

## **Annex I - The award procedure under Regulation 1370/2007 and under the Public Procurement Directives**

This annex provides an analysis of the applicable rules to the award of PSC (A) and a description of the award procedures (B) as well as a comparison of the award procedures under Regulation 1370/2007 and the Public Procurement Directives (C).

### **A. The applicable rules to the award of PSC**

Article 5(1) of Regulation 1370/2007 provides that

*'Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply'* (emphasis added).

### **B. The scope of the Public Procurement Directives**

#### **a) Definition**

Under Directive 2004/18, 'Public contracts' are **contracts** for **pecuniary interest** concluded in writing between one or more **economic operators** and one or more **contracting authorities** and having as their objective the execution of works, the supply of products or the **provision of services** within the meaning of this Directive.

Directive 2004/18 further defines 'Public service contracts' which are public contracts other than public works or supply contracts having as their objective the provision of services referred to in Annex II. Directive 2004/17 defines 'Service contracts' as contracts other than works or supply contracts having as their object the provision of services referred to in Annex XVII.

The annexes referred to include transport by land.

As might be relevant in the framework of public transport, Directive 2004/18 gives precedence to Directive 2004/17 for contract services that are awarded by contracting authorities exercising an activity relating to the provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable. Under Article 5 of Directive 2004/17, a network shall exist where the service is provided under operating conditions laid down by a competent authority of a Member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service.

## b) Exclusions

Public Procurement Directives and the case law set out some exceptions to the application of the Public Procurement Directives. This section shall examine the most relevant exclusions in the field of tram and bus services.

### (i) Concessions

Public Procurement Directives do not apply to service concessions.<sup>1</sup> Service concessions are contracts '*of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment*' (emphasis added).<sup>2</sup>

The ECJ provides for a test to determine whether a service contract constitutes a concession. The test consists in verifying whether the service provider's consideration is '*the right to exploit for payment its own service*'.<sup>3</sup> The key indicator of a concession is the fact that the consideration of the service provider consists of exploitation of the service.<sup>4</sup> According to the Advocate General Pergola in *BFI Holding*, exploitation entails that the provider '*assumes the economic risk arising from the provision and management of the services*' (emphasis added).<sup>5</sup> The ECJ has for instance recognised the existence of a service concession where the service provider's remuneration came from **payments made by users** of public service transport.<sup>6</sup> Indeed, such method of remuneration means that the provider assumes the risk of operating the services in question.<sup>7</sup> The analysis shall be made on a case-by-case basis.

The Commission issued in 2000 an interpretative communication on concessions under Community law which might give further guidance in identifying a service concession.<sup>8</sup> Since the Treaty does not provide any definition, the Commission, referring to the case law of the ECJ, stated that '*there is a concession when the operator bears the risk involved in operating the service in question (establishing and exploiting the system), obtaining a significant part of revenue from the user, particularly by*

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<sup>1</sup> Articles 17 of Directive 2004/18 and 18 of Directive 2004/17.

<sup>2</sup> Article 1(4) Directive 2004/18 and Article 1(3) b) Directive 2004/17.

<sup>3</sup> Case C-324/98 *Telaustria v Telekom Austria AG* [2000] ECR I-10745.

<sup>4</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, London, 2005), 324.

<sup>5</sup> Ibid. See Opinion AG Pergola in Case C-360/96, *Gemeente Arnhem v BFI Holding* [1998] ECR I-6821, para 26.

<sup>6</sup> Case C-410/04, *ANAV* [2006] ECR I-3303, para 16. For comments on this case, see Case Comment, Public service concession may be awarded to wholly-owned company, [2006] 187 EU Focus, 16-17; A. Brown, Case Comment, Legality of a national law allowing public authorities to award services contracts directly to their subsidiaries: a note on C-410/04 *ANAV v Comune di Bari*, [2006] Public Procurement Law Review. See also Case C-458/03 *Parking Brixen*, [2005] ECR I-0000, para 40.

<sup>7</sup> Please note that the ECJ has recently considered in a particular case that the quality of the risk (significant risk or limited) was not relevant in determining the concession nature of a contract (Case C-206/08, *Wasser- und Abwasserzweckverband Gotha und Landkresgemeinden (WAZV Gotha) v Euawasser Aufbereitungs- und Entsorgungsgesellschaft mbH* [2010] para 80). This case was strongly criticised by T. Kotsonis, Case Comment, The role of risk in defining a services concession contract: *Wasser- und Abwasserzweckverband Gotha und Landkresgemeinden (WAZV Gotha) v Euawasser Aufbereitungs- und Entsorgungsgesellschaft mbH* (C-206/08) (WAZV) [2010] 1 Public Procurement Law Review, 4-12.

