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"IMPACT OF EUROPEAN UNION PUBLIC PROCUREMENT LEGISLATION ON THE ALBANIAN PUBLIC PROCUREMENT SYSTEM"

PUNOI:
Msc. REIDA KASHTA (SHAHOLLARI)

UDHËHEQËS SHKENCORË

PROF.DR.ARTA MANDRO
UNIVERSITY OF TIRANA

PROF. ROBERTO CARANTA
UNIVERSITY OF TURIN

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Msc. REIDA KASHTA (SHAHOLLARI)

TUTORS:
PROFESSORI
ROBERTO CARANTA
E **ARTA MANDRO**

COORDINATORE DEL DOTTORATO:
PROF. ROBERTO CARANTA

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Abstract

Public procurement still remains a relatively new concept in Albania nowadays. Given the commitments taken with the purpose of the entry into the European Union, Albania has begun the process of integration in order to achieve the European Union standards in the public procurement system. The integration process in the public procurement field means the approximation of the public procurement law and through it, the entire public procurement system with the corresponding EU Directives. In this context, the analysis of relevant issues, such as the public procurement, becomes important. Certainly, approximation cannot be "rigid", but on the contrary, it should take into consideration the actual context in the country. The analysis of the actual situation of the public procurement system in Albania, its comparison with the procurement system provided for by the EU Directives, as well as the necessary improvements for achieving the EU standards, gain particular relevance.

The overall objective of this thesis is to analyze the approximation process of the public procurement legislation in Albania with the corresponding EU Directive(s), and to answer the question: which is the best approach to be followed for this purpose? This objective is achieved through the analysis and comparison of the procurement systems in Albania and in the European Union.

Key words: public procurement, Albania, European Union, approximation, integration process.

Abstrakt

Prokurimi publik mbetet ende një koncept relativisht i ri në ditët e sotme, në Shqipëri. Duke patur parasysh angazhimet e marra me qëllim aderimin në Bashkimin Evropian, Shqipëria ka filluar procesin e integrimit në arritjen e standardeve të Bashkimit Evropian, për sistemin e prokurimit publik. Procesi i integrimit në fushën e prokurimit publik do të thotë përafrim i ligjit të prokurimeve dhe, nëpërmjet tij, i të gjithë sistemit të prokurimit publik me direktivat përkatëse të Bashkimit Evropian, në këtë fushë. Në këtë kontekst, analiza e çështjeve konkrete, sikurse është prokurimi publik, bëhet e rëndësishme. Pa dyshim, përafrimi nuk mund të jetë "i ngurtë", por, përkundrazi, duhet të marrë në konsideratë kontekstin aktual në vend. Analizimi i situatës aktuale të sistemit të prokurimit publik në Shqipëri, krahasimi i tij me parashikimet e Direktivave të BE, si dhe analizimi i përmirësimeve të nevojshme për arritjen e standardeve të BE, fitojnë një rëndësi të veçantë.

Objektivi i përgjithshëm i kësaj teze është të analizojë procesin e përafrimit të legjislacionit për prokurimin publik në Shqipëri me Direktivat korresponduese të BE, si

dhe t'i japë përgjigje pyetjes: cila është përqasja më e mirë që duhet ndjekur për këtë qëllim? Ky objektiv bëhet i mundur nëpërmjet analizës dhe krahasimit të sistemeve të prokurimeve, në Shqipëri dhe në Bashkimin Evropian.

Fjalë kyçe: prokurim publik, Shqipëri, Bashkimi Evropian, përafrim, procesi i integrimit.

Acknowledgement

When I first decided to do this study, I was afraid that I could not realize it. I have to say that it was not that easy, but now that I finalized it, I am grateful to a lot of people, who directly or indirectly have helped me to come to an end.

First, I would like to show my gratitude to my two supervisors, Professor Roberto Caranta from the Law Department at Turin University and Professor Dr. Arta Mandro from the Public Rights Department at Tirana University, who have led me during this exercise, providing advice, insight and expertise that greatly improved my study and shaped it in the form it is now.

Another big gratitude goes to Professor Martin Trybus, Professor of European Law and Policy at Birmingham University, for very helpful comments and advice that increased the quality of my study.

As I had to realize this study on a part time basis, while I was working as the Director of the Legal and Monitoring Directory at the Public Procurement Agency, it has been a challenge to handle them both, at the same time. In this case, I would like to thank all my colleagues and my friends, who had to hear every day about my study, sharing thoughts with them, and being comprehensible that I needed to dedicate some time to my research work. Among my colleagues, I would like to thank particularly Enkeleida, for being one of the reviewers of my study and providing some helpful advice.

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Special thanks go to my lovely husband, for being the first reviewing my work, commenting and advising on it. Apart from this, he deserves my gratitude for encouraging me all the time during the course of this study and caring about our two lovely children, Kres and Tea, when I was not at home and had to work for the study.

Last, but not least, I am immensely grateful to my big family, my parents and my parents in law, my sisters and my brother and as well our nanny, for supporting me in hundreds visible and invisible ways, during these last years I had to work on this study.

In conclusion, I would like to emphasize that all the views expressed here are my personal opinions and can in no way be taken to reflect the opinion or imply the position of anybody advising me on the study.

INTRODUCTION

I The objectives and scope of the study

Political changes in Albania after the '90 were inevitably accompanied by radical changes of the economic system. The first changes in this context were the permission of the private entrepreunership and the opening to the market economy. These changes impacted not only the private law, but the public law as well. Private enterpreunership is closely related to public procurement, a term not known in Albania up to that time. With the opening to a market economy based on free competition, it became necessary to establish the legal and institutional framework for the regulation and implementation of the public procurement system. Since its beginnings and up to now, the system has been subject to several changes and improvements.
Given the commitments undertaken with the purpose of the entry into the European Union, Albania has started the process of integration, in order to achieve the standards of the European Union. Albania has signed and is implementing the Stabilization and Association Agreement, and on that basis it should, among other things, work for the approximation of its legislation and legal policies with those of the EU. Albania's commitments for the approximation of its legislation with the EU legislation refer to the public procurement as well.
The integration process in the public procurement field means the approximation of public procurement law and through it, the entire public procurement system, with the corresponding EU Directives.

In this context, the analysis of relevant issues, such as public procurement, becomes important. Certainly approximation cannot be "rigid", but to the contrary it should take into consideration the actual context in the country. The analysis of the actual situation of public procurement system in Albania, its comparison with the procurement system provided for by the EU Directives, as well as the necessary improvements for achieving the EU standards, gain a particular relevance.

What is required in the field of public procurement in the frame of the Stabilization and Association Agreement, namely in articles 70 and 74, and in the frame of the Interim Agreement, namely in article 40, consists mainly in the approximation of the legal framework with the acquis communautaire, increase of transparency and elimination of discrimination, encouragement of participation in public procurement procedures and increase of competitiveness. The strengthening of the administrative and institutional capacities, in function of the better implementation of public procurement legislation, is another priority of the European Partnership Document, which goes for the fulfilment of the commitments in the frame of the Stabilization and Association Agreement. This process has a certain time frame and is planned in the National Plan for European Integration.

The first incentive for conducting a study on "The impact of EU Public Procurement Legislation on the Albanian Public Procurement System" and transforming it into a thesis for receiving the "PhD" grade came from the many challenges I have come along in my everyday work as Director of Legal and Monitoring Department in the Public Procurement Agency, which focuses on the establishment of an efficient national procurement system. Considering that besides the internal factors, the establishment of such a procurement system is greatly impacted by the obligation of the Albanian Government to fully approximate the legislation in this field with the corresponding EU Directives, the challenge of preserving an equilibrium between the formal approximation and a special regulation, which suits and manages at the same time a given context as it is the Albanian one has been quite big in the last decade.

In this situation, I engaged in analyzing both systems, and based on my experience, particularly on the problems faced in the practical application of the Albanian legislation and the typology of such problems, I provide a position concerning the approach for the approximation of the public procurement legislation and recommendations, which could help facilitate this process by making it less formal and more effective.

The main objectives of the present study relate to the analysis of the Albanian public procurement system, the level of impact of the respective EU legislation in this system, the commitments of Albania in the frame of the integration process in this field and what is to be understood with the requirement of "full approximation" of the Albanian public procurement legislation with the respective EU legislation. Through these objectives, the study aims at analysing and discussing the feasibility of commitments of one party and the expectations of the other party, concerning the full approximation of a national law, applicable in a given context (such as Albania is), with an EU Directive, which aims at regulating the performance of certain states in a certain field, as public procurement is, with the purpose of creating of a common market. Hence, the states addressed by the respective acts are in different phases of development, and therefore the context in which these acts will be applied is totally different.

At the end, the study will come with conclusions concerning the approach followed in the process of approximation of the public procurement legislation with the respective EU Directives, as well as with recommendations on the steps to be taken for the achievement of maximal efficiency of the process by both parties.

I would like to emphasise that generally this is a theoretical study, but it is also combined with some practical aspects of public procurement.

II The structure

This work studies the Albanian public procurement system, its regulation in the Albanian legislation as well as the regulation of public procurement in the respective EU Directives. The study focuses only on the procedural aspects of the procurement process, thus considering only the similarities and differencies with the Directive of Procurement in the Public Sector[1]. Taking into account the fact that during the preparation of this study, the EU approved a new Directive for the public procurement in the Public Sector, such new Directive was included in the study, with the aim to complete as much as possible the presentation and analysis of the regulatory framework and the fisibility of the new obligations arising for Albania. The study includes an analysis of the similarities of the legal provisions and the level of approximation of the Albanian legislation with the respective EU Directives. The analysis is conducted by continuously posing the question and discussion on the possibility of implementation of certain provisions of the Directives, including those cases when the domestic legislation provides for a formal provision, is it effectively implementable, or is it being applied in the same context as established by the Directive? In this spirit, the Study poses for discussion the question regarding the level of fulfillment of the commitment of the Albanian Government in the frame of the Stabilization and Association Agreement for adapting the legislation, and if a full approximation of the legislation in the actual status of Albania as a non-Member State and in its actual political, economic and social context is possible and obligatory.

Apart from the Introduction, the Study is divided into six Chapters: five chapters consist in an analytical representation of the issue while the sixth chapter includes conclusions based on the analysis and discussions and also provides recommendations concerning the efficency of the process.

Chapter I is entitled: "Public procurement process, its role and importance"

This chapter provides a descriptive frame of a public procurement system in general and of the procurement process itself in particular. Initially in this chapter, the role of public procurement as the mechanism is analysed, which aims at a good administration of public funds in a given country. Further on, the three phases of the procurement process are analyzed (the identification of needs and the procurement planning stage, the competition stage and the implementation stage); the impact they have on each other and on the achievement of the final goal of the process. Further on, the analysis is extended to some economic aspects of the procurement process and their impact in shaping the process. There follows a deeper analysis of the public procurement process elements, the application area and respective exclusions. An analysis of the "contracting

[1] The study does not deal with issues covered by the Utility Sector Directive 2004/17/EC and the Public Sector Remedies Directive 89/665/EEC, as amended by Directive 2007/66/EC.

authority" concept is presented in the context of this legislation, of the "economic operator", "public funds", "public procurement contracts", and exclusions from these rules. The analysis is conducted considering the spirit of the legal provisions and the case law of the Court of Justice of the European Union (hereafter referred as CJEU). At the end of the chapter, the means and the goal of the public procurement process are taken in analysis, as well as the main internal and external factors impacting the regulation of a public procurement system.

Chapter II is titled "History and progress of the public procurement system in Albania and the European Union"

This chapter analyzes the progress of the public procurement system in Albania, its beginnings and developments up to date. An historical view of the Albanian procurement system aims at providing a fuller picture of the Albania's experience in this field as well as to assess in this context the improvements made by the country and the improvements asked to be done. The chapter also presents an history of the EU public procurement system. The corresponding European legislation is presented in a comparative way and in function of the results aimed by this study. The European legislation is presented by focusing mainly into the Directives, their position in the European legislation hierarchy and the obligations for the Member States. The historical view serves to evidentiate the experience of the EU in public procurement and the path followed for achieving a system as the one provided for by the actual Directives. The analysis of the progress of both systems serves to evidentiate the differences, even in a timeframe, between them and the impact of such a fact in the actual approaches followed by each of them.

Chapter III is titled "Public procurement process, rules according to the Albanian system; similarities and differences with the corresponding EU legislation"

This is one of the most important chapters of the study, which analyzes in details the public procurement process according to the Albanian legislation and raises discussions on the similarities and differences with the respective regulation of this process by the EU Directives. Through the discussion, it is aimed at understanding the impact of the EU system in the Albanian system of public procurement and the real possibility to implement the provisions of the Directive in the domestic legislation. Basic elements of the procurement process are also analyzed in this chapter. So, this part of the study analyzes and discusses all the concepts that make up the skeleton of a procurement process.

The definition of special rules for the management of public funds aims at minimizing the non-necessary costs on the state budget and the optimization of price and quality of the required good, service or work. Taking into consideration the main definition of public procurement and analyzing the elements of the public contract, it is understandable that concrete needs should be known to conduct a public procurement. To make these needs

known to the private sector, a contracting authority should describe them by using technical specifications. Once the needs are identified, the contracting authority should further describe the requirement that economic operators should meet, in order to be qualified to perform the contract at issue. After deciding on the characteristics of needs and qualification criteria, the contracting authority should launch a procurement procedure and run the selection process. To complete this process and award the contract, another necessary decision to be made by the contracting authority is deciding on the awarding criteria to be used. All this process should be based on procurement principles. As one of the most important principles, the transparency principle is concerted into concrete requirements, such as those on advertising the relevant notices of a procurement procedure. These entire concepts, which reflect the activities prior to the conclusion of the contract, are thoroughly analyzed in this chapter. The analysis of such concepts is based on the CJEU case law.

Chapter IV is titled "Awarding procedures and procurement tools according to the Albanian system; similarities and differences with the corresponding EU legislation"

This chapter analyzes the types of procedures and tools of public procurement envisaged by each legislation, aiming firstly at assessing the situation of each of the legislations and secondly assessing the impact of the EU legislation in the Albanian procurement legislation, in this regard. Discussions are made on the real possibility of the application of all procurement procedures foreseen by the corresponding Directives in the domestic legislation.

The so called 'competition stage' is one of the three stages of the procurement process and refers to an administrative competition process, following a certain procedure, aiming at the awarding of the contract to the best offers. The regulatory rules on public procurement generally focus on the competition procedures, since it is in this phase that legal rules and other regulatory measures become important tools of policy. As such, the procurement rules set out the processes to be followed by a contracting authority when using each of these competitive procedures, which differ according to the procedure.

Except for the procurement procedures, the procurement rules also include provisions covering procurement tools that a contracting authority may choose to use in conjunction with the competitive procedures, where permissible. These are framework agreements, electronic auctions and dynamic purchasing systems. Whenever a contracting authority wishes to award a contract without competition, using what is known as the 'negotiated procedure without prior publication of a contract notice', then it can only do so if specific conditions are met. All these awarding procedures and procurement tools are discussed in details, in this Chapter.

Chapter V is titled "The approximation of the Albanian procurement legislation with the corresponding EU legislation; the right approach of the concept".

This chapter provides for a description of the commitments of the Albanian government in the field of public procurement, in the frame of the Stabilization and Association Agreement. It analyzes if such commitments have been achieved in compliance with the apposite plan, in terms of content and time.

Using public procurement process to purchase goods, services, or works for the Albanian Government Bodies was possible only after 1990, when the first steps to a free and open market were taken. Given the commitments taken with the purpose of the entry into the European Union, Albania has begun the process of the approximation of the procurement legislation with corresponding EU Directives. The key issue, being discussed through this Chapter is whether it is possible to realize a hundred percent approximation while Albania is not yet an EU member, having into consideration that the purpose of the Procurement Directives is to create an internal market for public contracts among Member States themselves.

Aiming at providing valid scenarios for the near future, in the context of a new Directive for the procurement, for which Member States are given a transitory period for complying with (up to 2016), this chapter analyses the provisions of this new directive, comparing them also with the PPL changes and discussing the possibility of a full implementation of these provisions in the political, economic, and social context of Albania.

Chapter VI "Conclusions and recommendations"

Finally, this work is closed with the conclusions and the recommendations. This chapter provides a summary of the analyses and the conclusions of the study. Recommendations are provided concerning the process of approximation as well as the measures to be taken for assuring an approximated and efficient procurement system.

III Methodology

The methodology used for this work consists in a combination of the descriptive, comparative and analitical methodologies of the topic. Combination of these methods[2] *has been deemed as necessary for achieving the expected outcome of this study. Further on, combining these methods with my personal knowledge and expertise in the field, at*

[2] For various aspects on European legal method see U. Neergaard, R. Nielsen, L. Roseberry (eds.) "European Legal Method-Paradoxes and Revitalisation", DJØF Publishing, Copenhagen 2010.

practical and academic level, have facilitated the carrying out of the analysis and the adoption of a critical position concerning the issues raised for discussion in this work.

To be coherent with all possible readers of this study, I will initially provide a description and definition of the basic concepts and elements of a public procurement process, of the objectives aimed at being achieved through such process as well as the factors that shape it.

Further on, through the descriptive method, a history of the public procurement system in Albania will be provided, from the start and up to the current stage. In the same fashion a description of the EU public procurement system will be provided as well. Then, the commitments of Albania in the frame of the Stabilization and Association Agreement in the field of public procurement will follow.

After the description of the above mentioned facts, through the comparative and analitical method, I will compare the Albanian legislation with the corresponding EU legislation. Afterwards I will continue with a totally analytical and critical method on the level of approximation of the Albanian legislation in the field with the one of the European Union; the fully approximated articles and those not yet approximated; is this approximated legislation applicable and whether a full approximation of the Albanian legislation with the EU legislation is neccessary and feasible, as required by the SAA. Analysis and discussions will be carried out based mainly in the respective regulative frame as well as on the position of the CJEU and the literature (mainly foreign), on certain issues. In function of a correct analysis of the situation, data from different studies carried out by different subjects, mainly non-governmental organizations, will be used. The new EU Directive will be also analyzed. To this regard the novelties introduced by this Directive and the possibility to adopt such novelties in the internal Albanian legislation will be analyzed. The analysis aims at evidentiating the differences of contexts, in which the legal provisions are meant to be implemented, with the purpose of coming to the conclusion of what should be changed by both parties as to come to a meeting point.

As I previously mentioned, during my research for this study, I have paid particular attention to formal discussions and official meetings with representatives of the European Union, where they have expressed their position towards the Albanian public procurement system, in the light of the obligation for approximation with the corresponding EU Directies, as well as their expectations for this process. On the other hand, thanks to my job position, I have had the opportunity to confront such official positioning with opinions and positions of other homologues from other countries, EU Member and non Member States, and of course from colleagues in different institutions in Albania, from different institutions, who in their everyday work face problems in the implementation of the public procurement legislation. Another positioning towards the public procurement process, I have had the opportunity to share with representatives of

the judiciary system, during my lecturing in the School of Magistrates as well as during the training sessions with judges, concerning issues in this field. All these point of views, from various angles and levels, towards the procurement process, have helped me to apply the analytical method, mainly for finding out the main factors that impact the procurement system in Albania.

Combination of the comparative and analytical methods will be also applied for drawing the conclusions of this study, which are the source for the recommendations provided with the purpose of helping in establishing an efficient process of approximation of the public procurement legislation.

The study will be based on the consultation of primary and secondary legislation of the European Union; of the national and international organizations reports in the procurement field; commentaries of european and national codes and legal acts; recommendations and instructions of the European Commission; internal legislation of public procurement; works presented in national and international Scientific Conferences; articles published in national and international science magazines; foreign science texts; etc. An important part of the process has been the consultation of legal literature as well as with the many cases of the CJEU[3]. In addition to the above mentioned sources, discussion, comments, debates with scholars, counterparts and colleagues from EU Member States and Albania, concerning different issues within the scope of this study have helped me a lot in my work with the study. As well the research conducted in the rich library of the University of Turin has helped me to expand the field of science research. Last, but not least, participation in national and international Scientific Conferences, technical roundtables with procurement experts have been very important to understand the issues of the procurement process and the comparison between the national legislation and the EU Directives, and the impact of these last.

After consultation of the selected literature follows the second phase of the research process, which consists in the analytical study of the selected literature.

The analysis will be based mainly in:

1. *Albanian public procurement legal framework;*
2. *Treaty on the Functioning of the European Union;*
3. *EU Public Sector Directives in the field of public procurement, including Directive 2004/18 (current Directive) and Directive 2014/24 (new Directive);*
4. *Case law of the CJEU[4];*
5. *Comparisons and possible approaches of the national legislation with the EU countries and the acquis in the field of pubic procurement;*

[3] Court of Justice of the European Union (CJEU) is referred in this study also with its previous name European Court of Justice (ECJ).
[4] CJEU case law used in this study has been accessed on-line at http://curia.europa.eu.

6. *Statistics, as illustration of the provided arguments;*
7. *Data from the websites of the Albanian Public Procurement Agency, Albanian Ministry for European Integration, of various national and foreign organizations, dealing with public procurement as well as of EU.*

IV Relevance of the study

This study has a special relevance as it is the first of its kind in Albania. This work deals for the first time with concepts of public procurement, associated with interpretation and analysis. In addition, this study analizes for the first time a new EU Directive, taking a position towards the possibility for the implementation of some provisions in the actual context of Albania. And last but not least, this study engages in analyzing and drawing conclusions in relation to a process, which has been up to now taken for granted, conducted without proper analysis regarding its feasibility, advantages and disadvantages, risking to transform it into a formal process, the negative effects of which might appear in a not very far future.

Beside to the academic community, this study is also addressed to:

- *Domestic state institutions, which deal with public procurement issues and mostly to those institutions engaged in the approximation process of this field, such as the Public Procurement Agency and the Ministry for European Integration;*
- *Foreign institutions present in the country or groups of experts involved in the assessment or improvement of public procurement regulation in Albania;*
- *Domestic or foreign organizations, which offer public procurement trainings for public procurement officials and economic operators;*
- *Officials engaged in implementation of public procurement procedures in state institutions;*
- *Representatives of private entrepreneurs, which participate as bidders in procurement procedures;*
- *Faculties and other institutions engaged in education;*
- *All those individuals interested in understanding more in depth the public procurement system in Albania, regulation of this system in the EU and the level and the process of approximation of the Albanian legislation with the EU legislation.*

V Review of the literature of the field

The used literature for this scientific work includes primary and secondary sources. Considering that the public procurement system in Albania is relatively new, apart for sporadic studies in specific topics conducted mainly from non-governmental organisations (which has been taken into consideration in this study), there is not yet any publication and literature covering public procurement, in the country. Regarding the

data on the Albanian public procurement system, I have used the Albanian public procurement legislation from its beginnings to the legislation currently in force, the Stabilization and Association Agreement, the National Plan for Implementation of the Stabilization and Association Agreement 2007-2012, the National Plan for European Integration 2015-2020, the Annual Analysis of the Public Procurement Agency, reports of international institutions on the public procurement system in Albania as well as European Commission Annual Reports for Albania. Meanwhile, as far as the public procurement system in the European Union is concerned, I have used as basic material the EU public procurement directives. However, to have a broader idea on the EU legislation in general, the part taken by the Directives in this legislation, the obligations brough about by these Directives, and the EU public procurement, I have used a part of the literature found in this field. This literature comprises European Communities treaties, publication on EU legislation, Guides on public procurements in the European Union, periodic magazines of public procurement accessible online in the scientific research databases. Another very important source for this study were the cases of the CJEU, dealing with public procurement. These cases were accessed online in the respective EU database.

Abbreviations

CA	*Contracting Authority*
CJEU	*Court of Justice of the European Union*
DCM	*Decision of the Council of Ministers*
Directive 2004/18/EC	*Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*
Directive 2014/24/EU	*Directive 2014/24/EU of the Eeuropean Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC*
EU	*European Union*
EC	*European Commission*
ECJ	*European Court of Justice*
EO	*Economic Operator*
EPS	*Electronic procurement system*
GPA	*Government Procurement Agreement*
LCC	*Life-cycle costing*
MEAT	*Most economically advantageous tender*
NPEI	*National Plan for European Integration*
OJEU	*Official Journal of the European Union*
PIN	*Prior Information Notice*
PPA	*Public Procurement Agency*
PPL	*Public Procurement Law*
SAA	*Stabilization and Association Agreement*
STD	*Standard Tender Documents*
SMEs	*Small and medium enterprises*
TFEU	*Treaty on the Functioning of the European Union*
UNCITRAL	*United Nations Commission on International Trade Law*
WTO	*World Trade Organization*

CHAPTER I

PUBLIC PROCUREMENT, ITS ROLE AND IMPORTANCE

1.Introduction

Public procurement is a process performed by the Contracting Authorities (CA), which select the Economic Operators (EO) through a public competition, to enter into public contracts for the provision of goods, services or works (construction), against payment from public funds[5]. There lies a public purpose and a public task behind the public procurement, which the contracting authorities provide for by means of the procurement. The construction of a school is necessary for the education of pupils. The background to procurement can be cultural policy, commercial policy etc. The construction of a power station can be necessary for the maintaining of power on the electric grid. More detailed considerations of its construction, size, technology, location etc., can also involve issues such as the pollution of the environment, the competitiveness of the national economy, safety, national security and so on[6]. This is a process conducted by the state administration to serve directly or indirectly the citizens, who are taxpayers at the same time. In other words, through this process a state authority "delegates" to a private entrepreneurship the right to perform activities mainly of a technical character (non policy-making), on behalf and on account of the state authority, such as for example, the service of cleaning the city, construction of rural or urban roads, etc.[7] Such "delegation" is based on a bilateral contract, for the awarding of which the state authority should follow the rules of public procurement. On the other hand, this process is financed by public funds, which indirectly belong to taxpayers as well.

1.1 Role of public procurement

If we visualized the public procurement process, we would imagine a chain composed by the need for a good, service or work (directly for the Contracting Authority and/or indirectly for the citizens), a source of financing (public funds, i.e. income created by different types of payments from citizens), the administrator of such need and its implementer (Contracting Authority) and the direct or indirect beneficiary of the product (citizens). The "public" or "government" procurement refers to the situation, in which it is the government (whether central or local), or some public body that purchases items from the market. Those purchases are made with a view to fulfilling the tasks of government in providing public services. Procurement is, therefore, also an "acquisition

[5] Article 3/1 of Law no. 9643, dated 20.11.2006 "On Public Procurement", as amended (here and after refered as PPL).

[6] S.T. Poulsen, P.S. Jakobsen and S.E. Kalsmose-Hjelmborg, "EU Public Procurement Law; The Public Sector Directive, The Utilities Directive, 2nd Edition", DJØF Publishing, Copenhagen 2012, pg. 26.

[7] S.T. Poulsen, P.S. Jakobsen and S.E. Kalsmose-Hjelmborg, "EU Public Procurement Law; The Public Sector Directive, The Utilities Directive, 2nd Edition", DJØF Publishing, Copenhagen 2012, pg. 27.

for public consumption", a statement, which neatly discloses the public interest in procurement[8]. Such characteristic of public procurement is reflected in its two essential elements; the "public need" and the "public fund". The "public" character makes the procurement process highly sensitive[9] and naturally raises the need and the necessity for the special regulation of this process. Also, the need for special rules on the award of public contracts is based on the recognition that states, in contrast to commercial undertakings, are not disciplined by market forces when carrying out procurements. Selection of a certain economic operator, without considering optimization of price and quality, at the end of a procurement procedure, could result in costs for the budget of the state authority performing the procurement. However, in no case it bears the same risks and financial costs as a private undertaking would bear at the same conditions. A private undertaking can risk even bankruptcy in such situations, while a state authority never has this cost[10]. The same position has been kept in the case Arkkitehtuuritoimisto Riitta Korhonen[11], where the consideration for the difference in the "economical behavior" between a state authority and a private undertaking has been clearly expressed. Considering the context in which a state authority operates when carrying out a procurement procedure, the definition of special rules for the management of state funds, aiming at minimizing the non-necessary costs on the state budget and the optimization of the price and quality of the required good, service or work, become quite sensitive. In these conditions, the public procurement process gains a very important role as the mechanism which aims at a good administration of public funds.

1.1.1 Public procurement stages

When we say public procurement, generally we refer to public procurement procedures, in the meaning of an administrative competition. The procurement cycle and the regulation of procurement are not always coextensive. Procurement involves the purchase of items from the market, but the process of purchasing involves many stages from the initial recognition of the need for items to the final stage of ensuring completion (satisfactory delivery or construction).[12] In addition, the regulatory rules on public procurement generally focus on the competition procedures, since it is in this phase that

[8] P. Trepte "Regulating Procurement- understanding the ends and means of public procurement regulation", Oxford University Press Inc., New York, 2004 (reprinted in 2006), pg. 27.

[9] "Public procurement is also a major economic activity of the government where corruption has a potential high impact on tax payers' money". See "Integrity in public procurement- Good practice from A to Z", OECD Publishing 2007, pg.12.

[10] S.T. Poulsen, P.S. Jakobsen and S.E. Kalsmose-Hjelmborg, "EU Public Procurement Law; The Public Sector Directive, The Utilities Directive, 2nd Edition", DJØF Publishing, Copenhagen 2012, pg. 28.

[11] In the case C-18/01 Arkkitehtuuritoimisto Riitta Korhonen, parag. 51. is expressed as follows: "[a] body acting for profit and itself bearing the risks associated with its activity will not normally become involved in an award procedure on conditions, which are not economically justified".

[12] P. Trepte "Regulating Procurement- understanding the ends and means of public procurement regulation", Oxford University Press Inc., New York, 2004 (reprinted in 2006), pg. 35.

legal rules and other regulatory measures become important tools of policy[13]. A clear example of this theory is the Albanian Law on Public Procurement. The objective of this law, stated at its beginning, is "to set out the rules applying to the procurement of goods, works and services by contracting authorities"[14]. If we analyze the aim of this law further, which is following its objective, we will see that it is focused on procedural aspects of the competition. More specifically, the aim of the Albanian procurement law is to increase the efficiency in public procurement procedures, to decrease the procedural costs, to stimulate the participation of economic operators in public procurement procedures, to stimulate competition, to ensure equal treatment and nondiscrimination in public procurement procedures and to ensure integrity and transparency in public procurement procedures[15]. As easily noticed, the good conduct of the public procurement procedures is the aim of Albanian public procurement law[16].

On the other hand, the output of a procurement procedure is the conclusion of a public contract, which is a contract for pecuniary interest concluded by an exchange of written communication between one or more economic operators and one or more Contracting Authorities, having as its object the execution of works, the supply of goods or the provision of services[17]. Having taken into consideration the main definition of public procurement, as prescribed above[18], and analyzing the elements of the public contract, it is understandable that to conduct a public procurement, the concrete needs should be known. Once the needs are identified, the private sector will compete to get a contract, to fulfill the said needs. Once the contract has been concluded, the implementation of the contract should be supervised, to ensure the proper satisfaction of the needs. As we can see, there are three main stages, which can be named as follows:

1. The identification of needs and the procurement planning stage (deciding which goods or services are to be bought and when);
2. The competition stage (an administrative competition process, following a certain procedure, aiming at awarding the contract to the best offers); and
3. The implementation stage (the process of administering and supervising the contract to ensure effective performance).

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[13] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 1, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

[14] See article 1/1 of PPL.

[15] See article 1/2 of PPL.

[16] In addition, the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing the Directive 2004/18/EC (here and after referred as Directive 2014/24/EU), stands in the same position, when declaring in article 1, that the scope of this Directive is to establish rules on the procedures for the procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than thresholds laid down in article 4.

[17] See article 3/2, of PPL.

[18] See footnote no. 5, above.

Often, indeed in the majority of the cases (frequently as a result of internal budgetary, administrative or audit regulations), the different stages of the procurement cycles are carried out by different people[19]. All these three stages should be included under the "umbrella" of the procurement process, because there is a close connection and a strong impact of these stages to one another. This means that in practice the three stages need to be closely integrated and regarded as separate phases of a single cohesive "cycle". It also needs to be understood that there is a significant connection between the regulatory measures that apply at the second stage and the first and third phases of the process – and that in certain cases the regulatory provisions that we consider will have a direct impact on the first and second stages[20].

Besides the three stages of the public procurement process, as prescribed above, another division might be introduced as well, in the reference to these stages; stages before and after the conclusion of the contracts. Such concept does consider the steps in the procurement cycle up to and including the publication of the contract as "before conclusion", and steps that are taken after the contract is "concluded".[21] This implies that the two initial stages described above, which prepare and direct the procurement process, stand before the conclusion of the contract and the activities for the contract management are after its conclusion.

The concept reflects the activities prior to the conclusion of the contract as an "added value": because the aim of these two stages is the "correct" implementation of procurement through the processes that happen up to the moment the contract is awarded[22]. On the other hand, the contracting authorities actions that aim at the correct execution of the contract, performed after the contract conclusion, are considered as "added costs", because as it will be analyzed further on, besides the fact that changes of the contract conditions are not allowed after its conclusion, even if allowed, such changes would result in additional costs in relation to time and financial and/or human resources.

[19] The same regulation is applied also in the Albanian system; the three stages should be implemented from different people, to avoid the potential situations of conflict of interests. See for example articles 57-58 of the Decision of Council of Ministers No. 914, date 29.12.2014 "On approval of the public procurement rules".

[20] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 1, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

[21] The Albanian public procurement legislation provides for rules from the planning stage to the conclusion of the contract. Regarding the applicable rules during the contract execution stage, this legislation refers to the Civil Code. See article 60/3 of PPL.

[22] This main objective of realizing the procurement procedure as good as possible, reflecting the contracting authority needs, explains the flexibility and legal possibility of the contracting authority to change tender documents (see for example article 42 of the PPL), or to qualify an offer, even though it might have the so-called 'small deviations' (see for example article 53/4 of PPL).

1.1.1.a Impact of procurement stages on each-other

The main situations on how the procurement stages can impact each-other are prescribed as follows:

- Procuring involves a need to plan future procurement carefully to ensure there is enough time to run a procurement procedure in full compliance with the various procedures and time limits set out in the procurement legislation[23]. Procurement laws often allow the use of procedures without an advertisement and competition to deal with cases of urgency - but this is often not permitted when the urgency was foreseeable[24]. This is a clear indicator that the way of planning impacts the type of

[23] According to the article 35, paragraph 1 "Notices" of the Directive 2014/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (here and after referred as Directive 2004/18/EC), "*Contracting authorities shall make known, by means of a prior information notice published by the Commission or by themselves on their "buyer profile", as described in point 2(b) of Annex VIII:*
(a) where supplies are concerned, the estimated total value of the contracts or the framework agreements by product area which they intend to award over the following 12 months, where the total estimated value, taking into account Articles 7 and 9, is equal to or greater than EUR 750000.
The product area shall be established by the contracting authorities by reference to the CPV nomenclature;
(b) where services are concerned, the estimated total value of the contracts or the framework agreements in each of the categories of services listed in Annex II A which they intend to award over the following 12 months, where such estimated total value, taking into account the provisions of Articles 7 and 9, is equal to or greater than EUR 750000;
(c) where works are concerned, the essential characteristics of the contracts or the framework agreements which they intend to award, the estimated value of which is equal to or greater than the threshold specified in Article 7, taking into account Article 9.
The notices referred to in subparagraphs (a) and (b) shall be sent to the Commission or published on the buyer profile as soon as possible after the beginning of the budgetary year.
The notice referred to in subparagraph (c) shall be sent to the Commission or published on the buyer profile as soon as possible after the decision approving the planning of the works contracts or the framework agreements that the contracting authorities intend to award.
Contracting authorities who publish a prior information notice on their buyer profiles shall send the Commission, electronically, a notice of the publication of the prior information notice on a buyer profile, in accordance with the format and detailed procedures for sending notices indicated in point 3 of Annex VIII.
Publication of the notices referred to in subparagraphs (a), (b) and (c) shall be compulsory only where the contracting authorities take the option of shortening the time limits for the receipt of tenders as laid down in Article 38(4).
This paragraph shall not apply to negotiated procedures without the prior publication of a contract notice".
Prior Information Notice (PIN) is foreseen also by the Directive 2014/24/EU in article 48, refereeing as a mean of publication of the planned procurements of Contracting Authorities.

[24] See article 31 "Cases justifying use of the negotiated procedure without publication of a contract notice" of the Directive 2014/18/EC. The same position is stated also in article 32 "Use of negotiated procedure without prior publication", of the Directive 2014/24/EU.

procedure, which should be used. A procurement plan should foresee at least the object of the contract that will be procured, the estimated procurement fund, the type of the procedure which will be followed and the approximated time foreseen for launching the said procedure[25]. If a contracting authority will fail to have a well identification and planning process, this will directly impact the following stage, because an "unplanned" need will be fulfilled, using an inappropriate procurement procedure.

- Only a good identification and planning stage is not enough. In any case, aiming for an efficient process, including the well-execution of the contract, a good planning stage should be followed by an adequate competitive stage. Otherwise, even though there was a very good planning of the needs, if the procurement procedure is not respected and as such, the contract has not been awarded to the best offer, this will be reflected during the contract execution stage. Thus, a favored bidder in collusion with the procuring entity could make a very favorable bid to win the contract in accordance with the rules of the competition – but the procuring entity could then allow the bidder to undermine the terms of its bid by, for example, failing to enforce deliveries or quality standards under the contract, or allowing price revisions that are favorable to the contractor[26].
- In some other cases, if there was a bad planning of the needs, even though the procedural rules are correctly followed, this will lead to a bad contract and therefore the aim of the procurement procedure will not be achieved. On the other hand, if the contracting authority, aiming at the correct fulfillment of the contract, will change the contract terms at this stage (after the competition procedure is concluded), will act against the public procurement rules[27]. Changes to a contract made during the execution phase, may sometimes be held by the courts to constitute a "new" contract that must be retendered under public procurement laws[28].

The terms on which the contract is concluded, including terms relating to the termination and other aspects of contract administration, may be determined at least to some extent during the contract award process[29].

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[25] See for example article 4 of the Decision of Council of Ministers No. 914, dated 29.12.2014 "On approval of the public procurement rules", and Instruction of Public Procurement Agency No. 2, dated 27.01.2015 "On preparation of the register of the planning and register of the realization of procurement procedure", available at https://www.app.gov.al, retrieved on, 30.01.2015.

[26] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 1, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

[27] According to article 60/1 "Rules applicable to the contracts", of PPL, "*The terms of the contract awarded pursuant to the PPL shall not differ from the prescriptions established in the tender documents and in the successful tender"*.

[28] See Case C-454/06, Pressetext Nachrichtenagentur v Republik Osterrich (Bund) ECJ judgment of 19 June 2008.

[29] According to article 59/1 "Conditions for performance of contracts", of PPL, "*CA may lay down special conditions relating to the performance of a contract, provided these are lawful and indicated in the invitation to tender or in the tender documents".*

It might happen that a tight regulation at the contract award stage can be undermined, if there is no adequate control of the contract execution stage[30]. First, without careful management and oversight of the execution of the contract, the fraudulent behavior can be carried over into the execution stage. Secondly, even when the procuring entity is behaving honestly, the bidder may bid deliberately low and then seek to manipulate the contract execution phase to obtain better terms (for example, by refusing to perform without extra payments, with the potential to cause great inconvenience to the procuring entity). This is one of the reasons why changes to a contract made during the execution phase may sometimes be required by procurement laws to constitute a "new" contract that must be retendered, as mentioned above. However, changes made during the execution phase are often harder to monitor than violations of rules that govern the contract award phase, since other suppliers will not be policing the process in the same way as during a tendering procedure[31].

1.1.1.b. The economic aspects of the public procurement system

Procurement regulation has been developed largely by societies, which rely on concepts based on welfare economics in the market economy and is currently being adopted in societies, which are embracing a market economy. The development of procurement regulations within a market economy implies that its purpose is in some way an instrument of the pursuit of economic welfare. In a market economy, economic welfare is achieved, in part by pursuing the objective of economic or "allocative" efficiency. This, in turns, gives rise to further considerations. First, regulation can be seen as an attempt to correct market and institutional failures in order to achieve the goal of economic efficiency. Secondly, this goal may be seen as insufficient in itself to achieve economic welfare because it is based on the assumption that optimal economic welfare will result from the perfect functioning of the free market and the achievement of allocative efficiency. But economic "welfare" may, however, be seen as something more than pure allocative efficiency. Thirdly, economic welfare may be formulated with the intention of achieving specific economic, social and political objectives, which will have an impact on the formulation of those instruments of policy employed to achieve economic efficiency.[32] On the other hand, the public procurement process aims the management of public funds[33]. Most obviously, both public and private procurement has a main

[30] See, for example, Auricchio, "The Problem of Discrimination and Anti-competitive Behavior in the Execution Phase of Public Contracts" (1998) 7 Public Procurement Law Review, pg.113.
[31] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 1, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.
[32] P. Trepte "Regulating Procurement- understanding the ends and means of public procurement regulation", Oxford University Press Inc., New York, 2004 (reprinted in 2006), pg.63-64.
[33] See article 3, point 4/a of PPL.

objective of obtaining value for money, and both public and private purchasers are want to ensure an efficient procurement process[34]. Speaking about public funds in the sense of procurement processes, usually it means the fund at disposal of a contracting authority to conclude a public contract. As a matter of fact, public funds that are "spent" at the end of a procurement process are not only those funds needed for the conclusion of the contract with the winner of the procurement procedure, but they include also the funds used for administrative expenses necessary to perform the public procurement process. Thus, to perform a procurement procedure, the necessary costs for preparatory actions should be considered, as for example costs for preliminary research and comparing[35], in order to prepare necessary (technical and financial) requirements for the good, service or work, as well as the necessary administrative costs, as for example salaries of the employees engaged in preparing the procedure from the planning phase to the signing of the contract, costs for printing or copying of documents, electric energy spent for this reason, etc.[36] In this sense, a public procurement process should aim at the "value for money" and efficacy not only of the funds in disposal for concluding the public contract, but also of the administrative expenses necessary to implement the procurement procedure.

Cost control is a key issue in public (and private) procurement. Value for money remains the fore most objective associated with public procurement in most jurisdictions. Finding the appropriate trade-off point between cost and quality, and long and short term value, remains a project for individual contracting authorities supported by national policy. Broader concepts of value for money look at the economic impact of procurement and ask whether it is sustainable. There are a number of ways of promoting economic sustainability in procurement, from ensuring that contractors are financially sound and tax compliant, to encouraging competition from a diverse range of enterprises, to assessing the effect which a public contract will have on local employment and wages[37]. Looking for the "best value for money" in public (and private) procurement, while keeping under control the process management costs, requires several important decisions.

[34] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 5, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

[35] P. Trepte "Regulating Procurement- understanding the ends and means of public procurement regulation", Oxford University Press Inc., New York, 2004 (reprinted in 2006), pg. 122.

[36] Taking into considerations these kinds of financial costs, some procurement regulations foresee that the economic operators, interested to participate in a procurement procedure, should pay to the contracting authority the cost of copying the tender documentation. See for example article 10 "Standard tender documents" of the Decision of Council of Ministers No. 914, dated 29.12.2014 "On approval of the public procurement rules".

[37] See A. Semple 'A practical guide to public procurement', Oxford University Press, United Kindom, 2015, pg. x.

An example of a decision with direct impact in the management of these costs is to choose between the concentrated and decentralized procurement[38].
The issue whether centralization or decentralization is more appropriate, usually rises up when a certain organization or structure has reached a certain granditude and /or geographical expansion. When organizations grow, local structures cost control becomes more difficult; undoubtedly this problem is solved by assigning budgets to the decentralized structures, even though this measure does not necessarily mean efficient expenditures. A contracting authority can benefit from economies of scale by buying their requirements in bulk. This technique is appropriate for contracting authorities operating in similar sectors or in neighboring locations. This is most likely to be the case for products used from day to day where the various purchasers do not have any entity specific or differential technical requirements[39]. Concentration helps to considerably reduce the costs of purchase, mainly due to:

- Synergies (product of economy of scale, by avoiding duplication of efforts/work, through reduction of legal challenges);

The more standardized the product/service, the bigger the advantage of contracting authorities to aggregate the request, as economic operators have the possibilities to make use of the economy of scale, by operating this way with a lower cost per unit[40].
In public procurement, centralization may save also in the case of doubled costs, such as notice publication costs[41] and other administrative costs.

- Increased expertise and exchange of know-how/resources

Big organizations are commonly characterized by a high degree of expertise of human capital and produce at the same time a huge volume of information. Usually, the higher the level of concentration, the more information/know-how/data is shared among procurement experts. Generally, sharing of information improves the efficacy through the use of up-to-date data/information, share of common problems and solutions.

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[38] According to the Directive 2014/18/EC, paragraph 15 of the Introduction part is stated that "Certain centralized purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, those techniques help increase competition and streamline public purchasing…" See also article 11 of the above mentioned Directive and article 11 of the PPL.

[39] P. Trepte "Regulating Procurement- understanding the ends and means of public procurement regulation", Oxford University Press Inc., New York, 2004 (reprinted in 2006), pg. 125.

[40] Economies of scale emerge when the fix costs make up a considerable part of the production costs, i.e., of the costs that are independent from production scale. Production costs are composed by two components: fix costs and variable costs. The first component does not change through the production (or at least does not change within a certain production interval), while the second increases for every additional unit of production.

[41]Publication of such notices in local or international newspapers is done toward payments. According to the Albanian procurement legislation, the contract notice of the procedures above the high threshold should be published in an international newspaper. See article 38 of PPL.

- Minimization of opportunities for corruption

Favoritism and/or corruption may also happen at the central level. However, the higher visibility of concentrated purchase makes the "blooming" of this phenomenon more difficult[42].

1.2 Components of public procurement, scope of application and exclusions

To create the conditions for a procurement procedure, there should exist at the same time the following four elements:

1 The Contracting Authority (CA);
2 The Public Fund (state budget) available;
3 The need of the Contracting Authority for a public work, good or service;
4 The economic operators.

1.2.1. Contracting authority

In the perspective of a public procurement process, a contracting authority is the one which run the process, aiming at awarding a public contract for supplies, services, or public works. The modern state employs a wide variety of institutional forms to carry out its functions; and this may make it difficult and uncertain to establish an appropriate boundary for rules that apply to "public bodies" but not to the "private" ones, including defining the general scope of administrative/public bodies for states that adopt a general distinction between the administrative/public law and private law[43].
Nevertheless, once a body falls within the definition of a 'contracting authority', all of its purchases of goods, works and services will be subject to the procedural requirements, even if these purchases are made for the purposes of tasks that are not, or even mostly not, in the general interest[44]. Once covered by the procurement regulations (the procurement Directive, or a national procurement law, such as the Albanian case), the authority is covered for all purchases within the definition of the given regulation.

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[42] According to the 2005 worldwide study on corruption entitled "Resistance to corruption in the public sector", the international Consortium for Governmental Management of Finances (ICGMF) recommended a series of measures to reduce corruption, including the measure "to cure procurement propense to corruption by centralizing purchases". ICGMF suggested that, whenever possible, to concentrate purchases in order to reduce the opportunities for extra-bid negotiation or other forms of corruption and to use electronic purchase, which reduce the freedom of actions with processes and limit personal interventions.
[43] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 5, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.
[44] See Case C-44/96 Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GmbH ('Mannesmann') (1998) ECR I-73, paras 30-35.

