarly, requirements for general office cleaning services should be aggregated, but two contracts for specialist cleaning of hospital operating theatres and for cleaning of technical laboratories would not necessarily have to be aggregated.

#### **Comment and good practice note**

Where the aggregation of the value of a number of contracts or lots results in the application of the Directive, then the requirements of the Directive, except where the small-lot exemption applies, apply to the award of all of the aggregated contracts.

This means that if the contracting authority establishes that the Directive applies to a series of contracts and then decides to split the award into two separate procedures, with the value of the contract(s) to be awarded under those procedures being sub-threshold, the Directive will still apply to each of the two procurement procedures.

#### **2.4.7 Calculating the value of framework agreements and dynamic purchasing systems [article 5 (5)]**

The total value to be taken into account is the maximum estimated value of all of the contracts envisaged for the total term of the framework agreement or dynamic purchasing system. The total value excludes value-added tax (VAT).

#### **2.4.7A Calculating the value of innovation partnerships [article 5(6)]**

The total value to be taken into account in the case of innovation partnerships is the maximum estimated value of the research and development activities to take place during all stages of the envisaged partnership as well as the maximum estimated value of the supplies, services or works to be developed and procured at the end of the envisaged partnership. The total value excludes value-added tax (VAT).

#### **Utilities**

#### **Utilities**

This short note highlights some of the major differences and similarities in the requirements

applying to utilities in relation to thresholds.

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

## Utilities

The main legal requirements relating to financial thresholds are set out in articles 15, 16 and 17 of Directive 2014/25/EU (2014 Utilities Directive).

**Article 15** confirms that, subject to the exclusions in articles 18 to 23 or the provisions of article 34, the 2014 Utilities Directive applies to contracts that have a total value (excluding VAT) that is equal to or exceeds the specified thresholds.

**Article 16** sets out the rules governing the calculation of thresholds.

**Article 17** contains provisions for the revision of thresholds.

### 1. Thresholds

There are three thresholds for utilities, which are shown in the table below.

The financial thresholds are listed in article 15 and are expressed in euros (EUR). The financial thresholds are generally fixed for a period of two years and are amended every two years, with effect from 1 January. The amendments are made by means of European Commission Regulations.

Utilities	
<b>Type of contract</b>	
Work contracts	EUR 5 186 000
Supply and fully regulated service contracts	EUR 414 000
Light regime services	EUR 1 000 000

### 2. General principles applying to the calculation of thresholds

**Timing:** the rules for utilities relating to the time when the estimated value is calculated are set out in article 16(4) of the 2014 Utilities Directive. These rules are the same as the rules under the 2014 Directive.

**Total amount payable:** The estimate must take into account the total amount payable. The total excludes VAT but includes:

- any form of option or renewal;
- all prizes and payments;
- any non-financial payments.

**No avoidance:** Procurement may not be subdivided in order to prevent it from entering into the scope of the 2014 Utilities Directive, unless justified by objective reasons [article 16(3)].

### **3. Calculation of thresholds**

#### **3.1 Works contracts – works and related supplies and services must all be taken into account**

When calculating the estimated value of a works contract, the contracting authority must take into account both the cost of the works plus the estimated value of both the supplies and services necessary for executing the works that are placed at the economic operator's disposal by the contracting authority [article 16(7) of the 2014 Utilities Directive].

#### **3.2 Aggregation of lots**

Article 16(8) and (9) of the 2014 Utilities Directive confirms that where proposed contracts for works or services or similar supplies may result in contracts being awarded in separate lots, then the value of those lots must be aggregated.

Where the total value is equal to or exceeds the EU financial thresholds, then the directive will apply to the award of each lot.

#### **3.3 The small-lot exemption**

There is a waiver in article 16(10) of the 2014 Utilities Directive to the general aggregation rule for 'small' contracts in the context of lots. The provisions of the 2014 Utilities Directive can be waived for one or more individual lots on the same basis and for the same financial values as under article 5(10) of the 2014 Directive (2014/24/EU).

#### **3.4 Calculating the value of supply and services contracts [article 16(11) and (12)]**

There are specific rules covering the way in which the value of supply and services contracts are calculated for the purposes of establishing the total estimated contract value.

**For supply or services contracts that are regular in nature or intended to be renewed** within a given period, the calculation is based on one of two possible approaches. The contracting authority has a choice:

- **Either** the total actual value of the successive contracts of the same type awarded during the preceding 12 months or financial year, such value being adjusted if possible to take account of the changes in quantity or value that might occur in the course of the 12 months following the initial contract;

**Note**

This method is only available if the contracting authority has actually had a requirement for this type of supply in the previous 12 months.