<sup>8</sup> [2000] OJ C-121/02.

*charging fees in any form. [...] service concessions are [...] characterised by a transfer of the responsibility of exploitation*' (emphasis added).

#### **(ii) Service provision by another contracting authority pursuant to exclusive rights**

The Public Procurement Directives exclude PSC under which services are provided by other contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.<sup>9</sup>

Directive 2004/17 contains a list of contracting authorities in the field of urban railway, tramway, trolley bus or bus services. This list covers not only public undertakings set up by the national/regional/local authorities but also private undertakings benefiting from exclusive rights.

To the extent that the contracting authorities in the field of tram and bus services enjoy an exclusive right pursuant to a published law, regulation or administrative provision compatible with the TFEU, admittedly, as long as they are governed by public law,<sup>10</sup> the award procedure provided under the Public Procurement Directives is not applicable.

#### **(iii) In-house service providers**

If the previous exception does not apply, contracts between public bodies may still escape the application of the award procedure as provided for in the Public Procurement Directives where the order can be regarded as an 'in-house' arrangement rather than a contract with an external entity.<sup>11</sup> Indeed, as a general principle, Public Procurement rules apply to **contracts** between two separate persons.<sup>12</sup> Hence, Public Procurement rules are not applicable to relationships between an authority and its own services.

To see the Public Procurement rules apply, it is, in principle, sufficient for the contract to have been concluded between, on the one hand, an authority and, on the other, a person legally distinct from that local authority.

According to the *Teckal* case law, the position can be different only in the case where the 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 authority or authorities.<sup>13</sup>

<sup>9</sup> Article 18 of Directive 2004/18 and Article 25 of Directive 2004/17.

<sup>10</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, London, 2005), 362.

<sup>11</sup> Ibid.

<sup>12</sup> C-107/98, *Teckal* [1999] ECR I-8121, para 49. See also in the transport sector, C-410/04 *ANAV* [2006] ECR I-3303

<sup>13</sup> Id. para 50.

As a consequence, the case law allows for contracts, although entered into between two separate persons, not to be governed by Public Procurement rules if the two following cumulative criteria are met:

- the authority exercises control over the contractor which is similar to the control it exercises over its own departments. The control has to be complete, not only on strategic decisions but also on individual management decisions. By contrast, 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 control similar to that which it exercises over its own departments.<sup>14</sup> Advocates General Léger and Stix-Hackl have though suggested a less strict approach to the control issue. According to some authors, such strict approach '*may deter public bodies from seeking private sector investment for public services, which, when it takes the form simply of financial investment without actual participation, does not cover the situation at which the procurement rules are directed*'.<sup>15</sup> It was also suggested in *Stadt Halle* that the question of control could be addressed by applying the analogy of the affiliated undertakings exemption, whereby contracts awarded to an 'affiliated undertaking', at least 80% of the turnover of which relates to the contract services, are excluded from the application of the Directive.<sup>16</sup> This has been though rejected by the ECJ. Indeed, the shareholding is not sufficient to determine whether the control exercised by an authority over the contractor is similar to the control it exercises over its own departments. There is a need to take account of all the provisions and circumstances;<sup>17</sup>
- the contractor carries out the essential part of its activities with the controlling authority. This criterion means that even if the contractor is totally under the control of an authority (or several authorities), the fact that it is active in a market and susceptible to entering into competition with other companies should imply the application of Public Procurement rules.<sup>18</sup> The ECJ, in its *Correos* judgment, has even interpreted this condition as excluding from the in-house or quasi in-house derogation, the services provided to an unspecified number of customers (such as postal services, and, by analogy, transport services).<sup>19</sup> However, in *Carbotermo*, the ECJ held that the activities which must be taken into account are all those activities which that undertaking carries out as a part of a contract awarded by the contracting authorities, regardless of who the beneficiary is: the contracting authority itself or the user of the services,<sup>20</sup> or who pays for the services.<sup>21</sup>

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<sup>14</sup> Case C-26/03, *Stadt Halle and RPL Lochau* [2005] ECR I-1, para 49.

<sup>15</sup> S. Arrowsmith, 393.

<sup>16</sup> Article 23 of Directive 2004/17.

<sup>17</sup> Case C- 340/04, *Carbotermo and Consorzio Alisei*, [2006] ECR I-4137, para 36.