Anyway, 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[45] or a change in its legal status[46]. The financing of the contracting authority may also change over time[47]. These all have an effect on the inclusion of the body within the definition of the procurement rules (a Directive, or a national law, in case of Albania), and therefore it is not possible to say, once and for all, whether a body is covered or not covered by these rules.

The applicable rules on public procurement, generally, provide for the definition of the "contracting authority". So, for example, the Albanian public procurement law, provides in article 3, point 14 that the term 'Contracting authorities' (in the public sector) means all those entities subject to the PPL for the execution of their public contracts. Namely, the following:

a. Constitutional institutions, other central institutions, independent central institutions and local governing units,

b. Any bodies:

(i) Established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(ii) Having legal personality; and

(iii) Financed, for the most part, by the State, regional or local authorities, or other public bodies; or subject to management supervision by those 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 public bodies;

c. Associations formed by one or several of such authorities or one or several of such public bodies.

The same definition is provided also by article 1, point 9 of the Directive 2004/18/EC[48]. On the other hand, the Directive 2014/24/EU goes further with its definitions, because

[45] See Case C-470/99 Universale –Bau AG, Bietergemeinschaft: 1) Hinteregger & Söhne Bauges mbH Salzburg, 2) ÖSTŰ-STETTIN Hoch-und Tiefbau GmbH v Entsorgungsbetriebe Simmering GbmH ('Univesale – Bau') [2002] ECR I-11617.

[46] See Case C-373/00 Adofl Truley GmbH v Bestattung Wien GmbH ('Truley') [2003] ECR I-1931.

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

[48] According to the article 1/9 of Directive 2004/18/EC 'Contracting authorities' means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.
A "body governed by public law" means anybody:
(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
(b) having legal personality; and
(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those 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.

except for that provided from the Directive 2004/18/EC, it is providing also for the definitions of the "central government authorities" and "sub-central contracting authorities"[49].

The major distinction that must be made is between the two main categories of public or contracting authority, namely:

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

1.2.1.1 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 the bodies that exercise legislative, executive and judicial powers[50].

In the *Vlaamse Raad* case[51], 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. The Court found that "the term 'the State' referred to by the provision necessarily encompasses all the bodies, which exercise legislative, executive and judicial powers…".[52]

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 categorization that the entity has been given by internal law. In the *Beentjes* case[53], 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[54]. As a result, a body such as the awarding authority – whose composition and functions are

[49] See Article 2 of the Directive 2014/24/EU

[50] To include all categories of state institutions, exercising legislative, executive, or judicial powers, Albanian PPL has listed them as "constitutional institutions, other central institutions, independent central institutions and local governing units".

[51] Case C-323/96 Commission of the European Communities v Kingdom of Belgium ('Vlaamse Raad') [1998] ECR I-5063. Under the national law on procurement, which had apparently not correctly transposed the Works Directive of the time, the rules applied only to the executive authority.

[52] See Case C-323/96, Vlaamse Raad, ibid, at para 27.

[53] Case 31/87 Gebroeders Beentjes BV v State of the Netherlands ('Beentjes') [1998] ECR 46 35.

[54] The same position is expressed by ECJ in the Case C-360/96 Gemeente Arnhem and GemeenteRheden v BFI Holding BV ('Arnhem') [1998] ECR I-6821, in the para 62 of which has been found that "…the term 'Contracting Authority', must be interpreted in functional terms and that, in view of the need, no distinction should be drawn by reference to the legal form of the provisions setting up the entity and specifying the needs it is to meet…".

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.
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[55]. 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[56].

1.2.1.1.a Associations of Contracting Authorities

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[57]. As such the ECJ in the Arnhem[58] case, found that the term 'association' had only a residual function and that any Contracting Authority will fall within either the definition of 'State, regional or local authorities', or within the definition of 'a body governed by public law'[59]. Thus any joint purchasing will be done in the name of all or one or more (lead) authorities as contracting authorities[60].

[55] See Case 44/96 (n.44 above), para 32.
[56] In the Case C-126/03 Commission of the European Communities v Federal Republic of Germany ('City of Munich') ECR [2004] I-11197, (see para 18), ECJ found that "…it did not matter that the operation of the Munich North thermal power station was an independent economic activity, subject to competition, nor that the Contracting Authority intended to operate as a provider of services itself and that the contract in question aimed, in that context, to subcontract a part of the activities to a third party. The fact that it was a public authority meant that 'whatever the nature and the context of the contract at issue may be, it constitutes a public contract' within the meaning of, in that case, Article 1 (a) the Service Directive".
[57] See Case C 360/96 (n.54 above), Opinion of Advocate General La Pergola, para 40.
[58] Case C 360/96, ibid, at para 27.
[59] The same ruling is done from the Albanian PPL at article 3/14 when providing that a contracting authority is also "…associations formed by one or several of such authorities or one or several of such public bodies", meaning that each of the members of such 'association' should fall under one of the definitions; 'public authority', or 'bodies governed by public law'.
[60] P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 101, para 2.19.

1.2.1.1.b Central and joint purchasing

Public purchasers have recognized 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 neighboring 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[61]. A central purchasing body is a 'Contracting authority', which 'acquires supplies and/or services intended for contracting authorities', or 'awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities'[62].

1.2.1.2 Bodies governed by public law

The concept of a body governed by public law is intended to bring within the Public Sector Directive all entities that are not part of the "traditional state" apparatus of government departments and local authorities, but are nevertheless closely dependent on the state such as there is a risk that they will be influenced to discriminate in their purchasing.
A 'body governed by public law' does not have a simple definition as in the case of a 'public authority'; 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 centers on the three *cumulative* conditions required by the Directive[63] to indicate the existence of a body governed by public law[64]. The ECJ has consistently held that a body must satisfy all three of these conditions to fall within the definition[65]. The ECJ had to interpret this notion of the "body governed by public law" and the key to understanding its case-law is summarized in the Adolf Truley case[66], where it is found that *"…Given the double objective of introducing competition and transparency, the*

[61] See note no.40 above.
[62] See Art 1/10 of the Directive 2004/18/EC.
[63] As analyzed above, the Albanian PPL, provide the same ruling in this regard (see article 3/14/b of PPL).
[64] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 101, para 2.20.
[65] See for example Case C-44/96 Mannesmann (n.44 above) at para 12, where the ECJ found that the conditions provided by the Directive in this regard are cumulative.
[66] See R. Noguellou "Scope and Coverage of the EU Procurement Directives", Part I 'Substantive EU Public Procurement Law', "EU Public Contract Law- Public Procurement and beyond", Administrative Law, Publisher: Bruylant, Bruxelles 2014, pg. 16.

concept of a body governed by public law must be interpreted as having a broad meaning."[67]

Bodies governed by public law are those that fulfill the following conditions:

- established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character,
- having legal personality, and
- financed, for the most part, by the state, or regional or local authorities, or other bodies governed by public law; or subject to management supervision by those 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.

It is important to stress that[68] "an entity's private law status does not constitute a criterion for precluding it from being classified as a contracting authority."[69] Moreover, the fact that the entity carries out other kinds of activities is irrelevant for its qualification as a "body governed by public law", even if these activities are more important than the ones carried out to meet needs in the general interest.[70] In that case, all contracts entered into by the contracting authority, whether it is to meet needs in the general interest or not, are subject to the rules of the Directive.[71]

1.2.1.3 Condition for a body governed by public law

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[72].

There are two main issues that are relevant, and these include the definition of (i) needs in the general interest and

(ii) Not having an industrial or commercial character.

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[67] See Case 373/00 Truley (n.46 above), para 43.

[68] See R. Noguellou "Scope and Coverage of the EU Procurement Directives", Part I 'Substantive EU Public Procurement Law', "EU Public Contract Law- Public Procurement and beyond", Administrative Law, Publisher: Bruylant, Bruxelles 2014, pg. 17.

[69] Case C-214/00, Commission v. Spain [2003] ECR I‑466.

[70] See Case 373/00 Truley (n.46 above).

[71] See Case C-44/96, Mannesmann (n. 44 above) and Case C-393/06, Ing. Aigner [2008] ECR I‑2339.

[72] See Case 327/82 Ekro BV Vee-en Vleeshandel v Produktschap voor Vee en Vlees [1984] ECR 107, para 11, case C 287/98 Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster [2000] ECR I-6917, para 43, and case C 357/98 The Queen v Secretary of State for the Home Department, ex parte Nana yaa Konadu Yiadom [2000] ECR I – 9265, para 26.

'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[73]. That does not mean that these needs will always be satisfied otherwise than by the private market or that the state's choice will always be decisive[74]. Indeed, it is precisely these issues of the extent to which needs in the general interest may themselves have an industrial or commercial character or the extent to which such needs are, in fact, satisfied by the private market, which has engendered the extensive case law in this area[75]. 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 licenses 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[76].
- Another example is 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[77]. 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[78].
- In other examples, it was found that regional development agencies and other more specialized undertakings that were designed to attract investment to a particular

[73] See for example case C-360/96 (n.54 above) at para 50 and 51 and joined cases C-223/99 and C-260/99 Agorá Srl and Excelsior Snc di Pedrotti Bruna & C v Ente Autonomo Fiera Internazionale di Milano and Ciftat Soc.coo.arl ('Agora')[2001] ECR 3605, at para 37.

[74] See, for example, case C-380/98 (n.47 above) where the inclusion of the universities on the list was challenged.

[75] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 105, para 2.26.

[76] See case C-44/96 *Mannesmann* [1998] ECR I-73 (n.44 above)

[77] See Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821 (n.54 above).

[78] See Case C-373/00 *Adolf Truley* [2003] ECR I-1931 (n.46 above).

location could fall within the definition of general interest, 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[79].

1/1) 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. Activities with an industrial or commercial character are generally activities that are carried out for profit in competitive markets. One of the fundamental questions asked of the Court in this respect was whether the term "not having an industrial or commercial character" limits the term "needs in the general interest" to those, which are not of an industrial or commercial character or whether it means that all needs in the general interest are necessarily not industrial or commercial in character[80]. The ECJ in the Arnhem case[81] has 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[82], 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

[79] See for example cases C-223/99 and C-260/99 *Agorà* [2001] ECR 3605; case C-18/01 *Korhonen* [2003] ECR I-5321).
[80] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 107, para 2.32.
[81] See Case C-360/96 *Gemeente Arnhem* [1998] ECR I-6821 (n.54 above).
[82] See case C-44/96 *Mannesmann* [1998] ECR I-73 (n.44 above)

irrelevant, provided that the entity continues to attend to the needs that it is specifically required to meet[83].
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. In a sense, what makes the contract a 'public' contract for the purpose of the Directives is the fact that it is entered into by a public entity or by an entity, which fulfills the conditions of being a body governed by public law and, more particularly, carries out activities that meet needs in the general interest not having an industrial or commercial character[84].
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.

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[85]. 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 onlyissue is whether it has a legal personality[86].

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

[83] In the case C-373/00 *Adolf Truley* [2003] ECR I-1931 (n.46 above), the argument that the condition did not apply because the general interest services were only a small part of the overall services performed was also rejected (see para 55-56).
[84] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 110.
[85] Ibid, para 2.60.
[86] See case C-283/00 Commission v Spain [2003] ECR I-11697 in which EJC 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.

- financial,
- managerial, or
- Supervisory.

This condition is satisfied where only one of these three criteria is met[87].

3/1) Financial dependency

The term 'financed for the most part' means financed by 'more than half'[88]. However, 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[89]. The ECJ has also stated that the "financing" in question does not have to be direct. Thus in Case C-337/06, *Bayerischer Rundfunk and others v GEWA Gesellschaft für Gebaüdereinigung und Wartung*[90] the ECJ indicated that broadcasting authorities funded through a state-imposed license fee paid by all those with receivers, regardless of the actual broadcasting services each receives, is financed by the state.

In the Cambridge case[91], payments in the form of awards or grants for the support of research work made 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 organization 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

[87] See article 1(9)(c) of the Directive, which provides that: "…financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those 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."

[88] See case C 380/98 (no. 47 above) para 33.

[89] Ibid, at para 21.

[90] See case C-337/06, *Bayerischer Rundfunk and others v GEWA Gesellschaft für Gebaüdereinigung und Wartung* [2007] ECR I-11173. The same position is held also in case C-300/07 Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg, ECR [2009].

[91] See footnote no. 47 above.

to coincide with the teaching and research activities of the university. The contracting authority has in fact an economic interest in providing the service.

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. In a sense, fulfillment of this condition represents the most common understanding of the idea of a state-owned and controlled enterprise[92]. 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[93].

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[94].

In the Truley case[95], the Court held that 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 authorized 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

[92] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 124, para 2.65.
[93] See Case C-306/97 *Connemara Machine Turf Co Ltd v Coillte Teoranta* [1998] ECR I-8761.
[94] See case C-237/99 Commission of the European Communities v French Republic [2001] ECR 939, paras 48 and 49.
[95] See Case C-373/00 (no. 46 above).

supervision that permits the public authorities to influence or interfere with procurement procedures.

1.2.2 Economic Operators

To make a public procurement procedure happen, two main stakeholders (parties) should be acting; a public buyer named as the contracting authority, on one side and a private provider, named as the economic operator, on the other side. The Albanian public procurement law does provide for a definition of the "economic operator' concept[96], which is as follows:

'Contractor', 'supplier' and 'service provider' means any natural or legal person or public entity or group of such persons and/or bodies, which offers on the market, respectively, the execution of works and/or a work, products or services.

An 'economic operator' shall cover equally the concepts of contractor, supplier and service provider, without any kind of distinction.

a) An economic operator, who has submitted a tender, shall be designated a 'tenderer'.

b) One, who has sought an invitation to take part in a restricted or negotiated procedure, shall be designated as a 'candidate'.[97]

1.2.2.1 Legal form of the economic operator

As provided by Albanian procurement rules, an economic operator can be any natural or legal person or public entity or group of such persons and/or bodies, which offer on the market, respectively, the execution of works, products or services. This definition of the 'economic operator' concept clearly envisages both individuals (as natural persons) and companies (as legal persons[98]). As it is clearly defined by the procurement rules, (both PPL and corresponding procurement Directives) public entities may also be tenderers and even the fact that they may benefit from the state aid does not preclude them from

[96] See article 3, points 12 and 13 of PPL.

[97] The same definition is provided by Directive 2004/18/EC in Art.1/8, which foresees that 'The terms "contractor", "supplier" and "service provider" mean any natural or legal person or public entity or group of such persons and/or bodies, which offers on the market, respectively, the execution of works and/or a work, products or services.
The term "economic operator" shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification.
An economic operator, who has submitted a tender shall be designated a "tenderer". One, which has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue, shall be designated a "candidate".'

[98] According to the article 44/1, para 2 of the PPL and article 4/1, para 2 of the Directive 2004/18/EC "…in the case of public service and public works contracts as well as public supply contracts covering in addition services and/or siting and installation operations, legal persons may be required to indicate in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question".

competing with other 'private' tenderers[99]. In some sectors, notably in respect of utilities activities, contracting entities are themselves actively involved in providing services as economic operators, regardless of whether they are simultaneously concerned with providing for needs in the general interest[100]. Many contracting authorities will also set up 'private law' companies either on their own, or jointly[101] with other contracting entities or with private parties[102] in order to provide specific services. A contracting authority and its 'private law' subsidiary, even when it is itself a body governed by public law and therefore a contracting authority in its own right, will almost invariably be independent legal persons. Consequently, in such situations contracts between them will be contracts falling within the scope of the Directive[103]. In such situations, it is imperative that the subsidiary can be classified as a tenderer for the purpose of the Directives[104].

1.2.2.2 Group of economic operators

The definition of the economic operators, as prescribed above includes the 'group of natural of legal persons and/or bodies'. Procurement rules, except for the definition, explicitly provide[105] that groups of economic operators may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, the group of economic operators may not be required by the contracting authorities to assume a specific legal form; however, the group selected may be required to do so when it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract[106].

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[99] See case C-94/99 ARGE Gewässerschutz v Bundesministerium für Land-und-Forstwirtschaft [2000] ECR I-11037.

[100] See case C-126/03 (no.56 above).

[101] See case C-107/98 Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Regio Emilia [1999] ECR I -8121.

[102] See case C-26/03 Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna ('Stadt Halle') [2005] ECR I-1.

[103] See Case C-231-03 Consorzio Aziende Metano (Coname) v Padania Acque SpA ('Coname') [2005].

[104] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 324, para 6.08.

[105] PPL in article 44/2 provides that "Groups of economic operators may submit tenders or put themselves forward as candidates….". The same is provided by the Public Sector Directive in article 4/2.

[106] This provision is according to the article 4/2 of the Directive 2004/18/EC while according to the article 44/2 of the Albanian PPL, in order to submit a tender or a request to participate, the group of economic operators should be required by the Contracting Authority to assume specific legal form, as provided in the secondary legislation. On the other hand, article 74 of the Decision of Council of Ministers No. 914, date 29.12.2014 "On approval of the public procurement rules", explicitly provides for strict rules on how a joint group of economic operators should submit a tender, excluding from the right to participate as member of such a group, any economic operator, who does not intend to execute any part of the public contract. This stricter provision of the PPL is explained with the need of the contracting authority to put insurance mechanisms for the satisfactory performance of the contract, related with the legal and economic environment where this law is applied.

1.2.3 Public fund

Considering the fact that the Albanian public institutions and/or other entities, which fall under the provisions of the PPL, are eligible to and/or can profit funds from sources other than the state budget, such as for example international donors, PPL has explicitly provided for a definition of the 'public fund' notion[107]. According to the PPL, public fund means:

a) Any monetary value of the State Budget determined to be used for public contracts;
b) Any monetary value of the local budget determined to be used for public contracts;
c) Aid or credit funds provided by foreign donors, based on international agreements, which do not require implementation of other procedures different from this law;
d) Incomes from state, local enterprises, marketing associations and any other entity, where the State has the majority of the capital shares.

This public fund definition is strictly connected to the contracting authority definition (analyzed here above), and it should be "read" and interpreted in this context.
The two first definitions are very clear as they refer to the budget of the public authorities (central or local), which are determined to be used for public contract.
The third situation intends to include under the definition of the 'public fund' even the aid or credit funds provided by foreign donors, based on international agreements, providing the condition that these international agreements do explicitly require the application of the Albanian PPL. In this case, the definition as 'public fund' is not determined by the nature of the fund per se, but by the nature of the agreement, which provides this fund.
The last situation, which defines a notion of the 'public fund', is strictly related to the definition of a 'body governed by public law', and more specifically with the condition of the 'financial dependency' from the state as analyzed here above.

1.2.4 Public contracts

If all the conditions needed to conduct a public procurement procedure are in place, most probably at the end of the given procedure, a contract will be concluded. What is decisive is whether the procurement is the subject of negotiations for entering into a contract. Thus, the procurement rules cover both framework agreements and options, even if these are first to be fulfilled at a later date, or perhaps never fulfilled at all[108].
The distinction between contracts and other measures, such as the legislative or regulatory acts and administrative decisions, is obviously quite typical in defining the

[107] See article 3/4 of the PPL.
[108] S.T. Poulsen, P.S. Jakobsen and S.E. Kalsmose-Hjelmborg, "EU Public Procurement Law; The Public Sector Directive, The Utilities Directive, 2nd Edition", DJØF Publishing, Copenhagen 2012, pg. 183.

scope of application of the EU public procurement law[109]. In the Commission/Ireland 'Ambulances' case[110], the ECJ indicated that the provision of services to the general public by a public authority in the exercise of its own powers derived directly from statute and applying its own funds was not regulated by the EU public procurement directives, although a contribution is paid for that purpose from another authority, covering part of the costs of those services. Although in a different context (the *in house* exception[111]), in the *Asemfo' case*[112] the Court considered both the fact that the building service provider was required by law to carry out the orders given to it by the public authorities, and the fact that the service provider was not free to set the tariff for its services as relevant for excluding the application of EU public procurement law. A number of aspects may potentially come into play here, like the fact that all the entities involved in providing the service were entities of public law, or the fact that costs only were covered, and no profit was made by the service provider (on this contrast *Commission/Italy* C-119/06; *Ordine degli Architetti delle Province di Milano e Lodi* C-399/98 also addressed the relevance of the public law aspect in an agreement between a contracting authority and a private party)[113].

In the point of view of the public procurement regulatory framework, 'public contracts' are contracts for pecuniary interest concluded by exchange of written communication between one or more economic operators and one or more contracting authorities and

[109] R. Caranta Questionnaire General Topic 3 "Public Procurement Law: Limitations, Opportunities and Paradoxes", The XXVI FIDE Congress in Copenhagen 2014 Congress Publications Vol. 3; DJØF Publishing, Copenhagen 2014, pg 39.

[110] See case C-532/03 Commission of the European Communities v Ireland, [2007] ECR I-11353

[111] There are two situations of exeptions created by the Court of Justice, "inspired" by the 'in- house contracts' and in concrete: a) in the first situation, there are two main criteria for the in-house arrangements; first, the contracting authority must exercise control over the in-house entity, which is similar to the control it exercises over its own departments, and second, the essential part of the activities of the in-house entity must be performed for the benefit of the contracting authority (see 'Teckal' case, no 100 above); b) the second type of exception from the procurement rules created by the ECJ, inspired by the in-house contracts, is named the public-public cooperation. The ECJ considered that exempting a public-public arrangement from the procurement directives could be justified by the fact that an in-house provider, controlled by the same contracting authorities, could also have been exempted (see case C-480/06 *Commission/Germany)*. The conditions for the exception based on public-public cooperation to apply as set out by the ECJ (See See cases C-159/11 *Ordine degli Ingegneri della Provincia di Lecce and Others*, paragraphs 34 and 35, and C-386/11 *Piepenbrock*, paragraphs 36 and 37) are that (a) the aim of the contract is to ensure that a public task that all participants have to perform is carried out, (b) the contract is concluded exclusively by public entities, without the participation of a private party, (c) no private provider of services is placed in a position of advantage vis-à-vis competitors and (d) the implementation of the cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest.

[112] See Case 295/05, Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado 'Asemfo' [2007] ECR I-2999.

[113] R. Caranta Questionnaire General Topic 3 "Public Procurement Law: Limitations, Opportunities and Paradoxes", The XXVI FIDE Congress in Copenhagen 2014 Congress Publications, Vol. 3, DJØF Publishing, Copenhagen 2014, pg 39.

having as their object the execution of works, the supply of goods or the provision of services within the meaning of the said rules[114].

As made clear by the 'public contract' definition, there must be a "contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities". According to this definition, a public contract covered by the procurement rules, should meet three main conditions:

- 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, furthermore, be for 'pecuniary interest'. This means that there must be some kind of consideration for the contractor. This can take different forms, for example, the fact for a public administration to waive recovery of a fiscal contribution in exchange of some infrastructure works constitutes the pecuniary nature of the contract[115]. The fact that the payment only covers the fees of the contractor, but doesn't cover any profit, doesn't exclude the pecuniary nature of the contract.[116]
- The contract must be in writing. Since the requirement is for a contract in writing, it would seem that an oral contract may escape the provisions of the Directive. However, it is unlikely that any contract, which would otherwise fall within the terms of the Directives, could be concluded orally, not only for the reasons relating to the complexity of such contracts and the specific requirements of the contracting entities but also because of the amounts of pecuniary interest involved[117]. It is difficult to imagine that arrangements where a contracting authority is a party and the value of which exceeds the threshold laid down in the directives would not be recorded in writing[118]. However, in any case, even arrangements that are not written are subject to the provisions of the Treaty[119].
- 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 organization, for example, would not ordinarily be covered by the procurement rules[120].

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[114] This definition is the same for both acts we are discussing in this Chapter; Albanian PPL and Directive 2004/18/EC. See respectively article 3(2) of the PPL and article 1 (2) (a) of the Directive. The same definition is provided also by the new Public Sector Directive 2014/24/EU, see article 2(5).

[115] Case C-399/98, Ordine degli Architetti delle Province di Milano e Lodi and Others v Comune di Milano [2001] ECR I-5409.

[116] Case C-159/11, Azienda Sanitaria Locale di Lecce and Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others [2012].

[117] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 186, para 4.06.

[118] A. Tokár Institutional Report, "Public Procurement Law: Limitations, Opportunities and Paradoxes", The XXVI FIDE Congress in Copenhagen 2014 Congress Publications Vol. 3, DJØF Publishing, Copenhagen 2014, pg 184.

[119] See case C-532/03 (no. 110 above).

[120] This rule is valuable only if we refer to the relationship between departments of the same organization. As soon as these structures become separate legal entities, however, any arrangement between them

This is because there would normally not be any contractual relationship between the various departments of a single organization. As such, the procurement rules cannot be applied to unilateral relationships, for instance when an entity's intervention derives from its statute[121]. The question on whether or not the relationship relies on a proper contract can sometimes be asked[122]. In an ECJ case, the Court held that: "[…] the requirement for the application of the directives governing the award of public service contracts relating to the existence of a contract was not met where the company in issue in the case had no choice as to the acceptance of a demand made by the competent authorities in question or as to the tariff for services."[123]. The Court later reduced the impact of this solution, stating that it was applicable when the administration was the only possible customer of the company[124]. On the other hand, an arrangement may be covered even when it is not a contract under the domestic law definition of a contract: as with other concepts under the Directives, an EU law definition of the concept of a contract applies[125]. This helps to ensure that the Directives catch all acquisitions involving a risk of national preferences and to avoid significant divergences in coverage based on the irrelevant criterion of the domestic law definition of contract[126].

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. This situation has been confirmed by the European Court of Justice (ECJ). In the rather important case of *Teckal (see footnote no 100 above)*, 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.

[121] See Case C‑532/03, (no.110 above); See also A.Brown «The Commission Loses another Action against Ireland Owing to Lack of Evidence: A Note on Case C-532/03 Commission v Ireland » in Public Procurement Law Review, 2008, NA9.

[122] See R. Noguellou "Scope and Coverage of the EU Procurement Directives", Part I 'Substantive EU Public Procurement Law', "EU Public Contract Law- Public Procurement and beyond", Administrative Law, Publisher: Bruylant, Bruxelles 2014, pg. 25.

[123] See Case 295/05, 'Asemfo' (no. 112 above), paragraph 51.

[124] Case C‑220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia [2007] ECR I-12175.

[125] See case C-220/05, Jean Auroux v Comune de Roanne [2007] E.C.R. I-00385, para.40 and Case C‑220/06, Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia [2007] ECR I-12175, para.50, where the ECJ stated that the classification of an arrangement as contractual or otherwise under domestic law was irrelevant for determining the scope of the Directive.

[126] See also S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 6-05.

1.2.4.1 'Procurement' contracts

The procurement legislation (neither the Public Sector Directive 2004/18, nor the PPL) does not give any particular definition of a 'procurement' contract, but only certain contracts, in concrete three types of contracts fall within the scope of this legislation referring to them as 'public works' contracts, 'public supply' contracts and 'public services' contracts. On the other hand, the new Public Sector Directive 2014/24 in its article 1(2) does provide for a new definition: 'Procurement within the meaning of this 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'[127]. The definition of procurement brings an additional requirement – 'acquisition'– to the definition of public contract as provided by the Directive[128].

1.2.4.1.a Public works contracts

The procurement rules do give a definition of 'public works contracts', according to which works contracts are public contracts having as their object either the execution, or both the design and execution of works or a work, or the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole, which is sufficient of itself to fulfill an economic or technical function.[129] As

[127] The procurement concept is elaborated also at the Recital of the Directive 2014/24/EU, which provides that: 'The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself; that clarification should not however broaden the scope of this Directive compared to that of Directive 2004/18/EC. The Union rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this Directive whether they are implemented through purchase, leasing or other contractual forms.

[128] R. Caranta "Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts", François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg 69.

[129] This is the definition of public works contracts and "works" concept provided by the Albanian PPL in the articles 3(8) and (9). This definition is the same as the one of the Directive 2004/18/EC, with the only difference that that Directive does refer to "a list of activities provided by its Annex one". More specifically, the definition given by the Directive in article 1 (2) (b), in this respect is "Public works contracts" are public contracts having as their object either the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex I or a work, or the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authority. A "work" means the outcome of building or civil engineering works taken as a whole, which is sufficient of itself to fulfill an economic or technical function. This difference is explained by the fact that Albania is not an EU Member State and as such the Annexes of the Directive are not applicable. Almost the same definition is provided also by the Directive 2014/24/EU, which changes somehow the wording, but not the content. See article 2(6).

it is clearly stated by the given definition, the 'design and build' contracts also fall within this definition, as the possibility of including design works into a works contract is also foreseen. This could include for example, contracts covering the designation of a project as well as its execution.

For the second part of the definition, a 'work' is the outcome of building or civil engineering works taken as a whole that is sufficient of itself to fulfill an economic and technical function. This definition is relevant for a number of reasons, notably in the context of the realization of works by any means and for the purpose of assessing the threshold values[130] and consequently, in deciding whether a single requirement for works has been split up with a view to bringing contracts below the relevant threshold value.[131]

1.2.4.1.b Public supplies contract

According to the procurement rules, 'public supply contracts' are public contracts having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products[132].

Except for the definition of the public supply contracts, the Albanian PPL does provide for a definition of 'products' as well. According to article 3 (7) of the PPL, "a 'product' is any material thing, which can be economically evaluated".[133]

Although there is no a definition given by Directive, for what will be called a 'product' or 'good', the ECJ' jurisprudence has defined goods as products, which can be valued in money[134]. Despite this, difficulties have arisen over what may be termed 'intangible' goods, which includes the transmission of electronic signals. The ECJ has held that the broadcasting[135] and transmission[136] of television signals are services, not goods. Electricity, on the other hand, is defined as goods.[137] Production and broadcast can thus

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[130] See for example case C -16/98 Commission of the European Communities v French Republic (Sydev) [2000] ECR I-8315.

[131] P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 213, para 4.54.

[132] This is the definition of public supply contracts provided by the Albanian PPL in the article 3(6). This definition is the same with the one of the Directive 2004/18/EC, which provide in the article 1(2) (d) that 'Public supply contracts" are public contracts other than those referred to in (b) having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products. The same definition is provided by the Directive 2014/24/EU, see article 2 (8).

[133] Directive 2004/18/EC does not define the term "product" or 'good". The Court's jurisprudence in the context of the free movement of goods would seem, however, to consider goods to be products, which can be valued in money and which are capable as such of forming the subject of commercial transactions. See for example Cf case 7/68 Commission v Italy [1968] ECR 423.

[134] See the footnote no. 129 above.

[135] See case 155/73 Giuseppe Sacchi [1974] ECR 409.

[136] See case 52/79 Procureur du Roi v Marc J.V.C. Debauve and others [1980] ECR 833.

[137] See case C-393/92 Municipality of Almelo and others v NV EnergiebedrijfIjsselmij [1994] ECR I-1477.

give raise both to the goods and services. Similarly, some products could be considered to be both goods and services as it is for example IT software.[138]

1.2.4.1.c Public service contracts

'Public service contracts' are public contracts having as their object the provision of services.[139] Even though this definition does not differ too much in the content from the one of the Public Sector Directive, it is not exactly the same. More specifically, article 1 (2) (d) of the Directive provides that "Public service contracts" are public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II. It seems that the aim of the Directive giving such a definition is to cover all contracts for pecuniary interest, which do not fall within the definitions of works and supplies contracts[140]. Also, as in the case of the work contracts, the Directive does refer to one of its Annexes for the list of services covered[141].

1.2.4.2 Mixed contracts

The public procurement legislation (both Public Sector Directive and PPL) contains provisions on how to categorize 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. 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 categorized depends on the subjects and types of contracts, which are mixed. On the other hand, the new Public Sector Directive 2014/24/EU, does provide in a specific article[142] for a definition of "mixed procurement", according to which 'contracts, which 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 characterizes the main subject of the contract in question'.
Article 3(2) is dedicated to mixed procurements in the traditional sense of mixes of works, supplies, and services[143]. Concerning other mixed contracts, Article 3(3)

[138] P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 224, para 4.84.
[139] This is the definition of public service contracts provided by the Albanian PPL in the article 3(5).
[140] The Directive 2014/24/EU changes somehow this definition, providing that 'public service contracts' means public contracts having as their object the provision of services other than design services covered by the definition of woks contracts. See article 2 (9).
[141] The services covered are defined by reference to the United Nations' Central Product Classifications (CPC) and the Annex referred to above set out the services by name together with the relevant CPC category.
[142] See article 2(3) of the Directive 2014/24/EU.
[143] These contracts were already regulated in Directive 2004/18/EC, whose provisions are basically repeated with the adjustments necessary after social and special services have taken the place of non-priority services.

introduces a different regime according to whether the different parts of a given contract are objectively separable or not[144]. This implies that the contracting authorities are now expressly empowered to shape complex contractual arrangements provided that this does not translate in bringing the resulting contract outside the scope of application of the Public Sector Directive[145].

1.2.4.2.a Supplies/services

Essentially, contracts containing elements of both products and services will be treated as one or the other type of contract depending on the value represented by each element[146]. According to PPL, 'a public contract having as its object both products and services shall be considered to be a 'public service contract' if the value of the services in question exceeds that of the products covered by the contract[147]. Based on this definition, it is understood that where the value is equal, it will be considered as a supplies contract.

1.2.4.2.b Works/services

In the case of works and services, the procurement rules do not provide for a value test, as above, but include a test based on the principal object of the contract, as opposed to considerations that are merely incidental to that object[148]. As such, a public contract having as its object services and including works that are only incidental to the principal object of the contract shall be considered to be a "public service contract".[149] The

[144] According to Recital 11 of the new Directive 2014/24/EU it should be clarified "how contracting authorities should determine whether the different parts are separable or not. Such clarification should be based on the relevant case-law of the Court of Justice. The determination should be carried out on a case-by-case basis; expressed or presumed intentions of the contracting authority to regard the various aspects making up a mixed contract as indivisible should not be sufficient, but should be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract. Such a justified need to conclude a single contract could for instance be present in the case of the construction of one single building, a part of which is to be used directly by the contracting authority concerned and another part to be operated on a concessions basis, for instance to provide parking facilities to the public. It should be clarified that the need to conclude a single contract may be due to reasons both of a technical nature and of an economic nature".

[145] R. Caranta "Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts", François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg 79.

[146] See case Case C-300/07 Hans & Christophorus Oymanns GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg, ECR [2009].

[147] See article 3 (6) of the PPL.

[148] P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 236, para 4.109.

[149] See article 3(5) of the PPL and article 1(2) (d) para 2 of the Directive 2004/18/EC.

'principal object' test is clearly inspired by the decision of the ECJ in the *Gestión Hotelera* case[150].

1.2.4.2.c Works/supplies

According to PPL[151], 'a public contract having as its object the supply of products, which covers also, as an incidental matter, sitting and installation operations shall be considered to be a 'public supply contract' where the value of 'goods' exceeds the value of sitting and installation'. As it is clearly stated, the Albanian procurement rules, as in the case of mixed contracts with services and supplies, analyzed here above, even in the case of mixed contracts with works and supplies, will use the 'value test' to name the contract. On the other hand, under the Public Sector Directive, 'a public contract having as its object the supply of products and which also covers, as an incidental matter, siting and installation operations shall be considered to be a 'public supply contract'[152]. 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. According to the Directive, 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[153].

1.2.5 Exemptions[154]

It is also necessary for regulatory regimes to consider what types of transactions should be covered – how procurement should be defined in principle, and whether any transactions falling within the basic definition should be excluded. Some of these matters of cover might be dealt with by specific exclusions from the scope of the

[150] See Case 331/92 *Gestión Hotelera* [1994] ECR I-1329. 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.

[151] See article 3(6) of the PPL.

[152] See article 1 (2) (c), para 2 of the Directive 2004/18/EC.

[153] P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 238, para 4.112.

[154] Except the specific exemptions, the Public Sector Directives (both 2004/18/EC [article 19] and 2014/24/EU [article 20]) do provide also for 'reserved contracts', which are not excluded from the scope of the Directive but are subject to specific conditions of eligibility being imposed on the participants. The Albanian PPL does not envisage at all this type of contract.

procurement legislation, rather than through the definition of its concepts[155]. As such even where contracts fall within the general definition of a public contract, some of these contracts will be excluded from the scope of the procurement legislation (both Public Sector Directive[156] and the Albanian PPL[157]) 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. In any case, the ECJ has strictly interpreted the exceptions to the provisions of the Directives (both Public Sector Directive and the Utilities Directive)[158].

1.2.5.1 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.

1.2.5.1.a The Defense procurement

Defense 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 Defense 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[159]. Until 2009, certain military products were exempt from the provisions of the Directive 2004/18/EC (so-called Public Sector Directive). Since 2009, however, those exempt products and related

[155] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 30, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

[156] See Section 3 "Excluded contracts", (article 12-18) of the Directive 2004/18/EC. A list of types and/or contracts excluded is foreseen by the Directive 2014/24/EU, under the Section 3 "Exclusions". Exclusions have to a considerable extent been reviewed by Directive 2014/24/EU.

[157] See articles 5-9 of the PPL.

[158] See cases Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609.

[159] See article 10 of the Directive 2004/18/EC. The same position is held by the Albanian PPL, in article 5 of which is stated that 'The PPL shall apply to all public contracts awarded in the field of defense. The provisions of the PPL shall not apply in the following cases:

(a) when CA shall be obliged to supply information whose disclosure is contrary to the essential interests of national security;

(b) for the purchase of arms, munitions and war material, or related services. This exception shall not adversely affect the conditions of competition regarding products not specifically intended for military purposes;

(c) in specific circumstances caused by natural disasters, armed conflicts, war operations, military training and participation in military missions outside the country'.

services are now covered by Directive 2009/81[160], which applies a more flexible and confidential regime to the procurement of military supplies and related works and services[161].

1.2.5.1.b Contracts requiring secrecy measures

The Directives do not apply to public contracts (i) that are declared secret, or (ii) the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or (iii) when the protection of the essential interests of that state's security so requires[162]. However, these exemptions would not be automatic but would need, if challenged, to be properly justified[163]. In a case involving the prohibition against the unlicensed importation of narcotic drugs, an argument was put forward to the effect that the provisions of the Directives could be excluded on the basis of the above discussed exemption. The Court stated that a tenderer's ability to implement proper security measures could be taken into account as a criterion for the award of a contract[164].

1.2.5.1.c Contracts governed by other rules

Another situation when the public contracts are excluded from the obligation to follow the procurement rules is when such contracts are governed by different procurement rules. According to the Albanian PPL[165] 'to the extent that the PPL conflicts with an

[160] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC. Official Journal L 216/76, 20.8.2009.

[161] This amendment did not change, however, the substance of the exemption. Directive 2009/81 applies essentially the same definitions to the contracts that are exempt from the Public Sector Directive. It merely provides an alternative procurement regime so that the procurement of such products is no longer entirely excluded from the scope of Community 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.

[162] The same exclusion is provided by the Albanian PPL in its article 6 titled "Secret contracts, contracts requiring special security measures and contracts dictated by essential interests of the state", stating that 'The PPL shall not apply to public contracts when their performance must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force, or when the protection of the State's essential interests so requires.'

[163] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 243, para 4.127.

[164] See case C-324/93 The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd [1995] ECR I-563.

[165] See article 8 "International obligations" of the PPL.

obligation of the State under, or arising out of, an agreement with one or more other states or with an international organization, the provisions of that agreement shall prevail'[166]. In all other respects, public procurement activities shall be governed by the PPL.

The Public Sector Directive[167], on the other hand, having taken into consideration that this Directive aims at regulating public procurement within Member States, provides for a wider list of cases 'regulated by international rules', which foresees the situations of international agreements between a Member State and one or more third countries, or particular procedures of an international organization. In concrete, according to the Directive, procurement rules (meaning the Directive itself) do not apply to contracts that are governed by different procedural rules and awarded:

- pursuant to an international agreement concluded in conformity with the TFEU between a Member State and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory states;
- to undertakings in a Member State or a third country in pursuance of an international agreement relating to the stationing of troops;
- Pursuant to the particular procedure of an international organization.

The last provision refers to organizations in which Member States are members. It would include, for example, organizations 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[168], except where the national procurement systems are considered to be equivalent and, therefore, acceptable. Many of the new EU Member States have benefited from the World Bank assistance and may still be beneficiaries of the 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[169].

[166] According to the article 116 of the Constitution of the Republic of Albania, the ratified international agreements, are classified below the constitution but above the laws. In any case, based on this constitutional provision, the international agreement referred by the article 8 of the PPL, should be ratified by the parliament, to fulfill the condition of prevailing to the PPL.

[167] See article 15 "Contracts awarded pursuant to international rules" of the Directive 2004/18/EC.

[168] The same approach is followed also in Albania, in cases of grants or credits, provided by the World Bank.

[169] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 244, para 4.129.

1.2.5.2 Exemptions due to the nature of the contract

1.2.5.2.a Contracts for the acquisition of land

The procurement rules[170] 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[171].
On the other hand, financial services contracts concluded at the same time as, before or after the contract of acquisition or rental, in whatever form, are subject to the procurement rules.

1.2.5.2.b Broadcasting material and time

Contracts for the acquisition, development, production or co-production of programme material by broadcasters as well as contracts for broadcasting time, are excluded from the procurement rules[172]. This covers the production of audio-visual works, such as films, videos and sound recording, including for advertising purposes[173], and the purchase of services for the purchase, development, production or co-production of off-the-shelf programmes as well as other preparatory services, such as those relating to the preparation of scripts or to artistic performances necessary for the production of programmes[174].

The exemption also covers broadcasting time (transmission by air, satellite or cable, now defined as any transmission and distribution using a form of electronic network)[175]. 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 exemption insofar as it is connected with the broadcasting activities of broadcasting organizations that are public authorities. The exemption is justified on the grounds of the cultural and social significance of programming material, so that national broadcasters remain free to procure programme material from whomever they wish and according to the procedures of their choice. The exclusion does not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes[176].

[170] See article 7(a) of the PPL and article 16 (a) of the Directive 2004/18/EC.
[171] See the Explanatory Memorandum in respect of the Services Directive (COM (90) 372 final).
[172] See article 7(b) of the PPL and article 16 (b) of the Directive 2004/18/EC.
[173] See the Explanatory Memorandum in respect of the Services Directive (COM (90) 372 final).
[174] See Recital 25 of the Directive 2004/18/EC.
[175] Ibid.
[176] See Recital 25 of the Directive 2004/18/EC.

1.2.5.2.c Arbitration and conciliation services

The arbitration and conciliation services are excluded as well from the procurement rules[177]. Arbitration and conciliation services are usually provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules[178]. It is inappropriate to include the procurement of contracts for arbitration and conciliation services in the Directives because competitive bidding for such services would interfere with the joint selection of arbitrators and conciliators by the parties to a dispute. These parties would, in any event, want to select arbitrators and conciliators on the basis of their competence and experience and within relatively short time frames[179].

1.2.5.2.d Certain financial services

The procurement rules[180] exclude contracts of financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services. This exclusion refers to contracts that constitute transactions concerning government bonds, for example, and activities related to public debt management. Also, included in the derogation are contracts awarded to financial intermediaries to arrange the above financial transactions, as these services are specifically excluded from the scope of investment services. The exclusion is based on the fact that such services are closely connected with national monetary policies, tend to be heavily regulated, and are generally reserved to a small number of qualified and registered undertakings. Transactions are also carried out within very short time-limits[181].

1.2.5.2.e Employment contracts

Employment contracts, is another type of contracts excluded from the procurement rules[182]. This exclusion is better justified under the EU philosophy and freedoms. 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 localized one and subject to local conditions of employment, taxation and social regimes. These relationships are

[177] See article 7(c) of the PPL and article 16 (c) of the Directive 2004/18/EC.
[178] See Recital 26 of the Directive 2004/18/EC.
[179] See the Explanatory Memorandum in respect of the Services Directive (COM (90) 372 final).
[180] See article 7(ç) of the PPL and article 16 (d) of the Directive 2004/18/EC.
[181] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 250, para 4.143.
[182] See article 7(e) of the PPL and article 16 (e) of the Directive 2004/18/EC.

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[183].

1.2.5.2.f Research and development contracts

Research and development service contracts other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is mainly remunerated by the contracting authority, are not governed by procurement rules[184]. This provision is intended, essentially, to exclude from the procurement procedures research and development contracts of an altruistic nature, which are for the benefit of society as a whole. By the other side, the exclusion would not apply whether the benefits accrued to the contractors themselves.

1.2.5.3 Services contracts provided on the basis of exclusive rights

The procurement rules 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[185]. 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. Rather, the exclusion covers situations where the right to provide a service to a contracting authority is granted exclusively to another contracting authority.
The exclusion depends on the granting of an exclusive right, pursuant to a published law, regulation or administrative provision. 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[186].

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[183] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 250, para 4.144.
[184] See article 7(d) of the PPL and article 16 (f) of the Directive 2004/18/EC.
[185] See article 9 of the PPL and article 18 of the Directive 2004/18/EC.
[186] According to the Recital 31 of the Directive 2014/24/EU, there is considerable legal uncertainty as to how far contracts concluded between entities in the public sector should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted differently between Member States and even between contracting authorities. It is therefore necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice of the European Union. The sole fact that both parties to an agreement are themselves public authorities do not as such rule out the application of procurement rules. However, the application of

1.3 The approach of means and goals in public procurement

Within different public procurement systems the existence of different objectives and the weight attached to the various objectives can differ markedly. For example, some systems attach much more importance than others to policies of fair and equal treatment of providers, to the use of procurement to promote social objectives, or to accountability with the result that the government may be willing to pay higher prices for goods or services or to accept greater process costs to implement these values.[187]

Differently from the EU Directives[188], the Albanian PPL[189], which regulates the Public Procurement System in Albania, defines the objectives of this system, as follows:

- To promote efficiency and efficacy in public procurement procedures carried out by Contracting Authorities;
- To ensure the best use of public funds and to reduce procedural costs;
- To encourage economic operators to participate in public procurement procedures;
- To promote competition among economic operators;
- To guarantee an equal and non-discriminatory treatment for all economic operators participating in public procurement procedures;
- To guarantee integrity, public trust and transparency in public procurement procedures.

These objectives are considered to have equal importance and should be all achieved in a procurement process. However, if we refer to their ranking from the legislation, it is obvious that the most desirable objective is efficiency. This is an objective that is often used to describe the technical efficiency of the procedure itself, *i.e.* whether the planning

public procurement rules should not interfere with the freedom of public authorities to perform the public service tasks conferred on them by using their own resources, which includes the possibility of cooperation with other public authorities. It should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

[187] S. Arrowsmith, "Understanding the purpose of the EU's procurement directives: the limited role of the EU regime and some proposals for reform", published at "The Cost of Different Goals of Public Procurement", Swedish Competition Authority, 2012, p.47.

[188] Both Public Sector Directives; 2004/18/EC and 2014/24/EU do not define in a specific article the objectives of the procurement rules. This does not mean that the objectives of these Directives are not identified, but they are understood from the procedural rules.