- **Or** the total estimated value of the successive contracts awarded during the first

12 months following the first delivery or during the financial year if that period is longer than 12 months.

**For supply contracts relating to the lease, hire, rental or hire-purchase of products**, the value taken as a basis for calculating the estimated contract value is to be as follows:

- **In the case of fixed-term contracts**, the total value is expressed in the 2014 Utilities Directive as being the total estimated contract value for contracts of up to 12 months, and the total estimated contract value including residual payments for contracts in excess of 12 months. This means that in all cases the total estimated contract value applies.
- **For supply contracts without a fixed term or where the term cannot be defined**, the value is the estimated monthly value multiplied by 48.

### **3.5 Calculating the value of specific types of service contracts [article 16(13)]**

There are specific rules covering the way in which the value of service contracts is calculated for the purposes of establishing the total estimated contract value:

- **Insurance services:** the value includes the premium payable and any other forms of remuneration;
- **Banking and other financial services:** the value includes the fees, commissions, interest and other forms of remuneration;
- **Contracts involving design tasks:** the value includes fees, commission payable and other forms of remuneration.

### **3.6 Calculating the value of service contracts [article 16(14)]**

- **For contracts that do not indicate a total value but for which the term is fixed for 48 months or less**, the total price is the total estimated value of the full term of the contract.
- **For service contracts that do not indicate a total value and are either without a fixed term or with a fixed term of more than 48 months**, the value is the total estimated monthly value multiplied by 48.

### **3.7 Calculating the value of framework agreements and dynamic purchasing systems [article 16(5)]**

The total value to be taken into account is the maximum estimated value of all of the contracts envisaged for the total term of the framework agreement or dynamic purchasing system. The total value excludes VAT.

### **3.8 Calculating the value of innovation partnerships [article 16(5)]**

The total value to be taken into account in the case of innovation partnerships is the maximum estimated value of the research and development activities to take place during all stages of the envisaged partnership as well as the maximum estimated value of the supplies, services or works to be developed and procured at the end of the envisaged

partnership. The total value excludes value-added tax (VAT).

## Concessions

This short note highlights some of the major differences and similarities in the requirements applying to concessions in relation to the applicable threshold.

Adapt all of this section for local use – using relevant local legislation, processes and terminology.

The main legal requirements relating to the financial threshold are set out in articles 8 and 9 of the 2014 Concessions Directive.

**Article 8** states that the Concessions Directive applies to works and services concessions that have a total value (excluding VAT) that is equal to or exceeds the specified threshold and sets out the rules governing the calculation of that threshold.

**Article 9** contains provisions on the revision of the threshold.

### 1 Thresholds

There is a single threshold for both works and services concessions, which is shown in the table below. The financial threshold is listed in article 8(1) and is expressed in euros. The financial threshold is generally fixed for a period of two years and is revised every two years, with effect as from 1 January. Amendments to the threshold are made by means of European Commission Regulations. Up until 1 January 2016 the threshold is EUR 5 186 000.

### 2 General principles applying to the calculation of the threshold

**Timing:** The estimate must be valid at the moment when the concession-specific notice is sent to the Office of the Official Journal of the European Union (OJEU) or, where such a notice is not required, at the moment when the contracting authority or contracting entity commences the concession award procedure, for instance by contacting economic operators in relation to the concession [article 8(2)].

However, for the purpose of the application of the Concessions Directive, if the value of the concession at the time of the award is more than 20 % higher than its estimated value, the valid estimate shall be the value of the concession at the time of the award [article 8(2)]. This provision aims to make it more difficult to circumvent the regulations. It seems to apply, however, only in cases where the value of the concessions contract at the time of the award not only exceeds its originally estimated value by more than 20% but also at the same time exceeds the threshold of EUR 5 186 000. Unless the concessions award notice has been published in accordance with the terms of the Concessions Directive, the award procedure will have to be withdrawn and the concessions notice will have to be published, but in conformity with the Concessions Directive.

**The value of a concession:** The value of a concession is the total turnover of the

concessionaire generated over the duration of the contract, taking into consideration the works and services that are the subject of the concession, as well as the supplies incidental to such works and services. The total turnover excludes VAT [Article 8(2)].