<sup>18</sup> *Ibid.*, para 60.

<sup>19</sup> Case C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] ECR I-12175, para 59.

<sup>20</sup> Case C- 340/04, para 66.

<sup>21</sup> *Ibid.* para 67.

This case law has been extended to service concessions which are not covered by the Public Procurement Directives.<sup>22</sup>

If a contracting authority intends to have recourse to an in-house service provider, Public Procurement Directives shall not apply.

#### **(iv) Financial thresholds**

Directive 2004/18 sets the thresholds for its application at 193,000 EUROS and Directive 2004/17 at 387,000 EUROS. The reasons why the Public Procurement Directives provide for thresholds of application are twofold:

- (1) the administrative cost in applying formal tendering procedures should be outweighed by the benefits of such procedure; and
- (2) the thresholds tend to identify contracts for which there is likely to be competition from firms operating across borders.<sup>23</sup>

Hence, PSC for tram and bus services under these thresholds do not have to fulfil the requirements set out in the Public Procurement Directives.

#### **c) Regime applicable to the exceptions to the Public Procurement Directives**

As stated above, Article 5(1) of Regulation 1370/2007 provides that PSC shall be awarded in accordance with the Regulation; however, PSC as defined in Public Procurement Directives for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives.

We have examined above the contracts for tram and bus services which qualify as contracts under the Public Procurement Directives. We have also examined the cases in which, although the arrangement contemplated concerns tram and bus services, Public Procurement Directives shall not apply. It has to be noted that although the Public Procurement Directives are not applicable, the ECJ recognised the application of the general Treaty rules, such as the principle of non-discrimination.<sup>24</sup>

The question remains whether Regulation 1370/2007 would apply to PSC for public passenger transport services by tram and by bus that are excluded from the Public Procurement Directives or not.

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<sup>22</sup> See, for instance, C-458/03 *Parking Brixen* and C-410/04 *ANAV*.

<sup>23</sup> S. Arrowsmith, 362.

<sup>24</sup> Case C-324/98 *Telaustria v Telekom Austria AG* [2000] ECR I-10745.

The award procedure of these excluded contracts might either fall back on the general rules of the TFEU or have to comply with Regulation 1370/2007.

As regards contracts relating to public passenger transport by tram or bus which are concessions, the wording of Article 5(1) of Regulation 1370/2007 suggests that those contracts shall be awarded in accordance with the rules laid down in the Regulation.<sup>25</sup> As regards the other exclusions of the Public Procurement Directives, whether Regulation 1370/2007 would apply is not clear from Article 5(1).

On the one hand, it can be argued that since Article 5(1) of Regulation 1370/2007 has not expressly provided that the PSC excluded from the Public Procurement Directives fall back on Article 5(2) to (6), such exclusion cannot lead to the application of Regulation 1370/2007, so that the general Treaty rules would apply.

On the other hand, it can be argued that since this article deals with cases where public contracts for tram and bus services can qualify as PSC under the Public Procurement rules and Regulation 1370/2007, the award procedure provided for under the Public Procurement Directives has precedence over - rather than deviates from - the award procedure provided for under Regulation 1370/2007. In other words, if PSC are excluded from the Public Procurement Directives, the Regulation would apply.

### **C. The award procedures**

#### **a) The award procedure under Regulation 1370/2007**

PSC which are to be awarded on the basis of the rules laid down in Regulation 1370/2007 must comply with paragraphs 2 to 6 of the Regulation.

In principle, PSC must be awarded after an **open tendering** (Article 5(3) and Recital 20). The Regulation introduces competition *off* the roads/tracks, as opposed to competition *on* the roads/tracks. The Regulation constitutes thus a framework for competition between companies bidding to obtain contracts rather than opening up public passenger transport services to several operators, as clearly stated in Recital 25.<sup>26</sup>

Public services at a local level may be provided by the **competent authority itself**, which can also decide to award PSC **directly** to an **internal operator** over which it exercises similar **control** as over its own department, that is to say over which it has a dominant influence (Article 5(2)). Article 5(2)(b) enshrines the administrative principle of **geographic specificity** whereby the internal operator agrees

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<sup>25</sup> G. Skovgaard Olykke 'Legislative Comment, Regulation 1370/2007 on public passenger transport services' [2008] PPLR, 84-89.