[189] See article 2 of the PPL.

has been appropriate and carried out on time; whether the various responsibilities have been engaged; whether sufficient time has been given to economic operators to prepare suitable tenders; whether the procurement is made in a timely manner. At a more "economic" level, the principle can also be used to identify whether the correct or best contracting strategies have been used to minimize waste and benefit from economies of scale. At a policy level, the principle may be used to analyze the allocative efficiency of transactions and of the system as a whole to determine whether this can be optimized further.
On the other hand the 'efficiency' objective is often referred to as value for money.[190] To some extent, the 'value for money' objective overlaps with the concepts of economy and efficiency so that the procurement procedure is carried out with the least waste (in terms of cost and time) and as much benefit as possible. It comes into its own, however, when dealing with the setting of requirements and evaluation. The basic premise is that the government should only buy what is actually needed: leather-covered chairs should not be bought where plastic chairs will do (*e.g.* in a waiting room). In other cases, leather-covered chairs may be preferred (*e.g.* in the boardroom). While it is for the contracting authority to decide what to buy, the point is that the specifications must match the real needs of the contracting authority[191].

The other following objectives may be considered separately, as very important objectives which impact the procurement process.

Good use of public funds and decrease of procedural costs are in function of the procurement process efficiency. As it was analyzed above, provision of special rules to be followed is very important to manage the process. However, a balance should be stricken between the need for setting out procedural rules to be followed and the effect that these rules might have on procedural costs. Detailed provision and regulation of procedural actions to be followed in the implementation of a procurement procedure, serve to a context, which aims at avoiding unregulated instances (which in their side might create opportunities for misuse of public funds). However, it should be taken into consideration that detailed procedural regulation could be associated with procedural costs. In this sense, the aim of procurement legislation is the provision of such a

[190] See generally S. Arrowsmith, J. Linarelli and D. Wallace, "Regulating Public Procurement: National and International Perspectives", Kluwer Law International, London, 2000.
[191] The principle of value-for-money also recognises that goods and services are not homogenous, *i.e.* that they differ in quality, durability, longevity, availability and other terms of sale. The point of seeking value-for-money is that contracting authorities should purchase the optimum combination of features that satisfy their needs. Therefore the different qualities, intrinsic costs, longevity, durability, etc. of the various products on offer will be measured against their cost. It may be preferable to pay more for a product that has low maintenance costs than a cheaper product with a higher maintenance cost. In this sense, "value-for-money" broadly equates, in EU terms, to the award criterion of the *"most economically advantageous tender"*, which allows factors other than only price to be taken into account during the evaluation.

procedural regulation that on the one hand aims for a good use of public funds, and on the other hand to minimize as much as possible procedural costs.
Further on, the Albanian PPL does provide for three separate objectives, which all intend to ensure real competition among economic operators. Encouraging economic operators to participate in public procurement procedures, promoting competition among economic operators and guaranteeing an equal[192] and non-discriminatory treatment for all economic operators participating in public procurement procedures, are all objectives, directly related to the 'competition' requirement, which is in fact a basic requirement in a procurement process[193]. The explanation why PPL does insist so much on providing explicitly three different formulations, which all intend to ensure competition, might be the 'fear' of a lack of integrity[194], which does impact directly the scale of the competition[195]. It is clear that higher access to public procurement procedures and higher participation of economic operators leads to higher competition and savings[196]. While analyzing such objectives, it is also important to realize that the concept of equal treatment in public procurement may take on two different roles; first, equal treatment may serve simply as a means to achieve other objectives of the public procurement system, such as value for money in obtaining goods, works and services, preventing corruption and opening up markets to competition. Thus holding a competition in which all interested firms have an equal opportunity to participate is often the method chosen for seeking out the best terms for the goods, works and services. Requiring that those involved in the competition are treated on an equal basis during the conduct of the competition can help ensure value for money and/or prevent corruption in the procedure in two ways: a) by limiting the opportunities for the procuring entity to make discretionary decisions that could be abused to favor particular firms (for example, a firm that has paid a bribe or – from the perspective of opening up markets – a national firm) and b) by encouraging firms to have confidence in the process and thus encouraging the best firms to participate in the procedure[197]. Secondly, however, in

[192] See article 1, points c), ç) and d) of the PPL.
[193] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 11, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.
[194] According to a 2011 World Bank Study "Strengthening Country Procurement Systems: Results and Opportunities; Capacity development- Country Case: Albania", 'there has been a very common situation in Albania, when a public procurement official, do not provide tender documents to an economic operator, aiming the favorite of another economic operator. In this case, we have a corruptive "no-action", because this is in breach of the regulation and in the same time, it is a breach of the competition principle'.
[195] According to the Country Procurement Assessment Report (CPAR) 2001, public procurement in Albania was a particular target of corruption, with more than half of all firms stating that they did not participate in government procurement, because competition is unfair.

[196] See R. Kashta "Corruption and Innovation in the Albanian Public Procurement System", published in the Academicus International Scientific Journal, Nr. 10, 2014.
[197] ibid.

addition to serving as a means to support other procurement objectives, equal treatment may also serve as an objective of the procurement process in its own right[198].
As public procurement is one of the key areas where the public sector and the private sector interact financially, and this interaction is based on public money, integrity has a very important role. Integrity refers, first, to the idea that procurement should be carried out without any influence of corruption.[199] Procurement legislation as such will also serve to reduce the opportunities for corrupt practices. It does this by imposing accountability and transparency requirements so that the activities of procurement officers can be checked and verified, thereby reducing the possibility that these officers will act in their own self-interest. The procurement officers must clearly set out in a public manner the requirements that they intend to procure as well as the selection and award criteria to be applied. Their decisions will be recorded and can later be verified either by the government (internal or external audit) or by aggrieved economic operators. Some national laws make probity and integrity an explicit objective and they often include in the procurement legislation additional clauses of a practical nature seeking to enforce probity (*e.g.* conflicts of interest provisions or the compulsory application of "integrity pacts"), together with consequential provisions addressing the actions to be taken where corrupt practices have been found to exist[200].
However, whilst it is the case both that achieving value for money is an important reason to provide for integrity in the procurement system, and that the means for doing so are similar to the means used for achieving other aspects of value for money, integrity cannot necessarily be seen only as a step towards value for money – there are many reasons going beyond it why this is an objective of procurement systems. One reason is that it is considered that governments should seek to follow the highest standards of conduct for their own sake, and that individuals should not make profits from public office; another is that it is considered important for the government to set an example as a means of discouraging corruption in the economy more generally, particularly if this is a significant problem in economic life. For these reasons preventing corruption can be seen as an independent objective of procurement regulation, which is not necessarily tied to value for money[201].
Having into consideration all said above, we may conclude that the objective of "guaranteeing integrity, public trust and transparency" as it has been defined by the

[198] S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 12, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.
[199] S. Arrowsmith, "Understanding the purpose of the EU's procurement directives: the limited role of the EU regime and some proposals for reform", published at "The Cost of Different Goals of Public Procurement", Swedish Competition Authority, 2012, p.50.
[200] See for example articles 12, 21 and 26 of the PPL.
[201] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 9, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

Albanian PPL, rather than an objective in itself, as a whole, can be seen also as a tool to assure the realization of other objectives. Furthermore the distinction between integrity from one side and public trust and transparency on the other side may be done. The lack of integrity, may affect all or some of the other objectives, and may in some situation become a strong objective, while the lack of public trust and transparency, not necessarily may affect the other objectives and not necessarily may affect procurement process[202].
Transparency is both an objective in its own right, since lack of transparency can be a barrier to trade, and a means of ensuring that there is no violation of other objective, since where transparent procedures are applied it is difficult to disguise such a violation[203].
As a result of the above analysis, all objectives were connected and impact somehow the efficiency object. In this meaning all these objectives of the procurement process may be considered as instruments in function of the main objective of this process, as the cost effectiveness, or adversely called value for money. As discussed above in this chapter, public procurement has also an economic aspect and from this point of view procurement is an economic activity, which aims at using/spending taxpayers money in the most effective way possible to achieve value for money, which in the context of public procurement may be detailed as the best quality for a reasonable price, at the right time.

1.4 Basic factors which impact the regulation of a public procurement system- Summary

The efficiency of a public procurement system is directly linked to the good functioning of the entire procurement cycle, which has to be realized on time, in the proper manner and conform to the relevant public procurement legislation. In order for a procurement procedure to be implemented, all elements and parties of a procurement process, as described above, have to exist at the same time.
Public procurement processes per se are competitions for winning a contract by a private company and executing it in favor of a public institution, with rules rigorously provided for in the legislation. Such almost firm rigorous is closely linked to the fact that the funds for execution of these contracts are public funds. Considering that misuse of public funds does not directly affect (although public funds are indirectly funds of all taxpayers) the interests of any individual, be him even employee of public institutions, their well usage may be assured only in two ways; either by providing detailed rules for selection of the winner, or by providing more flexible rules and at the same time trust the self-consciousness (integrity) of public employees for the good use of public funds. The first way may avoid at maximum the misuse of public funds, but rigidity of norms brings to rigidity of process, which might be "translated" in time, quality and sometimes even in

[202] R.Kashta "Corruption and Innovation in the Albanian Public Procurement System", published in the Academicus International Scientific Journal, Nr. 10, 2014.
[203] See R. Kashta "E-procurement system in Albania, impact and lessons learned", available at http://www.ippa.org/IPPC5/Proceedings/Part2/PAPER2-5.pdf, retrieved 12.02.2015.

effectiveness. While the second way theoretically might be more effective (by avoiding bureaucracy you save time, gain quality, increase competitiveness). The differences in the objectives both between different public procurement systems and between private bodies and public bodies, to some extent, explain the difference in the approach to procurement and the rules that govern it. To give just one example, a system that places great weight on accountability is more likely to provide for a detailed, rule-based system, which allows for close public monitoring of the procurement process than one that does not, even to the extent that adherence to rigid rules may cause some loss to value for money or efficiency in particular procurement procedures[204].

This shows clearly that regulation of a certain public procurement system is closely linked to a political, economic and social environment, where it will be implemented. Integrity, as analyzed more above, is a very important factor, which directly impacts on the definition of objectives aimed at being fulfilled by the procurement regulation.

On the other hand, in a procurement system, not only procurement rules reflect the environment where they are applied, but even the needs of the contracting authorities will also reflect the political and social color of the government or the country in question. Its assessment of value for money will thus need to take into account the range of political and social policies it pursues. As a concept, 'value for money' is thus heavily contingent. It is contingent on individual's preferences, on the availability of differentiated products and services and on the political and social value judgments of governments, which reflect the collective will and preferences of the majority. It does not have meaning independent of the person or entity, whose value judgments are at issue[205].

Another factor, which does impact the approach of a given procurement system is the 'historic factor'. As will be further discussed in the following chapter, the public procurement system is known within the EU for more than 50 years, and it is a system, which has undergone drastic changes and improvements to come to the actual procurement system of today. Full assimilation of the EU procurement system by its Member States has been and is still being done gradually and in parallel with the consolidation of the EU itself and the improvement of the public procurement system. On the other hand, the Albanian public procurement system has rather a short history and as such it did not pass all the evolution phases, as in the other European Union countries. This, of course, is reflected in the public procurement provisions, which tend to regulate in detail all procedural and administrative steps, aiming at having under control an 'unknown' process[206].

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[204] See S. Arrowsmith "Public Procurement: Basic Concepts and the Coverage of Procurement Rules", Public Procurement Regulation-an introduction, pg. 5, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

[205] P. Trepte "Regulating Procurement - understanding the ends and means of public procurement regulation", Oxford University Press Inc., New York, 2004 (reprinted in 2006), pg. 390.

[206] See Law no.7971/1995 'On public procurement' Official Gazette no. 18/1995, pg. 778. This has been the first law regulating the public procurement system in Albania and it reflects in its articles the fact that

Political context is another factor that impacts the procurement system. Thus, for example, the procurement system in EU Member States does reflect the fact that these countries are part of the EU and as such their governing rules should be in line with Treaty principles and all the rest of the EU legal regimes. Member States are bound to take all appropriate measures to ensure the fulfillment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the Union. The procurement Directives, are by definition not directly applicable, *i.e.* they do not apply automatically[207]. In order to produce their effects within the Member States, they need to be implemented or "transposed" into national law. The Member States are, therefore, required to take the measures necessary to give full effect to the provisions of the Directives in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

The Albanian procurement legislation, on the other hand, does also reflect the political commitments of the Albanian Government toward the integration process in the EU. The signing by Albania of the Stabilization and Association Agreement (SAA) meant engagement and obligation to approximate the domestic legislation to the European legislation[208]. In this regard, the provisions of the new legal framework on public procurement in Albania[209] were dictated from the respective EU Directives, signing in this way the first steps towards the approximation of the public procurement legislation with *acquis* communautaire[210].

there is a lack of previous experience on the field. The history of public procurement system in Albania will be treated in the following chapter.

[207] See R. H. Folsom "Principles of European Union Law", Concise Hornbook Series, Thomson West, 2005, pg.73, par. 2.

[208] This subject will be trated in details in Chapter V, below.

[209] Law 9643/2006 'On public Procurement' was drafted and approved after the SAA was signed, and as such it was the first legal act in the field starting the approximation process.

[210] See Albania 2007 Progress Report of European Commission, point 4.1.6 Public Procurement.

CHAPTER II

HISTORY AND PROGRESS OF THE PUBLIC PROCUREMENT SYSTEM IN ALBANIA AND THE EUROPEAN UNION

2. Introduction

The concept of Public Procurement in Albania is "old" and "new" at the same time. It is an "old" concept as its initial legal regulation dates back to the mid '30s, and it is at the same time "new" because it did not pass all the evolution phases, as in the other European Union countries. Public procurement ceased to exist in Albania by the mid '40s and appeared again as a concept and as a process after the 1990s. This course of public procurement in Albania is tightly related to the political history of the country.

2.1 The beginnings of the public procurement concept in Albania

The first traces of public contracts awarded by the state administration to a private entrepreneur, through a competitive procedure, for the purchase of goods, services or works, are found in a special chapter of an act published in the Official Journal of May 22nd, 1936, pg. 3-9[211]. Types of contracts allowed to the public administration, as well as the legal form to enter in such contracts are stipulated in this chapter. According to article 19 of this act, contracts awarded by the state administration for its own needs for goods, services, works, selling, as well as concessions, shall be deemed as legal only in such case that they are awarded following one of these processes: a) public auction; b) invitation to bid[212]; or c) private agreement. According to this act, the general rule is that contracts are awarded by the state administration through a public auction process, i.e. open competition. Further on, this act regulates the situations and the conditions when contracts may be awarded by sending an invitation to bid[213] to several private entrepreneurs in order to receive offers in relation to the aimed contract. At any case, this type of proceeding is considered as an exemption, considering that the general rule, as

[211] Department of Public Administration, "100 Vjet Administratë", No.12, 13, 14, Botime Pegi, 2012, pg. 166-170.

[212] The original term used for this procedure at the referred act, is "licitation".

[213] Article 20 regulating the contracts of the public administration, stated that: "According to article 5 of the law as amended by article 1 of the Decree of Law of 13.6.1929, a contract may be awarded through invitation to bid 1) when public auction fails; 2) for all kinds of supply, for transport, or works, when an urgent need does not allow for the necessary deadlines for a public auction; 3) for the purchase of materials, vehicles, or artistic products, which should be bought at the place of production, or that their production should be entrusted to specialized houses; 4) when, despite of the object of contract, the foreseen price of the contract does not exceed 2000 franga ari {golden francs} and cannot be repeated by the administration earlier than three months. In the case mentioned in point 1 of this article, conditions, including the price to be established in the contract awarded through *licitacjon*, cannot be less favorable for the state, than those established before in the public auction carried on for the same contract".

described above is that of a public auction. Further on, article 21 of this act provides for the cases when purchase of goods, services and works, may be conducted through a private agreement. Awarding a private agreement meant that there was no preliminary public notice for the object of such agreement. Both articles 20 and 21 of this act provide for the specific cases when institutions of public administration are allowed to award a private agreement. The following articles provided for the procedures to be followed for the publication of the notice and for the implementation of the public auction or invitation to bid procedure. Interestingly, the terms and conditions for the selection of one of the procurement procedures (either the public auction as a general rule, or a less transparent procedure such as the invitation to bid or the private agreement), in essence have been similar to those provided for by the actual legislation of public procurement. The slight differences consist more to a terminological character than to the content of the rules.
With the adoption of the communist system in Albania and considering the political and economic features of such system, in particular the property regime, for a period of nearly 50 years, public procurement "ceased" to exist. Forbidding private entrepreneurship, the system did not allow for the concept of public procurement, which is basically a contract between a public entity and a private one[214].

2.2 Reintroducing the concept of public procurement after the '90

In 1990, although there was still a communist regime, Albania was undergoing political changes. In this frame, there is a return of the concept of "private", which inevitably brought the reintroduction of the "public procurement" concept.
DCM no. 400 of 17 November 1990 "On the purchase and realization of services outside the state sector", provided that enterprises and institutions, for fulfilling their own needs, were allowed to buy primary tools, equipment, goods and materials as well as services against payment. This Decision mentions also the evaluation criteria, which were either the price approved in advance, or the lowest price, which was evaluated by a commission created within the institution.
After this first transition phase and the evolution of the concept of private entrepreneurship and the free market, an evolution of the concept and of the legal framework regulating the public procurement system in Albania was required as well. DCM no. 191 of 22 March1993 "On the system of public purchase and the activity of buying and of services realized by enterprises and institutions financed by the state budget", provided for situations and detailed rules for the purchase of goods and services, but the term "public procurement" had not been introduced yet. However, this act mentions for the first time the foreign private economic entities, which are presented as

[214] See DCM no. 107, of date 12.07.1968 "On forbiddance of purchase and realization of services out of the socialist sector", which forbid all institutions, enterprises and artisanal cooperatives, to effect purchases for fulfilling their needs for equipment, goods and materials, out of the socialist sector. This decision forbade also realization of services out of the socialist sector, apart for transport with animals and loading/unloading.

potential entrepreneurs for being awarded public contracts by the state institutions. This Decision also defines the other elements of public procurement like the evaluation criteria, which in this case was the lowest price offered as well as the evaluation method by the Offer Evaluation Commission.
A particularity of this phase is the fact that public works (constructions) are not mentioned by the decisions, which provide for the process of awarding a public contract. The term "procurement", referring to the purchase of goods, works and services, is mentioned for the first time by DCM no. 467 of 17 August 1993 "On procedures for procurement with public funds". This decision regulates in a more complete and detailed way the public procurement procedures. In this decision, investments are mentioned for the first time by providing that selection of private entrepreneurs for awarding the contract should be done through a public procurement process. The decision gives a clear definition of the procurement process and all its elements and envisages for the first time several procurement procedures and when they have to be applied. Rules for the procedures, deadlines, establishment of evaluation commissions are also foreseen in detail. This decision gains a great importance for that time, as it is the first normative act, which provides for and regulates in full, the public procurement system in Albania.

2.3 The First Law on Public Procurement in Albania

Even though the public procurement concept has been reintroduced from 1990, still in 1995 there was no law on public procurement in Albania[215], leaving an incomplete legal framework. Considering the greater importance gained by public procurement, especially within the frame of an open market economy, it was necessary to have an apposite law regulating this sector. In this context, a law on public procurement was drafted and approved. Law no. 7971 of 26 July 1995 "On public procurement" was based on the model law on procurement of goods, civil works and services adopted by UNCITRAL (United Nations Commission on International Trade Law)[216]. Thereafter, secondary legislation was also approved, such as the Instruction of the Council of Ministers (ICM)

[215] Up to that time, the public procurement process has been regulated by secondary legislation.

[216] Model law on procurement of goods, civil works and services adopted by UNCITRAL aimed to serve as a model for developing countries for assessing and improving their public procurement law and/or for preparing public procurement legislation in those countries where such legislation did not exist, as it was the Albanian case in 1995.

The Model Law is purely a model to assist states – it is not a legally binding document in any way - and states are free to accept or reject bits of the Model as they wish. Even if states accept most of the provisions in it, it is envisaged that additional regulations will be needed to fill out the details of the Law and to adapt it to the particular state: for example, to state the thresholds at which informal procedure such as the "request for quotations" should apply. The Model Law is intended only to provide a framework for regulation of procurement and not a complete and comprehensive code. When the Model Law was adopted it was envisaged that it would be used mainly by developing countries. Its main influence was initially felt in Eastern and Central Europe, but it is now being used increasingly in other places, including in many African countries and many in Asia. www.uncitral.org

no. 1, dated 01 January 1996 "On public procurement", as amended[217] and Decision of Council of Ministers (DCM) no. 335, dated 23 June 2000 "Rules of public procurement", as amended[218]. This has been a step further towards the development of the public procurement system in Albania. Since 1995 and up to 2006 the law has undergone many changes dictated by the dynamics of the economic situation in Albania, as well as by the issues faced in application of the law itself.[219]
However, despite several changes of the law and the secondary legislation package, throughout a period of more than 10-years (1995 - 2006), the legal framework was still far from being in line with the EU's Directives[220].

2.4 Early steps for approximating public procurement framework to the EU Directives

2.4.1 Impact of the Stabilization and Association Agreement in public procurement

In 2006 a radical change of the public procurement framework was necessary, mainly for two reasons: (i) public procurement legal framework and issues faced by its application in practice, and (ii) Albania's commitments towards integration to the EU[221]. The signing by Albania of the Stabilization and Association Agreement (SAA)[222] meant engagement

[217] This Instruction has been amended by ICM no. 1, dated 24 May 2002, ICM no. 3, dated 10 July 2003, ICM no. 4, dated 16 June 2005, ICM no. 1, dated 18 January 2006, ICM no. 2, dated 27 January 2006, ICM no. 3, dated 6 May 2006, and ICM no. 4, dated 14 June 2006.
[218] This Decision has been amended by DCM no. 228, dated 24 May 2002, DCM no. 337, dated 01 June 2004, DCM no. 36, dated 18 January 2006, DCM no. 127, dated 02 March 2006, DCM no. 241, dated 19 April 2006, DCM no. 570, dated 23 August 2006.
[219] Law no. 7971, dated 26 July 1995 "On public procurement" has been amended by Law no. 8039, dated 23 November 1995, Law no. 8074, dated 22 February 1996, Law no. 8112, dated 28 March 1996, Law no. 8767, dated 05 April 2001, Law no. 9064, dated 08 May 2003, Law no. 9872, dated 14April 2005 and Law no. 9450, dated 15 December 2005.
[220] According to Albania 2005 Progress Report, of European Commission, point 3.1.6 Public Procurement, *"Albanian public procurement legislation, which dates from 1995, has undergone a number of changes (most recently in June 2005). The current legislation is based on definitions, basic principles, procedures, thresholds, evaluation and award criteria, publication requirements and review procedures, which are fundamentally different from those of EU legislation…".* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1421_final_progress_report_al_en.pdf
[221] According to Albania 2005 Progress Report, of European Commission, point 3.1.6 Public Procurement, last paragraph *"Very considerable further efforts will be necessary if Albania is to ensure the correct implementation of procurement rules. Significant improvements are needed in the legislation to align it with the acquis and to provide full coherence…".* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1421_final_progress_report_al_en.pdf
[222] Stabilization and Association Agreement between the European Communities and their Member States, on the one part, and the Republic of Albania, on the other part was signed on 12 June 2006 in Luxembourg and entered into force on 1 April 2009, after ratification from 25 EU Member' Countries at the time the SAA was signed. SAA's general frame consists of 4 pillars: political dialogue and regional cooperation;

and obligation to approximate the domestic legislation to European legislation[223]. More specifically, the commitment of Albania in the public procurement field in the frame of the SAA derives from articles 70[224] and 74[225]. According to these articles, Albania does undertake in the field of public procurement two main obligations, as follows:

- Approximation of Albania's existing legislation to that of the Community and its effective implementation; and
- Opening-up of the award of public contracts on the basis of non-discrimination and reciprocity.

Based on article 70 of the SAA, approximation will be carried out on the basis of a programme to be agreed between the Commission of the European Communities and Albania. Albania shall also define, in agreement with the Commission of the European

commercial provisions for a progressive liberalization of exchanges up to the establishment of a free area of commerce between the parties; community freedoms; and cooperation in priority sectors such and in particular in the judiciary and the internal affairs.

[223] According to the article 6 of the SAA, the association shall be implemented progressively and shall be fully realized over a transitional period of a maximum of ten years, divided into two successive stages. In the field of legal approximation and law enforcement, the aim shall be for Albania to concentrate in the first stage on the fundamental elements, with specific benchmarks, of the *acquis.* See SAA document at: http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf

[224] According to article 70 of the SAA *"The Parties recognize the importance of the approximation of Albania's existing legislation to that of the Community and of its effective implementation. Albania shall endeavor to ensure that its existing laws and future legislation shall be gradually made compatible with the Community acquis. Albania shall ensure that existing and future legislation shall be properly implemented and enforced. This approximation shall start on the date of the signing of this Agreement, and shall gradually extend to all the elements of the Community acquis referred to in this Agreement by the end of the transitional period as defined in Article 6. During the first stage as defined in Article 6, approximation shall focus on fundamental elements of the Internal Market acquis as well as on other important areas such as competition, intellectual, industrial and commercial property rights,* ***public procurement,*** *standards and certification, financial services, land and maritime transport – with special emphasis on safety and environmental standards as well as social aspects – company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities. During the second stage, Albania shall focus on the remaining parts of the acquis..."* See SAA document at: http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf

[225] According to article 74 of the SAA *"The Parties consider the opening-up of the award of public contracts on the basis of non-discrimination and reciprocity, in particular in the WTO context, to be a desirable objective. Albanian companies, whether established or not in the Community, shall be granted access to contract award procedures in the Community pursuant to Community procurement rules under treatment no less favorable than that accorded to Community companies as from the date of entry into force of this Agreement. The above provisions shall also apply to contracts in the utilities sector once the government of Albania has adopted the legislation introducing the Community rules in this area. The Community shall examine periodically whether Albania has indeed introduced such legislation. Community companies not established in Albania shall be granted access to contract award procedures in Albania pursuant to the Albanian Law on Public Procurement under treatment no less favorable than that accorded to Albanian companies at the latest four years after the date of entry into force of this Agreement. The Stabilization and Association Council shall periodically examine the possibility of Albania introducing access to contract award procedures in Albania for all Community companies."* See SAA document at: http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf

Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken[226].
In the light of the obligations undertaken in the SAA, considering the strategic objective to be an EU Member Country and the responsibility included in this objective and also the social, economic and legislative reforms, which are under the implementation process, Albania has approved a strategic approach which will regulate the undertaken obligations, having into consideration its national interests and capacities[227].
The European Integration process is regulated in the implementation instrument, as is the National Plan for European Integration[228]. This document addresses mainly the process of the approximation of the Albanian legislation with the *acquis*, as an obligation, which derives from the SAA, monitoring and improving the legislative and institutional framework. This document defines the priorities, and the respective time frames for their implementation; short-term, mid-term and long-term. The process of the approximation of the public procurement legislation with the relevant EU Directives and the respective time frame is clearly reflected in this document[229].

2.4.2 New law on public procurement and its approximation process

Considering the engagement related to public procurement in SAA, Albania drafted in 2006 a project of law approximating Directive 2004/18/EC "On coordination of public procurement procedures for works, goods and services". The new law on public procurement, oriented this time by the respective EU legislation, changed totally the public procurement system in Albania.
Law no. 9643/2006 "On public procurement" was approved by the Albanian Parliament on 20 November 2006 and entered in force on 01 January 2007, thus abrogating the previous law no. 7971/1995, and all secondary legislation. The new law was followed by DCM no. 1, dated 10 January 2007 "Rules of public procurement". Guidelines and Tender Standard Documents were prepared, based on these two pieces of legislation. This new legal framework brought about essential changes in the sector. First of all, it is worth mentioning that the new law provided for a more detailed and clearer process of public procurement, starting with the issuing of the procurement order and closing the cycle with the signing of the contract, including also several provisions related to the contract

[226] See SAA document at: http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf
[227] See the Document of the National Plan for the European Integration, June 2014, available at http://www.integrimi.gov.al/al/dokumenta/dokumente-strategjike/plani-kombetar-per integrimin-evropian
[228] Before 2013 this instrument was called National Plan for the Implementation of the Stabilization and Association Agreement. See PKZMSA 2007-2012, prepared by the Ministry of Integration, published by albPAPER, 2007.
[229] See PKZMSA 2007-2012, prepared by the Ministry of Integration, published by albPAPER, 2007, pg. 35, 36, 38 and 39 and the Document of the National Plan for the European Integration, June 2014, available at http://www.integrimi.gov.al/al/dokumenta/dokumente-strategjike/plani-kombetar-per integrimin-evropian, pg. 156-163.

execution[230]. The new law lays out very clearly the principle of equal treatment, the principle of nondiscrimination, the principle of transparency, the value for money principle and the principle of legal protection of economic operators' interests.[231] Exclusion of direct procurement from the list of procedures, through which a public contract could be awarded, made one of the significant changes in the new law. In addition, the new law introduced the concept of the "abnormally low bid". All these issues provided for the first time in the new law reflected the provisions of the respective Directive 2004/18/EC.

Although the new legal framework marked an important step towards the approximation of the public procurement legislation with the *acquis* communautaire, approximation at this stage was still only partial[232]. This partial approximation is related to several factors, which may be grouped in (i) *political, (ii) legal* and *(iii) economic factors.*

(i) The approval of a law is a political decision-making; hence the content of the law is strongly impacted by politics. Such was the case of the establishment of the Procurement Ombudsman. This institution was given by law competencies, which were overlapping with competencies of the Public Procurement Agency by that time (monitoring competencies and review of complains)[233] and at the same time it was an institution, which fell out of the model provided for by the EU Directive.

(ii) The legal factors impacted approximation for two reasons: firstly the implementation of certain articles of the Directive required the existence of other legislation in Albania (such as the use of electronic signatures)[234] and secondly not all provisions of the Directive were obligatory for the Member States (such as use of competitive dialogue procedure)[235], while some of the provisions were strictly addressed to Member States (such as the obligation for publication of the public procurement contract notice in the Official Journal of the EU. (iii) Another group of Directive's provisions were not

[230] Law 7971/1995 "On public procurement", was composed by 48 articles, meanwhile the new law 9643/2006 "On public procurement", was composed by 78 articles.

[231] See Albania 2007 Progress Report of European Commission, point 4.1.6 "Public Procurement".

[232] According to Albania 2007 Progress Report of European Commission, point 4.1.6 Public Procurement, *"There has been some progress in the area of public procurement. Albania has taken steps towards bringing its legislation into line with the acquis by approving a new public procurement law. Implementing legislation is in force. ... However, further alignment is required in all areas of public procurement (public contracts, utilities, concessions). The PPA also remains responsible for decisions on complaints, therefore the impartiality of review procedures cannot be guaranteed. The administrative capacity of all those dealing with public procurement needs to be strengthened to ensure that Albania can properly implement the new public procurement legislation properly…".*

[233] See Albania 2008 Progress Report of European Commission, point 4.1.6 "Public Procurement", par.3.http://ec.europa.eu/enlargement/pdf/press_corner/keydocuments/reports_nov_2008/albania_progress_report_en.pdf.

[234] At the time of approval, Law no. 9643/2006 "On public procurement" included several provisions regulating electronic procurement, but a law on electronic signature was still missing in Albania, making such provisions not applicable.

[235] Procurement procedures foreseen by Directive 2004/18/EC, but not included in the Albanian Law no. 9643/2006 "On public procurement".

considered reasonable to be implemented because Albania was not in the favorable economical conditions to do so (such as the case of "framework agreement"[236]).
Providing a partial approximation with the respective EU Directive, during the period 2007-2014 the legal framework passed through several changes and improvements[237], aiming to further approximation.
After observing application of the new legal framework on public procurement, on September 2007, the Parliament of Albania approved law no. 9800/2007. The law consisted in changing the conditions for using the procurement procedure of negotiation without prior publication of contract notice, thus approximating in full article 33 of the Albanian public procurement law with article 31 of Directive 2004/18/EC.
On December 2007, the Parliament of Albania approved some amendments to Law no. 9643/2006 "On public procurement", as amended. This Law No. 9855 of 26 December 2007, introduced new regulations on the procurement of electrical energy and of hydrocarbons. It introduced as well ex *novo,* the concept of "Framework agreement", thus creating the general framework for entering into special contracts for goods to be procured along a given timeframe.
Despite amendments introduced up to 2008, there were still some important issues which were not aligned with the *acquis*. Among these the most important were related to the review system; the specific regulations for procurement in the utility sector; and a detailed and clear provision for framework agreements[238]. That is why another amendment of Law 9463/2006 was necessary. Such an amendment was done by approval of Law no. 10170 of 22 October 2009. This law established for the first time a special instance for reviewing appeals in public procurement, entitled Public Procurement Commission, approximating the legislation to the respective EU Directive[239]. The newly established institution took from the Public Procurement Agency the competence of reviewing appeals. For the first time, a special chapter on procurement in the utility sectors was also introduced, approximating the legislation with Directive 2004/17/EC "On coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors" as well. A special article on framework agreement has been introduced. All the above listed amendments were another step forward to approximation with the respective EU Directives. What is worth mentioning is the fact that the public procurement law is being approximated not only with the Directive

[236] A tool provided by the Directive 2004/18/EC, to procure often needs or needs without all conditions known. This tool was not provided by the Albanian legislation of the time we are referring to, with the argument that the usage of this tool might be abusive and leads to the monopolization of the market for the given items.
[237] Law No 9643, dated 20.11.2006 'On Public Procurement" has been amended with laws No. 9800, dated 10.09.2007, No. 9855, dated 26.12.2007, No. 10170, dated 22.10.2009, Ne. 10309, dated 22.07.2010, No. 22/2012, No. 131/2012 and No. 182/2014.
[238] See Albania 2009 Progress Report of European Commission, point 4.1.6 "Public Procurement", par. 2, available at http://ec.europa.eu/enlargement/pdf/key_documents/2009/al_rapport_2009_en.pdf.
[239] In the acquis, the reviewing process is regulated by the Public Sector Remedies Directive 89/665/EEC, as amended by Directive 2007/66/EC.

regulating the procurement in the classic sectors (as it has been happening from 2006 to 2009), but also with the other two respective Directives: the utilities sector Directive and the remedies Directive.

Laws No. 10309 of 22 July 2010 and No. 22/2012 brought some changes, which were not significant in terms of approximation to the *acquis*. The first reformulated competences of the Public Procurement Agency on monitoring and administrative investigation, while the second was quite technical, removing Public Procurement Commission from the dependency of the Council of Ministers and putting it under the Prime Minister[240].

By the end of 2011, the PPL was still considered as partially approximated to the *acquis* and in some aspects presenting serious problems[241]. In this context, Law 131/2012 introduced the latest changes to Law no. 9643/2006.

Changes consist in both reformulation of the existing articles and technical changes of a more essential character to these articles.

The aim of the last changes to the public procurement legal framework was to facilitate the implementation of the procurement procedures, and at the same time to further approximate to the EU directives.

One of the novelties of the public procurement law is the authorization to continue a public procurement procedure even in the cases when only a single valid offer has resulted from the evaluation process. Prior to these law changes, to continue the procurement procedure the qualification of at least two valid offers was required. Such change aligns the law to the directive.

Another novelty is the change of the institutional setup. The Procurement Advocate has been abolished as the practice showed that there was an overlap of tasks between it and the Public Procurement Commission regarding complaints review and between it and the Public Procurement Agency regarding the monitoring[242].

Further on, aiming at a greater efficiency of public procurement, the new provisions shall allow implementation of procurement procedures without having available the funds. However, such funds should be available to the Contracting Authority at the moment the contract is signed; otherwise signing of the contract is not allowed.

PPA has regained the power to monitor public procurement procedures, but only after such procedures have been concluded with the signing of a contract. Such change has been introduced as to fulfill the recommendations of international organizations and the

[240] Such change was necessary as according to the functioning organic law, the Council of Ministers does not have any subordinated institution.

[241] According to the Albania 2011 Progress Report of European Commission, point 4.5, Chapter 5 "Public Procurement", last par. *"The legislative framework on public procurement and concessions is not fully in line with the acquis. Efforts are required with regard to strengthening the institutional framework and clearly defining and delimiting the competencies of all public procurement institutions in order to avoid the overlapping of tasks and to remove the remaining loopholes in the system. No comprehensive system of administrative monitoring and control of the application of public procurement rules and contracts has so far been introduced…".*

[242] See foot note 241 above.

Progress Reports for further approximation of the Albanian legislation to the EU Directive.

The article, stating "the criteria for determining the winner"[243] has been reformulated, as to align it with Directive 2004/18/EC. Reformulation does not state evaluation on monetary terms as an evaluation method. Instead it determines more clearly the criteria of the lowest price and of the most economically favorable offer. More details related to the evaluation according to the most economically favorable offer evaluation are set in the Albanian public procurement rules, approved by the secondary legislation.

Another change refers to complaints about the tender documents and the deadlines to be respected for such complaints. The deadlines for submitting a complaint to the Public Procurement Commission have been changed as to approximate the law with Directive 2007/66/EC.

The described changes of the law have been followed by changes in the secondary legislation, DCM no. 1 of 10 January 2007 "Rules on public procurement"[244] .

Another amendment of the PPL has been approved by the end of 2014[245]. The aim of the amendments and additions introduced by this law is above all to further increase the efficiency and effectiveness of public procurement procedures, encouragement of local and foreign economic operators to participate in public procurement procedures and at the same time to further approximate to the corresponding EU Directives. Changes consist in both reformulation of the existing articles and technical changes of a more essential character to these articles.

One of the novelties of the public procurement law is the exclusion of employment contracts from the scope of this law. This provision comes in line with Directive 2014/24/EU, which does provide for the first time such exclusion[246].

Another novelty is the abolition of the mandatory requirement of the bid security, bringing the law closer to the Directive provisions in this regard, as the latter do not provide a requirement for bid security at all.

The latest changes of the law have been followed by changes in the secondary legislation, which was totally reviewed and reorganized in articles. As such a new Decision of the Council of Ministers, providing rules on public procurement, has been approved[247] and the former DCM no. 1 of 10 January 2007 "Rules on public procurement" has been abolished.

[243] Article 55, par. 1 of PPL no. 9643/2006

[244] DCM no. 1 of 10 January 2007 "Rules of public procurement" amended DCM No. 153 of 22 March 2007, No. 135 of 03 February 2008, No. 392 of 08 April 2008, No. 822 of 18 June 2008, No. 495 of 15 May 2009, No. 917 of 29 July 2009, No. 398 of 26 May 2010, No. 32 of 23 January 2013 and No. 547 of 13 June 2013.

[245] Latest amendments of PPL are approved by Law no. 182/2014.

[246] See article 10/g of the Directive 2014/24/EU.

[247] Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on public procurement".

2.4.3 Electronic procurement

On October 2007, by Decision no. 659, Council of Ministers approved rules on public procurement by electronic means. This decision provides for the first time in the history of public procurement in Albania, the functional and legal requirements for implementing public procurement procedures by electronic means.
In the framework of measures towards increasing transparency and fighting corruption in the public procurement system in Albania, according to the Decision of the Council of Ministers No. 45, dated 21.01.2009, all public procurement procedures are performed through an e-procurement system.[248]
The system offers a secure, efficient and transparent preparation and administration of all tender-related documents, removing unnecessary paper work[249] and providing secure data flow throughout the entire process[250]. All the tender documents, from the contract notice to the winner notice and further more to the notice of the signed contract, are available in the electronic public procurement system. Moreover, all transactions, starting from the download of documents till the bidding by electronic means, may be done at anytime and anywhere the economic operators are.
The electronic public procurement system reduces the application time, facilitates and standardizes the process of introduction with the tender conditions. Likewise, it guarantees the secrecy of offers and, at the opening time of the procedures, allows the simultaneous publication of the offers.
Moreover, the electronic system does generate reports enabling ulterior inspections, ex post monitor of procedures and reduction of the possibility of corruptive deviations. It is constructed in such a way as to maintain at all times a copy of all data and all actions performed on it. The automatic recording of transactions is done by a separate server called "Black box", which is located at a completely different place from the main server and to which, moreover, none of the EPS administrators can enter.

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[248] From this rule were excluded the negotiation without prior publication of the notice and small value procurement. Small value procurement was included in the e-procurement platform in January 2013, according to the DCoM No. 47, dated 23.01.2013.

[249] Either from several studies is confirmed that 'in theory, e-procurement reduces administrative costs and bureaucracy by helping the State avoid repeating tasks such as registration and certification of contractors, allowing for more efficient control mechanisms and reducing paperwork'. See further M. Singer, G. Konstantinidis, E. Roubik and E. Beffermann "Does e-procurement save the state money?", Journal of Public Procurement, Volume 9, Number 1, PrAcademics Press, U.S.A., 2009, pg. 58-78.

[250] This position has been stated also at the Albania 2009 Progress Report of the European Commission, point 4.1.6 "Public Procurement" according to which "…Legislation was approved in January 2009 introducing the obligation for contracting authorities to use the electronic procurement. Contracting authorities have also to publish all procurement notices and tender dossiers on the website of the Public Procurement Agency (PPA). This has improved access to information and reduced procedural costs. The PPA provided advice and support to overcome the initial technical problems encountered. However, there are still some exceptions to the use of electronic procedures. Efforts need to continue to extend them to all types of public procurement. Electronic procedures aim at reducing the scope for corruption although further efforts are still required in all phases of the procurement process…".

The system provides greater participation of the economic operators in the public procurement procedures since they can submit their offers by electronic means, from their workplace, and have information on the procurement procedure they have applied on real time basis, without being necessary to be present at the Contracting Authorities[251].
The Albanian economic operators which are registered at the National Registration Center of Businesses can apply to be registered in the electronic procurement system, as well. Once they are registered, they have always the possibility to participate to the public procurement procedures and submit their offers electronically. The foreign economic operators should also be registered and be provided with a user name and password, in order to access the electronic procurement system. Registration can be done on-line by registering as an economic operator, or directly at the Public Procurement Agency. Registration is valid for bidding in all public procurement procedures delivered in Albania, at any time.
In addition to what is mentioned above, benefits of using the e-procurement system are also measurable in concrete terms. Analysis of data related to limit funds saved in electronic procedures in a three year period using e-procurement shows budget savings of 15% for the year 2009, 12% for the year 2010 and 20.1% for the year 2011 (Public Procurement Agency of Albania, 2009, 2010, 2011).
The number of bidders from paper based procedures to electronic procedures was increased from 2.3 to 7.7 bidders. This is one of the strongest impacts of using e-procurement system in Albania[252]. However, it should be noted that contract writing systems such as e-procurement system, are not a "black box" solution into which a procurement request is submitted and a contract comes out the other hand, untouched by human hands. At its essence, a contract writing system has two elements: the computer system and the human who operates it[253]. As such, human impact should always be considered even though an electronic procurement system is used.

2.5 History and progress of the EU public procurement system

2.5.1 Introduction

The Treaty on the European Union and the Treaty on the Functioning of the European Union[254] are considered in the European Union as primary sources for European

[251] According to the American Chamber of Commerce Survey, 70% of respondents said that using EPS has increased the number of procurement procedures, for which they submitted bids in 2009, as compared to the paper-based system. (American Chamber of Commerce in Albania, 2010).
[252] R. Kashta "Corruption and Innovation in the Albanian Public Procurement System", article published in Academicus International Scientific Journal, No. 10, 2014, pg.6. available also at: http://www.academicus.edu.al/?subpage=volumes&nr=10
[253] See R. E. Lloyd "Public Contract Writing Systems: A House Divided", Journal of Public Procurement, Volume 12, Number 3, PrAcademics Press, U.S.A., 2012, pg.313.
[254] Both Treaties have been amended by the Treaty of Lisbon. It amends the Maastricht Treaty (1993), which is also known as the Treaty on European Union, and the Treaty of Rome (1958), which is also

legislation, which form the constitutional basis of the European Union. The institutions established (provided) by the European Union Treaties (Council of Ministers, Commission, Parliament and the Court of Justice-through the case-laws) have created quite a wide and complex *corpus* of secondary legislation. Some of the legislative acts have been directly adopted at the European Union level, but a good part of such legislation is being implemented by national governments under the "direction" of the European Union. Similarly, some (the core part) of the European Union case-law has been created by decisions of the European Court of Justice and the First Instance Court, but also a lot of case-law enriching legislation are created by the national courts of different instances, which operate under the overview of the Court of Justice[255].

Directives are one of the two types of primary legislation acts in the European Union. A Directive establishes the policy of the European Union. It is upon the choice of each member state to implement the Directive in the most appropriate manner, which better suits the internal legal system of that state[256]. Such manner differs from one state to the other and might require a new statute, a presidential decree, an administrative act, a constitutional intervention (amendment), but in any case there should be an internal act to transpose a certain Directive[257]. Article 288 of the Treaty on the Functioning of the European Union (ex article 249 of the Treaty of Rome) provides among others that: "...A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods....". All Directives impose time limits to Member States for their implementation. Deadlines vary from type and content of the directives. If a Directive has not been transposed into the internal legislation by such deadline, it could transform into internal legislation only if it has "a direct effect"[258]. However, not all Directives have a direct effect. Court of Justice has established that only Directives that provide for clear and unconditional obligations, not leaving any normative discretion to Member States have a direct effect[259]. What is exactly required to implement a Directive depends on the nature of the Directive: national law must simply provide for measures that are effective

known as the Treaty establishing the European Community (TEEC). At Lisbon, the Treaty of Rome was renamed to the Treaty on the Functioning of the European Union (TFEU).

[255] R. H. Folsom "Principles of European Union Law", Concise Hornbook Series, Thomson West, 2005, pg.27, par. 2.0.

[256] R. H. Folsom "Principles of European Union Law", Concise Hornbook Series, Thomson West, 2005, pg.483.

[257] See Case C-292/07, Commission v Kingdom of Belgium (2009).

[258] In difference to the Regulations, for which article 288 of the Treaty of the Functioning of the European Union (ex article 249 of the Treaty of Rome) determines that are obligatory and directly applicable by the Member States, the position taken on the "direct effect" of the Directives, is not very clear.

[259] R. H. Folsom "Principles of European Union Law", Concise Hornbook Series, Thomson West, 2005, pg.73, par. 2.

See also Van Duyn v. Home Office (1974) Eur.Comm.Rep. 1337; Becker v. Finanzamt Munster-Innenstadt (1982) Eur. Comm. Rep. 53.

to secure the objectives of the particular Directive[260]. In this context public procurement Directives which have been implemented correctly into national law do not have direct effect. On the other hand, provisions in public procurement Directives which have not been implemented correctly into national law may have direct effect: some and probably many, of the provisions in the public procurement Directives have in such a case direct effect in the sense that they can be invoked by individuals before the national courts[261].

2.5.2 Public procurement Directives

To assess the context, in which the public procurement system of the European Union has been developed, it is important to have a historical overview of the public procurement Directives. This will enable us to study the purpose/purposes of the procurement system in the EU and understand the extent such objectives have evolved since their beginnings[262].