**No avoidance:** A concession may not be subdivided, with the intention of excluding it from the scope of the Concessions Directive, unless that subdivision is justified by objective reasons [article 8(4)].

### **3 Calculation of the threshold**

#### **3.1 Method**

When calculating the estimated value of a concession, the contracting authority must use an objective method and specify that method in the concession documents [article 8(3)]. The choice of the method used to calculate the estimated value of a concession shall not be made with the intention of excluding it from the scope of the Concessions Directive [article 8(4)].

#### **3.2 Calculating the value of works and services concession**

Article 8(3) of the Concessions Directive states that, when calculating the estimated value of the concession, contracting authorities and contracting entities shall, where applicable, take into account in particular:

- (a) the value of any form of option and any extension of the duration of the concession;
- (b) revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity;
- (c) payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity or any other public authority to the concessionaire, including compensation for compliance with a public service obligation and public investment subsidies;
- (d) the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession;
- (e) revenue from the sale of any assets that are part of the concession;
- (f) the value of all of the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary for executing the works or providing the services;
- (g) any prizes or payments to candidates or tenderers.

#### **3.3 Aggregation of lots**

Article 8(5) and (6) of the 2014 Concessions Directive confirms that where proposed works or services may result in contracts being awarded in the form of separate lots, then the total estimated value of all such lots shall be taken into account. Where the aggregate value of the lots is equal to or exceeds the EU financial threshold, then the Directive will apply to the

awarding of each lot.

## Section 3 Exercises

Adapt all of this section for local use – using relevant local examples, legislation, processes and terminology. You could add to the exercises to allow discussion of local thresholds below the EU thresholds

### Exercise 1: Preparation and Group Work

You work in the procurement department at the Ministry of Education (which is a central government department for the purposes of calculation of the EU financial thresholds). The Head of the Ministry's Information Technology (IT) Department sends an email to your boss asking for advice on a number of proposed purchases over the next year. Your boss asks you to prepare a written reply to send to the Head of the IT Department.

Please prepare outline answers to the questions raised in the email – answers should explain in a simple way the reasons for your advice.

Then discuss the answers in your small group. Nominate a spokesperson for your group who will speak for the group in the feedback session.

#### email 1

*Amend figures if necessary when new thresholds are published, to ensure that 80 laptops are sub-threshold but 90 laptops are over the EU financial threshold for central government and to refer to the two threshold levels in the final sentence.*

**From:** [headIT@mined.gov](mailto:headIT@mined.gov)

**To:** headprocure@mined.gov

**Subject:** IT procurements

**URGENT**

Dear Head of Procurement,

As you know we are planning a number of IT procurements over the next few months. I need to know from you whether we will have to advertise the procurements in the OJEU. Details are a bit vague on some of the procurements but here is the information that I have on the two main ones.

The first procurement is for about 80 high-specification laptop computers. The average price for a top-of-the-range model is EUR 1 600 plus VAT if we bulk purchase. We would like to buy all 80 laptops in one go. I understand that a figure of EUR 133 000 is relevant somehow – and the EU rules do not apply for purchases below that level. I assume that it is OK to go ahead and run a competition without advertising in the OJEU? We would like to include an option to add a few extra laptops to the order, perhaps 10 more. As we are not sure about these additional laptops, I assume that it is still OK and we are still under the financial limits? Please confirm the position.



Our second major procurement is for computer peripherals – printers, leads, ink, discs, etc. We think that it might be easier to package these all together in a single contract for 3 years, as most suppliers can supply all of the items. However, the total cost for a 3-year contract would be about EUR 250 000. We don't want to have to advertise in the OJEU if we don't have to, so can we split the contract into smaller parts for different types of purchases and avoid the OJEU route?

Many thanks,

Head of IT

P.S. – One of my friends who works for the town council says that it is not the figure of EUR 133 000 that matters, but it is the EUR 206 000 which triggers the requirement for an OJEU advertisement. Is he correct? Can you explain this, please?

The Head of IT gets back to you with another email

**email 2**

*Amend figures if necessary when new thresholds are published, to ensure that the costs are over the EU financial threshold for central government but two contracts fall within the small lots provisions.*

**From:** [headIT@mined.gov](mailto:headIT@mined.gov)

**To:** [headprocure@mined.gov](mailto:headprocure@mined.gov)

**Subject:** IT procurements

**URGENT**

Dear Head of Procurement,

Thanks for your replies to my first email – all very useful.