<sup>26</sup> See 'Funding public transport services: in need of standard regulation tools?' Oxera, Agenda, June 2008: <[http://www.oxera.com/cmsDocuments/Agenda\\_June08/Funding%20public%20transport%20services.pdf](http://www.oxera.com/cmsDocuments/Agenda_June08/Funding%20public%20transport%20services.pdf)>

not to bid for other competitive tenders outside the territory of the local competent authority on which it depends.<sup>27</sup>

Following Article 5(3), the competent authority that decides to recourse to a third party to organise the public service will have to base its choice for a specific third party on the outcome of a competitive tendering procedure.

This will not be the case if the third party can be considered as an internal operator of the deciding competent authority. Article 2(j) defines an internal operator as '*a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority exercises control similar to that exercised over its own departments*'. The competent authority can, as stated above, directly award the PSC to an internal operator, provided the contract concerns services at a local level.

If recourse is made to a third party to organise the public service, derogation from the principle of competitive tendering and direct award of the PCS is possible in three situations (Article 5(3)):

- below determined ceilings (Article 5(4)). This can be seen as a *de minimis* rule particularly defined in the case of small and medium undertakings;
- for an emergency situation, in the event of disruption of services or risk of such a situation (Article 5(5));
- transport by heavy rail, i.e. not for other track-based modes such as metro or tramways (Article 5(6)).

Specifically with regard to the competitive tendering procedure, Article 5(3) firstly states that the procedure should be open to all operators. This requires some advertising regarding the planned award procedure, to ensure that all the interested economic operators will have knowledge of the procedure.

Secondly the mentioned Article states that the competent authority has the obligation to be fair and to comply at all times with the principles of transparency and non-discrimination.

Finally Article 5(3) contains a brief overview of the course of the competitive tendering procedure. In accordance with that Article, the contracting authority can freely choose the content of the procedure. This means that there are no obligatory steps that need to be followed as long as the principles of **transparency** and **non-discrimination** are complied with. This enshrines the case law of the European Court of Justice with respect to concessions for which the Public Procurement Directives are not applicable.<sup>28</sup> The procedure may involve, after the submission of the tenders and a possible

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<sup>27</sup> L. Grard, 'Le droit européen de transports une référence pour le service public en environnement de concurrence', in J-V. Louis et S. Rodriguez, *Services d'intérêt économique général et Union Européenne* (Bruylant, Bruxelles 2006), 417.

<sup>28</sup> Case C-231/03 *Coname* [2005] ECR I-7287, paras 17 and 18.

pre-selection of candidates, negotiations in order to determine how best to meet specific or complex requirements.

When it comes to **transparency**, Article 7(2) states that the contracting authority has to take the necessary measures to ensure that, at least **one year before** the launch of the invitation or before the direct award, the following information is at least published in the Official Journal of the European Union:

- The name and the address of the competent authority.
- The type of the award envisaged.
- The services and areas potentially covered by the award.

Furthermore Article 7(2) provides a derogation from the obligation to ensure this publication in the case when the public service contract only concerns an annual provision of less than 50,000 kilometres of public passenger transport services.

If the published information would change after the date of publication, the contracting authority has to rectify this accordingly as soon as possible; this will however not affect the launching date of the direct award or of the invitation to tender.

Finally, Article 7(2) states *in fine* that it is not applicable to Article 5(5), which contains a derogation from the principle of competitive tendering and allows the contracting authority to directly award or to extend PSC in case of an emergency situation.

Whatever the procedure followed to award the PSC, Member States must comply with some conditions:

- Member States shall ensure that award decisions may be reviewed by any person having or having had interest in obtaining the contract (Article 5(7)).
- The award must be transparent, except in cases of emergency or of contracts covering a service of less than 50,000 kilometres (Article 7(2) and Recital 30). In the case of direct award, further information concerning the PSC is to be published and, when requested, the reasons for a decision of directly awarding PSC are to be given (Article 7(3) and (4)).
- If compensation proves necessary, then Member States have to comply with determined conditions in order to avoid overcompensation (Articles 6 and 4 and Recital 27). This last condition determines the state aid regime applicable under the Regulation.

During a transitional period, ending on 3 December 2019, the award of PSC by rail and by road has to gradually comply with Article 5 (Article 8(2)). However, contracts awarded before 26 July 2000 on the basis of a fair competitive tendering procedure may continue until they expire. The same shall apply to other contracts awarded prior to 26 July 2000 and contracts awarded on the basis of a competitive tender after 26 July 2000 but before 3 December 2009, with a limitation of the duration of the contract



to 30 years. Other contracts awarded before the entry into force of Regulation 1370/2007 may continue until they expire if they are of a limited duration as anticipated in Article 4. The same applies for any PSC where their termination would entail undue legal or economic consequences, upon the approval of the Commission.