2.5.2.1 The general programs

The Treaty of Rome and the following treaties[263] do not provide for any explicit provision with relation to public procurement. However, even though there is no special regulation on the procurement regime, this Treaty contains two provisions, which may also refer to procurement: one providing for the open competitiveness and equal treatment principle for all investments funded by the Community[264] and the other establishes the exclusion from this rule, by recognizing to the Member States the right of not disclosing to the public such information, which it considers contrary to the essential interests of its security, as the case may be for the production of or trade in arms, ammunitions and war materials[265]. This general provision on public procurement could be explained by the fact that Treaties have provided for the main principles, while more detailed regulation is left with the secondary legislation. In this context, it can be said in certainty that although the Treaty does not provide for a special regulation with relation

[260] See further S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 3-55.
[261] See D. D. Dingel "Public Procurement-A Harmonization of the National Judicial Review of the Application of European Community Law", published by Kluwer Law International, Netherlands, 1999, pg. 87.
[262] See further F. Weiss "Public Procurement in European Community Law", Athlone Press, 1993, Ch. 3; and J. F. Martin "The EC Procurement Rules: A Critical Analysis", Clarendon Press, 1996, Ch. 1.
[263] Treaty of Rome 1957, Establishing the European Community, as amended by the Single European Act 1986, The Treaty of Mastricht 1992, officially known as the Treaty on European Union (TEU), the Treaty of Amsterdam 1997 and the Treaty of Nice 2001. When the Treaty of Lisbon came into force in 2009, the pillar system was abandoned, and hence the EC ceased to exist as a legal entity separate from the EU. This led to the Treaty being amended and renamed as the Treaty on the Functioning of the European Union (TFEU), as amended.
[264] See article 132/4 of the Treaty of Rome.
[265] See article 223/1/b of the Treaty of Rome.

to public procurement, several provisions of this Treaty affect directly the public procurement regime. Such provisions, which affect directly the procurement process developed by one of the Member States, refer to: a) prohibition of discrimination on grounds of nationality[266]; b) free movement of goods and prohibition of import and export quantity limitations and measures of equivalent effect[267]; c) freedom of establishment[268] and d) freedom to provide services[269]. Beside these provisions of the Treaty, which directly affect the public procurement process, the principles of the Treaty affecting the process should not be left without mentioning, as well. Among these general principles, the most important to the public procurement process[270] are worth mentioning: a) the principle of equal treatment; b) the principle of transparency; c) the principle of legal security (legality); d) the principle of proportionality and e) the principle of mutual recognition. Court of Justice has also developed a number of "general principles of law", which are stemming from the Treaty or the legal systems of Member States. Both types of principles are directly applied in the public procurement sector[271].

The first real intervention of the European Communities in the procurement system started with two General Programs[272] for the abolition of restrictions to public works contracts, showing at an early phase the interest of Communities for non discrimination in public procurement. These programs began to deal with public works contracts, after being adopted here in the provisions with relation to freedom of establishment and freedom to provide services. Both programs aim at the abolition of restrictions, including regulations and practices of Member States towards foreigners, which exclude, restrict, or put conditions on the freedom to provide offers or to participate as a contractor or sub-contractor in contracts entered into by Member States or other legal persons functioning on public laws.

These were transitory rules and restrictions, which had to be abolished at the end of the transition period. Aiming at a gradual and balanced process of abolition of restrictions, the elimination process was subject to a quotas' system according to which Member States should suspend the award of contracts to companies of another member state if the number of awarded contracts to such company of the other member state surpassed the predefined quotas. This rule stated that quotas had to be calculated on a percentage basis over the mean value of public contracts coming out of the procurement process in the two preceding years. Such percentage was to be revised every two years up to the transition

[266] See article 12 of the Treaty of the European Community.
[267] See articles 28 - 31 of the European Communities Treaty.
[268] See articles 43 - 48 of the European Communities Treaty.
[269] See articles 49 - 55 of the European Communities Treaty.
[270] See Commission interpretative communication on concessions under Community Law (2000/C 121/02), section 3.1.
[271] P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 5, para 1.11.
[272] General Programme for the abolition of restrictions on freedom to provide services (JO 2/32; English special edition, series II, Vol IX, p3); General Programme for the abolition of restrictions on freedom of establishment (JO 2/36; English special edition, series II, Vol IX, p7).

period and in principle it would have to be the same for all Member States. Both General Programs foresaw that elimination of discrimination and restrictions in the procurement sector should be accompanied with measures for the coordination of procurement procedures for Member States.

2.5.2.2 First procurement Directives

General programs were implemented through a number of Directives approved consequently. They were of two types; the so called Directives of Liberalization and the Directives of Coordination. Directives of Liberalization aimed the abolition of restrictive and discrimination measures. Directives of Coordination aimed at the approximation of Member States procurement legislation with the purpose of coordinating procedures of awarding public contracts in these states.

2.5.2.3 Directives of Liberalization

Three General Directives of Liberalization were approved in 1964, aiming at the implementation of the General Programs[273]. The first two provided for an immediate abolishing of the restrictions identified in the General Programs. In relation to procurement, Directive 64/428 provided that certifications issued for the successful completion of work contracts in other Member States territories, shall be considered as an indicator of technical capacities and shall have the same value in the member state, which is implementing the procurement procedure. Following a proposal dating in 1964, the Council adopted its first Directive of Liberalization, which aimed specifically at the abolition of restrictions to freedom of establishment and freedom to provide services in respect to public work contracts[274].
In relation to purchase of goods, Directive 70/32[275] was the first Directive regulating specifically this category. The Directive was adopted just before the termination of the transition period, so it has more theoretical values. This Directive was applicable to all kinds of goods purchased by central and local institutions or legal persons, including equipment (goods) necessary to complete a construction, despite the fact if they constituted an integral part of a public work (construction) contract. The aim of the Directive was to require Member States to apply rules with relation to free movement of goods in their entire internal regulatory or administrative legislation and the administrative practices, which totally or partially (1) excluded imported products from participating in procurement; (2) protected or established preferences toward national products; (3) or disadvantage imported products, despite the fact that such products were subject to taxation. Directive provided also for a list of discriminations, which had to be

[273] Directives 64/427 (OJ 1964 No. 117/1863), 64/428 (OJ 1964 No. 117/1871) and 64/429 (OJ 1964 No. 117/1880).
[274] Directive 71/304 (OJ 1971 L 185/1).
[275] OJ 1970 L 13/1.

abolished. These included for example, different treatments in relation to regulations for securities and deposits, and highlighted the "principle of proportionality", seeking to consider the proportionality between the mean used and the objective to be accomplished. The Directives of Liberalization provided for and required the application of the above mentioned principles in relation to the free movement of goods, freedom of establishment and freedom to provide services. The importance of these essential principles was recognized by the Court of Justice in cases related to procurement[276]. Despite of the provisions of Liberalization Directives, abolition of all discrimination had to be associated with other positive measures such as for example coordination of procurement procedures of different Member States[277]. Such function was with the Coordination Directives, which aimed at the approximation of those laws, regulations and administrative practices of Member States directly affecting the founding or functioning of the common market.

2.5.2.4 The first Directives of Coordination

The first two directives of coordination were respectively: Directive 71/305[278] on public work contracts and Directive 77/62[279] on goods' contracts. Both directives provided more or less for the same regulations and practically there was no strong argument why works and services had to be treated separately in two different Directives, up to 2004 when both of them and Directive 92/50[280] in relation to services' contracts were consolidated in a single text. Directive 71/305 was adopted following to the General Programs with the aim of coordinating the internal procedures (legislation) of the Member States for selecting winners and awarding the public work contracts. Hence, this Directive reaffirms once again the main objectives of the General Programs such as the prohibition of setting as qualification criteria the technical specification of a discriminatory effect or the setting of the objective criteria for the participation of bidders. The Directive also gives special importance to the implementation of an effective competition in public contracts' sector. The general Treaty rules on free movement entail an obligation not to discriminate in public procurement, which is an important starting point for opening up public procurement. However, this alone has long been considered insufficient to remove barriers to trade that exist in public markets: it is widely considered that positive obligations, including transparency requirements, are needed in order to achieve this[281]. Thus, the aim of this Directive was to provide possible contractors, established in the

[276] See for example Case C-263/85 Commission v Italy (1991) ECR I – 2457; Case C-243/89 Danish Bridge; Case 76/81 SA Transporoute et Travaux v Minister of Public Work (1982) ECR 417.
[277] See also S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 3-28.
[278] OJ 1971 L 185/1.
[279] OJ 1977 L 13/1.
[280] OJ 1992 L 209/1.
[281] See S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 3-29.

community, with the opportunity of having adequate information to decide whether it was in their own interest to participate in a procurement procedure or not.
Directive 77/62 was adopted with the purpose of coordination of procedures for selecting the winners and awarding the goods' contracts. This directive, in addition to the requirement for creating equal conditions for competitiveness, highlights the transparency of the procurement process, aiming at a facilitated control of implementation of the above mentioned principles. The purpose of both directives was the increase of transparency of the procurement process (by publishing of tenders in all Member States of the Community), from which derived public contracts, assuring and monitoring the principle of effective competitiveness, which in its side brings equal opportunities and equal access in these contracts (by setting objective criteria for participation and prohibition of setting technical discriminatory specifications).
These Directives also regulated two other important aspects. First, as coordination measures, they do not require establishing a common regulatory regime in the Member States. Directive 71/305 states that coordination should take place considering as much as possible the existing procedures and practices in each member state. Article 2 of both Directives clearly provides that contracting authorities, in selecting contractors should apply their internal procedures, adopted by the Directives. These directives, differently from the later Directives, did not impose the usage of defined procedures; they provided only for defined requirements, which had to be fulfilled (mainly in relation to notice/publication rules) in case of a given kind of procedure. The second important characteristic of these Directives was that they were applicable only to procurement procedures and contracts above a certain financial value. It was the case of such values considered to have impact on competitiveness and could affect the trade among Member States.

2.5.2.5 Directives following the Single European Act

Preparation by the Commission of a series of communication to Member States for the application of these Directives[282], at that time showed not very good results achieved in this direction. Beside the criticism to Member States for not adopting measures for application and inclusion of Directives in the internal legislation, the Commission identified a number of factors of a relevant impact in such misapplication. A first factor was the limited application area (scope) of these Directives due to the exclusion of procurement in the utility sector, as it was the case of public and private entities operating in the sector of water, energy transport and telecommunication. Another factor identified by the Commission was that the level of the defined financial threshold restricted the effect of the directives, because the Contracting Authorities signed a great number of public contracts under the threshold set by the Directives. It was also evident that the

[282] COM (1984) 717, COM (1984) 747 and COM (1986) 375.

open tender procedure was rarely used, incentivizing the usage of non-competitive procedures[283].

These problems were not only limited to public procurement, but were also manifested in other important sectors for the implementation of the common market. Jointly with other sectors where the four freedoms were not respected, public procurement was significantly improved by the White Paper of 1985[284], which aimed at achieving the European "objective" by foreseeing an ambitious plan for the realization of the unique internal common market until 1992. According to article 8 (now article 14), the internal market intended an area without internal borders, within which free movement of goods, people, services and capitals was assured, in line with the provision of this Treaty. In order to achieve this, the Single European Act provided for an *ex novo* legal basis and the Directives of procurement adopted on the basis of the Single European Act were based on the new article 100a (article 114 of TFEU), which permitted the Council to adopt measures for the approximation of provisions established by law, regulations or administrative practices by the Member States, which have as their objective the founding and functioning of the internal market. This was a classic economic theory, according to which the removal of these restrictions to trade would be accompanied by the generation of benefits in trade, such as the increase of quality, better usage of the economy of scale and the increase of competitiveness. Savings were expected to grow by acquisitions of lower cost of imports, from rebates from local firms, which would result in a restructuring of the European industry. Most of the gains were expected due to the completion of the segmentation of the market in Europe, and by strengthening the ability of the European industry to compete in the world market. In this regard, two initiatives were taken: first to improve the existing Directives and second to expand the scope of the Directive and reduce the number of documents for participation in a procurement procedure.

2.5.2.6 Improving measures

The Directive that regulated public works was amended by Directive 89/440[285] whiles the Directive on goods was amended by Directive 88/295[286]. The main purpose of these amendments was to guarantee real freedom of establishment and freedom to provide services in the market for public works contracts, improving and expanding the provisions of Directives aimed at transparency in public procurement procedures and practices for the selection of the winning contractors, as to ensure the removal of restrictions and reduction of putting different competitive conditions for participants from different Member States.

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[283] See also S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 3-30.
[284] White Paper on Completing the Internal Market COM (1985) 310 final.
[285] OJ 1989 L 210/1.
[286] OJ 1988 L 127/1.

In order to increase transparency and respect of the procurement process, these Directives provided for the first time for a request for the publication of the preliminary notification by which the Contracting Authorities showed their intentions and plans of purchase in the next budgetary year, and in exchange they would be allowed to reduce the minimum time limits set in the relevant Directives from the publication of the tender to the bid opening date. In addition, the Directives would go further by introducing requirements for the transparency of the process, by requiring that at the end of the process a notification with the winner contractor and summarized information for the unsuccessful candidates would be published. Both amendments to the Directives provide for the first time for the negotiation procedure, which would be used in such circumstances, under which other standard procedures of public procurement could not be used[287].
Both directives provided for a rule[288], according to which Member States were authorized to apply their internal legislation "aiming at the reduction of regional inequalities, promotion of jobs in the area regions and reduction of industrial regions, with the condition that such internal legislation was in conformity with the Treaty and the Community's international obligations. Such authorization was valid up to 1992, when the internal market was expected to be realized. The other lone "social" objective foreseen by the Directive was in relation to the small and medium enterprises. According to this provision, bidders are provided with the possibility to define preliminarily in their tender documents the percentage, if it exists, of the contracts that they shall sub contract to third parties, with the purpose that this would be a good opportunity for small and medium enterprises to participate in tenders.

2.5.2.7 Expansion and rationalization

The next step in relation to works and goods was the adoption of two new Directives namely: 93/36[289] and 93/37[290]. The preambles of these two Directives reflect the provisions of previous Directives, although the term "transparency" is widely replaced with provisions in relation to the right of information[291].
Following the Single European Act, there were four new Directives adopted: I) for the review of procurement in the public sector[292], II) for the review in the utility sector[293], III) for the public procurement of works, goods and services in the utility sectors[294], and IV) for the contracts of public services[295].

[287] See also S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 3-31.
[288] Article 21 of the Directive 89/440 and Article16 of the Directive 88/295.
[289] OJ 1993 L 199/1.
[290] OJ 1993L 199/54.
[291] Recitals 14 and 10 respectively of Directives 93/36 and 93/37.
[292] Directive 89/665 (OJ 1989 L 395/33).
[293] Directive 92/13 (OJ 1992 L 76/14).
[294] Directive 90/531 (OJ 1990 L 297/1).
[295] Directive 92/50 (OJ 1992 L 209/1).

I) The Directives for the Review of procurement in the public sector

Lack of binding measures has been identified in the communications by the Commission as an obstacle for effective implementation of procurement Directives. Hence, directive 89/665 was approved, Recital 3 of which provided that the "opening" of public procurement to the Community's competitiveness, makes it necessary to guarantee the transparency and non-discrimination and to ensure that a system of effective and fast review is needed, in cases of violation of Community law in the procurement sector, or of the internal rules that implement the Community rules. Intending to ensure that rapid and effective means of redress is available in all EU countries in cases where bidders consider that contracts have been awarded unfairly, and improving the effectiveness of the review system on public procurement field, the above mentioned Directive was substantially amended by Directive 2007/66/EC[296]. Through this Directive, two main features of the said review system were introduced: a) a "standstill period" – contracting authorities need to wait for at least 10 days after deciding who has won the public contract before the contract can actually be signed. This period gives bidders time to examine the decision and decide whether to initiate a review procedure; and b) more stringent rules against illegal direct awards of public contracts – national courts will be able to render these contracts ineffective if they have been illegally awarded without transparency and prior competitive tendering[297].

II) The Directives for the Review of procurement in the utility sectors

Provisions of the Directive for the review of procurement in the public sector were almost replicated by Directive 92/13 for the review in the utility sectors, although this directive considered also the greater flexibility needed in the utility sectors thus providing for some additional articles for the verification system and reconciliation procedures. This Directive has been amended too by the Directive 2007/66/EC, for the same reasons as described above in the case of the Review Directive in the public sector.

III) The Directive for public procurement of works, goods and services in the utility sectors

At the beginning of the public procurement system regime was not thought that there is a need for special regulations of the utilities sectors. After the adoption of Utilities Directive, contracting entities operating in these sectors, entered the regime of public procurement, but this regime provided for a set of more flexible procedures than those of the classic sector, considering the more trade oriented environment, within which they operated (contracting entities in utility sectors were mainly private entrepreneurships).

IV) The Directive on Services procurements

[296] OJ 2007 L 335/31
[297] See article 1 of the Directive 2007/66 EC.

The Directive on the procurement of Services is almost identical to the directive of Goods, with some necessary adjusting to the specifics of service contracts[298]. This directive was based in the Treaty provisions for the freedom of establishment and freedom to provide services. This Directive applied two kinds of provisions, depending on the kind of services procured.

2.5.2.8 The Consolidated Directives

Reform of the above mentioned Directives was given special attention since the Green Card of the Commission in 1996, which was followed by the Communication on Public procurement in the European Union, in 1998[299]. This resulted in two proposals for two new Directives, one for the public sector and the other one for the utilitary sectors[300]. Followed by a series of amendments, these proposals were transformed into Directives in 2004, namely Directive 2004/18/EC "For the coordination of procurement procedures for contracts of public works, goods and services"[301] and Directive 2004/17/EC "For the coordination of procurement procedures in the utility sectors; water, energy, transport and postal services"[302]. Member States were given a deadline of two years to implement them into their internal legislation. In general, the amendments introduced with the new Utilities' Directive reflected those introduced with the new Directive of Public Sector. In fact, the most significant change in the public sector was the codification of the three previous directives, which were applied for the public works, goods and services, in one Directive. In addition, this Directive was simplified, with a more logical structure. The same may be said for the Utilities' Directive, which begins with definitions, then with the aim and further on with the rules to be followed for the implementation of the procedure.

2.5.2.8.a Main changes to the Directive for procurement in the public sector

The main changes introduced in the regime of public sector by Directive 2004/18/EC, are as follows:

- Acknowledgment of the right of some procurement entities to implement concentrated purchase through framework agreements;
- Explicit acceptance of the use of framework agreements, although this is under conditions provided in the directive (these are already allowed in the original Utilities' Directive);
- Amendments of the articles with reference to technical specifications, by waiving the obligation for references to the European standards;

[298] This directive is applied for all service contracts and is not limited only to consultancy service contracts.
[299] COM (1998) 143.
[300] COM (2000) 275 and COM (2000) 276, respectively.
[301] OJ 2004 L134/114.
[302] OJ 2004 L134/1.

- Provision of competitive dialogue as a new procedure, which may be used by the contracting authorities when they cannot determine the technical solution or can not specify the financial and contractual make up of the project. (this type of procedure is not provided for by the Utilities' Directive given that the provisions of this last one are more flexible than those of the public sector);
- Provision of the electronic procurement, including the electronic auction, and the dynamic purchase system as well as the reduction of deadlines in the case of electronic communications;
- Explicit approval of considering society and environment during drawing of specifications and selection criteria and in the implementation of the terms of contract;
- Provision of the new requirements in relation to the minimal qualifications as well as the selection criteria, which should be made preliminarily known to the possible offerers.

2.5.2.8.b Main changes in the Directive for procurement in the utilities' sectors

It was important that Directive in the Utilities' Sectors be consistent with the Directive for Public Sector, having same amendments in the major part for both sectors. However this directive introduces some particularities for the utilitary sector.
Main amendments made by Directive 2004/17/EC, included:

- Exclusion by scope of directive of the entities operating in the telecommunication sector;
- Inclusion of entities operating in postal services;
- Provision of a general mechanism, which would allow exclusion of those entities that could demonstrate that they operate in competitive markets;
- Amending of the definition of the exclusive right to approximate it, in line with the definition provided by the European Court' jurisprudence;
- Changing the monetary thresholds to fix the issues raised by GPA (Government Procurement Agreement) in relation to the variable monetary thresholds;

2.5.2.9 Amending of the Directive for review in the public and utilities' sector

Again, in the frame of consolidating and increasing the certainty of bidders in procurement procedures in both the Public Sector and the Utilities' Sector, Directive 2007/66/EC[303] amended directives 89/665/EEC and 92/13/EEC, which, as analyzed earlier, regulated the review process respectively in the Public Sector and the Utilities' Sector. The aim of this amendment was the strengthening of mechanism to guarantee transparency and non-discrimination, as two essential principles to be achieved by the respective Review Directives, as well as the aligning with the positive effects introduced by the modernization and simplification of rules in public procurement, by Directives 2004/18/EC and 2004/17/EC. The main change made by Directive 2007/66/EC is the

[303] OJ 2007 L 335/31

obligatory deadline set for the submission of complaints (period of suspension of the procurement procedure), with the purpose of assuring an effective mechanism for the protection of the rights of economic operators, making offers in a procurement procedure.

2.5.2.10 The new Directives

On 26th February 2014 the European Parliament and the Council adopted new rules on public procurement and concession contracts as follows:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC,
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing directive 2004/17/EC, and
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts[304].

The new directives repeal and replace the Public Sector Directive 2004/18 and the Utilities Directive 2004/17 and amend the Remedies Directives 89/665 and 92/13 (mainly with regard to the extension of remedies and review of measures to services concession covered by the new concession directive).
Those three new directives will have to be transposed to legal orders of Member States, in principle, within 24 months following their entry into force. A longer time period for transposition is available for the mandatory electronic communication in procurement procedures (54 months since the entry into force of the directive).
The new concession directive covers, for the first time in the EU law, in a comprehensive manner, both works concessions as well as service concessions. It codifies the rich case law of ECJ/CJEU on concessions but offers some discretion as for the precise way how the procedures leading to award of concessions are to be designed in Member States.

2.5.2.10.i Major changes introduced by new Directives

The main changes introduced by new Directive 2014/24/EU in general can be summarized as follows[305]:
The distinction between priority (Part A) and non – priority (Part B) services has been removed, and a new *light-touch regime* has been introduced, albeit, only for social and other "special services". Under those rules, there is mandatory advertising of bidding opportunities in the Official Journal of the European Union and other specific obligations

[304] The three Directives are published in OJ L 94, dated 20.03.2014 and entered into force on April 17, 2014.
[305] See generally R. Williams "Modernising the EU public procurement regim- A summary of the key changes to the public sector", Public Procurement Law Review, 2014, 3, Sweet & Maxwell, London 2014, pg. NA79-NA83.

concerning the award of those services; new rules apply, however, as of a threshold much higher than in the case of other services covered by the directive (EUR 750 000); in the case of Utilities the threshold for equivalent services is EUR 1 000 000.
The new directives offer more freedom to public purchasers to negotiate – constraints on using the competitive negotiated procedure have been relaxed, so that this procedure is available for any requirements that go beyond "off - the - shelf" purchasing.
A much simpler process of assessing credentials of candidates and bidders has been introduced, involving greater use of suppliers' self-declarations, and where only the winning bidder shall have to submit various certificates and documents to prove its status;
Poor performance under previous contracts is explicitly permitted as ground for the exclusion of an economic operator;
The rules on the Dynamic Purchasing Systems (DPS) have been greatly simplified, with the removal of the onerous obligation to OJEU-advertise call-off contracts made under the DPS;
The ability to reserve the award of certain services contracts to social enterprises for a time limited period has been introduced;
Electronic marketplaces for public procurement are expressly permitted, removing any doubt as to their legality;
The statutory minimum time limits by which suppliers have to respond to the advertised procurements and submit tenders or requests have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but it still permits longer timescales for procurements, where bidders will need more time to respond;
Review of thresholds: The directive includes a binding commitment on the Commission to review the economic effects on the internal market as a result of the application of thresholds, which could lead to an increase of the thresholds that have been broadly static for 20 years.
Legal clarity so that public buyers can take into account the relevant skills and the experience of individuals at the award stage where that is relevant (e. g. for consultants, lawyers, architects, etc.);
Improved rules on social and environmental aspects[306] have been designed, making it clear that:

- social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects, which had previously been allowed),

[306] In addition to "primary" objective such is to get best value for money, public procurement can also be used strategically to promote specific collateral or "secondary" economic goals such as social and environmental aspects. See further A. Mille "Collateral Objectives in Public Procurement: Social and Environmental Aspects", Public Procurement in the European Union, NWV Neuer Wissenschaftlicher Verlag, Vien, Graz 2006, pg. 489-497.

- contracting authorities can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating the procurement of contracts with social/environmental objectives,
- and refer to factors directly linked to the production process;

The electronic communication / e-procurement will become mandatory following 54 months after the directive's entry into force;

Various safeguards from corruption are required such as:

- specific safeguards against conflicts of interest where declarations are signed by procurement staff to confirm they have no outside interests with bidders etc.;
- similar provision against illicit behavior by candidates and tenderers, such as attempts to improperly influence the decision-making process or collusion,
- safeguards against undue preference in favor of participants, who have advised the contracting authority or been involved in the preparation of the procedure,
- self-cleaning measures for suppliers, who have cleaned up their bad practices;

The contracting authorities are encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate;

The new rules encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times;

A turnover cap to facilitate SME participation is imposed. The contracting authorities are not allowed to set company turnover requirements at more than two times the contract value;

A new procedure has been introduced: the "Innovation Partnership" procedure. This is intended to allow scope for more innovative ideas. The supplier essentially bids to enter into a partnership with the authority, to develop a new product or service;

Public authorities will no longer have to submit detailed annual statistics on their procurement activities. The European Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for public authorities;

Utilities contracts directive has partly amended scope – exploration of oil and gas was removed from the scope of covered activities;

The exemption related to bus services offered in the competition condition, which was kept by the 2004 Utilities Directive has been removed – all activities are subject now to uniform set of rules allowing for their exemption on the basis of the Commission decision;

The competitive dialogue was added to the list of procedures available to contracting entities under the new Utilities Directive;

The new directive on concessions covers both works and services concessions;

The Remedies Directives were changed in order to adjust the scope of contracts covered by the Remedies Directives resulting from the adoption of the new Concessions Directive.

The new directives provide for mostly mandatory rules that have to be implemented by Member States. The room for discretion has been greatly reduced as compared to 2004

directives, which means that Member States have less options available when it comes to decide whether and when to adopt specific rules. Many provisions that were optional under the 2004 directives became mandatory in accordance with 2014 directives. It is mainly the case of procedures and tools available to the contracting authorities.

2.6 Summary

As described above, initial regulation of public procurement in Albania dates back to the '30 of the last century. In 1995, after an interruption of more than 50 years, a law on public procurement was approved. However, only in 2006, a law aiming approximation with the EU Directives was adopted. The approximation process has been gradual. In almost 8 years of its existence, this law has gone through several amendments, aiming at progressively approximating the Directives. The approximation is still partial. The reasons are analyzed in the following chapters.

On the other hand, all what is described above shows the way followed by the public procurement system in the European Union and its Member States from the beginning up to nowadays. It is evident that the public procurement system has been known within the EU for more than 50 years, and it is a system, which has undergone drastic changes and improvements to reach the actual procurement system of today. The description and history of the development of this system show clearly that the full assimilation of the EU procurement system by its Member States has been and is still done gradually and in parallel with the consolidation of the EU itself[307] and the improvement of its public procurement system. What can be said in certainty is that the public procurement system is a dynamic system, in continuous change and improvement.

[307] See generally A.S. Sweet and W. Sandholtz "Integration, Supranational Governance, and the Institutionalization of the European Polity", The European Union – Readings on the Theory and Practice of European Integration, Third Edition, Lynne Rienner Publishers, Inc, U.S.A, 2003, pg. 215-238.

CHAPTER III
PUBLIC PROCUREMENT PROCESS, RULES ACCORDING TO THE ALBANIAN SYSTEM; SIMILARITIES AND DIFFERENCES WITH THE CORRESPONDING EU LEGISLATION

3. Introduction

The definition of special rules for the management of public funds aims at minimizing the non-necessary costs on the state budget and the optimization of price and quality of the required good, service or work. Taking into consideration the main definition of public procurement, and analyzing the elements of the public contract[308], it is understandable that to happen a public procurement, concrete needs should be known. To make these needs known to the private sector, a contracting authority should describe them by using technical specifications. Once the needs are identified, the contracting authority should further describe the requirement that economic operators should meet, to be qualified to perform the contract at issue. After deciding on the characteristics of needs and the qualification criteria, the contracting authority should launch a procurement procedure and run the selection process. To complete this process and award the contract, another necessary decision to be made by the contracting authority, is deciding on the awarding criteria to be used. The entire process should be based on procurement principles. As one of the most important principles, the transparency principle is concerted into concrete requirements, as are those on advertising relevant notices of a procurement procedure. These entire concepts reflect the activities prior to the conclusion of the contract and are very crucial for the achievement of the procurement objectives. All these concepts will be discussed in details, here below[309].

3.1 Public Procurement principles

Since its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU Member States. Creating a common procurement market means removing any barriers to trade arising from the procurement context[310].
The barriers to trade can be erected by means of the legislation or by the actions of contracting authorities or economic operators. Legislation can create barriers by imposing "buy national" requirements. Contracting authorities can impose barriers by making

[308] See Chapter I 'Role of Public Procurement".
[309] Considering that the Albanian PPL is approximated with the Directive 2004/18/EC, the analysis in this chapter will be made mainly referring to the relevant provisions of this Directive. Meanwhile, in Chapter V, where, among others, the need for further approximation of the PPL will be analyzed, this analysis will be made referring to the provisions of the new Directive 2014/24/EU.
[310] The ECJ in the case C-360/96 (n. 54 above), has held that 'The purpose of coordinating at Community level the procedures for the award of public service contracts is to eliminate barriers to the freedom to provide services and therefore to protect the interests of economic operators established in a Member State, who wish to offer goods or services to contracting authorities in another Member State'.

discriminatory award decisions. Economic operators can also create barriers by colluding together to rig tender prices. All of these barriers have the effect of distorting the competition in the common procurement market, and one of the primary purposes of public procurement legislation is to eliminate the existing barriers and prevent the erection of new barriers. It does so by applying the basic principles flowing through the legislation.

3.1.1 Principles of the Treaty of Functioning of the European Union (TFEU), affecting public procurement

As discussed in the previous chapter, the Treaty of Rome (and subsequent treaties amending the Treaty of Rome)[311] (hereafter referred to as the Treaty of Functioning of the European Union-TFEU) does not include any explicit provisions relating to public procurement. That does not mean, however, that it does not contain provisions that affect public procurement within the EU. On the contrary, the TFEU establishes a number of fundamental principles that underpin the EU[312]. These principles apply equally to the field of public procurement[313]. Of these fundamental principles, the most relevant in terms of public procurement are:

3.1.1.a Prohibition against discrimination on grounds of nationality

According to the TFEU[314] 'within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination'.
This principle is without prejudice to other more explicit provisions such as those relating to the freedom of establishment[315], which contain their own non-discrimination requirements and is thus not applied independently[316]. It embodies a standard of national treatment that 'requires persons in a situation governed by the Community law to be

[311] Treaty of Rome 1957, Establishing the European Community, as amended by the Single European Act 1986, The Treaty of Mastricht 1992, officially known as the Treaty on European Union (TEU), the Treaty of Amsterdam 1997 and the Treaty of Nice 2001. When the Treaty of Lisbon came into force in 2009, the pillar system was abandoned, and hence the EC ceased to exist as a legal entity separate from the EU. This led to the Treaty being amended and renamed as the Treaty on the Functioning of the European Union (TFEU), as amended.
[312] See for example article 18 of the consolidated version of the TFEU (ex article 12 of the TEC), articles 26-29 (ex articles 14, 15, 23 and 24 of the TEC), articles 49 and 50 of the TFEU (ex articles 43 and 44 of the TEC) and article 56 of the TFEU (ex article 49 of the TEC).
[313] See also S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 3-08.
[314] See article 18 of the TFEU (ex article 12 of the TEC).
[315] See article 49 of the TFEU (ex article 43 of the TEC).
[316] See case 307/87 Commission v Greece [1989] ECR 1461.

placed on a completely equal footing with nationals of an EU member state'[317]. In any case, this article applies only to Community nationals, individuals and legal persons[318], who are resident in any of the Member States of the Community. Nationals from third countries are excluded from the protection provided by this principle because they are 'not within the scope of application of this Treaty'[319]. According to this principle, in a procurement context, an economic operator from one member state must be treated in the same way as an economic operator from the contracting authority's member state. This is not the same as the principle of equal treatment[320], which does not rely on the concept of nationality.

3.1.1.b Free movement of goods and prohibition of quantitative restrictions on imports and exports and measures having an equivalent effect

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties[321]. On this regard, the Union shall comprise a customs union, which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having an equivalent effect, and the adoption of a common customs tariff in their relations with third countries[322]. The provisions relating to the free movement of goods apply both to products originating in Member States and to products coming from third countries[323], which are in free circulation in the Member States[324]. Thus, unlike the provisions of the Treaty relating to non-discrimination, which exclude from the protection provided by this principle nationals from third countries, the provisions relating to the free movement of goods, does provide for protection for non-Community goods, which are in free circulation within the Community[325].

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[317] See case 186/87 Ian William Cowan v Tresor Public [1989] ECR 195 at 219.
[318] According to article 54 of the TFEU (ex article 48 of the TEC), para.1 'companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States'.
[319] See case 136/78 Ministere Public v Vincent Auer [1997] ECR 437 at 447; case 271/82 Second Auer Case [1982] ECR 2727; case 115/78 Knoors v Staatssecretaris voor Economische Zaken [1979] ECR 399 at 407.
[320] This principle will be treated further below.
[321] See article 26 of the TFEU (ex article 14 of the TEC), para. 2.
[322] See article 28 para 1 of the TFEU (ex article 23, para.1 of the TEC).
[323] See article 28 para. 2 of the TFEU (ex article 23, para.2 of the TEC).
[324] According to article 29 of the TFEU 9ex article 24 of the TEC), Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect, which are payable, have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.
[325] See also S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 4-05 and 4-06.

Furthermore, the Treaty provides that quantitative restrictions on imports and exports and all measures having equivalent effect shall be prohibited between the Member States[326]. This principle seeks to prevent all trading rules enacted by EU Member States that are capable of hindering, directly or indirectly, actually or potentially, intra- Community trade[327]. The objective is to prevent Member States, through their contracting authorities[328], from buying only national products ('buy national' requirements). It applies to both the distinctly applicable measures that are clearly intended to discriminate against foreign goods (such as local content clauses) and the indistinctly applicable measures that apply equally to local and foreign goods but nevertheless discriminate indirectly against foreign goods in that their effect is to make market access more difficult for imported products than for local ones[329].

3.1.1.c Freedom of establishment

Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms[330], under the conditions laid down for its own nationals by the law of the country where such establishment is effected[331]. Unlike the provisions relating to the free movement of goods (as analyzed above), the provision relating to the freedom of establishment, does refer only to Community nationals.
This principle is designed to guarantee the rights of Community nationals to establish themselves or an agency, branch or subsidiary in the territories of other Member States. It also acts to protect the pursuit of activities of self-employed persons. Thus, an economic operator from a member state will be permitted to carry out a business in another member state through the establishment of a local entity[332].

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[326] See articles 34 and 35 of the TFEU (ex articles 28 and 29 of the TEC).
[327] See case 8/74 Procureur du Roi v Dassonvile [1974] ECR 837 at 852.
[328] The ECJ has specifically held that it applies to all authorities of a Member State, be they central authorities, the authorities of a federal state, or other territorial authorities. See for example joined cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior SA and Publivia SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluna [1991] ECR I-4151.
[329] P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 7, para 1.17.
[330] According to article 54 of the TFEU (ex article 48 of the TEC), 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.
[331] See article 49 of the TFEU (ex article 43 of the TEC).
[332] According to article 50 of the TFEU (ex article 44 of the TEC), 'in order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social

3.1.1.d *Freedom to provide services*

The restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States, who are established in a Member State other than that of the person for whom the services are intended. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Services' chapter to nationals of a third country, who provide services and who are established within the Union[333]. This principle protects the rights of the nationals of Member States, who are established in the Community to provide commercial or professional services[334] in the territories of other Member States. This would include the right of temporary establishment in the territory of another member

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Committee, shall act by means of directives'. Furthermore, this article provides for the main duties The European Parliament, the Council and the Commission shall carry out on this regards, in particular:
(a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
(b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;
(c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;
(d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions, which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;
(e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in the Treaty (Article 39(2);
(f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;
(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms with a view to making such safeguards equivalent throughout the Union;
(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

[333] See article 56 of the TFEU (ex article 49 of the TEC).

[334] According to article 57, para 1, of the TFEU (ex article 50 of the TEC), 'services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. 'Services' shall in particular include:
(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions'.

state for the purposes of providing a service in that member state[335]. Thus, an economic operator based in one member state will be entitled to submit a tender in another member state without the need to set up a local entity or representative.
Unlike the provisions relating to the freedom of establishment, the provision relating to the freedom to provide services does 'open a window' to the possibility for nationals of a third country to benefit from this freedom. In any case, this possibility is applicable only if there are two conditions fulfilled: a) nationals of a third country, who provide services and b) who are established within the Union. Yet, this possibility will be real if the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, will decide to extend the provisions of the Services' chapter to nationals of a third country.

3.1.2 Basic principles of public procurement

In addition to these fundamental principles in the Treaty, the award of contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities, is also subject to the principles deriving therefrom, such as the principle of a) equal treatment, b) the principle of non-discrimination, c) the principle of mutual recognition, d) the principle of proportionality and e) the principle of transparency. The dimensional nature of public procurement by virtue of the monetary applicability of the relevant rules introduces a *de minimis* criterion, where certain thresholds in relation to the value of the contracts are utilized for the applicability of the Directives[336]. Thus, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts, which are based on these principles so as to ensure their effects and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the Treaty[337].

As such, the public procurement legislation (Public Sector Directive and Albanian PPL) does provide for specific principles, which should be applied while running a procurement process. Both the Public Sector Directive and the Albanian PPL do provide

[335] According to the article 57, para 2, of the TFEU 'without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals'.

[336] See C. H. Bovis "EU Public Procurement Law", Second Edition, Edward Elgar Publishing Limited, United Kingdom, 2012, pg. 254.

[337] See Recital 2 of the Public Sector Directive 2004/18/EC. The same is stated also in the Recital 1 of the Public Sector Directive 2014/24/EU, which does stress also the fact that 'for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition'.

for principles, which should be considered by a contracting authority, in the procurement process, according to which the latest shall treat economic operators equally and non-discriminatorily and shall act in a transparent way[338]. Except for these principles, PPL, differently from the said Directive, provides explicitly for the principle of proportionality. On the other hand, the New Public Sector Directive 2014/24/EU does not only provide that contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner, but goes further by providing explicitly the necessity of measures to prohibit the artificial narrow of the competition. As such, according to this Directive, the design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. The competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favoring or disadvantaging certain economic operators[339]. There is a legal scope for Directives, which is the enactment of the Treaty principles of competition in the internal market, and an economic approach, more sensible to practical effects deriving from the abolition of trade barriers, which entails important consequences on the structure of European industry as well as on prices[340]. Another explanation, which is perhaps more pragmatic, lies with the idea that the reference to better value for money in the new Directive has to do with "marketing" considerations: in order to counter the increasing disfavor of the imposition of public procurement procedures, the Commission tries to "sell" the new Directives with the argument that public procurement entails value for money and not only internal market objectives[341].

Some general principles of law have also emerged from the case law of the European Court of Justice (ECJ). As *general* principles, these will also be applied in the context of public procurement, and a number have, in fact, been applied by the ECJ in cases concerned with public procurement disputes. They are important because they will often be used by the ECJ to fill in gaps in the legislation and to provide solutions of principle to situations that are often very complex. Thus, a very relevant principle set by ECJ case-law was the application of Treaty principles also under the threshold public procurements[342]. The result is that, according to procurement Directives (both Directive

[338] See respectively article 2 of the Directive 2004/18/EC and of the PPL.

[339] See article 18 of the 2014/24/EU.

[340] See R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law, Review Contents Vol. 52 No. 2 April 2015**,** © 2015 Kluwer Law International. Printed in the United Kingdom. pg. 394.

[341] *M. E. Comba "*Variations in the scope of the new EU public procurement Directives of 2014: Efficiency in public spending and a major role of the approximation of laws"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 45.

[342] See case C-59/00, 2001, Vestergaard ECR I-9505, in which the ECJ concluded that "Notwithstanding the fact that a public works contract does not exceed the threshold laid down in Directive 93/37 and does not, thus, fall within its scope, article 30 of the Treaty precludes a contracting authority from including in the contract documents for that contract a clause requiring the use in carrying out the contract of a product of a specified make, without adding the words 'or equivalent'". See also R. Caranta, The Borders of EU

2004/18 and Directive 2014/24)[343], the Treaty principles of the free movement of goods, freedom of establishment and provision of services are applicable in the award of all public contracts concluded in the Member States, but only contracts above a certain value require the Community coordination of national procedures[344]. The Treaty technique of approximation of legislation is peculiar of public procurements above the threshold, while other Treaty principles are common to above and below the threshold contracts[345]. On the other hand, the principles provided by the Albanian PPL, in the frame of the approximation process, are the same as the ones provided by the Public Sector Directives (both 2004/18 and 2014/24), but in any case they are applied in a different context.
Further below, we will see how the differences of the contexts do impact the 'shape' of the core principles, which rule the public procurement process.

3.1.2.a Equal treatment

Equality of treatments contains both formal and substantive elements. In a formal sense, equality presupposes equality before the law and is a fundamental requirement recognized by most systems of law[346]. In a substantive sense, this principle requires that identical situations be treated in the same way or that different situations not be treated in the same way[347]. Thus, this principle does not depend on the nationality (as with the principle of non-discrimination), but is based on the idea of fairness to its subjects[348]. In

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Public Procurement Law, in D. Dragos, R. Caranta (eds), Outside the EU Procurement Directives – Inside the Treaty?, Copenhagen, Djoef Publishing, 2012, p. 25 – 60.

[343] See Recital 2 of Directive 2004/18/EC and Recital 1 of Directive 2014/24/EU.

[344] *M. E. Comba "*Variations in the scope of the new EU public procurement Directives of 2014: Efficiency in public spending and a major role of the approximation of laws"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg 36.

[345] See Case C-6/05, Medipac-Kazantzidis, 2007, ECR I-4557 and joined cases C-147/06 and C-148/06, SECAP, 2008, ECR I-3565.

[346] See P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 14, para 1.32.

[347] See case C-304/01 Kingdom of Spain v Commission of the European Communities [2004] ECR I-7655 and case C-434/02 Arnold Andre GmbH & Co KG v Landrat des Kreises Herford [2004] ECR I-11825.

[348] See for example case C – 94/99 *"ARGE"*, where the association of undertakings and civil engineers ("ARGE") complained that the contracting authority conducting the public procurement breached the principle of equal treatment of all tenderers by allowing submission of tenders by service providers from public sectors. ARGE challenged the participation of such companies claiming that as semi – public tenderers, they received substantial state subsidies, which were not actually linked to the specific project. The national court reviewing the case referred to the ECJ with a number of questions. It was asking essentially whether the decision of the contracting authority to admit to the open procedure bodies, which receive subsidies of any kind, enabling those bodies to tender in public procurement procedures at prices, which are substantially below those of their private competitors, infringe the principle of equal treatment of suppliers in public procurement. During the procedure ARGE was arguing that the EU directives, which are applicable in the field of public procurement, are based on the principle that all suppliers must compete against each other under the normal conditions, without the market being distorted by the actions of Member States. The ECJ case noticed that EU directives, in particular the relevant directive 92/50

any case, having into consideration the dynamic, which characterizes the procurement process, the definition/interpretation of the 'fairness to the subjects' should be done according to the specific situation[349]. Based on its importance, this principle is required to be respected during all phases of a procurement process, but differently from the Public Sector Directive 2004/18, which does require for a equal treatment mainly in its recitals and has only one article[350] explicitly calling this principle, the Albanian PPL except from the general article declaring the public procurement principles, which is the same as the one provided by the above mentioned directive[351], does explicitly call for the principle of equal treatment in several articles[352] reinforcing the importance of respecting the equal treatment principle not only to achieve the purpose of the law, but also in communication to all interested stakeholders, during the awarding process, while preparing the technical specifications, while considering the cancellation of an awarding procedure, or while deciding to a use a negotiated procedure without prior publication of a contract notice[353].

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concerning the award of public service contracts contains detailed conditions for the selection of service providers and criteria for the contract award but none of those provisions provides that suppliers should be excluded from the participation because they receive public subsidies. On the contrary, the directive expressly authorizes the participation of public bodies. The mere fact that the contracting authority allows bodies receiving the subsidies of any kind, which enables them to submit tenders at prices lower than those of the other, does not amount to a breach of the principle of equal treatment.

[349] The Court of Justice rendered an interesting judgment in case C-336/12 Ministeriet for Forskning, Innovation og Videregående Uddannelser v. Manova A/S. This was a reference for preliminary ruling submitted by a Danish court in the course of proceedings concerning the lawfulness of a public procurement procedure organized by the Danish Ministry of Education. The Court of Justice held that the principle of equal treatment does not preclude a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favor or disadvantage the candidate or candidates to which it is addressed. While in the case C-87/94 *"Walloon buses"* the principle of equal treatment was breached in the opinion of the Court by the contracting authority, which changed the award of contract criteria in the course of the procedure. In that regard, ECJ pointed out that "by taking into account, in its comparison of tenders (...), the cost - saving features suggested by EMI [winning tenderer] without having referred to them in the contract documents or in the tender notice, by using them to offset the financial differences between the tenders in the first place and those of EMI's placed second and by accepting some of EMI's tenders as a result of taking those features into account, the Kingdom of Belgium failed to fulfill its obligations under the Directive."

[350] See article 2 of the Directive 2004/18/EC.

[351] See article 2 of the Albanian PPL, which is the same as article 2 of the Directive 2004/18/EC.

[352] In this point the Albanian PPL is 'closer' to the Public Sector Directive 2014/24/EU, which (in difference from the Directive 2004/18/EC) except for the recitals, does also explicitly call this principle in several articles (see for example article 24 'Conflicts of interest', article 29 'Competitive procedure with negotiation', article 31 'Innovation partnership', article 41 'Prior involvement of candidates or tenderers', Section 3 'Choice of participants and award of contracts "Article 56 'General principles' and Article 76 'Principles of awarding contracts').