I have a further question: We are going to be purchasing a large number of basic desktop PCs for use in our schools. We want to test the market to see if we can benefit from large-scale purchasing from major suppliers, but we think there might also be some good deals available from smaller suppliers.

We would like to split the purchases into 4 separate contracts, by geographical area. Suppliers could then bid for some or all of the contracts. All of the contracts will be for much less than the EUR 133 000 financial threshold. Our current rough estimates for the contracts are as follows:

Area A	EUR 20 000
Area B	EUR 60 000
Area C	EUR 50 000

Area D EUR 40 000

Area E EUR 10 000

My questions are: does the requirement to advertise in the OJEU apply? If there is a requirement to advertise in the OJEU, is there any way we could ensure that the contracts for Area A and Area E don't have to be awarded using a full European procurement process?

Many thanks,

Head of IT

## Exercise 2

You work in the procurement department at a town council. The council is involved in an urban regeneration project for the town centre.

Please answer the following questions, giving reasons for your answers.

**Question 1:** The Council is providing 55% of the funding for the construction of a new sports facility. The Council is providing the funding to a private sector urban regeneration company. The estimated construction costs are EUR 6 000 000. Will the urban regeneration company have to advertise the construction contract in the OJEU and comply with the Directive in the contract award process?

**Question 2:** The Council decides to redevelop the local cinema and theatre complex, which is next to the urban regeneration area. The estimated cost is EUR 5 200 000. The Council will award the contract and make available to the successful construction contractor, for use on the project, a large amount of building materials, including local marble. The estimated value of the building materials is EUR 600 000. Will this contract be over the relevant EU financial threshold?

**Question 3:** The Council decides to run a design competition for the architectural designs of the cinema and theatre complex. It offers 3 prizes of EUR 10 000 each. The winning architect will, in addition, be awarded a contract worth EUR 100 000 for the design services. Will the design contest have to be advertised in the OJEU?

## Section 4 Chapter summary

*Note on amendments to Self-Test Questions: The Trainer's Manual has not been updated to reflect the amendments below.*

### Self-test questions

1. How often are the EU financial thresholds set?
2. Why are the thresholds for central government contracting authorities often lower than the thresholds for other contracting authorities?
3. Why are the thresholds for works contracts so much higher than the thresholds for services and supplies contracts?
4. At what time must the estimate be valid?
5. What is the threshold for a contract for the following?
  - 5.1. the construction of a new office building by a central government department
  - 5.2. the construction of a new school by a local authority
  - 5.3. the purchase of stationery by a central government department
  - 5.4. the purchase of a new boat (not a warship) by the government's defence department
  - 5.5. the purchase of photocopiers by a local hospital
  - 5.6. the purchase of architects' services by a local authority
  - 5.7. the purchase of legal services by a central government department
6. When you calculate the total value of a contract, can you exclude the value of payments made by third parties for the contract?
7. What is the value of the following contracts for the purposes of calculating whether they exceed the financial threshold:
  - 7.1. A 3-year contract for the supply of stationery at an estimated value of EUR 100 000 per year
  - 7.2. A 2-year contract for cleaning services with an option to extend for a further 1 year where the estimated annual value is EUR 75 000
  - 7.3. A contract for design services worth EUR 150 000, awarded as a result of a design competition where there were 4 prizes awarded of EUR 20 000 each
8. A local authority intends to purchase 20 photocopiers over the next 12 months. Each photocopier is estimated to cost approximately EUR 7 000. Will these purchases be subject to the full application of the Directive?
9. A local authority intends to award construction contracts for two new administrative buildings and a separate canteen for the occupants of those new buildings. The local authority intends to use a single procurement process but divide the contract into lots:

Lot 1	Administrative building 1	estimated value of EUR 2 200 000
Lot 2	Administrative building 2	estimated value of EUR 3 300 000
Lot 3	Canteen	estimated value of EUR 500 000

  - 9.1. Is the relevant financial threshold exceeded so that the Directive applies in full?
  - 9.2. Can the local authority award Lot 3 for the Canteen without complying with the full requirements of the Directive?
10. What is the value, for the purposes of calculating whether the EU financial threshold is exceeded, of a contract for the supply of stationery without a fixed term where the estimated value is EUR 5 000 per month?

11. What is the value, for the purposes of calculating whether the EU financial threshold is exceeded, of a contract for insurance services estimated to cost EUR 200 000 plus commission of 10% of the total contract value?
12. How is the value of framework agreements calculated?