## **b) The award procedures pursuant to the Public Procurement Directives**

### **(i) General**

Both Directive 2004/17 and Directive 2004/18 contain the following award procedures:

- The open procedure
- The restricted procedure
- The negotiated procedure

With a view to addressing circumstances in which open and restricted procedures are not appropriate, the Public Procurement Directives provide for two types of 'negotiated procedures', which are diametrically opposed:<sup>29</sup>

- with prior publication of a contract notice;
- without the publication of a contract notice.

Furthermore, Directive 2004/18 also contains the possibility of organising the new procedure of the competitive dialogue.

In accordance with both Directives, the above-mentioned procedures can be defined as following:

- The open procedures are *'the procedures whereby any interested economic operator may submit a tender*;
- The restricted procedures are *'the procedures in which any economic operator may request to participate and whereby only those economic operators invited by the contracting authority may submit a tender'*.
- The negotiated procedures *'are the procedures where the contracting authority consults the economic operators of its choice and negotiates the terms of the contract with one or more of these'*.

Directive 2004/18 defines the competitive dialogue as *'the procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender'*.

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<sup>29</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, London, 2005), 557.

These Directives have been transposed in the national legal orders, so that it might be that additional procedural rules have been set out at national level.

### **(ii) The open procedure**

Following the definition of the open procedure, any interested economic operator may submit a tender.

To enable the interested economic operators to submit their tenders, both Directives determine minimum time limits for the submission of tenders.

In accordance with Article 53 of Directive 2004/18 the contract will be awarded either based on the price, as set out in the tender, or on the award criteria, in which case the contract will be awarded to the economic operator with the most economically advantageous offer. The same is stated in Article 55 of the Directive 2004/17.

### **(iii) The restricted procedure**

Since, in the framework of a restricted procedure, only economic operators that are invited can submit a tender, they first will have to submit a request to participate.

With regard to the restricted procedure, both Directives also contain minimum time limits for the submissions of requests to participate and the tenders.

The contracting authority will make a pre-selection of economic operators, based on those requests to participate.

After the pre-selection, the contracting authority will then, simultaneously and in writing, invite at least five candidates to submit their tenders. That is, of course, if there are at least five candidates that comply with the selection criteria (art. 44.3 Directive 2004/18).

After the pre-selection, the contracting authority will invite the selected candidates, simultaneously and in writing, to submit their tenders.

In accordance with Article 53 of Directive 2004/18 the contract will be awarded either based on the price, as set out in the tender, or on the award criteria, in which case the contract will be awarded to the economic operator with the most economically advantageous offer. The same is stated in Article 55 of the Directive 2004/17.

#### **(iv) The negotiated procedure with publication of a public contract notice**

Under the negotiated procedure with publication of a public contract notice, the authority must advertise the contract and hold a competition. The difference from the two former procedures lies in the greater flexibility which characterises the form of competition.<sup>30</sup>

Following Article 28 of Directive 2004/18, which states that the contracting entities can only use the negotiated procedure (with or without publication of a contract notice) in the specific circumstances as set out in Articles 30 and 31 of that same directive, the negotiated procedure has an unusual nature and the use of it will therefore have to be justified.

Article 30 of Directive 2004/18 contains the following circumstances under which the use of the negotiated procedure with publication of the contract notice is justified:

- a) In the case where the first procedure has led to the submission of only irregular tenders and this under the condition that the original contract terms are not substantially altered.
- b) In exceptional circumstances, when the nature of the contracts and the risks attached to them prevent the prior determination of the price.
- c) In the field of services, more specifically intellectual services which do not permit the use of an open or restricted procedure.
- d) In the field of works, when those works are solely performed for purposes of research, testing and development (and therefore not to make a profit).

That same Article also states that the contracting authorities should guarantee the equal treatment of the candidates during the negotiations and anticipates the possibility of the contracting authority organising the negotiated procedure in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria.

Articles 38 and 40 of Directive 2004/18 regulate the time limits for this procedure and the content of the invitations to negotiate.

Following the pre-selection, the contracting authority will, simultaneously and in writing, invite at least 3 candidates to negotiate (art. 44.3 Directive 2004/17).

That invitation should comprise all the contract documents, the deadline for the receipt of the tenders, the address to which the tenders must be sent, the language or the languages in which the tender must be drawn up and the relative weighting of the criteria for the award of the contract (see also art. 47 Directive 2004/17).

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<sup>30</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement*, Sweet & Maxwell, London, 2005, 557.