[353] See for example article 1 'Purpose of the law', article 23 'Technical specifications', article 24 'Cancellation of an awarding procedure' article 32 'Negotiated procedure without prior publication of a

Another feature of the equal treatment principle (and all the other principles consequently) provided by the Albanian PPL is that it must be respected by all contracting authorities, for all type of contracts, falling in the scope of the PPL, without any exception. Meanwhile, the Directive does provide for a different treatment depending on the type of the contract for example, 'priority' and 'non-priority' services[354] as listed in the respective Annexes of the Directive. Still, this difference in the application of respective rules is dictated by the fact that the Directive does intend mainly to rule 'cross border' procurement, while the Albanian PPL has a narrower focus[355]. To emphasis the importance of this principle, except for specific provisions in the PPL, the respect of the equal treatment principle on public procurement system is strongly required by the legal system in Albania, as the breach of this principle is considered a criminal offense[356]. In this regard, when one or some of the same conditions of the participants in a tender are not evaluated equally, and based on this (unequal) evaluation the winner of the procedure is decided, a criminal offense is consumed[357].

contract notice', article 38 "Notices", article 42 "Clarifications and modification of tender documents, article 53 "Evaluation of tenderers", etc.

[354] In case C-95/10 (Judgment of 17 March 2011) the Court indicated, that the general principles of transparency and equal treatment do not impose on the contracting authorities an obligation, such as that laid down by Article 47(2) of Directive 2004/18/EC [economic and financial standing], for contracts concerning the services set out in Annex II B of that directive [so called 'non-priority' services]. Consequently, the ECJ judged that Directive 2004/18/EC does not create the obligation, for Member States, to apply the abovementioned art. 47(2) of that directive also to contracts, which have as their object services referred to in Annex II B. However – that directive does not preclude Member States and, possibly, contracting authorities from providing for such application in, respectively, their legislation and the documents relating to the contract. Moreover, in case C-226/09 (Judgment of 18 November 2010) the Court stated, that the system established by the European Union legislature for contracts relating to services falling within the ambit of Annex II B to the Directive [so called 'non-priority' services] cannot be interpreted as precluding application of the principles deriving from Articles 49 TFEU [ex art. 43 TEC] and 56 TFEU [ex art. 49 TEC], in the event that such contracts are nevertheless of certain cross-border interest or, therefore, of the requirements designed to ensure transparency of procedures and equal treatment of tenderers.

[355] However, the principle of equal treatment also applies if it turns out that only domestic undertakings are interested in the contract, given that the assessment of whether a contract is of cross-border interest must be made at the time that the contracting authority decides whether to put the contract out for competition. See further C. R. Hansen "Contracts not covered, or not fully covered, by the Public Sector Directive", DJØF Publishing, Copenhagen 2012, pg. 58.

[356] According to the article 258 "The breach of the equality of the participants in tenders or public auctions" of the Penal Code of the Republic of Albania 'performance of actions by the person in charge with state functions or to provide public service activities, contrary to the laws governing freedom and equality of citizens' participation in tenders and public auctions to create unfair advantages or privileges to a third party, is punishable by imprisonment up to three years'.

[357] See Decisions no. 269, date 17.10.2012 and no. 198, date 12.06.2013 of the Penal College of the Albanian Supreme Court.

3.1.2.b Non-discrimination

The concepts of equal treatment and non-discrimination are not the same. In general terms, all procurement legislation will seek to maintain equality between economic operators. In the European context, however, that equality will also be based on "nationality". Equal treatment, as analyzed above, is a concept that generally requires identical situations to be treated in the same way or different situations not to be treated in the same way, and it requires the identical treatment of identical people. In a sense, it implies that the contracting authorities will not take into account the different abilities or difficulties faced by individual economic operators but will judge them purely on the results of their efforts, *i.e.* on the basis of the tenders they submit. It provides for an objective assessment of tender prices and tender qualities and ignores any considerations that are not relevant to the discovery of the economically efficient tender[358]. In the European context, the concept of equality is, in addition, based on nationality or on the origin of goods, such that all economic operators of Community nationality and all bids including goods of Community origin must be treated equally, which is in fact the principle of non-discrimination. This is more than simply an extension of the concept of equal treatment. It implies that any condition of eligibility or origin (based on nationality or local provenance) will automatically give rise to unequal treatment, since those conditions will, by definition, discriminate against a certain group of (foreign) economic operators or favor another. However, while discrimination in a given context will produce unequal treatment, unequal treatment does not always give rise to discrimination[359]. Treating two economic operators from the same country differently could be unequal treatment but, since they are of the same nationality, there would be no discrimination (on grounds of nationality). The Danish Bridge case[360] provides a good example of the difference.

The non-discrimination principle is provided by the Albanian law generally with the same terms as it is provided by the Public Sector Directives (both Directive 2004/18 and Directive 2014/24), but still there are some differences in the specific provisions providing explicitly for the 'non-discriminatory' clause. The Public Sector Directive

[358] See P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 14, para 1.32.

[359] See P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 14, para 1.33.

[360] Case C-234/89 *Commission v Denmark* [1993] ECR I-3353. There were two alleged breaches of procurement law at issue; first, a clause that required the use of local goods and labor and second, the way in which the employer had given one of the tenderers the chance of putting forward a variation to the specifications contrary to the instructions set out in the tender documents. The first breach was clearly discriminatory and thus gave rise to unequal treatment between those tenderers, who could fulfill the nationality condition and those who could not, even though they could meet the output specifications. The second breach was not discriminatory because it did not distinguish between national and non-national tenderers. It merely treated one tenderer differently from the others. This is unequal treatment but is not necessarily discriminatory. It could also (coincidentally) be discriminatory if it were applied to different nationalities.

2004/18, except for the recitals, does list this principle at the basic principles of public procurement process[361] and does explicitly call this principle at the 'competitive dialogue' procedure[362], at the 'rules applicable to communication'[363], at qualification of economic operators' phase[364] and at the selection of competitors in cases of design contests[365]. The non-discriminatory clause does appear also indirectly at the requirements which should be respected, while the technical specifications are prepared; according to the Directive 'unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favoring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract is not possible; such reference shall be accompanied by the words 'or equivalent'. In difference from these cases where it does refer to the non-discrimination clause in general, when it provides for the 'special or exclusive rights[366]', it does refer specifically to the 'principle of non-discrimination on the basis of nationality'[367]. Anyway, even though the concept of 'non-discrimination on the basis of nationality' is mentioned explicitly only in one article of the Directive, the application of the non-discrimination principle in the context of the given Directive, is strongly related to the nationality[368]. As discussed above, the non-discrimination principle is one of the principles deriving from the Treaty principles, which intend to rule relations between countries (with different nationalities). The importance of the non-discrimination principle for EU is clearly reflected to the commitment required from the Albanian Government on the Stabilization and Association Agreement (SAA)[369], at the procurement part. According to the SAA, one of the obligations, which Albania does undertake in the field of public procurement, is the 'opening-up of the award of public contracts on the basis of non-discrimination and reciprocity'. This 'opening-up' on the basis of non-discrimination and reciprocity means that Albanian companies, whether established or not in the Community, shall be granted access to contract award procedures in the Community pursuant to Community procurement rules under treatment no less favorable than that accorded to Community companies as from the date of entry

[361] See article 2 of the said Directive.
[362] See article 29 of the said Directive.
[363] See article 42 of the said Directive.
[364] See article 44 of the said Directive.
[365] See article 72 of the said Directive.
[366] See article 3 of the said Directive.
[367] Directive 2014/24/EU in general does provide the same requirements for the non-discrimination principle, but differently from Directive 2004/18/EC, it specifically calls for this principle, in more articles than the latest does and in the case of 'special or exclusive rights', does not refer at all to the nationality (see article 11).
[368] C. R. Hansen "Contracts not covered, or not fully covered, by the Public Sector Directive", DJØF Publishing, Copenhagen 2012, pg. 56-57.
[369] As discussed in Chapter II, the commitment of Albania in the public procurement field in the frame of the SAA, derives from articles 70 and 74.

into force of this Agreement. The above provisions shall also apply to contracts in the utilities sector once the government of Albania has adopted the legislation introducing the Community rules in this area. The Community shall examine periodically whether Albania has indeed introduced such legislation. Community companies not established in Albania shall be granted access to contract award procedures in Albania pursuant to the Albanian Law on Public Procurement under treatment no less favorable than that accorded to Albanian companies at the latest four years after the date of entry into force of this Agreement. The Stabilization and Association Council shall periodically examine the possibility of Albania introducing access to contract award procedures in Albania for all Community companies[370].

The Albanian procurement law, on the other hand, provides for this principle in some of its articles, as the one providing for procurement principles[371], the one providing for the purpose of the procurement law[372], the one providing for the preparation of the technical requirements[373], the one providing for the applicable rules on electronic communications[374], and at qualification of economic operators' phase[375]. Differently from the Directive, PPL does provide a specific article dedicated exclusively to the non-discrimination clause[376]. According to PPL, 'contracting authorities shall establish no criterion, requirement or procedure with respect to the qualification of economic operators that discriminates against or among suppliers or contractors or against categories'. This requirement together with the requirement of non-discrimination during the qualification phase serves to make clearer the division between non-discrimination and equal treatment; in a procurement process, a contracting authority should comply first with the non-discrimination principle (by establishing non-discriminatory requirements and criterion) and then should comply with the equal treatment principles (to equally evaluate the already established (non-discriminatory) requirement and criterion). This argument leads further on to another conclusion; a (non) discriminatory behavior is strongly related to a characteristic, which might be directly related to the subject (economic operator) participating in a procurement procedure (its nationality, for example), or indirectly related to it, through establishment of certain requirements or criteria which orients toward, or exclude a given category of economic operators. In any case, PPL does call for the principle of non-discrimination, without making a direct reference to nationality[377], but indirectly it refers somehow to the nationality when defines the concept of the economic operators. In this case, PPL does provide that the

[370] See SAA document at: http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf.
[371] See article 2 of the PPL.
[372] See article 1 of the PPL.
[373] See article 23 of the PPL. PPL in this article does provide for the same as the Directive, an indirect requirement of non-discriminatory clause.
[374] See article 36 of the PPL.
[375] See article 46 of the PPL.
[376] See article 20 of the PPL.
[377] The provision on special or exclusive rights where Directive 2004/18/EC does make a direct reference to nationality is not provided at all by the PPL.

concept of an 'economic operator' shall cover equally the concepts of a contractor, supplier and service provider, without any kind of distinction. Providing this, PPL does allow for foreign (non Albanians) economic operators to submit a tender in the same conditions as the Albanian economic operators. Still the difference with the respective Directive in this case is that the latter directive refers to the non-discrimination of economic operators of EU Countries, while PPL does refer to the non-discrimination of all foreign economic operators, including all other countries outside the EU.

3.1.2.c Competition

From an economic perspective, "competition" operates as a discovery procedure by allowing different economic operators to communicate the prices at which goods and services are available on the market. Those prices act as guideposts and reflect the demand and supply conditions at any given moment. They also reflect the differences in quality and in terms and conditions of sale of the different (non-homogenous) products available.

Keeping competition fair (or maintaining a "level playing field") is a key concern for achieving efficient and economic procurement results. In the European Union context, coordination of national procurement procedures is required for the award of public contracts, which are based on Treaty principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition[378].

The Public Sector Directive 2004/18 seeks to prevent any distortions or restrictions of competition within the Community, and any attempt to prevent economic operators from being able to tender will be prohibited[379]. The new Public Sector Directive 2014/24 seems to be more interested to strengthen the importance of the competition principle as it does explicitly refer to it much more than the Public Sector Directive 2004/18 does (both in recitals and articles[380]).

The principle of the competition is considered as very important by the Albanian PPL as well, listing 'the promotion of the competition among economic operators' as one of its scopes[381]. Equally as the Public Sector Directives[382], the Albanian PPL does explicitly

[378] See Recital no. 2 of the Directive 2004/18/EC and Recital no.1 of Directive 2014/24/EU.

[379] The aim of the Directive 2004/18/EC to prevent 'distortion of the competition' is stated more than one time in the recitals of the Directive (see recital 2, recital 4 and recital 8) and in several articles (see for example article 23 according to which the Technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. See also articles 29, 32, 33, 35, 44 and 54).

[380] See Recitals 1, 7, 31, 32, 36, 49, 50, 57, 59, 61, 63, 68, 69, 71, 74, 78, 79, 90, 92, 96, 101, 104, 110, 122 and articles 24, 30, 32, 33, 34, 40, 41, 42, 50, 55, 57, 65, 66, 67, 79 and 80 of the Directive 2014/24/EU.

[381] Albanian PPL, in article 1 "Objective and Scope", does provide for three separate objectives, which all intend to ensure real competition among economic operators. Encouraging economic operators to participate in public procurement procedures, promoting competition among economic operators and guaranteeing an equal and non-discriminatory treatment for all economic operators participating in public procurement procedures, are all objectives, directly related to the 'competition' requirement.

[382] Both, Directives 2004/18/EC and 2014/24/EU.

express in several articles, its intention to guarantee 'the opening-up' of public procurement to competition and to prevent any distortions or restrictions of competition[383]. Even though the PPL puts itself in the Directive "level", calling for the principle of competition, in the same situations as Directive does, the function of this principle, under PPL is just to support the efficiency of the procurement system[384]. This is understandable considering the fact that PPL is a national law.

On the other hand, it seems that the objective of the respective Directives in this regard is to remove certain restrictions on participation in the market so that it is opened to potential competition from, in particular, firms from other Member States and that they require the procuring entities to hold a competition as a means of ensuring transparency to prevent discriminatory behavior[385]. The function of 'competition' as supporting non-discrimination rules has been stated also by the ECJ in several cases[386]. Also In *CoNISMa*[387] and more recently in *Swm Costruzioni 2*[388], the ECJ held that the objective of attaining the widest possible opening-up of public contracts to competition shall be beneficial not only to economic operators but also to the contracting authorities. In particular, in *CoNISMa* the ECJ added that "the widest possible opening-up to competition is contemplated not only from the point of view of the Community interest in the free movement of goods and services but also the interest of the contracting authority concerned itself, which will thus have greater choice as to the most advantageous tender, which is most suitable for the needs of the public authority in question." [389]

As a conclusion, we might say that the Albanian PPL has the same requirement as the Directive does, for the principle of competition[390], but despite the narrower view of the directive in this regard, PPL 'use' this principle to ensure efficient expenditure to safeguard the public money.

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[383] PPL does provide for the principle of competition in the same situations as Directive 2004/18/EC. See for example articles 1, 21, 23, 33, 34, 35, 35/1 and 46.

[384] See analyses of the approach of means and goals in public procurement, discussed at point 1.3 of the Chapter I above.

[385] See S. Arrowsmith, "Understanding the purpose of the EU's procurement directives: the limited role of the EU regime and some proposals for reform", published at "The Cost of Different Goals of Public Procurement", Swedish Competition Authority, 2012, p.75.

[386] See for example case C-399/98 Ordine degli Architetti delle province de Milano e Lodi v Commune di Milano 'La Scala' [2001] ECR I-5409; joined cases C-285/99 and C-286/99 Impresa Lombardini SpA v ANAS [2001] ECR I-9233 and case C-92/00 Hospital Inginieure Krankenhausrechnik Planungs-GmbH (HI) v Stadt Wien [2002] ECR I-5553, in which the ECJ has held that 'the primary aim of the Directive is to prevent entities indulging in favoritism'.

[387] See Case C-305/08, Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche, ECR [2009] para 37.

[388] See Case C-94/12, *Swm Costruzioni 2*, EU:C:2013:646, para 34.

[389] See R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law, Review Contents Vol. 52 No. 2 April 2015**,** © 2015 Kluwer Law International. Printed in the United Kingdom. pg. 404.

[390] See generally C. E. de Quesada PhD "Competition and transparency in public procurement markets", Public Procurement Law Review, 2014, 5, Sweet & Maxwell, London 2014, pg. 229-244.

3.1.2.d Transparency

According to this principle, the contracting authorities shall act in a transparent way[391]. This principle imposes an obligation of transparency on the contracting authority while conducting a procurement procedure and awarding a public contract. As well as in the case of the other principles analyzed above, the procurement legislation (both respective Public Sector Directives and PPL) provides for specific situations, which require transparency, while conducting a procurement procedure.
In accordance with the transparency principle, the contracting authorities are obliged to inform at least about:

- the plans concerning the award of contracts of particular value within a particular time – span (prior information notice[392]), provided that they want to apply shorter time period for submission of tenders[393];
- launched procedures for procuring goods, services, works (contract notice)[394];
- decisions taken in the course of the public procurement procedure and results of the public procurement procedure (award of contract or cancellation of the procedure)[395].

It is debatable whether the principle of transparency can create obligations of its own without relying upon other principles or rules[396]. However, one can argue that transparency is both an objective in its own right, since lack of transparency can be a barrier to trade, and a means of ensuring that there is no violation of other objective, since where transparent procedures are applied, it is difficult to disguise such a violation. For example, publication and accessibility of the legislation provides clarity and certainty for all stakeholders and enables contracting authorities and economic operators to be aware of the rules of the game. The requirements of advertising the contract notice, guarantee transparency in the discovery process, *i.e.* guaranteeing equal treatment and the widest possible competition[397]. Publicizing in advance the technical specifications and the selection and award criteria permits stakeholders to check that these are fair and non-

[391] See article 2 of the Directive 2004/18/EC, article 18 of the Directive 2014/24/EU and article 2 of the PPL.
[392] See Article 35 (1) of Directive 2004/18/EC and article 48 of Directive 2014/24/EU.
[393] See Article 41 (1) and Article 38 (4) of Directive 2004/18/EC and article 49 of 2014/24/EU.
[394] Ibid.
[395] Directive 2004/18/EC does not provide explicitly in one of its articles, this obligation. On the other hand, Directive 2014/24/EU does explicitly provide this obligation in article 50. The same is provided by PPL in this regard, in article 58. As it is easily noticed, PPL goes further than Directive 2004/18/EC in this respect and comes more in line with Directive 2014/24/EU.
[396] See C. R. Hansen "Contracts not covered, or not fully covered, by the Public Sector Directive", DJØF Publishing, Copenhagen 2012, pg. 65.
[397] See for example case C-299/08 European Commission v French Republic (Judgment of 10 December 2009), in which ECJ held that 'both the principle of equal treatment and the obligation of transparency, which flows from it, require the subject-matter of each contract and the criteria governing its award to be clearly defined'.

discriminatory[398]. Recording and reporting requirements ensure that the actions of the contracting authorities may be verified where appropriate[399]. The latter objectives are also a fundamental aspect of "accountability", *i.e.* holding procurement officers accountable for their decisions and actions. "Accountability" is also often an explicit objective of national procurement systems, and the transparency provisions reinforce this accountability.

The importance of the principle of transparency in the EU context, however, is that it applies independently of the legislation itself. So, if a particular procurement contract falls below the threshold values of the EU legislation (or national legislation) or if a contract is excluded from the scope of the Directives, *e.g.* public services concessions[400] or the procurement of certain non-priority services[401], then it is possible that the principle

[398] See case C-226/09 European Commission v Ireland (judgment of 18 November 2010), in which the ECJ stated that the obligation of transparency applies where the contract for the provision of services in question may be of interest to an undertaking located in a Member State other than that in which the contract is to be awarded. In the same case, the ECJ referred to the requirement to inform tenderers in the light of equal treatment and transparency principles – namely, and held that it is true that, according to the Court's case-law relating to public contracts awarded in accordance with all the provisions of the various public procurement directives, which preceded the adoption of the Directive, the purpose of the requirement to inform tenderers in advance of the award criteria and, where possible, of their relative weighting, is to ensure that the principles of equal treatment and transparency are complied with. See inter alia case C-470/99 Universale-Bau and Others [2002] ECR I-11617, paragraph 98; case C-331/04 ATI EAC and Viaggi di Maio and Others [2005] ECR I-10109, paragraphs 22 to 24. See also case C-91/08 Wall [2010] ECR I-0000, paragraph 29.

[399] Both Directives (2004/18/EC and 2014/24/EU) indirectly through respective articles on 'confidentiality' (see respectively articles 6 and 21), impose the right of information on the procurement process, except for the 'information forwarded to it by economic operators, which they have designated as confidential'. Albanian PPL, on the other hand, is clearer on this regard, providing in two separate articles the 'access to relevant information' (see article 21 of PPL) and the 'confidentiality' (see article 25 of PPL).

[400] See case C – 324/98 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, joined party: Herold Business Data AG where the subject of procurement was "*public service concession for the production and publication of printed and electronically accessible lists of telephone subscribers*". In this case, the ECJ came to the conclusion that since services in question were to be provided not on the basis of service contracts but concessions, detailed provisions of the directive were not applicable. Nevertheless, it stated that "it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular. That principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with. That obligation of transparency, which is imposed on the contracting authority consists in: ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed."

[401] See case C-95/10 Strong Segurança SA v Município de Sintra and Securitas-Serviços e Tecnologia de Segurança (Judgment of the Court (Third Chamber) of 17 March 2011) in which the ECJ stated, that the principle of transparency is not infringed if an obligation such as that laid down by Article 47(2) of Directive 2004/18/EC "rely on economic and financial standing", is not imposed on the contracting authority in respect of a contract, which has as its object services referred to in Annex II B (so called 'non-priority' services) to that directive. Indeed, the fact that an economic operator cannot rely on the economic

of transparency will continue to apply so as to impose advertising requirements[402]. The imposition of the transparency principle beyond the scope of the application of the Directive itself, as discussed above, is another feature of the differences between the Directive (and its objectives) and a national law (as PPL is). According to the Directive, the contracting authorities of Member States should advertise the contract notices throughout the Community and the information contained in these notices must enable economic operators in the Community to determine whether the proposed contracts are of interest to them[403]. Anyway, despite the Directives' requirement 'the degree of the advertising' depends on the national law of a Member States, especially in the cases, which are under the Directive thresholds[404]. The Albanian PPL, on the other hand, is stricter in this regard. It provides for the same rules of transparency, despite the value of the contract, but in any case these transparency requirements are mandatory only for the contracts, which fall under the scope of the PPL. This difference is explained with the fact that PPL is a national law and has a specific scope of application. The stricter requirement of the PPL on 'the degree of the transparency' is explained with the concrete environment and context, where this law is applied[405]. The biggest problem of the

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and financial capacities of other entities has no connection with the transparency of the contract award procedure. Moreover, the Court underlined that, the application of Articles 23 (technical specifications) and 35(4) (notices) of Directive 2004/18/EC during the contract award procedures relating to such 'non-priority' services is also intended to ensure the degree of transparency that corresponds to the specific nature of those contracts.

[402] In case C – 275/98 Unitron Scandinavia A/S and 3-S A/S, Danske Svineproducenters Serviceselskab v Ministeriet for Fødevarer, Landbrug og Fiskeri. *"Unitron Scandinavia"* the ECJ stated that the principle of non-discrimination on the ground of nationality implies in particular an obligation of transparency in order to enabling the contracting authority to satisfy itself that the principle has been complied with.

[403] See recital 36 of Directive 2004/18/EC.

[404] Where Directives do not apply to the contract in question (either because it is outside Directives or below the thresholds), the principle of transparency will apply, requiring some form of advertising of the proposed contract. That will be the case whenever the contract in question may be of interest to an undertaking located in another EU Member State. This is not required, however, where the lack of advertising can be justified by "objective" or "special" circumstances, such as where there is only a very modest economic interest at stake. See for example case C-231/03 *Consorzio Aziende Metano ("Coname") v Padania Acque SpA ("Coname")* [2005] ECR I-7287.

[405] One of the biggest problems in the Albanian procurement system before the application of the e-procurement system was the impossibility of private business/community to have access to tender documents, for procedures that will be performed by the Contracting Authorities. This was closely related to the lack of transparency in the procurement process. Every one that was interested in the tender documents had to buy them in hard copy at the Contracting Authority office (see Law no.7971/1995 "On Public Procurement"). Very often happened that Contracting Authorities, had no "good will" to sell those documents, and in the best case, economic operators reached the above mentioned documents, some days before the opening of the tender, not having in this way the necessary time for preparation of their offer. The lack of transparency made impossible the access of economic operators or everyone else interested, to the other steps/phases of the procurement process, which led directly to a high level of corruption. As the procurement procedures were performed on paper bases, in spite of the requirement of keeping written records on every step of the procedure often happened that some documents were taken off from the folder or some others were added later. Also the evaluation phase was not transparent at all.

procurement system in Albania was the lack of transparency[406]. In these circumstances, an e-procurement initiative was introduced in Albania in 2008.[407] The electronic system[408] is transparent, since it provides the increasing of information passing through it, and most importantly, it enhances the responsibility in relations between the contracting authorities and economic operators, enabling a more effective and efficient use of the tax payers' money. Using EPS has improved access to information and reduced procedural costs[409]. The e-procurement system provides also a greater participation of the economic operators in the public procurement procedures, since they can submit their offers by electronic means, from their workplace, and having information on the procurement procedure they have applied in real time, without being necessary to be present at the contracting authorities premises[410]. This is a clear indicator of higher access to public procurement procedures and higher participation of economic operators leads to higher competition and savings[411]. Moreover, the electronic system does generate reports enabling ulterior inspections, ex post monitoring of procedures and reducing the possibility of corruptive deviations. It is constructed in such a way as to maintain at all times a copy of all data and all actions performed on it. The overall impact of this

[406] According to the "Albania Progress Report" (2005, November 9) of the European Commmission, EC had expressed its concerns about the complexity and inconsistency of the whole legal framework, which combined with weak institutions and weak implementation of basic principles such as transparency, equal treatment, free competition and non-discrimination, results in a procurement system that strongly discriminates against foreign bidders in favor of the local ones, does not achieve the best value for money and efficiency in the procurement process and leaves room for corruption and collusion.

[407] See Public Procurement Agency of Albania (2008). *Annual Report*. [On-line]. Available at www.app.gov.al. [Retrieved September 2012].

[408] The e-procurement system in Albania offers secure, efficient and transparent preparation and administration of all tender-related documents, removing unnecessary paper work and providing secure data flow throughout the entire process. All the tender documents from the contract notice to the winner notice and further on to the notice of the signed contract are available in the electronic public procurement system, and all transactions, starting from the download of documents till the bidding by electronic means, may be performed at anytime and from anywhere the economic operators are in Albania, or in any other country of the World. See Public Procurement Agency of Albania (2009). *Annual Report*. [On-line]. Available at www.app.gov.al. [Retrieved September 2012]

[409] See Commission staff working document – Albania 2009 Progress Report – Accompanying the Communication from the Commission to the European Parliament and the Council, (2009, October 14), Commission of the European Communities, Brussels. Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2009/al_rapport_2009_en.pdf

[410] According to the American Chamber of Commerce Survey (AmCham Survey), 70% of respondents said that using EPS has increased the number of procurement procedures for which they submitted bids in 2009, as compared to the paper-based system. See American Chamber of Commerce in Albania (2010) *"Monitoring the usage of the E-procurement System"* [On-line]. Available at www.amcham.com.al. [Retrieved October 5, 2011].

[411] See R.Kashta "Corruption and Innovation in the Albanian Public Procurement System", published in the Academicus International Scientific Journal, Nr. 10, 2014.

initiative is transparency and reduction of corruption[412]. All what is analyzed above is a clear indicator that transparency in the public procurement process in Albania is considerably high. In this regard, the public procurement legislation in Albania is more advanced than the respective requirement of the Directive, with which it is required to be in line[413]. This is also a reflection of the fact that PPL is a national law, and a national law will be "shaped" also by the concrete context and environment where it is applied.

3.1.2.e Proportionality

The principle of proportionality requires that any measure chosen is both necessary and appropriate in the light of the objectives sought. As mentioned above, the Albanian PPL, differently from the Directive 2004/18, does explicitly provide in the relevant article, which states the basic principles of the procurement[414] the obligation of the contracting authorities to respect the principle of proportionality of requirements and obligations imposed to actual and potential tenderers[415]. Furthermore, PPL does refer to the principle of proportionality in all specific articles that rules preparation of all kind of requirements in a procurement procedure, such as technical specifications, qualification criteria, awarding criteria, time limits etc.[416] In general, the principle of proportionality is provided in the same situations as in the PPL. Choosing the measures to be taken, an EU member state must adopt those that cause the least possible disruption to the pursuit of an economic activity. In the case of contracting authorities, for instance, it could be said that

[412] According to Transparency International, e-procurement is a fantastic tool for reducing corruption and increasing integrity in public procurement systems. Globally, there have been concrete examples in Albania and also in South Korea, among others. This shows that e-procurement provides not just a step, but a leap forward in terms of increasing the integrity of public procurement systems. http://blog.transparency.org/2011/02/16/combating-corruption-in-the-eu-through-e-procurement/ . See also the Albania Report on Benchmarking and Draft Capacity Assessment 2010, introduction of the e–GP platform undoubtedly had a very positive effect in reducing corruption and overall opacity of the procurement system, while increasing transparency. http://www.oecd.org/development/effectiveness/47126088.pdf

[413] While the Albanian procurement legislation provides for the mandatory use of electronic means for this purpose, the Public Sector Directive 2004/18/EC, leaves it as an optional choice of the Member States. According to the new Directive 2014/24/EU, on the other hand, the 'electronic means should become the standard means of communication and information exchanges in procurement procedures, as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the internal market. For that purpose, transmission of notices in electronic form, electronic availability of the procurement documents and – after a transition period of 30 months – fully electronic communication, meaning communication by electronic means at all stages of the procedure, including the transmission of requests for participation and, in particular, the transmission of the tenders (electronic submission) should be made mandatory'. (see Recital n. 52).

[414] See article 2 of the Directive 2004/18/EC and article 2 of the Albanian PPL.

[415] In this regard, the Albanian PPL provides more than Directive 2004/18/EC does and is in line with the New Directive 2014/24/EU, which in its article 18 provides explicitly for the principle of proportionality.

[416] See articles 23, 32, 33, 43, 46, 49, 55, 59, 61, 64 of Albanian PPL.

when selecting candidates and tenderers, the contracting authorities should not impose technical, professional or financial conditions that are excessive and disproportionate to the subject of the contract[417].

3.1.2.f Mutual recognition

According to this principle, the relevant Community rules on mutual recognition of diplomas, certificates or other evidence of formal qualifications apply when evidence of a particular qualification is required for participation in a procurement procedure or a design contest[418]. Also, a contracting authority in a EU Member State, which requires the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, shall refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series concerning certification and they shall recognize equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent quality assurance measures from the economic operators[419]. The new Directive 2014/24 goes further in this regard, providing also for the possibility that contracting authority shall also accept other evidence of equivalent quality assurance measures where the economic operator concerned had no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards[420]. In practice, this means that the member state, in which the service is provided, must accept the technical specifications, checks, diplomas, certificates and qualifications required in another Member State if they are recognized as equivalent to those required by the Member State, in which the service is provided.

Differently from all other principles analyzed here above, the principle of mutual recognition is the only one, which is not explicitly provided by the Albanian PPL. This is easily explained with the fact that the objective that Directive wants to achieve through this principle is supporting the idea of a ‘common market’ and ‘no barriers’ among Member States, and as such, this principle is not relevant for a national law of a country, which is not member of this Union.

3.1.3 Summary

[417] See articles 44, 47 and 48 of the Directive 2004/18/EC and articles 19, 42, 47 and 58 of the Directive 2014/24/EU.
[418] See article 42 of the Directive 2004/18/EC.
[419] See article 49 of directive
[420] See article 62 of Directive 2014/24/EU.

As a conclusion, we can certainly say that principles stay at foundations of the procurement process. Their importance does not stand only at each of them alone, but also at the impact that each of them has on the others. Such as for instance, if the non-discrimination principle is violated, the equal treatment might be violated too, and competition will be distorted. If the requirement for transparency is not respected, the equal treatment and non-discrimination might be violated, proportionality might be violated and competition will be distorted. Analyzing all the above principles, it seems that two main categories may appear: principles (such as equal treatment, non-discrimination, and proportionality), which in a way or another make the competition happen, and transparency, which more than a principle is a tool that observes and supports the implementation of other principles.

An interesting issue, coming up from the analysis of the procurement principles, is the fact that the Albanian PPL has absorbed the same principles, which are provided for by the Public Sector Directives (respectively Directive 2004/18 and 2014/24) even though it is not in the same context. The reasons and explanation of determining such principles on the foundation of the procurement process, in the European Union context, are found on the objectives of the EU, discussed above, as is for example, to create a common market that eliminates barriers to trade in goods and services between EU Member States. In this case, creating a common procurement market means removing any barriers to trade arising from the procurement context. As such, the procurement principles provided by the Directives are closely related and have to comply with the main principles set out by the Treaty[421]. Following this argument, Member States does not just 'copy' the said Directive as such, but they have a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with procurement principles, which are binding on contracting authorities in any procedure for the award of public contracts[422].

On the other hand, as analyzed above, the principles provided by the Albanian PPL, in the frame of the approximation process, are the same as the ones provided by the Public Sector Directives (both 2004/18 and 2014/24), but in any case they are applied in a different context. The aim of these principles in the Albanian PPL, as it is a law ruling the procurement system of a given state (not the procurement system of more than one state as it is the case of the Public Sector Directive) is to provide for the equal treatment, nondiscrimination, transparency, fair competition etc, in a narrower aspect, meaning that these principles should be respected in a procurement process, to achieve the goals and objectives of this process[423]. They are not meant to be used 'to create a common market

[421] See note n. 334 above.

[422] See cases C-379/08 of 23 December 2009; C-213/07 Michaniki [2008] ECR I-0000, paragraph 44; C-299/08 of 10 December 2009, according to which as regards the principles of equal treatment and transparency, the Member States must be recognized as having a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with those principles, which are binding on contracting authorities in any procedure for the award of public contract. Moreover, both the principles of equal treatment and the obligation of transparency, which flows from it, require the subject-matter of each contract and the criteria governing its award to be clearly defined.

[423] As discussed in point 1.3 of Chapter I.

that eliminates barriers to trade in goods and services between countries', at least for as long as Albania is not a member of the European Union.

3.2 Publication of notices in a procurement procedure

Advertising is a foundation stone of public procurement. Full and open advertising:

- facilitates appropriate competition[424] – by informing as many potential economic operators as possible about contract opportunities and thereby enabling them to compete, which leads to the best value-for-money outcomes for contracting authorities;
- develops markets – by showing potential economic operators that business opportunities are available, which encourages the development of the marketplace with new and more diverse economic operators and a wider source of economic operators at the local, regional, national and international levels;
- Helps in the battle against corruption – by increasing transparency and ensuring that economic operators, the public, the press and other stakeholders are aware of contract opportunities and have the opportunity to find out more about the contract opportunities that are available and to whom contracts have been awarded[425].

Any contracting authority wishing to award a public contract shall make known their intention by contract notices.[426]

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[424] See Recital 36 of Directive 2004/18/EC, according to which 'to ensure development of effective competition in the field of public contracts, it is necessary that contract notices drawn up by the contracting authorities of Member States be advertised throughout the Community'. See also Recital 126 of Directive 2014/24/EU, according to which 'the traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report. To avoid administrative burdens wherever possible, it should be permitted for the procurement report to refer to information already contained in the relevant contract award notice. The electronic systems for publication of those notices, managed by the Commission, should also be improved with a view to facilitating the entry of data while making it easier to extract.

[425] See R.Kashta "Corruption and Innovation in the Albanian Public Procurement System", published in the Academicus International Scientific Journal, Nr. 10, 2014.

[426] See article 38 of PPL. Exception from this rule makes the negotiated without prior publication procedure, for the reasons which will be analyzed further below. See also article 35 /2 of Directive 2004/18/EC, according to which 'the contracting authorities are obliged to advertise all public contracts and framework agreements' and article 49 of Directive 2014/24/EU according to which 'contract notices shall be used as a means of calling for competition in respect of all procedures, except for the specific cases when prior information notice has been used and negotiated without prior publication notice' procedure'.

3.2.1 Prior Information Notice

Except for the general rule of publishing the contract notice, both relevant Directives (2004/18 and 2014/24), give to the Contracting Authority the option to use a Prior Information Notice or Buyer Profile for notifying economic operators of forthcoming contracts or framework agreements[427]. Advertising in advance in this manner provides benefits to both the contracting authority and potential economic operators. Before advertising the contracting authority needs to have thought carefully about its requirements, and so the preparation of the Prior Information Notice can assist in ensuring that advance planning and budgeting are taken seriously[428]. The economic operators that have been given advance warning of potential opportunities can also plan accordingly. This planning assists in ensuring good levels of competition and better outcomes in terms of value-for-money for the contracting authority. If a Prior Information Notice is used, then in certain circumstances statutory tender time scales can be reduced[429]. Also, Directives set out the content of a Prior Information Notice referring to the standard format that must be used[430] and rules on where this prior information notice should be published. According to the said Directives, they shall be published either by the Publications Office of the European Union or by the contracting authorities on their buyer profiles. Where the prior information notice is published by the contracting authorities on their buyer profile, they shall send a notice of publication on their buyer profile to the Publications Office of the European Union[431]. Although it is important to be

[427] See article 35/1 of Directive 2004/18/EC and article 48 of Directive 2014/24/EU. The latter, differently from the Directive 2004/18/EC, does provide for a specific article on prior information notice.

[428] According to article 26/5 and article 48 of Directive 2014/24/EU, 'for restricted procedures and competitive procedures with negotiation, the sub-central contracting authorities may use a prior information notice as a call for competition, provided that the notice fulfils all of the following conditions:
(a) it refers specifically to the supplies, works or services that will be the subject of the contract to be awarded;
(b) it indicates that the contract will be awarded by restricted procedure or competitive procedure with negotiation without further publication of a call for competition and invites interested economic operators to express their interest;
(c) it contains, in addition to the information set out in relevant annexes;
(d) it has been sent for publication between 35 days and 12 months prior to the date on which the invitation to tender is sent'.

[429] The Directive sets out specific requirements about when Prior Information Notices are to be advertised. There are general requirements applying to all Prior Information Notices and specific requirements where the contracting authority wishes to rely on a Prior Information Notice to reduce statutory tender time scales. The requirements are different depending upon whether the contracting authority is advertising for works, supplies or services contracts.
See articles 35 and 38/4 of Directive 2004/18/EC and articles 27-29 of Directive 2014/24/EU.

[430] This standard format is published by the European Commission on its website at www.simap.europa.eu. The format is the same for all types of contracts. See Annex VII A of Directive 2004/18/EC and Annex V, Part B, Section I of Directive 2014/24/EU.

[431] See article 35 of Directive 2004/18/EC and article 48 of Directive 2014/24/EU.

mentioned, this is an option for the contracting authorities of the Member States, and as such use of Prior Information Notices is therefore voluntary and not obligatory[432].
The Albanian PPL does not provide for such an instrument. If analyzed in the context of the obligation and commitments undertaken in the SAA, it will not be the case of 'non-approximation' as this is optional even for Member States. On the other hand, if it is the case that Albanian law will provide for such mechanism anyway (even though it is not obligatory), in practice it will not be possible to implement it, because it is required that the notice itself, or the fact of publication of this notice on the buyer profile, should be published in any case, by the Publications Office of the European Union. As such, it seems that this mechanism is meant only for states, which are subject of the Directive, and there is no sense to require a non-member state to introduce such a mechanism in its national procurement law. Although the Albanian PPL does not provide for the possibility of publication of a prior information notice as such, it provides in its secondary legislation the obligation for the contracting authority to publish at PPA website at the beginning of the budgetary year, the forecast register[433]. The content and the format of this register is approved by PPA and published at its website and it gives information on the object of the contract, the public procurement procedure that will be followed, the estimated fund, and the estimated launching time[434]. In any case in the forecast register, the contracting authorities should publish all kind of procedures despite the value (including the small value purchases). Publication of such information at the beginning of the year goes in line with the principle of transparency and in concrete terms its aim is the same as mentioned above, to benefit both, the contracting authority and potential economic operators as on one hand economic operators that have been given an advance warning of potential opportunities can also plan accordingly and on the other hand this planning assists in ensuring good levels of competition and better outcomes in terms of value-for-money for the contracting authority.

3.2.2 Contract notices and contract award notices

As discussed in the beginning of this section, in any case that contracting authorities wish to award a public contract shall make known their intention by contract notices[435]. This rule is applicable for all kinds of procurement procedures, provided by the respective legislation, except for negotiated procedures without the prior publication of a contract

[432] Publication of the prior information notices shall be compulsory only where the contracting authorities take the option of shortening the time limits for the receipt of tenders.

[433] See article 4 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[434] See at https://app.gov.al/Model_Regjistri.aspx.

[435] On many occasions the ECJ expressed its view on the obligations of contracting authorities regarding the transparency in public procurement realized through publication of procurement notices. See for example case C – 24/91 Commission of the European Communities v Kingdom of Spain.

notice[436]. The Contract Notice is an extremely important part of the procurement process. It marks the commencement of the formal procurement process for a specific contract and notifies potential economic operators of the concrete opportunity to participate in the procurement process. To ensure as much competition as possible and to comply with the basic requirements for transparency, the Contract Notice must be drafted in a way that clearly describes the nature, scope and estimated value of the contract and how economic operators can apply to participate in the process[437]. The Contract Notice must also be completed fully and correctly[438]. Failure to draft a clear, complete and compliant Contract Notice could result in a disappointing level of competition, poor quality or inappropriate tenders, or a flawed procurement process that might have to be re-started. In cases when there is a need for correction or changing of the contract notice and all the subsequent information, another notice should be published[439]. This implies a requirement to notify all potential tenderers of any revision so as not to favor one tenderer in particular[440]. In any case, it is important to consider carefully the impact of any changes that the contracting authority proposes to refer to in the amending notice. Should any corrected or added information lead to a substantial change of the conditions provided for in the original contract notice with a bearing on the principle of equal treatment and on the objective of competitive procurement, it would be necessary to extend the originally foreseen deadlines[441]. There are no specified minimum and maximum time periods for publishing a Contract Notice[442], but there are statutory time limits that start on the date of dispatch of the Contract Notice and vary on the type of the concrete procedure[443].

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[436] See article 38(1) of the Albanian PPL and respectively article 35 (2) and (3) and article 49 of Directive 2004/18/EC and Directive 2014/24/EU.

[437] Both the Albanian PPL and relevant Directives set out the required content for Contract Notices and refer to the standard forms that must be used. The standard format Contract Notice is used for the majority of procurement processes, but there are different formats for different types of procurement. These standard forms are published respectively by the Public Procurement Agency in Albania on its website at www.app.gov.al and by the European Commission on its website at www.simap.europa.eu . See article 39 of the Albanian PPL and respectively article 36 (1) and article 49 of Directive 2004/18/EC and Directive 2014/24/EU.

[438] According to the Albanian PPL the contract notice is always associated by the Standard Tender Documents, which include all the necessary information needed by potential tenderers. See article 41 of the PPL and articles 10 and 11 of the Decision of Council of Ministers no. 914, date 29.12.2014 "Rules on Public Procurement".

[439] See article 42 (1) and (2) of the PPL and standard forms available on the Commission's Simap website (see form number 14).

[440] See case C-87/94 Commission of the European Communities v Kingdom of Belgium 'Walloon Buses' [1996] ECR I-2043.

[441] According to article 42 (2/1) of the PPL 'in any case, when tender documents are modified, contracting authorities shall extend the time limit for the submission of tenders, by 5 days, whereas for procurements above the high monetary thresholds by 10 days'. See also The standard form notices according to the respective Directives, available on the Commission's Simap website www.simap.europa.eu.

[442] In cases when contracting authorities of Member States wish to rely on the combination of a Prior Information Notice and a Contract Notice so as to reduce statutory tender time scales, then there are specified, statutory minimum and maximum periods permitted between publishing a Prior Information

Under the light of the transparency principle, except for the contract notices, contracting authorities should advertise the conclusion of a contract in a specific procurement process by using a Contract Award Notice[444]. This final notice is important because it ensures the transparency of the process, as economic operators and others are made aware that the procurement process has been concluded and on what basis[445]. This information is also used to prepare statistical data on the level and nature of the procurement activity and to monitor procurement processes. Differently from the referred Directives, the Albanian PPL does call for two types of notices at the end of the procurement procedure; the 'winner notice' and the 'contract signed notice'[446]. The division of the 'winner notice' and 'contract signed notice' in two separate steps, is done more in statistical perspective, to evaluate in how many procedures that end up with a winner, a contract is really concluded. The legislation (both PPL and the respective Directives) sets out the content for the Contract Award Notices and refers to the standard forms that must be used[447].

The contract award notices should be published according to time limits set by the given legislation. According to Directive 2004/18, contracting authorities, which have awarded a public contract or concluded a framework agreement[448], shall send a notice of the results of the award procedure no later than 48 days after the award of the contract or the conclusion of the framework agreement[449]. Directive 2014/24 has shortened this time frame in '30 days after the award of the contract or the conclusion of the framework agreement'[450]. The Albanian PPL, on the other hand, is much more stricter in setting these time limits, as it provides that 'the winner notice' should be sent for publication within 5 days from the day the winner has been awarded[451] and 'the contract signed

Notice and publishing the related Contract Notice. See respectively, article 38 (4) and articles 27-29 of Directive 2004/18/EC and Directive 2014/24/EU.

[443] See article 43 of the PPL and respectively articles 38 and articles 27-29 of Directive 2004/18/EC and Directive 2014/24/EU.

[444] See respectively article 35/4 and article 50 of Directive 2004/18/EC and Directive 2014/24/EU.

[445] See case C-160/08 Commission v. Germany, ECR [2010].

[446] See article 58 of the PPL and articles 11 and 25 of the Decision of Council of Ministers no. 914, date 29.12.2014 "Rules on Public Procurement".

[447] The standard forms are published respectively by Public Procurement Agency in Albania on its website at www.app.gov.al and by the European Commission on its website at www.simap.europa.eu .

[448] In cases of the contract award or conclusion of the framework, certain information can be withheld from publication. This is where publication would impede law enforcement, or be contrary to the public interest, or would harm the legitimate commercial interests of the economic operators (economic operators or public sector), or might prejudice fair competition. See respectively, article 35/4 and 50/4 of Directive 2004/18/EC and 2014/24/EU.

[449] See article 35/4 of the Directive 2004/18/EC.

[450] See article 50/1 of the Directive 2014/24/EU.

[451] See article 58/2 of the PPL.

notice' should be sent for publication within 5 days from the day the contract has been signed[452].

Following the transparency principle, a notice should be published as well in cases of an incomplete procedure, when a procedure has been discontinued, declared unsuccessful, or the contract has not been awarded[453]. This notice should be published in the same way as the contract notice has been published.

If the requirement for publication of the contract notices, in a standard form and of certain content, is provided by the Albanian PPL in the same way as it is provided for by the respective Directives, there is a different approach for the place where these notices should be published. According to the relevant Directives, notices for contracts and contract award notices of a certain type and value (which means that they are subject to the Directive[454]), must be sent to the Office for the Official Publications of the European Communities[455]. Contract notices shall be published in full in an official language of the Community as chosen by the contracting authority, this original language version constituting the sole authentic text. A summary of the important elements of each notice shall be published in the other official languages. These notices are published free of charge (the costs of publication of such notices by the Commission shall be borne by the Community). The Commission shall give the contracting authority confirmation of the publication of the information sent, mentioning the date of that publication, which shall constitute proof of publication. Directive 2004/18/EC does provide for two ways of communication with the Publication Office of the EU: by electronic means and non-electronic means. The difference on the way of communication is reflected at the restriction on the length of the notices and 'responding time" of the Publication Office. The content of notices not sent by electronic means shall be limited to approximately 650 words, while there are not such limitations for the content of the notices sent by electronic means. Also, notices drawn up and transmitted by electronic means shall be published no later than five days after they are sent, while notices which are not transmitted by electronic means, shall be published not later than 12 days after they are

[452] See article 25 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[453] See article 24 of the PPL and Annex VIII, 2 b respectively of the Directive 2004/18/EC and Directive 2014/24/EU.