Article 40 of Directive 2004/17 states that the contracting authorities can choose to organise a negotiated procedure as long as a call for competition has been made. This means that, when a contract falls under the scope of Directive 2004/17, the contracting authority will have the possibility of choosing for the negotiated procedure with publication of a public contract notice, without needing to justify its choice in the sense that there should be special circumstances as those listed in Article 30 of Directive 2004/18.

In accordance with Article 53 of Directive 2004/18 the contract will be awarded either based on the price, as set out in the tender, or on the award criteria, in which case the contract will be awarded to the economic operator with the most economically advantageous offer. The same is stated in Article 55 of Directive 2004/17.

#### **(v) The negotiated procedure without publication of a public contract notice**

For the contracts that fall under the scope of Directive 2004/18 and Directive 2004/17, the authority may negotiate a contract with one or more operators without advertising the procedure and without holding any competition.<sup>31</sup> This shall only be possible under the specific circumstances that are explicitly listed in both Directives.

Article 31 of Directive 2004/18 lists the specific circumstances under which the contracting authority can justify the use of the negotiated procedure without publication of a contract notice. Those circumstances are the following (relevant for public transport):

- 1) For all types of contracts:
  - a) When, following an open or restricted procedure, no tenders have been submitted.
  - b) When the contract can only be awarded to a specific economic operator due to technical or artistic reasons.
  - c) When unforeseeable events resulted in extreme urgency and therefore the time limits of the open or restricted procedure, or the negotiated procedure with publication of the contract notice, cannot be adhered to.
- 2) For PSC:

When the contract is awarded to the successful candidate in a design contest.

- 3) For works and service contracts:
  - a) For additional works and or services which were not included in the initial contract and have become necessary due to unforeseen circumstances, and this up to 50% of the amount of the original contract.
  - b) For new works or services consisting in the repetition of similar works or services entrusted to the initial economic operator for a maximum period of 3 years.

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<sup>31</sup> S. Arrowsmith, *The Law of Public and Utilities Procurement* (Sweet & Maxwell, London, 2005), 557.

For the contracts that fall under the scope of Directive 2004/17, the circumstances under which the contracting authority may award a contract without a prior call for competition are listed in Article 40 as follows (relevant for public transport):

1) For all types of contract:

- a) When no (suitable) tenders or applications have been submitted in response to a procedure with a prior call for competition, and this under the condition that the original contract terms are not substantially altered.
- b) When the contract is solely awarded for purposes of research, experiment, study or development.
- c) When the contract can only be awarded to one specific economic operator due to technical or artistic reasons, or for reasons connected with the protection of exclusive rights.
- d) In cases of extreme urgency due to unforeseeable events.
- e) For contracts awarded on the basis of a framework agreement.

2) For works and service contracts:

For additional works and/or services which were not included in the initial contract and have become necessary due to unforeseen circumstances.

3) For a services contract:

When the contract is awarded based on a design contest.

#### **(vi) The competitive dialogue**

Following Article 29 of Directive 2004/18, the contracting authority can only use the competitive dialogue if it is not able to define by itself the technical solutions to satisfy its needs or is not able to specify the legal and/or financial make-up of the project.<sup>32</sup>

The procedure can be summarised as follows:

The contracting authority first publishes a contract notice including the needs and requirements, which can also be defined in a separate descriptive document (art. 29.2). After the pre-selection, the contracting authority then, simultaneously and in writing, invites the selected candidates to conduct a dialogue. This dialogue can take place in stages and will continue until all the necessary solutions have been defined.<sup>33</sup> All of the aspects of the contract can be the subject of the dialogue. During the dialogue, the contracting authority will ensure the equal treatment of all candidates and will protect the confidentiality of all the information gathered (art. 29.3). At the end of the dialogue, the candidates will submit their final tenders, which can be specified but cannot change the basis features of the contract (art. 29.6). In the end, the contracting authority awards the contract in accordance with the award

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<sup>32</sup> See also consideration 31 of Directive 2004/18.

<sup>33</sup> See also Recital 41 of the Directive 2004/18.

criteria that were set out in the contract notice or the descriptive document and on the basis of the most economically advantageous tender (art. 29.1).

As a conclusion, it can be said that the contracting authority will have to justify its choice for the competitive dialogue, since this procedure can only be followed for certain complex contracts, and that it will have to ensure compliance with the principles of equality, transparency and competition.

#### **(vii) Common rules**

Regardless of the award procedure followed, the Public Procurement Directives provide for several modalities to be followed, translating the main objective of the Directives to create a free internal market. The main following points can be mentioned:

- Specifications and contract documents. The technical specifications must be set out by the authority in such a way as to allow the equal access of tenderers and not to create any unjustified barriers to the opening up of public contracts to competition.<sup>34</sup>
- Possibility for tenderers to propose variants under certain circumstances.<sup>35</sup>
- Possibility in EU Member States of requiring the tenderer to indicate whether subcontracting is envisaged and if so the identity of the subcontractor(s).<sup>36</sup>
- Pre-information requirements relating to the publication of notices on the expected contracts for the following 12 months.<sup>37</sup>
- Criteria for qualitative selection relating to the personal situation of the candidate or the tenderer, economic and financial suitability, knowledge, professional and technical suitability.<sup>38</sup>
- Criteria for the award of the contract, being either the lower price or the most economically advantageous tender.<sup>39</sup>
- Possibility for the authority to reject a tender which appears to be abnormally low.<sup>40</sup>

### **D. Comparison of the award procedures pursuant to Regulation 1370/2007 and the Public Procurement Directives**

#### **a) Choice of procedures**

Article 5(3) of Regulation 1370/2007 does not contain a list of specific procedures that can be used when awarding PSC to a third party. As set out above, the Public Procurement Directives describe not only, in a detailed manner, the possible award procedures, but also state the rules that should be

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<sup>34</sup> Article 23 of Directive 2004/18 and Article 34 of Directive 2004/17.

<sup>35</sup> Article 24 of Directive 2004/18 and Article 36 of Directive 2004/17.

<sup>36</sup> Article 26 of Directive 2004/18 and Article 37 of Directive 2004/17.

<sup>37</sup> Articles 35 and 36 of Directive 2004/18 and Article 41 of Directive 2004/17.

<sup>38</sup> Articles 45 - 52 of Directive 2004/18 and Article 54 of Directive 2004/17.

<sup>39</sup> Article 53 of Directive 2004/18 and Article 55 of Directive 2004/17.

<sup>40</sup> Article 55 of Directive 2004/18 and Article 57 of Directive 2004/17.

followed in any of those procedures, starting from the publication to the actual awarding of the contract.

However, in accordance to the formulation of Article 5, it would appear that no formal procedure has to be followed and that the procedures as described in the Public Procurement Directives are possible under that Article:

- An 'open procedure' (*'The procedure adopted for competitive tendering shall be open to all operators'*).
- A 'restricted procedure' (*'any pre-selection'*).
- A 'negotiated procedure' or a 'competitive dialogue' (*'the procedure may involve negotiation in accordance with the principles of transparency and non-discrimination'*).

Articles 5(4), (5) and (6) of Regulation 1370/2007 allowing for direct award of contracts rely on a concept comparable to the negotiated procedure without publication of a contract notice.

Despite the possible conceptual similarity between Regulation 1370/2007 and the Public Procurement Directives as to the award procedures, if a contracting authority organises any of these procedures in the framework of Regulation 1370/2007, it will **not have to comply with the rules as set out for those procedures in the Public Procurement Directives** (time line, information to be given concerning the contract, the setting out of award criteria and their weighting, etc.).

The contracting authority that organises a procedure under Regulation 1370/2007 will be able to determine the content of the procedure, irrespective of the provisions of the Public Procurement Directives, as long as the principles of **transparency** and **non-discrimination** are complied with, even if, as stated in the study on contracting in urban public transport, it might be useful to find inspiration in these Directives.

Since paragraphs 4 to 6 of Article 5 describe explicitly the circumstances under which the contracting authority can directly award a contract, no negotiated procedure will be possible unless justified by those circumstances or unless there was a prior publication of the contract notice.

Furthermore, paragraphs 4 to 6 of that Article 5 foresee the possibility of awarding a contract without the publication of a contract notice, which means that, in those specific circumstances, a negotiated procedure without the publication of a contract notice can be organised by the contracting authority. However, Article 7(2) of Regulation 1370/2007 imposes the publication, one year before the invitation to tender or before the direct award of some information.

Therefore, and this similarly to the provisions under the Public Procurement Directives, the negotiated procedure without the publication can only be exceptionally used and that use will have to be justified by the contracting authority. Where Regulation 1370/2007 provides for specific circumstances tailor-

made to the public services which may justify the derogation from a competitive tender, the Public Procurement Directives provide for general derogations, which might not embrace the specific ones described in Regulation 1370/2007 (as for instance the *de minimis* rule).