[454] Contracting authorities from Member States award very many contracts that are not subject to the requirement to advertise according to the Directive' requirements. This may be the case, for example, of a particular type of contract that is not subject to those obligations or that is of small value and therefore does not meet the required thresholds (such a contract is referred to as 'sub-threshold'). As previously discussed, the Directive does not set down specific rules that apply to the award of these types of contracts, but the basic general law and Treaty principles, including the requirement for transparency and equal treatment, do apply to the procurement process that the contracting authority follows in procuring those contracts.

[455] A free online version of the Supplement of the Official Journal of the European Union (OJEU) called 'TED' (Tenders Electronic Daily) is available at http://ted.europa.eu. TED is updated five times per week, and all notices are published in full and translated into all EU languages. TED provides free access to business opportunities for economic operators that use the TED database to search for tender opportunities by country, region, business sector or other categories.

sent (when no prior information notice has been used)[456]. This difference aims at the stimulation of the electronic communication. The Directive 2014/24, on the other hand, is stricter in this regard, allowing only for electronic communication[457]. The 'electronic' tendency of this Directive goes further, when it requires all contracting authorities to offer free of charge unrestricted and full direct access by electronic means to the procurement documents from the date of the publication of a notice or the date on which an invitation to confirm interest was sent[458]. The text of the notice or the invitation to confirm interest shall specify the internet address, where the procurement documents are accessible[459].

Except for the 'centralized' publication, contract notices may also be advertised at the national level. Where additional advertisement is used, the Directive stipulates that this advertisement must not take place before the contract notice has been dispatched to the Office of the Official Publications of the European Community and that the additional advertisement must not contain any information that is not included in the contract notice. Notices and their contents may not be published at national level before the date on which they are sent to the Commission[460]. This requirement is strongly related with the principle of equal treatment and non-discrimination. It seeks to avoid situations in which economic operators of the Member State that is launching the procurement procedure will have the information before the potential economic operators of other Member States. Also, the requirement on the language of the notices comes in the light of these principles. Aiming at the uniformity that 'supports' the equal treatment and non-discrimination, the European Commission has introduced a detailed coding system, so called 'Common Procurement Vocabulary' (CPV)[461] specifically for use in public procurement. It provides a method for describing works, supplies and services using a unique reference number[462]. Economic operators can search for contract opportunities

[456] See article 36 and Annex VIII of the Directive 2004/18/EC.

[457] According to the article 50 of Directive 2014/24/EU, 'notices shall be drawn up, transmitted by electronic means to the Publications Office of the European Union'.

[458] The Directive 2004/18/EC does provide for both ways of access to the procurement documents, electronic and non-electronic ways. See for example article 39/1 of the Directive, according to which 'where contracting authorities do not offer unrestricted and full direct access by electronic means to the specifications and any supporting documents, the specifications and supplementary documents shall be sent to economic operators within six days of receipt of the request to participate, provided that the request was made in good time before the deadline for the submission of tenders'.

[459] See article 53/1 of the Directive 2014/24/EU.

[460] See article 36/5of the Directive 2004/18/EC and article 52 of the Directive 2014/24/EU.

[461] See respectively articles 1/14 and 23 of Directive 2004/18/EC and Directive 2014/24/EU.

[462] A single classification system: the Common Procurement Vocabulary (CPV) has been established by Regulation (EC) No. 2195/2002. The classification endeavors to cover all requirements for supplies, works and services. Later on the CPV codes were updated in 2008 and were adopted under Regulation (EC) No. 213/2008 and have been in use since September 2008. The CPV attaches to each numerical code a description of the subject of the contract, for which there is a version in each of the official languages of the EU. The CPV codes are subject to ongoing updating. The up to date list of CPV codes and the tables of correspondence between the CPV and other nomenclatures can be consulted at www.simap.europa.eu.

electronically using the CPV codes. The CPV attaches to each numerical code a description of the subject of the contract, for which there is a version in each of the official languages of the EU.
The CPV consists of:

- A main vocabulary containing a series of numerical codes comprising eight digits each and subdivided into divisions, groups, classes and categories. A ninth digit serves to verify the previous digits;
- a supplementary vocabulary expanding the description of the subject of a contract by adding further details regarding the nature or destination of the goods to be purchased.

Use of these codes enables automatic and accurate translation into other Community languages. The aim is to make access to tender opportunities easier for economic operators.

3.2.3 Summary

Analyzing the requirement of the respective Directives for publication of notices, such as the place they should be published, the time scale, the language, CPV codes, etc, it is clearly understood that these requirements refer to the contracting authorities of Member States only. As such, they might not be applicable to a country, which is not a Member State yet, meaning that a national law of such country cannot introduce such concrete requirement, even though it might be under an approximation process. Saying this, the Albanian PPL does not 'comply' with respective Directives, regarding the requirements on notice' publications, but on the other hand it is for sure that the respective PPL requirements does comply one hundred per cent with the overall requirements of the Directives regarding transparency. According the Albanian PPL, contract notices for contracts of a value above the high value thresholds (so called international procurement procedure)[463] shall be published on the Public Notices Bulletin (PNB)[464] and on at least one journal of European distribution[465], while contract notices for contracts of a value lower than the high value thresholds (so called national procedures), but above the low value thresholds, shall be published only in the PNB. In any case, all procurement notices (despite their value) are published on the web-site of the Public Procurement Agency (PPA)[466]. This requirement goes even further in the secondary legislation, which does require that all contracting authorities (in Albania) should use the electronic procurement system (eps)[467] (placed in the PPA website), not only to publish their procurement

[463] See article 27 of the PPL "Monetary threshold".
[464] See article 3 of the Decision of Council of Ministers no. 914, date 29.12.2014 "Rules on Public Procurement".
[465] This means that the information on the procedure will be given in a well known international journal.
[466] See article 38/ 2, 3 and 4 of the PPL.
[467] The electronic procurement platform is a centralized web-based application, supporting the automation for public procurement procedures of all the Albanian contracting authorities. This system enables secure

notices, but also to perform their procurement procedures, making the use of the electronic procurement system mandatory[468]. In this case, the contract notice and tender documents accompanying it should be dispatched in the electronic platform by the contracting authority itself. The publication of such notice and relevant tender documents will be done by PPA in the following day, of the dispatching day (by the contracting authority)[469]. The usage of this system is free of charge for both parties; the contracting authorities and the economic operators. As it is seen, the interaction between the contracting authority and the publisher (PPA in this case) is done in a very short time (only a working day). Also, using the e-procurement system does allow for a shorter time period of publication of the tender documents, compared to the paper based procedures[470]. Using such an electronic system, the Albanian procurement system, (even though it does not publish the procurement notices in the Official Journal of EU), is quite an open system towards the international business community. The e-procurement system does allow for any interested economic operators, despite their nationality, to be registered in the electronic procurement system. Registration can be done on-line or by a request sent to the Public Procurement Agency. Once an economic operator is registered, registration is valid for bidding in all public procurement procedures delivered in Albania, at any time[471]. It is important to emphasize that the requirement to use the e-procurement system does refer to all kinds of procedures (except for the negotiated without prior publication procedure), despite their value[472]. The requirement of the Albanian legislation in this regard goes further than the one of the relevant Directives, which oblige the contracting authorities to advertise only contracts of a certain value and type that are subject to the Directive. For public contracts that are not subject to an obligation to publish a notice, contracting authorities may choose to publish prior

transactions among Albanian public institutions and national and international business community. See R. Kashta "E-Procurement system in Albania, impact and lessons learned", available at http://www.ippa.org/IPPC5/Proceedings/Part2/PAPER2-5.pdf .

[468] The mandatory use of the electronic procurement system has been set by the Decision of Council of Ministers no.45, dated 21.01.2009 "On performing public procurement procedures by electronic means". This decision has been adopted several times and is now replaced by the Decision of the Council of Ministers no. 918, dated 29.12.2014 "On performing public procurement procedures by electronic means".

[469] See article 5 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[470] See article 43/8 of the PPL.

[471] According to PPA in 2010, 336 new economic operators were registered in the eps, of which 114 foreign economic operators, in 2011, 347 new suppliers, of which 119 foreign suppliers, in 2012, 371 new suppliers, of which 82 foreign suppliers, in 2013, 1576 new suppliers, of which 38 foreign suppliers, in 2014, 1580 new suppliers, of which 173 foreign suppliers, (See respectively, Annual Reports of the Public Procurement Agency of Albania, available at www.app.gov.al).

[472] According to the Decision of Council of Ministers no. 918, dated 29.12.2014 "On performing public procurement procedures by electronic means", even the small value procurement (from approximately 700 euros), must be performed through the e-procurement system.

information notices, contract notices and contract award notices in the Official Journal[473]. Despite this option, when such a contract is advertised in accordance with the provisions of the Directive, however, that does not mean that the remaining provisions of the Directive apply[474]. As far as they are not covered by the relevant Directives, in practice, EU Member States may opt to introduce their own rules for sub-threshold contracts and other contracts that are not subject to the detailed advertising requirements of the Directive and as discussed above this is not the case of the Albanian procurement system. The latter is stricter as it provides for the same advertisement rules for all kinds of public contracts falling under the scope of PPL. This stricter requirement might raise a discussion on evaluating means and goals to be achieved. It might happen in practice that stricter requirement (as the obligation to publish a contract notice even for very low value contracts) might result to be a non cost-effective solution (by allowing everyone to submit an offer, the number of bids will be considerably high[475], which means that first you will need time to evaluate, second a lot of complaints can take place, etc). Despite this, taking into consideration the 'need for transparency" in the system[476], the procurement legislation does 'insist' on the advertising requirement.

Having analyzed all of the above, the answer to the question if the Albanian procurement legislation is fully approximated to the relevant EU Directive, regarding the publication of the notices, is that it is approximated at the highest level possible, considering the fact that it is a national law of a non-Member State.

3.3 Technical specifications and the qualification criterion

As it is discussed in Chapter II, procurement involves the purchase of items from the market, but the process of purchasing involves many stages from initial recognition of the need for items to the final stage of ensuring completion (satisfactory delivery or construction). This initial work of 'identification of the needs' and the final objective of

[473] See respectively article 37 of the Directive 2004/18/EC and article 51/6 of the Directive 2014/24/EU. There are also, however, some judgments of the ECJ concerning the obligation of transparency in case of contracts, which are not covered by the directives on public procurement. In the case C – 324/98 Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, ECR 2000 Page I-10745, for example, ECJ held also that '…even though such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular. That principle implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that the principle has been complied with. That obligation of transparency, which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.'

[474] See for example case 45/87 Commission of the European Communities v Republic of Ireland [1988] ECR 4929.

[475] According to the Annual Report of PPA during the year 2014 in the EPS 46.537 small value procurement procedures are performed (from around 70 euro to around 3500 euro). If we consider at least three bids per procedure (normally it is more than 3), the number of offers to be evaluated in a year for this kind of procedure will be no less than 120.000.

[476] See discussion at point 3.1.2.d here above.

ensuring 'satisfactory completion of the contract', are directly reflected on the technical specifications and qualification criteria. During the preparatory phase of a procurement procedure, a contracting authority should describe the characteristics of goods, services or works they want to purchase/realize through the implementation of the public contract. This description is done by the technical and service specifications. The purpose of technical and service specifications is to give instructions and guidance to tenderers at the tendering stage about the nature of the tender they will need to submit, and to serve as the economic operator's mandate during contract implementation. On the other hand, after describing the characteristics of the object of the public contract, the contracting authorities will need to describe the criterion of the potential economic operators, which will be considered eligible to implement such a contract. This description is done by the qualification criteria of the economic operators. The qualification of economic operations refers to the process of assessing and deciding which economic operators are qualified to perform the contract (referred to also as the qualification stage). These two main components of the procurement procedure will be analyzed in details, below, in the light of relevant Directives and Albanian PPL, considering also the different environment /context of their application.

3.3.1 Technical specifications

Technical specifications setting forth the characteristics of the goods, works or services to be procured[477] shall be prepared for the purpose of giving a correct and complete description of the object of procurement and for the purpose of creating conditions of fair and open competition between all candidates and tenderers[478]. Specifying a requirement

[477] Differently from the Directive 2004/18/EC and the Albanian PPL, the Directive 2014/24/EU, while providing for technical specifications, goes further with its prescription providing also that 'the characteristics required of a work, service or supply, may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. The technical specifications may also specify whether the transfer of the intellectual property rights will be required'. See article 42/1.

[478] See article 23/1 of the PPL. Also according to the first paragraph of the Recital no.29, of the Directive 2004/18/EC, 'the technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To this end, it must be possible to submit tenders, which reflect the diversity of technical solutions'. On the other hand, the Directive 2014/24/EU seeks to emphasize not only the aim of allowing competition, but also achieving the objectives of sustainability. In concrete Recital no.74 of the said Directive, in its first paragraph provides that 'the technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve the objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services. Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favor a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that

is a fundamental and early stage in the procurement process. If the specification is lacking in some way, what is delivered will also be lacking. As such, technical specifications should reflect correctly the needs of the contracting authority and the budget estimations made for the acquisition. A set of precise and clear specifications is a prerequisite for tenderers to respond realistically and competitively to the requirements of the contracting authority. Incorrect or unrealistic specifications lead to problems that later occur during the tender and award process, such as the need for issuing amendments to the tender dossier, cancellation of tender proceedings, lodging of complaints and contract problems. As such thorough preparation of technical specifications is extremely important for the ultimate success of the contract implementation; therefore, greater effort during the preparation phase will save time and money in the later stages of the project cycle.

Whenever possible, the technical specifications should be defined to take into account the accessibility criteria for people with disabilities or design for all users[479]. In any case, the technical specifications shall afford equal access to candidates and tenderers, and not have the effect of creating unjustified obstacles to competitive tendering[480]. The thrust of the rules in this context is to ensure the use of non-discriminatory specifications, which would allow all potential contractors, suppliers and service-providers to meet the requirements and would prevent the artificial restriction of potentially successful tenderers to one[481]. Even in cases where a contracting authority makes a reference to a technical specification, it cannot reject a tender on the grounds that the products and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in his tender to the satisfaction of the contracting authority, by whatever appropriate means[482], that the solutions which he proposes satisfy in an equivalent manner the requirements defined by the technical specifications. Also, where a contracting authority prescribes technical specifications in terms of performance or functional requirements, it may not reject a tender for works, products or services, which comply with a national standard transposing a European standard, with a European technical approval, a common technical specification, an international standard or a

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economic operator'. While Recital no.74 provides that, when drawing up technical specifications, the contracting authorities should take into account EU law requirements in the field of data protection law, in particular in relation to the design of the processing of personal data. See also F. Lichère and S. Richetto "Framework agreements, dynamic purchasing systems and public eprocurement*";* François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 206.

[479] See article 23/1 of the PPL and respectively articles 23/1 and 42/1 of Directives 2004/18/EC and 2014/24/EU.

[480] See article 23/2 of the PPL and respectively articles 23/2 and 42/2 of Directives 2004/18/EC and 2014/24/EU.

[481] See P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 272, para 5.03.

[482] An appropriate means might be constituted by a technical dossier of the manufacturer or a test report from a recognized body. See article 23/4 of Directive 2004/18/EC.

technical reference system established by a European standardization body, if these specifications address the performance or functional requirements, which it has laid down[483]. In this respect, they do not more than confirm the application of the Treaty principle of free movement[484] and other relevant principles deriving from it as are equal treatments, non-discrimination and mutual recognition, to the use of technical specifications.

Under this light, the contracting authorities must presume that products manufactured in accordance with the standards drawn up by the competent standards bodies conform to the essential requirements laid down in the Directive concerned. They may not refuse products simply because they were not manufactured in accordance with such standards, if evidence is supplied that those products are in conformity to the essential requirements established by the Community legislative harmonization. If there are no common technical rules or standards, a contracting authority cannot reject products from other Member States on the sole grounds that they comply with different technical rules or standards, without first checking whether they meet the requirements of the contract. In accordance with the mutual recognition principle, a contracting authority must consider on equal terms products from other Member States manufactured in accordance with technical rules or standards that afford the same degree of performance and protection of the legitimate interests concerned as products manufactured in conformity with the technical specifications stipulated in the contract documents[485].

The importance of technical specification is, among others, at the fact that they are the core conditions of the contract that will be concluded at the end of the procurement process. As such they may be considered as the connection mechanism among three stages of the procurement process; identification of needs (there is no needs' identification without specification of what is needed), competition process (based on these technical specifications the competition is run) and contract implementation (the satisfactory implementation of the contract should meet these technical specifications). Having such a role in the procurement process, the technical specifications should be included in the tender documents and will become an annex of the eventual contract awarded as a result of the tender[486].

3.3.1.1 References of technical specifications

According to the Albanian PPL[487], technical specifications shall clearly describe the contracting authority' requirements by reference to:

[483] See article 23/3/c of the PPL and respectively articles 23/4 and 5 and 42/5 and 6 of Directives 2004/18/EC and 2014/24/EU.
[484] As discussed at point 3.1.1.b, above.
[485] See case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon') [1979] ECR 649.
[486] See articles 23 and 60/1 of the PPL and respectively articles 23 and 42 of Directives 2004/18/EC and 2014/24/EU.
[487] See article 23/3 of the PPL.

a) national standards transposing international accepted standards, international accepted technical approvals, common technical specifications, international standards, other technical reference systems established by international standardization bodies or - when these do not exist - to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products;
b) Functional requirements with reference to national or international standards as means of presuming conformity with such functional requirements;

c) Both methods under (a) and (b), for different products, services or works included in the same contract. Each reference shall be accompanied by the words "or equivalent".

Relevant Directives[488], on the other hand, provide that without prejudice to mandatory national technical rules, to the extent that they are compatible with Community law, the technical specifications shall be formulated:

a) either by reference to technical specifications defined in the relevant Annex of the Directive and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardization bodies or - when these do not exist - to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference shall be accompanied by the words "or equivalent"[489];

b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

c) or in terms of performance or functional requirements as mentioned in subparagraph (b), with reference to the specifications mentioned in subparagraph (a) as a means of presuming conformity with such performance or functional requirements;

d) or by referring to the specifications mentioned in subparagraph (a) for certain characteristics, and by referring to the performance or functional requirements mentioned in subparagraph (b) for other characteristics.

Comparing the respective provisions of the Albanian PPL and the relevant Directive, on the way of formulating the technical specifications, it is clearly noticed that, PPL has

[488] Both Directive 2004/18/EC and Directive 2014/24/EU does provide for the same way of formulating technical specifications. See respectively articles 23/3 and 42/3.
[489] See cases C-45/87 Commission v Ireland and C-359/93 Commission v Netherland.

adopted the Directive provision[490] and customized it into the Albanian context. As such, the PPL does not refer to the 'European standards' as Directive does, but it refers to the 'international standard', which does include the "European standards" but it is broader than that. This difference, once again, leads to the discussion of the differences between an EU Directive and a national law, especially when it is of a non-EU Member State. Even in this case, when requiring that formulation of the technical specifications should be done only by reference to European standards, it is noticed that the aim of the Directive is to guarantee the principle of non-discrimination among Member States (economic operators, which comply with European standards[491]). The Directive seeks to prevent the designation of technical requirements in a way, which intend to favor one or more products (especially national products and economic operators) without any objective reasons. PPL, on the other hand, is more open in this regard, providing for the non-discrimination principle not only for European Member States (economic operators, which comply with European standards), but for all interested stakeholders, which do comply with relevant international standards. Another difference of the respective provisions is that the PPL requirements on technical specifications do not refer to the performance requirement and environmental characteristics at all. As such, the PPL is focused on technical specifications based only in functional requirements, giving less possibility to the contracting authorities, to fully describe their needs based also on performance and when it is the case on environment requirements. On the other hand, this legal requirement (preparing technical specifications based only on functional requirement), gives more space to the contracting authorities to define the technical specifications by reference to some specific functional requirements, orienting in this way the tender towards a specific product and/or provider. This may be done for example by using a specific feature of a product, or by reading the part number of the item, or by looking up the details in a economic operator's catalogue and replicating them etc. As such, the use of a specification that favors a single economic operator will lead to reducing the options available to ensure that the best overall value is provided through the procurement process.

Furthermore, providing for the possibility of the performance and environment requirements[492], while preparing technical specifications, both Directives (2004/18[493] and

[490] The adoption refers to Directive 2004/18/EC, even though in this case Directive 2014/24/EU does provide for the same way of formulating technical specifications.

[491] See for example case C-225/98 Commission v French Republic.

[492] While considering environmental requirements it is possible to distinguish between two types of environmental costs, which are dependent on the life cycle stage at issue. First, there are the costs, which are incorporated into the price of the product or the cost of its use to the consumer (reflected, for example, in the energy efficiency of a building or product). Second, there are the costs that relate to externalities (for example, to environmental damage in general, the costs of which are not reflected in the end price) caused by product either at the production or consumption stage. See P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 289, para 5.41.

[493] See article 23/6.

2014/24[494]) give also the possibility to use detailed specifications or require relevant labels, providing that:

- Those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract,
- The requirements for the label are drawn up on the basis of scientific information,
- the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organizations can participate, and
- They are accessible by all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognized body[495]. The Albanian PPL, on the other hand, does not explicitly provide for the possibility of requiring labels as such, but gives the possibility to the contracting authorities to require certificates drawn up by independent bodies stating the compliance of the candidate or tenderer with certain quality assurance standards, including, also environmental management standards[496].

There is a general ban on technical specifications that mention goods of a specific make or source, or of a particular process, and that have the effect of favoring or eliminating certain enterprises or products. Among the specifications that can have such a discriminatory effect and are therefore prohibited, the Directive mentions in particular the indication of trademarks, patents, and types or a specific origin or production.

Following the principle of non-discrimination and open competitions, procurement rules explicitly provide that while preparing technical specifications, contracting authorities (unless justified by the subject-matter of the contract) shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin[497] or production with the effect of favoring or eliminating certain undertakings or certain products. An exception to this general ban is allowed where the subject matter of the contract cannot otherwise be described by specifications that are sufficiently precise and intelligible to all concerned. Reliance on this derogation should not, however, have discriminatory effects; to that end, the procurement rules require that such indications be

[494] Differently from the Directive 2004/18/EC, this Directive dedicates more attention to labels used to describe technical specifications and means of proofs of conformity with requirements, providing specific rules in two separate articles, respectively article 43 and article 44. In any case, this Directive seeks to prevent discriminatory requirements toward economic operators, as well.

[495] "Recognized bodies", within the meaning of this Article, are test and calibration laboratories and certification and inspection bodies, which comply with applicable European standards. See article 23/7 of the Directive 2004/18/EC and article 44/1, para 3 of the Directive 2014/24/EU.

[496] See article 46/2 of the PPL.

[497] See for example case C-234/89 'Danish Bridge' (n.360 above), where one of the requirement (against the procurement regulation) was the 'use of local goods and labor'.

accompanied by the words "or equivalent". Contracting authorities relying on this or other derogations must always be able to provide evidence that they are necessary[498].

3.3.1.2 Definitions of technical specifications and other concepts related to them

As discussed above, the Albanian PPL has adopted partially the relevant provision of the procurement Directive, on technical specifications. As such, PPL has been satisfied with the adoption of basic concepts and requirements, which should be considered while preparing technical specifications, but does not explicitly provide neither for the definition of technical specifications depending especially on the type of the contract, nor for other concepts related to such specifications, such as for example the definition of 'standards', in the context of technical specifications. The Procurement Directives (both 2004/18 and 2014/24), on the other hand, dedicate a specific annex[499] to such definitions and in concrete they provide that:

a) "Technical specification", in the case of public works contracts, means the totality of the technical prescriptions contained in particular in the tender documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfills the use for which it is intended by the contracting authority. These characteristics shall include levels of environmental performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labeling and production processes and methods. They shall also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions, which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts, which they involve;

b) "Technical specification", in the case of public supply or service contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labeling, user instructions, production processes and methods and conformity assessment procedures;

[498] See article 23/5 of PPL and respectively articles 23/8 and 42/4 of Directives 2004/18/EC and 2014/24/EU.
[499] See respectively Annex VI and Annex VII of Directive 2004/18/EC and Directive 2014/24/EU.

c) "Standard" means a technical specification approved by a recognized standardization body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

- International standard: a standard adapted by an international standards organization and made available to the general public,
- European standard: a standard adopted by a European standards organization and made available to the general public,
- National standard: a standard adopted by a national standards organization and made available to the general public;

d) "European technical approval" means a favorable technical assessment of the fitness for use of a product for a particular purpose, based on the fulfillment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State[500];

e) "Common technical specification" means a technical specification laid down in accordance with a procedure recognized by the Member States, which has been published in the Official Journal of the European Union;[501]

f) "Technical reference": any product produced by European standardization bodies, other than official standards, according to procedures adopted for the development of market needs.

As the Albanian PPL remain silent on the definitions of technical specifications, but on the other hand does use this concept, it might be understood that definitions given by the Directive, are valuable for the Albanian PPL and procurement context as well. Meanwhile, as the PPL does not refer in its relevant provision to the use of the 'European' standards, but to the 'international' standards, the Directive definitions might be valuable whenever the required standard will be a European one.

3.3.1.3 Types of specification

Analyzing the relevant provisions, providing for technical specifications in the procurement rules, several types of specifications are noticed. These specifications' types

[500] According to the Directive 2014/24/EU, the 'European technical approval' is called the 'European Technical Assessment' and means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the respective European Assessment Document, as defined in point 12 of Article 2 of Regulation (EU) No. 305/2011 of the European Parliament and of the Council.

[501] According to the Directive 2014/24/EU a 'common technical specification' means a technical specification in the field of ICT laid down in accordance with Articles 13 and 14 of Regulation (EU) 1025/2012; As it is seen the latest Directive refers these definitions to specific EU Regulations, which has not been in force yet at the time the Directive 2004/18/EC has been adopted.

derive mainly from the type of the contract and concrete needs of the contracting authorities. According to the PPL, the description of works, goods or services should contain the technical specifications to be achieved, including plans, drawings, models, etc. In cases of functional description of works or goods, the technical specifications should clearly and neutrally describe the scope of the works, in order to indicate all the conditions and circumstances which are important to the preparation of the bid. The description shall indicate not only the scope of work, but also the requirements related to the named work from the technical, economic, aesthetic and functional aspect. In order to guarantee the comparison of bids in relation to the contract object's requirements for these goods or for their functions, the competitors and bidders shall be provided with precise requirements for the functions or performance, thus helping them during the bid preparation. Specifications for the supply of appropriate goods or services for the environment shall also be indicated in the description of works[502].
According to this provision four types of technical specifications might be evidenced and in concrete:

a) Generic specifications

A generic specification aims at describing the requirement in a way that does not restrict the number of economic operators that the contracting authority may attract. It can be based on national (European) or international standards (provided that equivalents are accepted) as a means of clearly opening the market. In the context of procurement, specifications need to be developed in such a way that the requirement described can be met by any number of economic operators that supply the goods or services identified.
A generic specification:

- makes economic operators responsible for proposing and delivering the requirement, meeting the contracting authority's needs;
- can be used to stimulate competition;
- can be used where there is no need to be specific.

b) Conformance specifications

A conformance specification lays down unambiguously the requirements that economic operators must meet. It allows no room for maneuvers. The specification describes the product or service required in great detail and can be based on national (European) or international standards (or equivalent) as a means of clearly specifying what is needed. In case of using such type of specification for goods for example, it may specify weight, size, finish, volume, circumference, and use with other goods. In case it is used for services, it may describe duration, number of people required, what will be done by the people, where they will do it and when they will do it. The economic operator is required to deliver the goods or services that meet this need and in this case they are not encouraged to do better. Conformance specifications are often supported by drawings.

[502] See article 23/4 of the PPL.

While in some contexts conformance specifications can work appropriately, the following dangers exist:

- The economic operator may know of a better or more cost-effective way to meet the need. If discouraged from being concerned with this aspect, economic operators will not pass on the benefit of the experience they have to the contracting authority;
- Doubt may still exist concerning exactly what is required, because the specification is still not "clear";
- Too much detail requiring "conformance" may lead to: an additional cost, while preventing economic operators from offering the benefit of their wider experience; confrontational relationships, particularly with services.

However, where for a given reason the specification *has* to be "just so", a conformance specification may be appropriate. Additionally, if the contracting authority has a nationally recognized expert in the field they are specifying, then the economic operators may genuinely learn from this expert by attempting to meet the need specified.

c) Detailed design specifications

This option develops a conformance specification a step further. A design specification defines the technical characteristics of the requirement in great detail. The economic operator has no input into the design process and is not responsible for the benefits available to the contracting authorities. This option can be used where:

- The contracting authority has the nationally recognized expert in the field they are specifying;
- The economic operator innovation is not required;
- Non-experts will be asked to deliver the requirement;
- There is a risk of ambiguity.

As with conformance specifications, an economic operator may feel that different positions for the components will be more advantageous but not offer the preferable solution, for fear that noncompliance may result in their exclusion.

d) Performance specifications

Performance specifications are sometimes called output specifications because they focus on the output to be delivered. Performance specifications provide a clear indication of the purpose, for which the item is required and this requirement is fully communicated to the economic operators. The difference here is that the economic operators are then encouraged to use their expertise to offer solutions (products and/or services) which, in the expert view, best meet the need as specified by the contracting authority.

The use of a performance specification can lead to wider competition being stimulated than with a conformance specification.

3.3.2 Qualification criteria

The qualification criteria provided by the procurement rules aim at giving access to economic operators, who are capable to successfully perform a contract. The task is

essentially to ensure that potential bidders are properly qualified and, to that end, all systems of procurement regulation set out objective qualification criteria, against which bidders may be judged. The 'exclusion criteria' and the 'selection criteria' are put at the same time under the 'qualification umbrella'. Procurement rules require the mandatory exclusion of economic operators, who are in a specific personal situation (for example, they have not paid social security contributions or taxes, or have been convicted of an offence relating to their professional conduct)[503] and also give the possibility to the contracting authorities to require economic operators to meet minimum capacity levels relating to their economic and financial standing and technical or/and professional ability. Thus, a contracting authority may want to check, for example, the financial resources, experience, skills and technical resources of economic operators and disqualified from the procurement process those economic operators that do not satisfy such capacities.
This process of selection of economic operators must be carried out by applying objective, non-discriminatory and transparent criteria[504] (referred to as selection criteria), which are set by the contracting authority in advance.

3.3.2.1 Grounds for exclusion of economic operators

Personal situation of the economic operators, participating in a procurement procedure should be considered first (even before the assessment of the financial and technical qualifications) in a selection process. In this perspective, it is clear that this personal situation of the economic operators is not directly linked to his capacities to successfully perform the contract. They are issues, which are personal to the tenderer, although it may be that some of these grounds will imply previous wrongdoing in respect of past performance in procurement procedures and may, therefore, imply a serious concern over the suitability of the tenderer to perform the contract at issue[505]. According to the procurement Directive, there are two categories of grounds for exclusion; a) mandatory grounds for exclusion and b) optional grounds for exclusion, which will be analyzed below.

3.3.2.1.a Mandatory grounds for exclusion

According to the Albanian PPL[506], any candidate or tenderer, convicted by a final judgment, of which the contracting authority is aware for any of the reasons listed below, must be excluded from participation in the awarding procedures:

[503] In these cases, public procurement is also used to achieve secondary objectives that are not always directly linked to the risk of non-performance of the contract, *i.e.* it is also used to prevent and penalize specific behavior of those economic operators that want to do business with the public sector.
[504] See article 46/1 of the PPL and respectively articles 44 and 56 of Directive 2004/18/EC and Directive 2014/24/EU.
[505] See E. Piselli "The scope for Excluding Providers who have Committed Criminal Offences under the EU Procurement Directive", 2000, p. 267-269.
[506] See article 45/1 of the PPL.

- participation in a criminal organization;
- corruption;
- fraud;
- money-laundering
- forgery

The contracting authority may ask tenderers to supply the production of an extract from the judicial record or failing that, of an equivalent document issued by a competent judicial or administrative authority showing that these situations do not apply[507] and may, where they have doubts concerning the personal situation of such tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the tenderers concerned. Where the information concerns a tenderer established in a foreign country, contracting authorities may seek the cooperation of the competent authorities.

In this regard, PPL has approximated the relevant provision of Directive 2004/18[508], nevertheless there are some differences, which should be emphasized[509]. First, according to the PPL, the 'forgery' reason[510] has been added to the list of mandatory grounds. Second, the Directive explicitly leaves it to the Member States to provide for derogation from the requirement of mandatory exclusion if there is an overriding requirement that is in the general interest[511], while PPL does not provide at all for such opportunity. This is still explained with the national context where this law is applicable, and in concrete with the low level of integrity[512]. As such, PPL does not give space for any 'subjective' decision of derogation from the said rule, even though in cases of an overriding situation. The third difference is merely related to the fact that Albania is not an EU country and as such cannot approximate the relevant Directive in all its features. Thus, the Directive[513] when asking for documents, which prove the personal situations of the economic operators, provide that 'in case the information concerns a candidate or tenderer established in *a State* other than that of the contracting authority, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the

[507] See article 45/3/a of the PPL.
[508] See article 45/1 of Directive 2004/18/EC.
[509] New Directive 2014/24/EU has expanded the list of reasons for mandatory exclusion. According to article 57, except for what it is provided by the Directive 2004/18/EC, as reasons for mandatory exclusions are considered also: terrorist offences or offences linked to terrorist activities; money laundering *or terrorist financing*; and child labor and other forms of trafficking in human beings.
[510] It should be said that 'forgery' has not been there at the text approved by the law no. 9643, dated 20.11.2006 "On public procurement", but has been added almost one year after, with the amendments of this law, by the law no.9800, dated 10.09.2007. The reason why it has been added is the national context where this law is applicable.
[511] See article 45/1 of Directive 2004/18/EC.
[512] See footnote no. 194 above.
[513] See article 45/1, para. 3 of Directive 2004/18/EC.

candidate or tenderer'. On the other hand, for the same situation, PPL refers just to 'a tenderer established in *a foreign country'*[514]. As previously discussed, the Directive refers to Member States only, and PPL in such cases refers to 'other countries than Albania', including here Member States, but not only. In this context, the different terminology used respectively by the Directive and PPL is also explained to prescribe the legal possibility of the contracting authorities to ask evidence as proofs of their personal situations. Thus, the Directive provides that 'the contracting authorities shall, *where appropriate*, ask candidates or tenderers to supply the documents…', while PPL provides that 'the contracting authorities *may* ask tenderers to supply the documents…', without mentioning at all 'where appropriate'. Even in the context of the Directive, the meaning of the term *'where appropriate*' is not clear. The prevailing interpretation is that this term implies that a contracting authority is to ask an economic operator to submit evidence that it does not fall under the mandatory grounds for exclusion, but only in the case where the contracting authority has an actual suspicion of a conviction or where it should have such a suspicion. One of the objectives of the directives is to avoid imposing unreasonable burdens on providers, which may deter them from participation. To require actual evidence of convictions from every provider for every contract would be disproportionately burdensome for providers and also for the procuring entity[515]. On the other hand, it is arguably necessary at least to ask providers to confirm that they do not have relevant convictions and to exclude those, who do not confirm this[516]. Meanwhile according to the Albanian procurement legislation, such evidence is always required (is mandatory to be submitted in a tender despite the term "may" used by PPL in article 45/1 para. 2), including a self-declaration from the economic operator, declaring that he is not convicted by final judgment for any of the reasons listed by PPL[517].

3.3.2.1.b Optional grounds for exclusion

According to Directive 2004/18 except for mandatory grounds for exclusion, there are also optional grounds for exclusion[518]. In concrete, a contracting authority is permitted

[514] In case of an economic operator established in another country, if documents, which prove the personal situations of the economic operators, are not issued in that country, the Albanian procurement legislation does allow the self-declaration, as evidence. See article 15 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[515] It may be difficult in practice for a contracting authority to establish the types of documents/evidence that economic operators based in other Member States are able to submit in order to prove that they do not fall under any of the optional grounds for exclusion and to identify the authorities that are authorized to issue these documents/evidence under their national laws.
To facilitate access to this information in the various EU Member States, the Commission Services (DG-Internal Market) designed a questionnaire, which has been completed by a number of Member States. The completed questionnaires can be downloaded from the following website: http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm .

[516] See S. Arrowsmith "*The Law of Public and Utilities Procurement",* Sweet and Maxwell, London, 2005, p. 1310.

[517] See Standard Tender Documents, available at www.app.gov.al.

[518] See article 45/2 of the Directive 2004/18/EC.

(and not obliged) to exclude from participation in the procurement process those economic operators that:
a) are bankrupt or are under any analogous situation in accordance with national laws or regulations;
b) are the subject of proceedings for a declaration of bankruptcy or similar proceedings under national laws and regulations;
c) have been convicted by a judgment that has the force of res judicata of an offence relating to their professional conduct, in accordance with the legal provisions of the country concerned[519];
d) have been guilty of grave professional misconduct proven by any means that the contracting authority can demonstrate[520];
e) have failed to fulfill obligations relating to the payment of social security contributions in their countries of establishment or that of the contracting authority in accordance with the legal provisions of the country concerned[521];
f) have failed to fulfill obligations relating to the payment of taxes in their countries of establishment or that of the contracting authority, in accordance with the legal provisions of the country concerned;
g) have been guilty of serious misrepresentation in supplying information required for the purpose of the selection of economic operators or have not supplied such information.
A contracting authority is obliged to accept as sufficient evidence that an economic operator does not fall under any of the optional grounds for exclusion the types of evidence listed in article 45(3) of the Directive 2004/18[522]. These types of evidence vary depending on the optional grounds for exclusion concerned. With regard to grave professional misconduct and serious misrepresentation of information, it is for the contracting authority to determine the acceptable types of evidence. Each EU Member State is obliged to inform the Commission of the identity of the authorities that are authorized to issue the listed evidence[523].
The Albanian PPL, on the other hand, does approximate the Directive in this regard, providing for the same reasons as grounds for exclusion[524], but with a meaningful

[519] The ECJ in the case C-470/13 Generali-Providencia Biztosito Zrt v Kozbeszerzesi Hatosag Kozbeszerzesi Dontobizottsag, Judgment ECLI:EU:C:2014:2469, observed that, 'for the purposes of this provision, the concept of "professional misconduct" covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only infringements of ethical standards in the strict sense of the profession to which that operator belongs. In those circumstances, an infringement of the competition rules, particularly if it was penalized by a fine, constitutes a cause for exclusion under art.45(2)(d) of Directive 2004/18'.
[520] See case C-465/11 Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA (Judgment of the Court (Third Chamber) of 13 December 2012).
[521] See also case C-358/12 Consorzio Stabile Libor Lavori Pubblici v Comune di Milano, Judgment ECLI:EU:C:2014:2063.
[522] New Directive 2014/24/EU provides the means of proof in a specific article (see article 60).
[523] See article 45/4 of the Directive 2004/18/EC.
[524] Except for one situation, which has been lately introduced in article 45/ë (this article has been amended by Law no. 182/2014 "On some amendments in Law no. 9643, dated 20.11.2006 "On public

difference; it does not consider these reasons as optional, but it categorizes them as mandatory, too[525]. As it is discussed above, PPL avoids at maximum the terms, which give room to contracting authorities to make a decision, and as such it tries to be as determined as possible[526].

A discussion and a different treatment of the situation from the Albanian PPL might arise on some issues on which the Directive 2004/18 remains silent. As such, the Directive does not provide for any period of time during which the above-mentioned situations may be considered relevant, or a period of time during which the exclusion is valid[527]. According to the Directive, Member States shall specify, in accordance with their national law and having regard for Community law, the implementing conditions for this paragraph[528]. In the light of this provision different Member States have adopted different practices on the above-mentioned points. Thus, some Member States only allow exclusion from the current tender, others allowed for indefinite exclusion but varying, for example, from 3-10 years[529]. PPL, on the other hand, is much more determined in this

procurement"), according to which when an economic operator has been excluded with a PPA' decision from the right to participate in procurement procedures, for the reasons provided in article 13/3 of the PPL, it should be excluded from a concrete procedure.

[525] According to article 45/2 of the PPL 'Any candidate or tenderer *must* be excluded from participating in awarding procedures where he…'.

[526] The New Directive 2014/24/EU, on the other hand, is more flexible than even Directive 2004/18/EC. It gives the possibility to the economic operators to provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion (article 57/6 para.1). Also in case of taxes and social security contributions, it gives the possibility to economic operators to fulfill their obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines (see article 57/2, para.3). The new Directive expands also the list of reasons for optional exclusion with situations such as: a) a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure; b) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract; and c) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority.

[527] Directive 2014/24/EU is clearer in this regard, by providing that 'by law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4' (see article 57/7).

[528] See article 45, last para of respectively point 1 (mandatory grounds for exclusion) and point 2 (optional grounds for exclusion) of the Directive 2004/18/EC. See also case C -465/11 Forposta dhe ABC Direct Contact, (footnote no. 520 above).

[529] According to UNICORN (UNITED AGAINST CORRUPTION) – Global Political Research Group, Cardiff University School of Social Sciences (www.againstcorruption.org) – *The Challenges Facing Debarment: The EU Public Procurement Directives* – OECD Global Forum on Governance, "Fighting Corruption and Promoting Public Integrity in Public Procurement", 29-30 November 2004, was found that *there is no consistency on the period of time for exclusion*. Some Member States only allow exclusion from the current tender (Austria, Denmark, Finland, Ireland, the United Kingdom, the Netherlands and Sweden);

regard, by dividing concepts of 'excluding of an economic operator from a concrete procedure' and 'excluding of an economic operator from the right to participate in a procurement procedure' for a given period of time, which varies from 1 to 3 years. This is clearly noticed also in point ë) of article 45 of PPL, which provides as one of the grounds for exclusion from a procedure, the cases when an economic operators has been excluded with e PPA' decision from the right to participate in procurement procedures, as provided by PPL[530]. According to PPL, the Public Procurement Agency can exclude an economic operator from participation in awarding procedures – without prejudice of criminal proceedings, which may have started – for a period of 1 to 3 years in the cases of[531]:

a) Serious misrepresentation and submission of documents containing false information for purposes of qualification, according to Article 45 and 46 PPL; or

b) corruption within the meaning of item a), para 1, Article 26;

c) conviction for any of the crimes listed in Article 45, para 1 PPL;

ç) failure to fulfill contractual obligations for public contracts according to the time limits provided in the procurement regulations; or

d) in case of a final decision of the Commission of the Competition Authority, for collusion among economic operators[532].

On the other hand, article 13, para 3 refers to articles 45 and 46 of PPL. These articles provide respectively the criteria for exclusion of an economic operator from a procurement procedure and the criteria that should be met by economic operators in order to qualify in a procurement procedure. Both articles are used by Contracting Authorities to qualify or not qualify an economic operator in a given procurement procedure and should not be misinterpreted as articles, which serve to the Public Procurement Agency for excluding economic operators from the right of participating in procurement procedures, for a certain period of time. The provisions used by the Public procurement Agency for this purpose are article 13/3/a and article 47 of PPL[533].

The literal and contextual interpretation and reading of these two articles, provides the understanding that the articles have different purposes. Article 45 is not aiming to punish the economic operators, but instead provides for those conditions, in which economic operators should not be into, in order to be qualified (not be excluded) in a given

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others allowed for indefinite exclusion (France, Greece and Italy); whilst others for a set period of time (Belgium, Germany, Portugal, Spain and Luxembourg) but varying, for example, from 3-10 years in the case of Belgium to five years or less in the case of Spain."

[531] See article 13/3 of the PPL.

[532] This PPL' provision comes in the same line with the new exclusion ground introduced by new Directive 2014/24/EU in article 57/4/d which provide as one of the exclusion grounds the situation 'where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable'.

[533] See R. Kashta "The legal competence of the Public Procurement Agency to exclude the economic operators from the right to participate in public procurement procedures; Treatment of this process from the court' practice", published at Scientific Journal "Legal Studies" of Law Faculty, University of Tirana, No.1, 2014, pg 147.

procurement procedure[534]. This article provides for the rights and obligations of the Contracting Authority and the economic operator. Taking into consideration the importance of the credibility of an economic operator that competes for a public contract, this article lists the conditions that this economic operator[535] should not meet, in order to be able to win a public contract.

While article 13/3/a has the purpose of punishing those economic operators, which even though do not meet the legal requirements set out by the contracting authority, present false information in a procurement procedure, aiming to qualify and be awarded a public contract.

Obviously, the purposes of these two articles differ from each other and they are to be implemented independently from each other. The fact that an economic operator has been disqualified from a procurement procedure, by the contracting authority, because of presenting false information, does not prohibit the Public procurement Agency to apply a punishment for the said economic operator and for the same breach. This economic operator may be excluded from the right of participating in procurement procedures for a given period of time. It should be understood that the difference stands in the motivation of the two involved institutions; The Contracting Authority disqualifies the economic operator because it does not meet the established criteria; while PPA referring to a wider public interest in the administration and ensuring a good-functioning procurement system excludes the economic operator because it has misinformed with the purpose of being qualified.

Such position is based also in article 47 of the PPL, which states that the CA disqualifies, at any time up to the moment of declaring the winning contract, any candidate or bidder, who presents false data with the purpose of qualification. For the purpose of article 13, para 3 of PPL, the Contracting Authority reports all disqualification to PPA.

Another discussion rising by the analysis of this article concerns the kind of measure in terms of time of exclusion. PPL provides for a period of exclusion from 1 to 3 years. The judicial practice demonstrates that there have been cases when the court has come to the conclusion that the economic operator has misinformed by submitting documents with false data and with changed content, with the purpose of aligning with the qualification criteria. Yet concerning the administrative measure to be taken, it concludes that it should be one year and not the maximum of three years. The reasoning has been that the minimal administrative measures do assure the enforcement of the law[536].

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[534] Same position concerning article 45 of PPL is kept in Decision no. 7038, date 05.07.2012 of the First Instance Court of Tiranë, "Eurofab" Sh.p.k, v Public procurement Agency, with object: Suspending of application of administrative act no. 8217/8, dated 09.03.2012 of PPA until the closing of the judgment. Annulment of the administrative act, Decision no. 8217/8, dated 09.03.2012 of PPA, considering it a decision contrary to the law and not based on evidences. pg.8.

[535] See article 45 of PPL.

[536] See Decision no. 9725, dated 01.10.2013 of the First Instance Court of Tiranë, "H.E.L.D.I" sh.p.k, v Public procurement Agency, with object: Annulment of administrative act, decision no. 5677/4 Prot., dated 13.06.2012 of the Public procurement Agency; establishment of security measures for indictment

Interpretation of this provision concerning the time period of the administrative measure is to be done within the context and in the spirit of PPL as well as considering the circumstances and the conditions in which the breach has been committed. As the law provides for a period of time with a minimum and a maximum term, it means that the breach of a certain kind is not always of the same grade. Instead, it should be evaluated case by case depending on the circumstances, hence deciding the appropriate grade of punishment in order to enforce the law. For example, if the misinformation and submission of documents containing false data is a consequence of the fact that the document exists as such, but is not valid any more for fulfilling the criteria in a procurement procedure, the economic operator is to be considered in breach of the PPL provision and guilty, as it has already submitted the document. However, considering the fact that the economic operator has not taken any further step for altering the content of the document, but it has simply submitted a document, which is not valid any more, this might serve as a circumstance which supports a minimal punishment or even a medium punishment, but not the maximal one.