When it comes to the possibility of using a 'negotiated procedure with publication of the contract notice', it can be said that both Regulation 1370/2007 and the Directive 2004/17 do not require the existence of specific circumstances whereas Directive 2004/18 does.

It can be concluded that both Regulation 1370/2007 and the Public Procurement Directives contain the possibility of organising and opening the restricted procedure without any limit to the scope of those procedures.

Secondly, both Regulation 1370/2007 and Directive 2004/17 contain the possibility of organising a negotiated procedure with a prior call for competition, and this with no limits to the scope of this procedure. Directive 2004/18 only allows this procedure under the specific circumstances that it lists.

Finally, with regard to the negotiated procedure without any prior publication, it must be concluded that both Regulation 1370/2007 and the Public Procurement Directives determine specific circumstances in the absence of which this procedure can not be used.

#### **b) Principles of transparency, non-discrimination and fair competition**

The Public Procurement Directives contain several provisions to ensure that the principles of transparency, equality and fair competition are complied with. There are, for example, provisions that explicitly state that the contracting authority should make sure that the equality of the candidates is ensured (principle of non-discrimination), or that the contracting authority must guarantee the confidentiality of information that the candidates hand over during the procedure (principle of fair competition). Furthermore, the Public Procurement Directives contain provisions concerning the publication of a contract notice and its content, concerning the minimum of candidates that need to be selected or invited for the negotiations and concerning the time limits that should be given when it comes to submissions.

By contrast, Regulation 1370/2007 only states that '*the procedure adopted for the competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination*'.

Regulation 1370/2007 contains one Article, being Article 7, on publication, which states that, when a contracting authority directly awards a public service contract for transport by rail in accordance with Article 5(6), it will have to publish the following information within one year of granting the contract (Article 7(3)):



- Name of the contracting entity, its ownership and, if appropriate, the name of the party or the parties exercising legal control.
- Duration of the PSC.
- Description of the passenger transport services to be performed.
- Description of the parameters of the financial compensation.
- Quality targets, such as punctuality and reliability and rewards and penalties, as applicable.
- Conditions relating to essential assets.

Also with regard to the contracting authorities' decision to directly award PSC, Article 7(4) states that any interested party can request the deciding authority to forward its reasons to directly award the contract.

Irrespective of the absence of any more specific provisions with regard to the publication, time limits and the number of candidates to be selected or invited to the negotiations, the contracting authority that wants to award a contract that falls under the scope of Regulation 1370/2007 will have to comply with the mentioned principles. This means that the contracting authority will have to publish a contract notice, so that the interested economic operators are aware of the planned attribution procedure, that it will have to give them enough time so that all of them are able to submit a request to participate and/or an offer and finally that, in order to ensure fair competition, it will have to invite enough candidates to submit a tender or to negotiate so that the competition is ensured.

It can be stated that although the discussed provisions of the Public Procurement Directives will not be applicable to the award procedures that fall under the scope of Regulation 1370/2007, the contracting authority will, during that procedure, *de facto* have to organise a procedure similar to those provisions of the Public Procurement Directives. This, not because this authority has to comply with the Public Procurement Directives, but because it will have to respect the principles of transparency, non-discrimination and fair competition, which are the same principles that lie at the heart of the provisions of the Public Procurement Directives.

The same conclusion follows from the Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives ('Interpretative Communication').<sup>41</sup> In the Interpretative Communication, it is stated that the ECJ has developed a set of minimum standards for the award of PSC which are derived directly from the rules and principles of the Treaty on the functioning of the European Union. This means that even with regard to contracts that are excluded from the scope of the Public Procurement Directives, the contracting authorities are nevertheless bound to comply with the fundamental rules of the Treaty.

Those minimum standards can be summarised as follows:

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<sup>41</sup> 2006/C 179/02.

- Obligation to ensure adequate advertising (unless in cases of extreme urgency and when the contract can only be executed by one specific economic operator).
- Non-discriminatory description of the subject matter of the contract.
- Equal access for economic operators from all Member States.
- Mutual recognition of diplomas, certificates and other evidence of formal qualifications.
- Appropriate time limits.
- Transparent and objective approach.
- Transparent and non-discriminatory manner of limiting the number of candidates.

As a final conclusion, it can be said that the contracting authority that wants to award a contract based on Regulation 1370/2007 will have to comply with the rules and the principles of the Treaty on the functioning of the European Union and more specifically with the principles of transparency and non-discrimination, as stated in Article 5, and will therefore *de facto* organise a procedure that shall be comparable to that under the provisions of the Public Procurement Directives.