In another situation, when the economic operator submits a document containing false information, confirmed also by the competent authority, which is pretended to have issued the document, such economic operator not only is in the conditions provided for by article 13/3/a of PPL, but it is in worse circumstances, as there has been an interference in the document, providing false information with the purpose of meeting the respective qualification criteria. This is a clear indicator that the economic operator lacks reputation and credibility, which are indispensable criteria to be met by economic operators for being awarded public contracts[537]. In such a case, considering all circumstances of the breach, the punishment should be proportional to the breach, and referring to the maximal term provided by law, otherwise the law would not be truly enforced.

As such, PPL has a different approach from the Directive 2004/18 (and in this regard, is closer with Directive 2014/24[538]), explicitly providing for situations when an economic operator may be excluded from the participation in all procurement procedures; competent authority for such a decision and period of time, such exclusion will be valid. Providing all this, seems that PPL is more concrete and stricter than Directive(s) and this is explained first, with the fact that differently from the Directive, it is a national law and second, with the national context where this law is applicable.

3.3.2.2 Grounds for exclusion and groups of economic operators/consortia

The procurement rules do not explicitly provide whether the grounds for exclusion apply to each member of a group of economic operators/consortium. Anyway, since

concerning the suspension of the application of the administrative act no. 5677/4, dated 13.06.2012 of the Public procurement Agency. pg. 9

[537] See article 46/1/b of PPL.

[538] See footnote no. 515 above.

procurement rules refer to the 'ground for exclusion of economic operators' and "economic operators" may also be "groups of economic operators"[539], a contracting authority would have to apply the grounds for exclusion to each member of a group of economic operators/consortium. Therefore, even if only one member of the group/consortium falls under one or more of these grounds for exclusion, it entails the exclusion of the whole group/consortium.

3.3.2.3 Mandatory grounds for exclusion and sub-contractors

The procurement rules do not indicate whether the grounds for exclusion apply to sub-contractors as well. In fact, strictly speaking, the procurement rules apply only to the selection of the parties to the contract. In principle, there is nothing that precludes a contracting authority from requiring economic operators to propose sub-contractors that do not fall under any of the mandatory grounds for exclusion. If a proposed sub-contractor falls under one or more of the mandatory grounds for exclusion, it would not normally entail the exclusion of the economic operator as such but only the replacement of the proposed sub-contractor.

3.3.2.4 Selection criteria

Aiming the successful performance of the procurement procedure, contracting authorities may decide some selection criteria, which should be met by the economic operators, to be qualified in the given procurement procedure. These criteria, aim at ensuring contracting authorities that economic operators, applying in the procedure, are legally, technically and financially able to successfully perform the contract.
After the personal situation of the economic operators who have submitted a tender has been considered (has been confirmed that there are no grounds for exclusion), the selection criteria which may be used by a contracting authority to establish whether an economic operator is qualified to perform a specific contract, are the following:

- Suitability to pursue the professional activity;
- Economic and financial standing;
- Technical and/or professional ability[540].

While setting the selection criteria, the contracting authority should respect the procurement principles[541] (which as analyzed above derive from the Treaty principles) [542] and in concrete:

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[539] See point 1.2.3.2 at Chapter I, above.
[540] See article 46 of the PPL and respectively articles 44/1 and 58 of Directive 2004/18/EC and article 2014/24/EU.
[541] See article 46 of the PPL and respectively articles 44/1 and 56 of Directive 2004/18/EC and article 2014/24/EU.
[542] See point 4.1 in this Chapter.

i) Equal treatment and non-discrimination

The selection criteria must be objective. Criteria and evidence must be non-prejudicial to fair competition and non-discriminatory, especially on the grounds of nationality. Regardless of nationality, economic operators must be treated equally[543].

ii) Proportionality

The principle of proportionality requires that any measure chosen should be both necessary and appropriate in the light of the objectives sought. In particular, the selection criteria to be applied must be proportionate to the size, nature and complexity of the contract. Also, the evidence requested must be only that which is strictly necessary to establish whether the set selection criteria are satisfied. The principle of proportionality is very important in the context of setting the selection criteria to be applied. Setting, for example, economic and financial standing criteria that are not necessary or are inappropriate may attract economic operators that, in practice, are not qualified or deter efficient economic operators from participation. This situation will produce misleading results in thus, depending on the nature of the contract, its complexity and size, a contracting authority may need to consider a wide range of factors and analyze various financial statistics, ratios and figures in order to assess the economic and financial standing of economic operators with regard to the contract to be awarded.

iii) Mutual recognition

The principle of mutual recognition requires an EU Member State to accept the products and services supplied by economic operators from another Member State. It must also accept the diplomas, certificates and qualifications required in another member state if these are recognized as equivalent.

iv) Transparency

To ensure a level playing field for all economic operators interested in a given public contract award procedure, the contracting authority must disclose in advance the selection criteria to be applied and the evidence to be submitted. This also permits stakeholders to check that the criteria and evidence requested are fair and non-discriminatory.

3.3.2.4.a Suitability to pursue the professional activity

A contracting authority is allowed to check if economic operators are generally suitable and fit to carry out the professional activity to perform a given public contract. According to PPL, any economic operator is requested to prove its enrolment, as prescribed in his/her State of establishment, on one of the professional or trade registers to pursue the

[543] These principles are directly related to the Treaty principles of freedom of establishment and of freedom to provide services, which aim at ensuring that intra- Community trade is not restricted.

professional activity required by the contract to be awarded[544]. On the other hand, the Directives (both 2004/18[545] and 2014/24[546]), except for the requirement for the economic operator to prove that they are enrolled on trade or professional registers in their Member State of establishment, in the case where no relevant register exists in these states, do allow economic operators to produce a declaration on oath or a certificate as described in relevant Annexes[547].

With regard to procedures for the award of public service contracts, if economic operators are obliged to obtain a particular authorization or to be members of a particular organization in order to perform the services concerned in their country of origin, a contracting authority may require them to prove that they hold such an authorization or membership[548].

The main difference of the PPL, in this regard, is that it does not provide for the possibility of 'a declaration on oath'. In any case, according to PPL, the economic operators should submit the relevant documents to prove their suitability to pursue the professional activity, as required. This stricter requirement aims at preventing the untrue declarations and at ensuring the contracting authority that the economic operator, who has submitted an offer, is professionally suitable.

Even though it is stricter and requires as much evidence as possible to ensure contracting authorities on the integrity of the economic operators, PPL, same as the Directive (s)[549], does not require an economic operator established in another country to be enrolled on a trade or professional register in Albania before submitting an offer. In the context of the EU regime, this requirement would be in breach of the Directive itself but also of the principle of the freedom to provide services within the Community[550].

3.3.2.4.b Economic and Financial Standing

The specific economic and financial standing criteria must be aimed at assessing whether economic operators have adequate financial resources (throughout the contract period), as

[544] See article 46/1/a of PPL.
[545] See article 46/1 of Directive 2004/18/EC.
[546] See article 58/2, para.1 of Directive 2014/24/EU.
[547] Both Directives do provide in their relevant Annexes a list of registers and corresponding declarations or certificates for each EU Member State, in respect of works, supplies and services. See Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts of Directive 2004/18/EC and Annex XI of Directive 2014/24/EU.
[548] See respectively articles 46/2 and 58/2, para. 2 of Directive 2004/18/EC and Directive 2014/24/EU.
[549] See case C-74/09 Bâtiments et Ponts dhe WISAG Produktionsservice (Judgment of the Court (Seventh Chamber) 18 October 2012).
[550] See case C-71/92 Commission of the European Communities v Kingdom of Spain [1993] ECR I-5923, where Court held that registration on an official list of the host state could also not be required. Also in case C-225-98 Commission of the European Communities v French Republic [2000] ECR I-7445, Court held that the condition imposed on tenderers by a French contracting authority to provide proof of registration with the French order of architects, is a restriction of their freedom to provide services.

cash in hand, as a credit line or in any other way, to handle and complete the contract to be awarded.

According to PPL, the contracting authority may require from the economic operator to prove they have the economic and financial capability to enter the contract. This may be proven by providing appropriate statements from banks or, where appropriate, evidence of relevant professional risk indemnity insurance; the presentation of balance-sheets or extracts from the balance-sheets; a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last 3 financial years available, as far as the information on these turnovers is available[551]. Proof of the economic and financial standings of the economic operators, provided by PPL, are the same as those provided by Directive 2004/18[552]. Both acts do not indicate the criteria relating to economic and financial standing that a contracting authority may apply, but it contains a non-exhaustive list of evidence that a contracting authority may request from economic operators to prove that the economic and financial standing criteria that have been set are satisfied[553]. Thus, a contracting authority may derive some of the criteria that it may apply from this list of evidence (this is the case, for example, of the turnover criterion)[554]. However, a contracting authority may also apply other relevant criteria, which are not limited to the criteria that may be derived from this non-exhaustive list[555].

[551] See article 46/1/c of PPL.

[552] See article 47/1 of Directive 2004/18/EC. New Directive 2014/24/EU, on the other hand, does not provide as a proof, statements from banks. See article 58/3 of Directive 2014/24/EU.

[553] See case C-218/11 Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Éduköviz ig), Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe v Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság (Judgment of the Court (Seventh Chamber) 18 October 2012).

[554] Even according to PPL and secondary legislation on public procurement, these criteria (reflected in the list of the proofs), are not mandatory. It is on the decision of the contracting authority to appropriately choose which of them will apply. See articles 26/7, 27/5 and 28/4 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[555] See for example Joined cases 27-29/86 Constructions et Enterprises Industrielles (CEI) v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes", (1987) E.C.R. 3347. These cases concerned requests from the Belgian Council of State for a preliminary ruling on various issues relating to the interpretation of Directive 71/305 on public works, a predecessor to the Directive 2004/18/EC/EC. In these cases, one issue concerned a decision to reject CEI's tender for work on a motorway. This rejection was based on a Belgian decree, which had established that tenders must be rejected where the total value of a contractor's work in hand plus the value of the contract exceeded a prescribed maximum. One purpose of this provision was to prevent firms from overstretching themselves financially. CEI's tender was rejected because it exceeded this limit. This rejection was challenged by CEI and certain questions on the matter were referred to the ECJ. One of the questions concerned whether a firm could be excluded because the value of its commitments exceeded the level set by the Belgian authorities. An issue considered by the ECJ was whether there was any limit to the contracting authority's discretion to determine the nature of the criteria to be used in assessing financial and economic standing. The ECJ concluded that the Directive did not limit the criteria that could be applied in assessing financial and economic standing. In any event, the contracting authority must determine the criteria relating to

Furthermore, the Directive(s)[556] provide in this regard for the possibility of an economic operator to rely on the resources of other entities to prove its economic and financial standing. An economic operator, or a group of economic operators, where appropriate and with regard to a specific contract, may rely on the capacities of other entities, regardless of the legal nature of the links that it may have with them. It must in this case prove that it will have at its disposal the resources necessary, for example by producing an undertaking by those entities to that effect[557]. Also, the Directive(s) gives to the economic operator the possibility to prove his economic and financial standing by any other document, which the contracting authority considers appropriate, if, for any valid reason, is unable to provide the references requested by the contracting authority as such[558]. The Albanian legislation, on the other hand, does not explicitly provide for such possibilities. In this context, the only possibility for an economic operator to rely on the capacities of other entities is when they have a legal relation between them, according to the legislation on trade companies[559]. In all other cases, the economic operator should prove that he fulfills by himself the required capacities[560].

economic and financial standing to be applied by taking into account the specific practical context of each case.

[556] See article 47/2 and 3 of Directive 2004/18/EC and article 63 of Directive 2014/24/EU.

[557] See for example case C-389/92, Ballast Nedam Groep NV v The State ("Ballast Nedam I") (1994) ECR I-1289, in which the Court held that a holding company that does not itself execute works may not be excluded from participating in public works contracts based on the fact that its subsidiaries, which do carry out the works, are separate legal persons. Furthermore, the ECJ ruled that, in assessing the economic and financial standing and technical capacity of such a firm, account must be taken of the companies belonging to the same group, where the firm in question actually has available the resources of those companies to carry out the work. (In the case C-5/97, *Ballast Nedam Groep NV v The State (1997)* ECR I-75 the Court made it clear in its ruling that contracting authorities were required to consider the resources of subsidiaries in such circumstances).
See also cases C-176/98, *Holst Italia v Ruhrwasser AG International Water Management* (1999) ECR I-8607 and C-314/01, *Siemens AG Osterreich v Hauptverband der sterreichischen Sozialverischerungstrger* (2004) ECR I-2549.

[558] See article 47/5 of Directive 2004/18/EC and article 60/3 of Directive 2014/24/EU.

[559] See articles 207, 208, 209 of the law no.9901, dated 14.04.2008 "On trade and trade companies" as amended.

[560] This stricter approach of PPL is reflected also at the condition of joint ventures among economic operators, applying in a procurement procedure. According to article 74 of the Decision of Council of Ministers No. 914, dated 29.12.2014 "On approval of the public procurement rules", the members of the joint venture should fulfill all required capacities proportionally with the percentage of their participation in the contract execution. As such they cannot rely on capacities of other members of the joint venture. This stricter provision of the PPL is explained with the need of the contracting authority to put insurance mechanisms for the satisfactory performance of the contract, in relation to the legal and economic environment where this law is applied.

3.3.2.4.c Technical and/or professional ability

The specific technical and/or professional ability criteria must be aimed at assessing whether economic operators have the relevant technical and/or professional ability (skills, equipment, tools, manpower, past experience, etc.) to perform the contract to be awarded. According to PPL, the contracting authority may require from the economic operators to prove they have the necessary technical qualifications, the professional and technical competence, the organizational capacity, the equipment and other physical facilities, the managerial capability, reliability, experience and reputation and the necessary personnel to perform the contract as indicated by the contracting authority in the contract notice[561]. Further on in the secondary legislation, these requirements, related to the technical and/or professional ability, are divided and specified according to the nature of the contract: i) works, ii) supplies and iii) services, meaning that specific requirements depend and are different for works, supplies and services. The difference is not in the requirement as such, but mainly in time references and relevant proofs required. Here below, I will analyze the concrete requirements and compare them with relevant requirements provided by the relevant Directives.

i) Technical and professional requirement for work contracts[562]

With regard to previous experience, the contracting authority shall require similar works for one single object, of an amount not more than 50% of the estimated value of the contract to be procured, carried out in the last three years[563] of the operator's activity; or similar works up to a total value of the last three years' work, not lower than the double of the limit value of the contract to be procured. Meeting one of the two above-mentioned conditions shall be the basis for considering a tender as qualified. As evidence of previous experience, the contracting authority shall require certificates of successful completion issued by any public or private entity, stating the value, time and type of work performed.

Regarding the technical and professional performance:

- Professional licenses in relation to the performance of works, contract object; and/or
- A statement on the average labor capacities of the economic operator; and/or
- A statement on the means and the technical equipment at the economic operator's disposal for the execution of the contract[564].

[561] See article 46/1/b of PPL.

[562] The same requirements are provided by Directive 2004/18/EC and Directive 2014/24/EU as well (see article 48 and article 58/4 respectively).

[564] See article 26 of the Decision of Council of Ministers No. 914, date 29.12.2014 "On approval of the public procurement rules".

This list of evidence is exhaustive; a contracting authority may apply only the criteria that are derived from such a list. However, within these limits, it is left to the discretion of the contracting authority to determine the specific criteria to apply. In any event, the contracting authority must determine the criteria relating to technical and/ or professional ability to be applied by taking into account the specific practical context of each case.

One of the differences noticed between the PPL and the Directive (s) concerns the required time for the past experience. While PPL requires past experience during past three years, Directive 2004/18, accepts it for the past five years[565], meanwhile Directive 2014/24, does not provide such time limitation at all[566].

ii) Technical and professional requirement for supplies contracts[567]

With regard to previous experiences, the contracting authority requires evidence of previous similar contracts carried out in the last three years of the business activity. In any case, the amount shall not be more than 40% of the value of contract to be procured.

Evidence of the delivery of supplies must be given by certificates issued by the recipient of goods, and/or sale tax invoices stating clearly dates, sums and the amount of supplies.

In case of supply contracts, the contracting authority may request from economic operators samples of supplies, descriptions and/or photographs/ catalogues, and evidence of authenticity. It may also require certificates drawn up by official quality control institutes or agencies attesting to the conformity of the products with clearly identified specifications. These are optional requirements, left on the discretion of the contracting authority on whether they should be required or not.

iii) Technical and professional requirement for service contracts[568]

With regard to previous experiences, the contracting authority requires evidence of previous similar service contracts carried out in the last three years of business activity. In any case, the amount shall not be more than 40% of the value of contract to be procured. Evidence of successful execution of the service must be given by certificates or other documents issued by the recipient of the service stating dates, the amount and the type of service.

To prove other technical and professional capacities, the contracting authority requires:

- Professional licenses issued by competent authorities, needed for the delivery of the service; and/or

[565] See article 58/2/a.
[566] See article 58/4.
[567] See article 27 of the Decision of Council of Ministers No. 914, dated 29.12.2014 "On approval of the public procurement rules".
[568] See article 28 of the Decision of Council of Ministers No. 914, dated 29.12.2014 "On approval of the public procurement rules".

- A list of key personnel necessary to carry out the type of contract and/or its components may be requested by the contracting authority. The list of key personnel shall include their CVs, and professional licenses if applicable; and/or
- a statement of the manpower needed for the execution of the contract; and/or
- A statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract.

As such, the Albanian procurement legislation has adapted the Directive requirement in the national context, taking mainly into consideration the complexity of the works contracts, compared to the supply and service contract (which is reflected at the requirement on past experience).

In order to verify that works, goods and/or services meet the quality requirements[569], the contracting authorities may request tenderers to submit certificates issued by independent bodies, recognized by national or international standardization systems. This provision shall be applicable even when technical requirements refer to the candidates' or tenderers' qualifications. These shall be proportionate and strictly related to the contract object and shall observe the principle of non-discrimination[570]. The same is generally provided by Directives too[571], but it is still adapted into the Albanian context with two typical changes; first, Albanian procurement rules do not provide for the possibility of economic operators to submit equivalent quality assurance measures (mainly in cases where the economic operator concerned had no possibility to obtain such certificates within the relevant time limits for reasons that are not attributable to that economic operator, provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards) as Directives do, and second, the Albanian rules refer to the international standardization systems (logically including the European ones, but is broader any way), while Directives refer to the European standards.

Even in the case of technical and/or professional ability criteria, (as in the case of economic and financial standings, analyzed above), Directive(s)[572] provide for the possibility of an economic operator to rely on the resources of other entities to prove its economic and financial standing, while the Albanian legislation, on the other hand, does not explicitly provide for such possibilities. Still, in this context, the only possibility for

[569] This criterion allows a contracting authority to assess whether economic operators have in place systems for carrying out tasks that directly affect product quality. This criterion is particularly important for supplies, for example. An example of a quality assurance standard is ISO 9001.
[570] See article 30 of the Decision of Council of Ministers No. 914, dated 29.12.2014 "On approval of the public procurement rules".
[571] See article 49 of Directive 2004/18/EC and article 62 of Directive 2014/24/EU. The latest refers also to environmental management standards.
[572] See article 48/3 and 4 of Directive 2004/18/EC and article 63 of Directive 2014/24/EU.

an economic operator to rely on the capacities of other entities is when they have a legal relation between them, according the legislation on trade companies[573].

3.3.2.5 Possibility of requiring economic operators to supplement or clarify evidences

When deemed as appropriate, the contracting authority may require tenderers to clarify their tenders in aiming at an objective examination, evaluation and comparison of tenders. Without prejudice to the negotiated procedures, no change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted[574]. Directive 2004/18, on the other hand, does further, providing also the right of economic operators to even supplement[575] submitted certificates and documents[576]. Both cases do not indicate what is meant by "clarification" of evidence and "supplementary" evidences, or to what extent clarifications of the evidence submitted and/or supplementary evidence may be requested and accepted consequently. However, the 'clarification situation' is clearer than the 'supplementary situation'. In general terms, to assist in the assessment of the evidence submitted with a view to establishing whether economic operators meet the set selection criteria, a contracting authority may, at its discretion, ask economic operators to clarify this evidence. Clarifications may be requested, for example, when the evidence submitted contains inconsistent or contradictory information, is not clear, or contains omissions[577]. Submitting supplementary evidences, on the other hand, is a much more delicate situation. Generally speaking, supplementary evidence means that additional information/evidence may be requested. Normally, this supplementary information/evidence required must relate to the evidence submitted and to the corresponding selection criteria that have been set[578] and must be a possibility given to all

[573] See footnote no. 551 above.
[574] See article 53/ of PPL.
[575] The Directive does not indicate what is meant by "supplementary evidence".
[576] See article 51 of Directive 2004/18/EC. The new Directive 2014/24/EU, on the other hand does not provide for such possibility, at all.
[577] See case C-599/10 SAG ELV Slovensko a.s., FELA Management AG and others v Úrad pre verejné obstarávanie (Judgment of the Court (Fourth Chamber) 29 March 2012).
[578] According to S. Arrowsmith "what it is clear is that supplementary information must relate to the evidence and criteria in the lists…Thus, for example, in seeking information supplementary to certificates or declarations of completion of past contracts, entities can only seek information that concerns the completion of those contracts." See S. Arrowsmith, "*The Law of Public and Utilities Procurement",* Sweet and Maxwell, London, 2005, p. 744. See also case C-336/12 Ministeriet for Forskning, Innovation og Videregående Uddannelser v. Manova A/S, where the Court held that the principle of equal treatment does not preclude a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favor or disadvantage the candidate or candidates to which it is addressed.

tenderers, otherwise too much discretion is left to the contracting authority, which might lead to abusive practices[579]. Considering the possibility of misimplementation of the rules from contracting authorities, in such cases, PPL does not foresee the possibility of economic operators to supplement the already submitted documents at all.

3.3.3 Summary

Description of the characteristics of goods, services or works that a contracting authority needs, is a key step in a procurement procedure. This description is made by the technical and service specifications. Apart from the technical specification, another important step of the contracting authority is to describe the criteria of the potential economic operators, which will be considered eligible to implement such a contract. These are actions carried out by the contracting authority, under the preparatory stage, but have a direct and important (inevitable) effect on the selection stage. As such, a lot of attention must be given to this stage of a procurement procedure.
Generally speaking, the requirements of the PPL, on preparation of technical specifications and qualification criteria, are in the same line with those of the Directive (s). However, even in this case, it might not be said that the provisions at issue are fully approximated. The main feature, making the difference is 'flexibility'. PPL tends to be stricter than the Directive(s), because it does reflect in its provisions, the general context (such as economic, social, political considerations). As analyzed in details, above, PPL tends to minimize the situations, which leave decisions on the contracting authority discretion[580]. This way of ruling the system gives more possibility to monitor and control the activities of contracting authorities in this regard, and aims at ensuring the good implementation of procedural rules. On the other hand, these "detailed ruled situations" might lead to situations that are not cost-effective (for example, a very good offer might

[579] The provision in Article 56(3) of the New Public Procurement Directive 2014/24/EU now ensures that contracting authorities can request the economic operators to submit documents that are missing provided that such requests are made in full compliance with the principles of equal treatment and transparency. See also S. Treumer "Evolution of the EU Public Procurement Regime: The New Public Procurement Directive", François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg 15.

[580] Either the Directive(s) limits in a significant way a contracting authority's discretion in this area. In fact, it lists the selection criteria on the basis of which the selection of economic operators may be carried out, it lays down the evidence or references that a contracting authority may require from economic operators to verify that the set selection criteria are satisfied, and it also lays down general rules concerning the process of selection. It seeks to ensure that the selection of economic operators does not provide opportunities for contracting authorities to conceal discrimination and that fair opportunities of participation are given to economic operators. The main objective of the Community Legislator is to ensure that intra-Community trade is not restricted and that the Treaty principles on freedom to provide services and freedom of establishment are respected. However, the Directive does give some discretion on contracting authorities (as for example to decide to apply or not the optional grounds for exclusion), or some possibilities to the economic operators (as for example to rely on others' capacities).

be disqualified for an unessential non-compliance with set requirements, only because the contracting authority does not have the discretion to decide differently)[581].
On the other hand, the requirements of the PPL on technical specifications and qualification criteria are applied for all public procurement procedures, despite the financial threeshold, while the Directive does not apply to public procurement procedures relating to contracts that are below certain financial thresholds set by the Directive itself[582]. This difference is explained by the different status and different objectives of the Directive from one side and PPL, as a national law of a non member country, on the other.

3.4 Contract award criteria

The award criteria are the criteria that constitute the basis on which a contracting authority chooses the offer that best meets the set requirements (technical specifications and selection criteria) and consequently awards a contract. These criteria must be established in advance by the contracting authority and must not be prejudicial to fair competition.
The procurement rules limit the criteria that a contracting authority may apply to award a public contract to either the lowest-price criterion, or the most economically advantageous tender (MEAT) criterion[583]. They also set out general rules concerning the formulation of the specific criteria that may be applied when the MEAT criterion is used, and lays down disclosure obligations concerning these criteria.
In any case, when setting the criteria to be applied for the award of a contract (award criteria), a contracting authority should respect the procurement principles[584] and mainly:
- Equal treatment and non-discrimination

The award criteria must be non-discriminatory[585] (especially on the grounds of nationality) and not prejudicial to fair competition.

[581] See analysis of the approach of means and goals in public procurement, discussed at point 1.3 of the Chapter I above.
[582] Generally speaking, with regard to contracts below the EU thresholds, it is left to EU Member States to introduce their own rules, but in any case, the general principles of law, including the requirements of transparency, equal treatment and proportionality, as well as the Treaty principles of non-discrimination, free movement, freedom of establishment and freedom to provide services must also be respected in the context of selection (qualification) of economic operators in the case of contracts below the thresholds set in the Directive.
[583] See article 55/1 of PPL and article 53/1 of Directive 2004/18/EC. The new Directive 2014/24/EU brings considerable change in this regard, by providing as the only option of awarding criteria the most economically advantageous tender. It also states that Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts (see article 67).
[584] According to recital 46 of the Directive 2004/18/EC and recital 90 of Directive 2014/24/EU, *contracts are to be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment and that guarantee the assessment of tenders under conditions of effective competition. The obligation to respect such principles is stated also at article 55 of PPL.*

- Transparency

The award criteria must be set in advance and duly disclosed in the contract notice[586]. The purpose of establishing and formally disclosing the award criteria to be applied is to ensure that:

- potential tenderers can prepare their tenders in a more appropriate way, trying to best meet the stated priorities of the contracting authority;
- the evaluation of tenders is carried out by a contracting authority in a transparent and reliable way and as objectively as possible;
- the relevant stakeholders (for example, audit bodies, review bodies, other government bodies or economic operators) can monitor the process so as to prevent discriminatory or non-authorized award criteria[587].

3.4.1 Lowest price criteria

According to the Albanian procurement legislation, the lowest price criteria[588] may be used when works, supplies or services, object of the contract have simple and well defined specifications, or well-known technical standards[589], while Directive 2004/18

[585] See for example case C-234/03 Contse SA, Vivisol Srl, Oxigen Salud SA v Insituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud) (2005) ECR I-9315.

[586] Except for the explicit disclosure obligations mentioned above, the Directive does not specifically require a contracting authority to formulate a detailed evaluation methodology in advance. According to the PPL, on the other hand, in case of using MEAT, the contracting authority must disclose in the tender documents the specific weight and its concrete score, for each criterion and also the evaluation methodology. The tender documents should bring as much transparency as possible by providing clear information on how the evaluation process will take place and on all factors that will be taken into account (including their specific weightings) and the methodologies that will be applied to determine the most economically advantageous tender. This will not only help potential tenderers in preparing more responsive tenders, but it will also make the whole tender process, including the evaluation process, more transparent. Being such sepcific, the Albanian procurement legislation aims at better monitoring and controling the activity of the contracting authorities, while procuring public funds.

[587] This requirement is confirmed by ECJ as well, that in the case C-538/13 "eViglio" has stated, inter alia, that the award criteria must be stated in the contract notice or the tender specifications and the fact that they are incomprehensible or lack of clarity may constitute an infringement of the Public Sector Directive. ECJ confirm as well that award criteria must be formulated in such a way as to allow all reasonably well informed and normally diligent tenderers to interpret them in the same way. See further case C-538/13 "eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos", Judgment ECLI:EU:C:2015:166.

[588] The lowest price criteria is the criteria, which is used in more than 90 percent of procurement procedure in Albania. For this reason in the amendmends of the PPL in 2012 (law 131/2012), aiming at the decreasing of cases when this criterion is used, was stated that the lowest price criteria should have not been used always, but they may be used when works, supplies or services, object of the contract have simple and well defined specifications, or well-known technical standards.

[589] See article 31/1 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

remains silent on this issue[590]. As such, this silence of the Directive leaves the choice between the lowest-price criterion and the MEAT criterion to the discretion of the contracting authority.[591] In any case, the choice of contracting authorities should be made considering the concrete contract to be awarded (its nature and the specific characteristics) and advantages (and disadvantages) of both criteria provided by the Directive.

In this case the contracting authorities will rely only in the lowest price offered to award the contract, and do not set any other qualitative criteria. Tenders received are evaluated against the set specifications on the basis of a pass or fail system, and no quality considerations can come into play in this choice. For sure, the lowest price criteria will be considered only for the tenderers, who have passed the selection phase, meeting all requirement of the contracting authority in this regard.

When the lowest price criterion applies, a contracting authority should use detailed specifications, allowing tenders that are technically compliant to be easily compared on the basis of the price only. On the other hand, the lowest-price criterion cannot be used whenever a contracting authority wants to apply cost analysis[592].

3.4.1.1 Limitations of using lowest price criteria

The lowest price criterion has the advantage of simplicity and rapidity, but it presents some limitations, including in particular the following:

- It does not allow the contracting authority to take into account qualitative considerations. Apart from the quality requirements built into the specifications, which must be met by all tenders, the quality of the items being procured is not subject to evaluation[593].

- It does not allow the contracting authority to take into account innovation and innovative solutions. Tenders that meet the minimal set specifications are compliant.

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[590] In article 53 of Directive 2004/18/EC, the lowest price is listed as one of the award criteria, without any extra description when this criteria is more apropriate to be used.

[591] This is confirmed by the European Court of Justice (ECJ) in the case C-247/02, *Sintesi SpA vs. Autorita' per la Vigilanza sui Lavori Pubblici* [2004] E.C.R. I-9215, where the Court held, *inter alia*, that national legislation could not impose such a general and *abstract* requirement (refering to the impose of the Italian law that the award of all works contracts launched under an open or restricted procedure to be made on the basis of the lowest price only) since it deprived contracting authorities of the possibility of taking into consideration *the nature* and *the specific characteristics* of such contracts and of the possibility of choosing the best tender.

[592] See for example case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-7725.

[593] Meaning that a tender that exceeds the set specifications (and offers a better quality) but is set at a slightly higher price than a tender that simply meets (but does not exceed) the set specifications, cannot be chosen as the winning tender.

- For requirements that have a long operating life, it does not allow the contracting authority to take into account the life-cycle costs (*i.e.* costs over the duration of the life cycle) of the requirement procured. When the lowest-price criterion is used, only the direct cost of the purchase (or the initial purchase price) within the set specifications can be taken into consideration.

3.4.2 Most Economically Advantageous Tender criterion

When the most economically advantageous tender (MEAT) criterion is used, a contracting authority can take into account other criteria in addition to – or rather than – the price, such as the quality, delivery time, and after-sales services. Each chosen criterion is given a relative weighting by the contracting authority, which reflects the relative importance that it has[594]. Through the weighting system, the contracting authority makes potential tenderers know the relative importance that it attaches to each criterion chosen and it allows them to prepare more appropriate tenders. At the same time, through the weighting system, the contracting authority structures its discretion and restricts the possibilities for arbitrary decisions during the process of evaluation of tenders[595].

According to the Albanian legislation, there is a given formula used to calculate the MEAT, depending on the weight given to each criterion. Lowest price should be always one of the criteria, and, accepting its important role, it is determined that despite the nature of the contract or other characteristic of it, the lowest price criteria cannot get less than 50 points, out of 100 points[596]. For each established criterion, the contracting authority should determine the specific weight and its concrete score. Providing for such a specific rule on MEAT application, PPL does not provide neither for the possibility of expressing those weightings by providing for a range with an appropriate maximum spread, nor for the possibility of indicating in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance[597], where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, as Directives do[598].

3.4.2.1 Advantages of using MEAT

[594] See article 53/2 of Directive 2004/18/EC and article 67/5 of Directive 2014/24/EU.

[595] See case C-368/10 European Commission v Kingdom of the Netherlands (Judgment of the Court (Third Chamber) 10 May 2012).

[596] See article article 31/1 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[597] This system, in fact, does not allow tenderers to know in advance the relative importance that the contracting authority attaches to each criterion applied. As a result, this system makes it more difficult for potential tenderers to prepare appropriate tenders, while at the same time making it easier for a contracting authority to conceal arbitrary or discriminatory decisions during the process of evaluation of tenders. This explain also the 'fear' of the Albanian legislation, to give too much discretion to the contracting authority.

[598] See article 53/2 of Directive 2004/18/EC and article 67/5 of Directive 2014/24/EU.

The MEAT criterion, as opposed to the lowest-price criterion, presents a series of advantages, including in particular the following:

- It allows contracting authorities to take into account qualitative considerations. The MEAT criterion is typically used when quality is important for the contracting authority,
- It allows contracting authorities to take into account innovation or innovative solutions. This is particularly important for small and medium-sized enterprises (SMEs), which are a source of innovation and important research and development activities,
- For those requirements with a long operating life, it allows the contracting authority to take into account the life cycle costs (*i.e.* costs over the life cycle) of the requirement purchased and not only the direct cost of the purchase (or initial purchase price) within the set specifications.

Considering these advantages, we might say that the MEAT criterion is typically used for complex supplies, services and works contracts, where there are various products/solutions available and where it would therefore not be appropriate to evaluate the tenders on the basis of the price only[599]. As such it might be argued that the purpose of the MEAT criterion is to identify the tender that offers best value-for-money[600]

3.4.2.2 Criteria that may be taken into account to determine the MEAT

A contracting authority may take into account various criteria to determine the most economically advantageous tender[601]. These criteria might be:

- quality
- price
- technical merit

[599] According to Recital 46, para.3, where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine, which one offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.

[600] As discussed in Chapter II above, the concept of value-for-money recognises that goods, works and services are not homogenous, *i.e.* that they differ in quality, durability, longevity, availability and other terms of sale. The point of seeking value-for-money is that the contracting authorities should aim at purchasing the optimum combination of features that satisfy their needs. Therefore, the different qualities, intrinsic costs, longevity, durability, etc. of the various products on offer are measured against their cost. It may be preferable to pay more for a product that has low maintenance costs than a cheaper product that has a higher maintenance cost.

[601] See article 55/1 of the PPL and respectively articles 53/1 of Directive 2004/18/EC and articles 67/2 and 68 of Directive 2014/24/EU. The latest has provided for an specific article on life-cycle costing (see article 68).

- aesthetic and functional characteristics
- environmental characteristics
- running cost
- cost-effectiveness
- after-sales service and technical assistance
- delivery date and delivery period or period of completion.

However, the above list is only illustrative and it is left to the contracting authority to establish the criteria to be applied[602] in order to determine the most economically advantageous tender from its point of view, taking into account the specific circumstances of each case and within certain specified limitations. In any case, the criteria chosen must be linked to the *subject matter* of the public contract in question[603]. At the same time, the criteria chosen not only should be linked to the subject matter, but they must be aimed only at identifying the most economically advantageous tender, not to other purposes[604]. Thus, in order to guarantee the objectivity of the criteria to be applied and to prevent the unrestricted freedom of choice being conferred on the contracting authority, these criteria must be formulated in a precise and (as far as possible) measurable way, *i.e.* in a way that allows tenderers to plan their tenders and to take account of the way, in which the assessment/evaluation of the tenders would be made[605]. Furthermore, the criteria that a contracting authority may apply to determine the MEAT must be chosen in such a way that they match the contract specifications. All

[602] Article 53/1 of Directive 2004/18/EC provides that 'when the award is made to the tender most economically advantageous *from the point of view of the contracting authority*…'. See also article 67/2 of Directive 2014/24/EU. PPL, on the other hand, does not use the same wording, but in context, it leaves this on the discretion of the contracting authorities as well.

[603] The requirement that the criteria must be linked to the subject matter of the public procurement in question prevents the contracting authority from choosing criteria not linked to the subject matter of the contract. Thus, for example, a contracting authority cannot give extra points to a tender simply because the tenderer that has submitted it applies in general a good environmental policy in carrying out its activities. This provision has been confirmed by the European Court of Justice in the *Wienstrom* case, where it has found that *the award criterion applied did not relate to the service that was the subject matter of the contract*. See case C-448-01, *EVN AG and Wienstrom GmbH vs. Austria* [2003] E.C.R. I – 14527.

[604] This has been repeatedly stressed by the European Court of Justice in its case law. See for example case C-31/87, "*Beentjes" (see n.53 above)*; case C-19/00 *SIAC Construction Ltd v County Council of the County of Mayo* [2001] ECR I-7725; and case C-448-01, *EVN AG and Wienstrom GmbH vs. Austria* [2003] E.C.R. I – 14527. In all of this cases, the Court held, *inter alia*, that even though it was left to the authorities awarding contracts to choose the criteria on which they proposed to base their award of the contract, their choice was limited to criteria aimed at identifying the offer that was economically the most advantageous.

[605] See for example case C-315/01, *Gesellschaft fur Abfallentsorgungs-Technik (GAT) v Osterreichische Autobahnen und Schnellstrassen AG* [2003] E.C.R. I-6351, where the Court held, *inter alia*, that a simple list of references, containing only the names and the number of the tenderers' previous customers *without other details* relating to the deliveries effected to those customers, could not be used as a criterion for awarding the contract since it could not provide any information that would allow the identification of the most economically advantageous tender.

specifications subject to evaluation should have criteria associated with them[606]. When the MEAT criterion is used, in general terms, a contracting authority may decide to operate in particular in one of the following manners:

- Fix the minimum mandatory specifications that all tenders must meet, which will be evaluated on the basis of a pass or fail system, and then award scores to those tenders that have achieved a pass. The scores will reflect the degree to which a tender exceeds the minimum specifications, or
- Fix, in addition or as an alternative to mandatory specifications, specifications that do not entail the application of a minimum "threshold" and that will be scored on the basis of the level of compliance of tenders with the contracting authority's requirements. In this case, some variability with regard to the level of compliance is acceptable.

The criteria that may be taken into account by a contracting authority to determine, which tender is the most economically advantageous one, may be divided into two broad categories: the cost-related criteria and the non-cost related criteria.

3.4.2.2.a The cost-related criteria

The cost-related criteria (also referred to as economic criteria) allow the contracting authority to determine the cost - in monetary terms - for the acquisition of the object of the procurement and also, for example, for using and operating it (such as for example, the price - the initial purchase price stated in each individual tender, the running costs - costs related to the use of the object of the procurement, which may include the cost of spare parts and consumables, maintenance costs, licenses, etc., or costs for after-sales services - costs related to the technical support required with regard to the object of the procurement).

In this context, it is important to examine the concept of life-cycle costs. Life-cycle costs are the costs of the goods, works or services that are being procured through the duration of their life cycle. Where a requirement is, for example, a machine, vehicle or building that has a working life over several years, there may be a need to ensure that it is cost-effective over its whole working life. This means looking not only at the lowest purchase price but taking a long-term view in order to guarantee long-term value-for-money. In these cases, in fact, it may be the case that the direct cost of purchase is only a small proportion compared to the total cost of the requirement procured through the duration of its life cycle. In broad terms, the life-cycle costs comprise all costs to the contracting authority relating to the:

[606] The preparation of the specifications and the criteria to be applied to determine the MEAT goes hand in hand. The contract specifications cannot be prepared without taking into account the criteria to be applied and, vice versa, the criteria to be applied cannot be determined without taking into account the contract specifications.

- acquisition
- operational life (including maintenance costs) and
- end of life (such as disposal)

of the goods, works or services being procured. It should be noted, however, that for certain assets there are no end-of-life costs since there is no disposal but, for example, instead there may be a resale value. The type of life-cycle cost is linked to and depends on the different types of goods, services or works being procured[607].

3.4.2.2.b Non-cost related criteria

The non-cost related criteria concern key performance requirements and adherence to specifications (such as for example quality - the quality characteristics that the object of the procurement must satisfy (for example, the number of pages per minute of a printer or its durability), technical merit - if the object of the procurement is fit for purpose and how well it performs, aesthetic and functional characteristics - how the object of the procurement looks and feels and how easy it is to use, delivery date - the guaranteed turnaround time from order to delivery and the ability to meet the set deadline, or after-sales services - what support is required and available to the contracting authority after the contract has been signed).

3.4.2.3 Selection criteria and award criteria; the difference between them

The selection of economic operators and the award of the contract are two different exercises in the procedure for the award of a public contract. Selection (or selection stage) – is about determining *which economic operators* are qualified to perform the contract to be awarded on the basis of the selection criteria pre-established by the contracting authority. Award (or award stage) - is about determining, *which tender* is the best one meeting the award criteria set in advance by the contracting authority (which may be either the lowest price or the most economically advantageous tender)[608]. In terms of timing, the selection stage of the economic operators always takes place before the award stage[609]. These two types of criteria serve different purposes and as such the one selection criteria cannot be used as a criterion for determining the MEAT[610]. As selection

[607] See article 68/1 of Directive 2014/24/EU.

[608] In Beentjes case for example (see footnote no. 53 above), the Court held, inter alia, that the selection and the award were two different operations in the procedure for the award of a public contract; that selection took place before the award (even though - in practice – the two operations might also take place simultaneously); and that the two operations were governed by different rules.

[609] If an economic operator has been excluded because it does not meet the set selection criteria, it cannot be re-admitted to the procurement process just because its tender is the least expensive or most economically advantageous one, as the case may be.

[610] See for example case C-532/06, *Lianakis AE and Others v Alexandroupolis and Others.* In this case, the Court pronounced, *inter alia*, on the legality of the criteria applied. The Court distinguished, on the one hand, the criteria that were aimed at identifying the most economically advantageous tender, and, on the other hand, the criteria that were *essentially linked* to the evaluation of the tenderers' ability to perform the

criteria, they may be used to establish whether economic operators have the capability of performing the contract according to the set minimum standards. However, in some cases, these criteria may also affect the quality of the performance and its cost[611]. This issue might arise more in the case of consultancy services procedure[612], where the criteria that are to be applied to determine the MEAT are price and quality. In the case of consultancy services, in practice the quality measures that contracting authorities will be concerned about are, on the one hand, the methodology and organization proposed for delivering the services (which could also probably be covered under technical merit) and, on the other hand, the qualifications and experience of the individual experts /consultants, who will be providing the services in accordance with the requirements contained in the specifications/terms of reference)[613]. The equation price/quality is fundamental in consultancy services: a contracting authority may choose to pay more for higher quality performance or less for lower quality performance and this is the main characteristic of the MEAT criterion.

3.4.2.4 Abnormally low tenders

The procurement rules at issue do not define what an abnormally low tender is. The concept of an abnormally low tender is strictly related with the price and refers to a situation where the price offered by a tenderer appears to be unreasonably low so as to raise doubts as to whether the tenderer would be able to perform the contract for the

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contract in question, and it held that only the former were award criteria. It went on to state that, in the case in question, the criteria that had been selected as award criteria were criteria that were *essentially linked* to the tenderers' ability to perform the contract, and they therefore did not have the status of award criteria. As a result, they could not be taken into account as award criteria instead of as selection criteria (see in particular paragraphs 30-32 of the judgment in question).

[611] In practice, there may be overlaps between these two types of criteria. Thus, a crucial issue relates to whether, *in practice*, certain selection criteria may be used also as criteria for determining the most economically advantageous tender. The procurement rules at issue (both Directive(s) and PPL) does not explicitly regulate this issue. See also S. Treumer "Evolution of the EU Public Procurement Regime: The New Public Procurement Directive", François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 15.

[612] Directives 2004/18/EC and 2014/24/EU do not specifically address the particularity of consultancy services. PPL, on the other hand, (under the influence of the World Bank' rules) does provide specifically for such a procedure in article 34/1. According to article 37/4/ë of the evaluation of technical proposals shall be carried out immediately taking into account several criteria, such as:

- the consultant's relevant experience,
- the quality of the methodology proposed,
- the qualifications of the key staff proposed,
- transfer of knowledge, if required.

Each criterion shall be marked on a scale of 1 to 100, and then the marks shall be weighted to become scores".

[613] See article 37 of the Decision of Council of Ministers no. 914, date 29.12.2014 "Rules on Public Procurement".

tendered price. If the contracting authority suspects that a tender is abnormally low, it needs to consider very carefully the implications for the contract, before deciding to qualify or reject it. As such, before it may reject those tenders, the contracting authority shall request in writing details of the constituent elements of the tender, which it considers relevant and shall verify those elements by consulting the tenderer, taking account of the evidence supplied[614].

Such details may relate in particular to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen and/or any exceptionally favorable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;

(e) the possibility of the tenderer obtaining State aid[615]

If, however, the investigations carried out show that the price is genuine, the tender in question cannot be considered as abnormally low and it cannot be rejected. The purpose of the rules on abnormally low tenders is to allow tenderers to prove that their tenders are genuine and realistic before they are rejected. Taking into consideration this purpose, the Albanian PPL, in order not to 'suggest' the decision of the contracting authority in case of an abnormally low tender, does not use the term "rejection" as the Directive does, but provides that "when a contracting authority notices that one or more offers are abnormally low, *before continuing the evaluation process*...". This provision aims at avoiding any abusive rejection by contracting authorities of tenders that appear to be abnormally low[616].

The procurement rules do not determine the method of calculating an anomaly threshold, and in case of the Directive, this issue is in principle left to the discretion of EU Member

[614] See article 55 of Directive 2004/18/EC.

[615] PPL does provide for the same rules on dealing with an abnormally low tender, except for the possibility of the tenderer obtaining State aid (see article 56 of PPL). The new Directive 2014/24/EU, on the other hand, has added another detail compared to Directive 2004/18/EC, such as the situation of a subcontracting possibility. This new Directive provides also for a new situation when contracting authorities shall reject the tender, which does reflect the tendency of this Directive to emphasize the importance of the compliance with the applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions listed in its Annex X (see articles 18/2 and 69).

[616] See case 274/83 Commission v Italy [1985] ECR 1077; case C 76/81 Transporoute et Travaux SA v Minister of Public Works [1992] ECR 417, where the Court said that 'the fact the provision expressly empowers the awarding authority to establish whether explanations are acceptable does not under any circumstances authorize it to decide in advance, by rejecting the tender without even seeking an explanation from the tenderer, that no acceptable explanation could be given'.

States[617]. In case of PPL, it does refer to the secondary legislation where two specific methods of calculation are provided. The first one refers to the case when no more than two offers are qualified[618]. In this case, the economic offer that is reduced more than 25% from the estimated limit fund will be considered as abnormally low. The second refers to the case when there are three and more qualified tenderers. In this case, the economic offer that will be lower than 85% of the qualified offers' average[619] will be considered as abnormally low.

3.4.3 Summary

The Albanian procurement rules on defining the award criteria, as analyzed above, do generally comply with the relevant Directive (s) rules. It provides as well for two types of award criteria; the lowest price and the most economically advantageous tender (MEAT)[620]. Even the context of applying such criteria is the same, despite the fact that Albania is not an EU member. However, there are still some differences, which do reflect the environment where the PPL is applied. The environment impact is clearly reflected at the fact that in practice, more than 90 percent of the contracting authorities use lowest price criteria. MEAT is mandatorily used only in case of consultancy services procedure[621]. This situation is explained with the low level of professionalism and "fear from discretion", which associate the procurement process. Using MEAT will need some extra engagement from the contracting authority and they will be always prejudiced from the audit institutions, because of the discretion they have by law to decide which will be the criteria for MEAT and their specific weight. To promote the use of MEAT, PPL, differently from the Directive, has even provided for some situation when the lowest

[617] In any case, any method leading to the automatic exclusion from procedures is not allowed, of certain tenders determined according to the mathematical criteria, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations (see case 103/88 Fratelli Costanzo SpA v Commune di Milano [1989] ECR 1839 and case c_295/789 Impresa Dona Alfonso di Dona Alfonso et Figli Snc v Consorzio per lo sviluppo industrial del commune di Monafalcone [1991] ECR I-2969.

[618] The calculation of abnormally low offers should be done at the last stage of the selection phase, meaning that the tenderer meets all requiremets of the contracting authority (see article 66/1-5 of the the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement").

[619] The methods of calculation of abnormally low tenders in the Albanian legislation have been changed several times. The latest refer to the amendments of PPL and its secondary legislation in 2014 (see footnote no.203 above) and there is no comment, in this regard, from the European Commission. Nevertheless, the Community law does not in principle preclude a mathematical criterion from being used for the purposes of identifying the tenders that appear to be abnormally low, *on condition that* the result of applying that criterion is not beyond challenge, and that the requirement for *inter partes* examination of those tenders is complied with (see for example joined cases C-285/99 and C-286/99 Impresa Lombardini SpA v ANAS [2001] ECR I-9233).

[620] In this case, PPL does comply only with Directive 2004/14, and not with Directive 2014/24/EU, which does not provide for the lowest price criteria, at all.

[621] See article 37 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

price can be used, aiming at reducing its use as much as possible. The limitations of PPL are also in the same line of the above said explanations, not providing for the possibility of expressing weightings of the criteria by providing for a range with an appropriate maximum spread, and for the possibility of indicating in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in a descending order of importance, where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons.

On the other hand, the requirement of the PPL on award criteria are applied for all public procurement procedures, despite the financial threshold[622], while the Directive does not apply to public procurement procedures relating to contracts that are below certain financial thresholds set by the Directive itself. Generally speaking, with regard to contracts below the EU thresholds, it is left to EU Member States to introduce their own rules[623]. As discussed above, this difference is explained with a different status and different objectives of Directive from one side and PPL, as a national law of a non member country, on the other.

[622] These awarding criteria may be applicable for all procurement procedures except for small value procedures (up to around 5700 euro), where only lowest price criteria is used.

[623]However, as previously discussed, the general law and Treaty principles, including the requirements of transparency, equal treatment and non-discrimination, must also be respected in the context of setting the award criteria in the case of contracts below the thresholds set in the Directive.

CHAPTER IV
AWARDING PROCEDURES AND PROCUREMENT TOOLS ACCORDING TO THE ALBANIAN SYSTEM; SIMILARITIES AND DIFFERENCES WITH THE CORRESPONDING EU LEGISLATION.

4. Introduction

One of the three stages of the procurement process[624] is the so called 'competition stage', which refers to an administrative competition process, following a certain procedure, aiming at the awarding of the contract to the best offers. The regulatory rules on public procurement generally focus on the competition procedures, since it is in this phase that legal rules and other regulatory measures become important tools of policy[625]. As such, it may be said that procedures are the life and soul of the public procurement law and this is confirmed by these legal acts themselves, while establish their objectives[626].

As analyzed in the previous chapters, the basic presumption in public procurement is that contracts will be procured using an advertised, competitive procedure that is open, fair and transparent, ensuring equality of opportunity and treatment for all candidates and tenderers. There are only limited circumstances where a procedure without advertised competition is permitted[627].

The procurement rules set out the processes to be followed by a contracting authority when using each of these competitive procedures, which differ according to the procedure.

Except for the procurement procedures, the procurement rules also include provisions covering procurement tools that a contracting authority may choose to use in conjunction with the competitive procedures, where permissible. These are framework agreements, electronic auctions and dynamic purchasing systems. Whenever a contracting authority

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[624] See point 2.1.1 "Public procurement stages", Chapter II, above.

[625] See footnote no. 13 above.

[626] PPL states at its very first article, that its objective is "to set out the rules applying to the procurement of goods, works and services by contracting authorities". Also analyzing the aim of this law, which is following its objective, we see that it is focused on procedural aspects of the competition (see article 1/2 of PPL.) Procurement Directives 2004/18/EC and 2014/24/EU, on the other hands, have stated at the very beginning (see Recital 2 of Directive 2004/18/EC and Recital 1 of Directive 2014/24/EU) that "The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the [TFEU]". However, and this justifies EU legislation under the subsidiarity principle, for public contracts above a certain value, "provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition". Differently from the Directive 2004/18/EC, the New Directive 2014/24/EU reaffirms this position also in its very first provision, providing that "This Directive establishes rules on the procedures for procurement by contracting authorities …." (see article 1(1). See also R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law, Review Contents Vol. 52 No. 2 April 2015, © 2015 Kluwer Law International. Printed in the United Kingdom. pg. 450-451.

[627] It refers to the negotiated procedure without prior publication of a contract notice, which will be analyzed in details below.

wishes to award a contract without competition, using what is known as the 'negotiated procedure without prior publication of a contract notice', then it can only do so if specific conditions are met[628]. All these awarding procedures and procurement tools will be discussed in details, here below[629].

4.1 Public procurement procedures

According to the Albanian PPL, in awarding their public contracts, contracting authorities shall apply one of the types of procedures to be used for the award of public procurement, which are:

a) open procedures;
b) restricted procedures;
c) negotiated procedures, with or without prior publication of a contract notice;
d) request for proposals;
e) design contests;
f) consultancy services[630].

The open procedure is the most preferred one by the PPL, as it states that this type of procedure can always be used for all types of contracts. Restricted procedure, on the other hand, can be used when it is necessary to distinguish between the selection phase – dealing only with the candidates' qualifications – and the award phase – dealing with the offer. Design contests and consultancy services are procedures, which may be used only for specific types of contracts (mainly service contracts). Negotiated procedures may be used only in the specific circumstances set forth in the respective articles of the PPL. As per request for proposals' procedure, it may be used despite the type of the contract, but only for contracts of a value[631] lower than the low value thresholds[632].

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[628] As will be analyzed further in this chapter, the European Court of Justice (ECJ) has confirmed that these conditions should be narrowly interpreted and that the award of a contract without competition should only occur in exceptional circumstances.

[629] Considering that the Albanian PPL is approximated with the Directive 2004/18/EC, the analysis in this chapter will be made mainly referring to the relevant provisions of this Directive. Meanwhile, in Chapter V, where the need for further approximation of the PPL will be analyzed among others, this analysis will be made referring to the provisions of the new Directive 2014/24/EU.

[630] See article 29/1 of PPL.

[631] The applicable thresholds for the purposes of the PPL are:

a) high value thresholds;

b) low value thresholds. The value of the thresholds might be reviewed by Council of Ministers (see article 27 of the PPL).

In accordance to the PPL, the value of the thresholds is set forth, as follows:

i. the high value thresholds are:

a) 1.200.000.000 (one billion and two hundred millions) ALL for public works contracts (ca. 8,5 mln EUR);

b) 200.000.000 (two hundred million) ALL for public service and supply contracts (ca. 1,5 mln EUR)

ii. the low value thresholds are:

a) 12.000.000 (twelve millions) ALL for public works contracts (ca.86,000 EUR);

b) 8.000.000 (eight million) ALL for public service and supply contracts (ca. 57,000 EUR).

As it is noticed, PPL does provide in a specific article for all types of procedures which may be used from a contracting authority, depending on concrete circumstances that should be considered to decide on the type of the procedure. As such, PPL formally does not make a division on competitive procedures and non-competitive procedures, but giving some general considerations[633] on when certain procedure can be used, it is understandable that either under PPL they might be divided in two sub-categories; competitive procedures and non-competitive procedures.

This provision of the PPL generally comes in the same line with the relevant provision of the Directive 2004/18, which provides for procurement procedures[634]. As such, the Directive at issue also provides that contracting authorities shall award public contracts by applying the open or restricted procedure[635]. Except for these two main procedures, in the specific circumstances expressly provided for in the Directive, contracting authorities may award their public contracts by means of the competitive dialogue. Also, in the specific cases and circumstances provided by the Directive, they may apply a negotiated procedure, with or without publication of the contract notice[636]. Thus, except for

(See article 8/1of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement").

As compared with the thresholds currently in force in the European Union "high thresholds" in Albania are considerably higher than those set by the EU directives. It should be noted, however, that in the Albanian PPL the procedures above high and low value contracts are basically the same– the only difference is that in the case of contracts above the high thresholds some additional obligations are imposed on public purchasers (additional publication in widely accessible in the European newspaper, use of English for tender dossiers and longer time periods for receipt of requests or offers are required). There is no bottom threshold set by the PPL or implementing rules adopted on its basis, under which there would be no need to apply specific public procurement rules. None the less, in the case of very small contracts, not exceeding 800 000 ALL (ca 5.700 EUR) within one calendar year, contracting authorities are authorized to use the "small value procurement procedure", as defined in procurement regulations.

[632] See article 29/2, 3 and 4 of the PPL.

[633] Further the concrete conditions provided by PPL will be analyzed for using each of the procurement procedures at issue.

[634] See article 28 of the Directive 2004/18/EC.

[635] According to the article 28, para.1 of Directive 2004/18/EC, 'In awarding their public contracts, contracting authorities shall apply the national procedures adjusted for the purposes of this Directive', meaning that in any case, it is left on the discretion of each Member State to decide on concrete procedural aspects, enough not to contradict 'the purpose of the Directive'.

[636] The number of public procurement procedures that can be used has expanded over the years, in particular, as a result of the 2004 and 2014 revisions. In addition to the traditional open, restricted and negotiated procedures, the 2004 reform formally introduced competitive dialogue. The 2014 reform has instituted a new competitive procedure with negotiation and the innovation partnership. The multiplication of procedures necessitates defining their nature as their different characteristics have an impact on which subsidiary rules are applicable or how legislative limitations should be overcome. As such, it can be argued that the procedures contained in Directive 2014/24/EU may be characterized as standard, special or exceptional depending on the freedom that contracting authorities exercise in their choice as to the relevant procedure. See *P. Telles and L. R. A. Butler"* Public Procurement Award Procedures in Directive 2014/24/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg.132.

similarities, on one hand, Directive 2004/18/EC does provide for a type of procurement procedure which is not provided by PPL[637], and on the other hand, PPL does provide for a procedure which is not listed by the Directive[638]. Furthermore, the Directive does not list the design contest at the procurement procedures' provision, even though, it provides for such a procedure, in specific articles.

4.1.1 Definitions and procedural aspects of competitive procurement procedures

Procurement rules (both PPL and Directive) does provide for definitions of procurement procedures and for procedural aspects, which should be followed in different procedures, which will be analyzed in details here below.

4.1.1.a Open procedure

Open procedure is a 'single-stage' competitive procedure, whereby any interested economic operator may submit a tender that can be used for works, supplies and services contracts without having to fulfill any special conditions[639].
According to the Albanian PPL, the open procedure is the preferred procurement procedure[640]. In case of using an open procedure, a contracting authority advertises the contract opportunity[641] and then issues full tender documents, including the specification and contract, to all economic operators that request to participate. According to the Albanian legislation, full tender documents are always electronically available, because the contracting authority has the obligation to publish a set of tender documents and at

[637] PPL does not provide for the "competitive dialogue" procedure.

[638] Among other procedures, PPL does provide also for the request for proposal procedure, which is used for values lower than low threshold, but despite this, all requirements of the PPL, are mandatory as well for this kind of procedure.

[639] Both, PPL and Directive 2004/18/EC, give a definition of an 'open procedure', on their relevant definitions' articles (see article 3/17 of the PPL and article 1/11 (a) of Directive 2004/18/EC). The New Directive 2014/24/EU, on the other hand, does not provide for a definition on the "definitions' article, but provide for a specific article on open procedure, stating among others that "In open procedures, any interested economic operator may submit a tender in response to a call for competition" (see article 27).

[640] The Albanian PPL, aiming at encouraging at maximum the transparence and competition in the procurement process, has emphasized that the open procedure is the most preferred one, and as such it can be used by the contracting authorities, without any need of justification, while all other procedures, including the restricted one, may be used only in justified cases (See article 30/1 of PPL and article 33 of the Decision of CoM). This legal approach is reflected at the number of open procedures, performed over the year. The statistical data show that the 'open procedure' is the most used procurement procedure for contracts above the low value thresholds (see annual reports of PPA available at www.app.gov.al).

[641] See articles 30/2 and 38 of PPL and respectively Annex VII A of Directive 2004/18/EC and article 27/1 of Directive 2014/24/EU. PPL and Directive 2014/24/EU have specific articles providing basic requirements for the open procedure, while Directive 2004/18/EC, does not provide for such a specific article.

the same time, they publish the contract notice[642]. According to the Directive 2004/18, in case of using the open procedures, where contracting authorities do not offer unrestricted and full direct access by electronic means to the specifications and any supporting documents, the specifications and supplementary documents shall be sent to economic operators within six days of receiving the request to participate, provided that the request was submitted in good time before the deadline for the submission of tenders[643]. The economic operators submit both the selection (qualification) information and the tenders at the same time in response to the contracting authority's advertised requirements, within the time limits for the submission of the bids[644]. The contracting authority may receive a large number of tenders as it cannot control the number of tenders that it receives[645], but only tenders from suitably qualified economic operators that have

[642] See articles 39 and 41 of the PPL and article 5 of Decision of CoM.

[643] See article 39 of Directive 2004/18/EC. Directive 2014/24/EU, on the other hand, provides as a rule that "Contracting authorities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice in accordance with Article 51 or the date on which an invitation to confirm interest was sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible".

[644] According to the PPL, the time limits for bid submission in an open procedure depend on the threshold (if it is international or national procedure). As such, in case of open procedures above the high value thresholds, the minimum time-limit for the receipt of tenders shall be not less than 52 days from the date, when the contract notice was published on the Public Procurement Agency website. In case of open procedures between the high and the low value thresholds, the minimum time-limit for the receipt of tenders shall be 30 days from the date when the contract notice was published on the Public Procurement Agency website. In case notices are prepared and published by electronic means, (and this is always the case) in compliance with the format and procedure for the transmission that are provided in the PP-rules, the time limits for the receipt of tenders may be reduced by seven days for the open procedure (see article 43 of PPL). This PPL provision comes in the same line of relevant provision of Directive 2004/18/EC, which provides that in the case of open procedures, the minimum time limit for the receipt of tenders shall be 52 days from the date on which the contract notice was sent. (article 38) When contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. The time limit shall run from the date on which the contract notice was sent in open procedures (see article 38 of the Directive). Comparing the two relevant provisions of PPL and Directive 2004/18/EC, it is noticed that they provide both for the same time limits (referring to the contract above the high value threshold according to PPL) and in case of using PIN, the respective Directive time limits, will be even shorter that those provided by PPL. Directive 2014/24/EU, on the other hand, applies even shorter time limits, providing that 'the minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent. Where contracting authorities have published a prior information notice, which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, may be shortened to 15 days, provided that all required conditions are fulfilled. Also (if the PIN' option is not used, the contracting authority may reduce by five days the time limit for the receipt of tenders where it accepts that tenders may be submitted by electronic means in accordance with the relevant provisions (see article 27 of Directive 2014/24/EU).

submitted the required documents and that meet the selection criteria are considered[646]. All the tenders will be evaluated, first to assess the qualification of the tenderers, and second to award the contract to the successful tenderer based on the award criteria. Tenders can be evaluated on the basis of either the lowest price or the most economically advantageous tender. No negotiations are permitted with economic operators, although contracting authorities may clarify aspects of the tender with tenderers[647].
Whilst the procedure seeks to provide for maximum participation, it may not always be the most appropriate procedure and in this case[648] the Directive (s) provide for the possibility of the contracting authorities, given the value of the contracts and the costs associated with evaluating a large number of tenders, to pre-qualify a smaller number of potential tenderers first, using the restricted procedure, in order to make the process more manageable and less costly for both itself and the tenderers. PPL, on the other hand, does not allow for this possibility. Instead, it does stimulate the use of the open procedure, aiming at the maximization of the competition. This approach of the PPL is argued with the 'fear' of the misuse of the law to narrow the competition in a procurement procedure.

4.1.1.b Restricted procedure

Restricted procedures are those procedures, in which any economic operator may request to participate and whereby only those economic operators selected by the contracting authority may submit a tender[649]. According to the PPL, contracting authorities may use the restricted procedure to carry out a procurement activity, which leads to the award of a public contract, when:

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[646] See article 30/4 of PPL and respectively Recital no.39 of Directive 2004/18/EC and article 56 of Directive 2014/24/EU.

[647] As discussed at point 3.3.2.5 at Chapter III above, the Directive(s) does allow not only for clarification, but also for the supplementing possibility. PPL, on the other hand, does allow only for the clarification option. In any case, these options are allowed given the condition that this does not involve discrimination; otherwise, non-compliant tenders must generally be rejected in respect to the principle of equal treatment or non-discrimination. See, for example, case C-234/89 Commission v Denmark ('Danish Bridge') [1993] ECR I-3353, case C-87/94 Commission v Kingdom of Belgium (Walloon Buses) [1996] ECR I-2043 and case T-40/01 Scan Office Design SA v Commission [2002] ECR II-5043.

[648] Both Directives 2004/18/EC and 2014/24/EU leaves the choice to the contracting authority, as according to the restricted procedure, it is not linked to specific grounds. See the analysis below.

[649] As in the case of the 'open procedure' both PPL and Directive 2004/18/EC, give a definition of the 'restricted procedure', on their relevant definitions' articles (see article 3/18 of the PPL and article 1/11 (b) of Directive 2004/18/EC). The New Directive 2014/24/EU, on the other hand, does not provide for a definition on the "definitions' article, but provide for a specific article on 'restricted procedure', stating among others that "In restricted procedures, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B or C as the case may be by providing the information for qualitative selection that is requested by the contracting authority. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with respective provision of the Directive" (see article 28).

a) the respective good, service or work – having a rather complicated and special character – may be supplied, obtained or executed by economic operators who possess the proper technical, professional and financial capacities;
b) it would be economically more effective for the contracting authority to examine the capacities and the qualifications of the interested economic operators first and then, to invite those operators, who possess specific minimal qualifications to submit their tenders[650]. When making the decision to apply the restricted procedure, the contracting authority should consider:

a) aspects related to the nature of the contract;

b) the time frame involved;

c) the costs involved with running the procedure divided into two steps;

d) the market situation;

e) the prospective/expected number of tenderers.

In no manner the value and size of the contract may be the sole reason for justifying the complexity of the contract or of the awarding process. This procedure must not be used for works, goods and services of general market availability or with standard and simple technical specification[651].

The conditions of using the restricted procedure, under the Albanian procurement legislation, do not comply with the relevant provisions of Directive 2004/18. According to this Directive, the contracting authorities should not use the restricted procedure for particularly complex projects, providing that 'open' and 'restricted' procedures do not allow the award of such contracts[652]. Furthermore, under the Directive provisions, in restricted procedures, contracting authorities may limit the number of suitable candidates they will invite to tender, provided a sufficient number of suitable candidates are available. The contracting authorities shall indicate in the contract notice the objective

[650] See article 31/1 of the PPL.
[651] See article 34/ 2 and 3 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".
[652] See Recital no.31 of the Directive 2004/18/EC, which provides that "Contracting authorities, which carry out particularly complex projects may, without this being due to any fault on their part, find it objectively impossible to define the means of satisfying their needs or of assessing what the market can offer in the way of technical solutions and/or financial/legal solutions. This situation may arise in particular with the implementation of important integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing, the financial and legal make-up of which cannot be defined in advance. *To the extent that use of open or restricted procedures does not allow the award of such contracts*, a flexible procedure should be provided, which preserves not only competition between economic operators but also the need for the contracting authorities to discuss all aspects of the contract with each candidate. However, this procedure must not be used in such a way as to restrict or distort competition, particularly by altering any fundamental aspects of the offers, or by imposing substantial new requirements on the successful tenderer, or by involving any tenderer other than the one selected as the most economically advantageous".

and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number. In any case, in the restricted procedure the minimum shall be five. The contracting authorities shall invite a number of candidates at least equal to the minimum number set in advance. Where the number of candidates meeting the selection criteria and the minimum levels of ability is below the minimum number, the contracting authority may continue the procedure by inviting the candidate(s) with the required capabilities. In the context of this same procedure, the contracting authority may not include other economic operators, who did not request to participate, or candidates, who do not have the required capabilities[653]. Even though PPL does foresee that it would be economically more effective for the contracting authority to examine the capacities and the qualifications of the interested economic operators first and then, to invite those operators who possess specific minimal qualifications to submit their tenders, it does not profit from it, because it does not put it in the same context as Directive. The aim of the Directive with such a provision is to pre-qualify a smaller number of potential tenderers first, in order to make the process more manageable and less costly for both itself and the tenderers, while the PPL does not allow for such opportunity.

The restricted procedure is a two-stage process. The contracting authority advertises the contract opportunity[654], and any interested economic operator may submit his request to participate at the qualification phase. The economic operators first submit the selection stage (pre-qualification) information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract[655] and to select the economic operators that are to be invited to tender[656]. The contracting authority issues the full invitation to tender documents, including the specification and contract, to the economic operators that it has selected or shortlisted[657]. The submission of the request for participation at the first stage and the submission of the offer at the second stage

[653] See article 44/3 of the Directive 2004/18/EC. The same is provided by the Directive 2014/24/EU as well (see article 65/ 1 and 2).

[654] According to article 31/2 of the PPL, in restricted procedures, contracting authority shall publish a notice, which must contain the following: a) a description of the object of the contract to be awarded; b) an indication of the selection criteria; c) an invitation to express interest in participating to the awarding procedure. The same requirements are foreseen by Directives as well (See respectively Annex VII A of Directive 2004/18/EC and article 28/1 of Directive 2014/24/EU. PPL and Directive 2014/24/EU have specific articles providing basic requirements for the restricted procedure, while Directive 2004/18/EC, does not provide for such a specific article.

[655] During the prequalification stage, no award criteria should be taken into account. See for example case C-362/90 Commission v Italian Republic [1992] ECR I-2353.

[656] See article 31/3 of PPL. As discussed above, according to Directive (s) contracting authorities are permitted to limit the number of economic operators that it invites to tender and to draw up a shortlist of economic operators. This means that not all of the economic operators that qualify have to be invited to tender. According to the PPL, on the other hand, all qualified economic operators in the first stage, should be invited to submit an offer at the second stage.

[657] See article 31/ 4 and 40 of PPL and respectively article 40 of Directive 2004/18/EC and 28/2 and 54 of Directive 2014/24/EU.

should be done within the time limits set from the contracting authority[658]. Tenders can be evaluated on the basis of either the lowest price or the most economically advantageous tender. Even in this procedure, as in the open one, no negotiations are permitted with economic operators.

As discussed above, the restricted procedure under the PPL is not 'understood' and applied as the restricted procedure under the Directive(s). As a matter of fact, the provision of the restricted procedure in the PPL seems as a mix between the relevant provisions of the UNCITRAL Model Law[659] and Directive 2004/18. According to the UNCITRAL Model Law[660], the procuring entity may engage in procurement by means of restricted tendering when: *a)* the subject matter of the procurement, by reason of its

[658] According to the PPL, the time limits for bid submission in a restricted procedure depend on the threshold (if it is international or national procedure). As such, in case of restricted procedures above the high value thresholds, the time-limit for submitting the request to participate shall be not less than 20 days from the date, when the contract notice was published on the Public Procurement Agency website, while the time-limit for the receipt of tenders shall be not less than 20 days from the date, when the invitation to tender was sent to the candidates.

In case of restricted procedures between the high and the low value thresholds, the time-limit for submitting the request to participate shall be not less than 15 days from the date, when the contract notice was published on the Public Procurement Agency website, while the time-limit for the receipt of tenders shall be not less than 15 days from the date, when the invitation to tender was sent to the candidates (see article 43/3 and 6 of PPL). Time limits provided by PPL for this procedure are shorter than those provided by Directive 2004/18/EC for the same procedure. According to the said Directive in case of the restricted procedure, the minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice is sent; and the minimum time limit for the receipt of tenders shall be 40 days from the date on which the invitation is sent (see article 38/3 of the Directive).

Still according to PPL, in case notices are prepared and published by electronic means, (and this is always the case) in compliance with the format and procedure for the transmission that are provided in the PP-rules, the time limits for the receipt of request to participate and receipt of tenders, may be reduced by five days for the restricted procedure. While, according to the Directive 2004/18/EC when contracting authorities have published a prior information notice, the minimum time limit for the receipt of tenders (not for receipt of request to participate) may, as a general rule, be shortened to 36 days, but under no circumstances to less than 22 days. Considering these provisions, it results that time limits applied under PPL for the restricted procedure, are as the half of the respective time limits, applied by the Directive at issue, even in cases the PIN is applied. Directive 2014/24/EU, on the other hand, applies shorter time limits than Directive 2004/18/EC, (but not shorter than PPL), providing that 'the minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent and the minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation to tender was sent. Where contracting authorities have published a prior information notice, which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in the second subparagraph of paragraph 2 of this Article may be shortened to 10 days. Also (if the PIN' option is not used, the contracting authority may reduce by five days the time limit for receipt of tenders, where it accepts that tenders may be submitted by electronic means in accordance with the relevant provisions (see article 28 of Directive 2014/24/EU). In all situations, prescribed above, the time-limits provided by PPL are shorter than the ones provided by both Directives.

[659] The first law on public procurement in Albania has been prepared under the influence of the UNCITRAL Model Law (see Chapter III above).

[660] See article 29/1 of the UNCITRAL Model Law.

highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or b*)* the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement. This second option refers to cases where the value is so low that using an open procedure would be more costly than the benefit from the open competition. This provision of the Model law gives to the contracting authority the possibility to solicit tenders (in case (a) from all known economic operators (for the object matter), or to simply select a given number of economic operators, aiming at a non-costly process (in case (b). Directive 2004/18, on the other hand, allows the contracting authority to restrict the number of bidders, but through selective qualification criteria. Thus, the restriction is not based on the previously known identity of the bidders but a process, which takes into account the qualifications of the bidders, known as a pre-qualification procedure. The pre-qualification procedure under the Directive is used to identify those tenderers, who are most likely to be able to submit responsive and adequate tenders based on their qualifications, reducing in this way the time and cost of the contracting authority in assessing potentially non-compliant tenders, on one hand and reducing the cost of preparing the entire set of documentation for those tenderers, who do not have a chance of winning. Analyzing all this, it is clear that the situations when a restricted procedure is used under the Model Law and situations when such a procedure is used under the Directive, are rather contrary to each other; the model law stimulates the use of this procedure when there are not too many potential bidders on the market, while Directive when there are too many potential bidders on the market. The PPL stays in the middle; it provides for the conditions of Model Law on one hand, but it allows everyone to participate, on the other hand, and differently from both regulations at issue, it does not restrict the number of bidders neither in the first stage (by sending invitation only to the potential tenders, as Model Law does), nor in the second stage, (by deciding a maximum number of bidders, who will pass in the second stage, as Directive does). The approach of the PPL at this stage, by inviting to submit a bid all those bidders who meet the minimum qualification criteria, is similar to the World Bank approach[661]. All these different approaches on restricted procedure, mixed in one provision, make the position of the PPL very ambiguous. This ambiguity is reflected in the very low number of use of the restricted procedure from the contracting authorities in Albania[662].

4.1.1.c Negotiated procedure with prior publication of a notice

The negotiated procedure with prior publication of a notice is a 'two-stage' competitive procedure that can be used for some works, supplies and services contracts, subject to fulfilling narrowly prescribed conditions that vary depending on whether the contract

[661] See section 3.2 of the World Bank Guideline.

[662] According to the Annual Reports of PPA, the number of the restricted procedure in years 2011, 2012, 2013 and 2014 have been respectively, 1, 0, 3 and 6 (see Annual Reports of PPA, available at www.app.gov.al).

concerns works, supplies or services and whereby the contracting authority consult the economic operators of their choice and negotiate the contract terms with one or more of these[663].

According to the PPL[664], a contracting authority may use the negotiated procedure with prior publication of the contract notice in the following cases:

a) in the event of irregular tenders or the submission of tenders, which are unacceptable under national legal provisions, in response to two consecutive open or restricted procedures, insofar as no substantial alteration is included in the contract, as provided in the PP rules[665];

b) in exceptional cases, when the nature of works, supplies or services or the risks attaching thereto do not permit prior overall pricing[666], specially:

(i) in case of service contracts, particularly intellectual services such as services involving the design of works, insofar as the nature of the services cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures[667];

(ii) in case of works contracts, for works which are performed solely for the purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

Conditions of using the negotiated procedure with prior publication of the notice as provided by PPL, generally speaking, are the same as those provided by Directive 2004/18[668], but still there is a difference in the approach followed by PPL. Thus, PPL put the cases 'when the nature of the services cannot be established with sufficient precision'

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[663] See article 3/19 of the PPL and article 1/11 (d) of the Directive 2004/18/EC. Both, PPL and Directive 2004/18/EC, give a definition of a 'negotiated procedure', on their relevant definitions' articles. Directive 2014/24/EU includes a "new" public procurement procedure (see article 29) called the competitive procedure with negotiation. In reality, this is not an entirely new procedure but rather a new name for the negotiated procedure with prior notice or at least of one of the ways in which such could be undertaken. See also *P. Telles and L. R. A. Butler"* Public Procurement Award Procedures in Directive 2014/24/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg.153.

[664] See article 32/1 of PPL.

[665] The contracting authority must verify if any tenders are irregular or unacceptable. If tenders are found to be irregular or unacceptable because of errors made in the tender documents, or are caused by action of the contracting authority and/or if substantial alterations need to be made to the terms of the contract or to the tender documents, a new open or restricted procedure must be organized. The contracting authority shall take necessary measures to correct actions that caused the failure of the procedure (see article 35/2 (a) of the Decision of CoM).

[666] This might be the case for example when the repair of entire network services, integrated transport infrastructure, large IT project involving complex and structured financing is needed, where the extent of the work required would not become apparent until after it had started (see article 35/2 (b) of the Decision of CoM.

[667] The nature of the service to be provided is such that specifications cannot be defined with sufficient precision (e.g. contracts for consultancy or financial services, complex IT projects or any other complex contracts of a similar magnitude in infrastructure or in rapid change technologies) (see article 35/2 (ç) of the Decision of CoM).

[668] See article 30/1 of Directive 2004/18/EC.

and 'when works contracts are performed solely for the purposes of research, testing or development' as subordinated cases under the 'exceptional cases, when the nature of works, supplies or services or the risks attaching thereto do not permit prior overall pricing' (option (b) above), while Directive does list all these cases as different situations, when a contracting authority may use the procedure at issue.

Furthermore, PPL provides that when the value of the contract is lower than the low value thresholds, a contracting authority may use negotiated procedures with prior publication of a contract notice in any case, which they deem appropriate, provided that the procedure complies with the principles of equal treatment, proportionality and transparency[669]. This means that for low value contracts, there is not a need for justification when using the negotiated procedure with prior publication of a notice. However, despite this flexibility of the law, considering the specific nature of this procedure, contracting authorities, either in low value contracts, will choose this procedure only if they will be in conditions analyzed above, otherwise it is not worthy of using it, compared to an open procedure.

Even in the case of using this procedure, the contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract. The submission of the request for participation at the first stage should be done within the time limits set from the contracting authority[670]. After the deadline of submitting the request to participate, the contracting authority opens the procedure and selects the economic operators that are to be invited to tender[671]. As in the case of a 'restricted procedure' under the Directive

[669] See article 32/2 of PPL.

[670] According to the PPL, the time limits for submitting the request to participate in a negotiated procedure with prior publication of the notice, depends on the threshold (if it is international or national procedure). As such, in case of negotiated procedures above the high value thresholds, the time-limit for submitting the request to participate shall be not less than 20 days from the date, when the contract notice was published on the Public Procurement Agency website,

In case of negotiated procedures between the high and the low value thresholds, the time-limit for submitting the request to participate shall be not less than 15 days from the date, when the contract notice was published on the Public Procurement Agency website, (see article 43/3 and 6 of PPL). Time limits provided by PPL for this procedure, are shorter than those provided by Directive 2004/18/EC for the same procedure. According to the said Directive in case of the negotiated procedure, the minimum time limit for receipt of requests to participate shall be 37 days from the date on which the contract notice is sent; (see article 38/3 of the Directive).

Still according to PPL, in case notices are prepared and published by electronic means, (and this is always the case) in compliance with the format and procedure for the transmission that are provided in the PP-rules, the time limits for the receipt of request to participate may be reduced by five days for the negotiated procedure (see article 43/8). While, according to the Directive 2004/18/EC, when notices are published by electronic means, the time limits for the receipt of request to participate may be reduced by five days for the negotiated procedure (see article 3/5). Considering these provisions, it results that time limits applied under PPL for the negotiated procedure, are as the half of the respective time limits, applied by the Directive at issue.

[671] At this first stage, this procedure is very similar to the restricted procedure.

provisions, in negotiated procedures with prior publication of a notice, the contracting authorities may limit the number of suitable candidates they will invite to tender, provided a sufficient number of suitable candidates is available. The contracting authorities shall indicate in the contract notice the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number. In any case, in the negotiated procedure, the minimum shall be three[672]. PPL, in the same context as in the restricted procedure, does not limit the number of economic operators who will be invited in the second stage[673]. The contracting authority issues the invitation to negotiate only to the economic operators that it has shortlisted. It receives initial proposals and then enters into negotiation with the shortlisted tenderers in respect of those proposals, in order to adapt them to the requirements set out in the contract notice, the specifications and additional documents, if any, to seek out the best tender. During the negotiations, while dialogue is carried on with each candidate individually, the contracting authorities shall ensure equal treatment of all tenderers. In particular, they shall not provide information in a discriminatory manner, which may give some tenderers an advantage over others. Contracting authorities may provide for the negotiated procedure to take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria in the contract notice or the specifications. The contract notice or the specifications shall indicate whether recourse has been made to this option[674]. Tenders can be evaluated on the basis of either lowest price or most economically advantageous tender.

The negotiated procedures are open for negotiations with preselected tenderers. As the negotiations possibility leave space for private discussion between a contracting authority and tenderers, this type of procedure gives the impression that there is danger of abusive conduct of the contracting authorities to steer the award procedures in favor of a 'preferred' economic operator. Not only PPL, but also EU law is based on the fear of preferential treatment for domestic economic operators and discrimination against foreign ones in case of using negotiated procedures. Negotiated procedures are inherently more flexible, and as such they provide greater opportunities for preferential treatment – if not for outright corruption – for instance through selective distribution of information by the contracting authority to the benefit of one economic operator[675].

The negotiated procedure with prior publication of a notice, provided by PPL, is somehow similar to the restricted procedure, which, as analyzed above, is a two-stage procedure as well and may be used only under given circumstances.

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[672] See article 44/3 of the Directive 2004/18/EC.

[673] According to PPL, in case of restricted procedures and negotiated procedures, contracting authorities may not limit the number of candidates to be invited to tender (see article 40/4 of the PPL).

[674] See article 32/3, 4 and 5 of PPL and article 30/2, 3 and 4 of Directive 2004/18/EC.

[675] See also R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law, Review Contents Vol. 52 No. 2, © 2015 Kluwer Law International. Printed in the United Kingdom, April 2015, pg. 451.

It may be that having two similar procedures for almost same situations will actually confuse procurers and lead to non-adoption as it leaves officials open to criticism should a procedure fail or the results are not as good as anticipated[676]. Saying this, and considering also the prejudice for 'preferential treatments' through negotiations, might be some grounds for explanation why this procedure is used in very few cases from the contracting authority in Albania[677].

4.1.1.d Competitive dialogue procedure

Directive 2004/18, except for the above competitive procedures, provides also for another procedure called 'the competitive dialogue procedure'[678]. 'Competitive dialogue' is a 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[679].

This is also a two-stage procedure and might be used in the case of particularly complex contracts[680], providing that use of the open or restricted procedure will not allow the award of the contract.

The contracting authority advertises the contract opportunity, and the economic operators first submit pre-qualification and selection stage information, which is used by the contracting authority to establish whether the economic operators are qualified to perform the contract and to select the economic operators that are to be invited to tender. The

[676] See also See *P. Telles and L.R. A. Butler"* Public Procurement Award Procedures in Directive 2014/24/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg.143.

[677] According to the Annual Reports of PPA, the number of restricted procedure in years 2011, 2012, 2013 and 2014 have been respectively, 3, 0, 1 and 0 (see Annual Reports of PPA, available at www.app.gov.al).

[678] See article 29 of the Directive 2004/18/EC. This type of procedure is also provided by the Directive 2014/24/EU (see article 30 of Directive 2014/24/EU). The general purpose of competitive dialogue appears to remain unchanged, namely that for certain contracts where the solution is not clear in advance, it is possible for contracting authorities to discuss with candidates any and all topics related to a contract. See further *P. Telles and L. R. A. Butler"* Public Procurement Award Procedures in Directive 2014/24/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg.144.

[679] See article 1/11 (c), para. 1 of Directive 2004/18/EC.

[680] According to article 1/11 (c), para.2, for the purpose of recourse to the procedure at issue, a public contract is considered to be "particularly complex" where the contracting authorities:
- are not objectively able to define the technical means in accordance with the relevant article of Directive 2004/18/EC, capable of satisfying their needs or objectives, and/or
- are not objectively able to specify the legal and/or financial make-up of a project.
It should be noted that under Directive 2014/24/EU/EU, competitive dialogue is no longer limited to situations of particular complexity but can be used for the award of contracts on the same grounds as the competitive procedure with negotiation specified in Article 26(4).

contracting authority is permitted to limit the number of economic operators being invited to tender and to draw up a shortlist of economic operators. The contracting authority issues the invitation to participate only to the economic operators that it has shortlisted, and it then enters into a competitive dialogue phase with those economic operators. During the competitive dialogue phase, all aspects of the project can be discussed with the economic operators and the number of solutions can be reduced as part of the process. Once the contracting authority is satisfied that it will receive proposals meeting its requirements, it declares the competitive dialogue phase closed and invites tenders. Under this procedure, tenders can only be evaluated on the basis of the most economically advantageous tender.

This procedure was first proposed as another variation of the negotiated procedure with a call for competition and this uncertain conception may well be at the root of the current uncertainty over its scope of application[681]. That lack of clarity[682] led to an unfortunate uncertainty with regard to the scope of the procedure and to a very hesitant application of the procedure in a broad range of Member States themselves[683]. It is interesting that when providing the conditions of using such procedure, Directive addresses to Member States and not to contracting authorities, as it does in case of other competitive procedures. Considering this, it might be said that this procedure is an optional procedure that Member States can choose or not to use in their national legislations.

As such, being so similar to the negotiated procedure with prior publication of a notice[684] (arguing here same as above, that having two similar procedures for almost same situations will actually confuse procurers and lead to non-adoption as it leaves officials open to criticism should a procedure fail or the results are not as good as anticipated), on one hand and considered as an optional procedure even for Member States (considering

[681] P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 404, para 7.79.

[682]. The European Commission, in its *Explanatory Note - Competitive Dialogue – Classic Directive (CC 2005/04) (available at: http://ec.europa.eu/internal_market/publicprocurement/docs/explan_notes/classic-dir-dialogue_en.pdf)* explaining the introduction of the competitive dialogue procedures, emphasizes that the use of the negotiated procedure with prior publication of a contract notice is 'limited solely to the cases listed' in the Directives. This implies that the competitive dialogue process is more easily available than the negotiated procedure with prior publication of a contract notice. However, there are no legal provisions in the Directive requiring a contracting authority to use one of these procedures in preference to the other, which creates grounds for unclarity.

[683] See the extensive and comparative analysis in S. Arrowsmith and S. Treumer (eds.), Competitive Dialogue in EU Procurement, Cambridge University Press, 2012.

[684] According to Article 26 of Directive 2014/24/EU, contracting authorities are able to use competitive dialogue, the new competitive procedure with negotiation and innovation partnerships to award contracts as long as certain grounds for use are met. A cursory glance at the three procedures, regulated in successive articles of the Directive, creates an instant impression that all three procedures are very similar. Each has its own specificities but there is more by way of commonality than distinction between them. As such, the underlying rationale for providing two or three very similar procedures with similar grounds for use might be questioned. See further *P. Telles and L. R. A. Butler"* Public Procurement Award Procedures in Directive 2014/24/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg.143.

here also the uncertainty about the scope of application of such procedure, even for Member States) on the other hand, the Albanian legislation does not provide for the competitive dialogue procedure, at all. Thus, formally the Albanian PPL might be considered not in line with Directive 2004/18, in this regard, but as the provisions on competitive dialogue are of optional character[685] and as such are left as regards their transposition to the discretion of national legislators of the Member States, this might be one of the situations, when the requirement on 'fully approximation, should not be tightly read.

4.1.1.e Design contests

According to Directive 2004/18[686], "design contests" means those procedures, which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes. The Albanian PPL, on the other hand, does provide for a narrower definition[687], focusing to 'an aesthetic nature' of a study, or design providing that 'design contests' are those procedures enabling the contracting authority to acquire a study or design of a merely aesthetic nature, selected by a jury after being put out to competition. However, even PPL with the latest amendments[688] has introduced the same definition of the design contests[689], as Directive 2004/18. The basic requirements on using the design contest are the same in PPL and Directives 2004/18 and 2014/24[690]. As such PPL[691] provides that Design contest may be organized:
(a) as a part of a procedure leading to the award of a public service contract;
(b) for the purposes of obtaining the design only, which is rewarded with a prize or a payment.
Contracting authorities wishing to launch a design contest shall make known their intention by means of a contest notice, which shall be published according to respective

[685] See Article 29 of the Directive 2004/18/EC, which defines the conduct of this procedure, states that "*Member States may provide...*". The directive 2014/24/EU, on the other hand, makes this procedure mandatory for implementation meaning that the Member States have no other option than to transpose it to their legal systems. As will be discussed on the following Chapter, this different approach of the New Directive will change also the position of Albanian PPL toward the approximation process.
[686] See article 1/11 (2) of Directive 2004/18/EC. The same definition is provided by Directive 2014/24/EU, as well, in article 2/21.
[687] See article 3/21 of PPL.
[688] It refers to the amendments made to PPL by law no. 182/2014 "On some amendments of law no.9643, dated 20.11.2006 "On public procurement", as amended.
[689] See article 35/1 of PPL.
[690] New Directive 2014/24/EU provide the same requirements on design contests as Directive 2004/18/EC. See articles 78-82 of Directive 2014/24/EU, formerly Articles 66-74 Directive 2004/18/EC.
[691] See article 35 of PPL and article 38 of the Decision of CoM no. 914, dated 29.12.2014 "Rules on Public Procurement".

provisions, as discussed in Chapter IV above. The rules governing each individual contest shall be communicated to those interested in participating in the contest. Participation in a contest may be limited to a number of selected candidates, provided that the selection is made on the basis of clear and non discriminatory criteria made known to all interested persons and that the number of candidates invited to participate is sufficient to ensure genuine competition. The admission of participants to a contest shall not be limited:
(a) by reference to the nationality, territory or residence;
(b) on the grounds that they would be required to be either natural or legal persons.
The commission (jury) shall be composed exclusively by persons, independent of participants in the contest and conduct the contest autonomously. The majority of the commission members must have same license or specialization provided as a qualification requirement by the tender documents and with 10 years of experience in the topic of the design to procure. The commission's decisions shall be based on the criteria set out in the contest notice and respect the principle of anonymity of participants.
Except for these similarities, there are still some different approaches used on design contests, between PPL and Directive (s). According to the Directive, there are no detailed requirements relating to the number of stages to be used, while according to Albanian procurement rules, it is specified that the design contests is a two-stage procedure. The given articles of Directive (s) specify the scope of design contests and cover the issue of financial thresholds, providing some specific thresholds above which the design contests may be used[692], while Albanian legislation does not provide for such thresholds, meaning that it does not condition the use of such procedure with financial thresholds. According to the Directive at issue, a contracting authority may choose to limit participants and where it does so, it must lay down clear and non-discriminatory selection criteria. The minimum number of participants is not specified, but there must be a sufficient number of participants to ensure genuine competition. PPL, on the other hand, as in all other competitive procedures analyzed above, does not allow for the limitation of the number of participants.
There are no detailed provisions covering matters such as time limits, the contents of the documents inviting candidates to participate, or criteria for selection and evaluation, in the Directive (s) and therefore those aspects of the process are governed by the basic principles requiring the process to be conducted in a transparent manner, ensuring equal treatment and non-discrimination. The same situation has been in the PPL up to 2014; there were no more details than those provided by the Directive. Even though the legal aspects seem all right, there was a problem in the practical aspect with this procedure, because in 7 years of its legal history (this procedure has been introduced in the PPL since the end of year 2006), there was a reluctance from the contracting authorities of

[692] According to article 67 of the Directive 2004/18/EC, the financial thresholds are different for different types of contracting authorities. The provisions covering the calculation of the financial thresholds specify that the total value of both prizes/payments and any potential public service contract must be taken into account.

using such a procedure[693]. The main concern of the contracting authorities were the lack of detailed provisions covering matters such as time limits, the contents of the documents inviting candidates to participate, or criteria for selection and evaluation, and all procedural steps to be followed. Based on these concerns to make this procedure happen in practice, in procurement rules, detailed provisions on procedural steps and time limits even for this procedure[694]were introduced. Analyzing this situation, it seems that in Albania not only the legislator fears the discretion of the contracting authorities, but also contracting authorities fear their own discretion. The 'flexibility' of the rules leaves officials open to criticism and to prejudices mainly by the audit bodies, and for this reason they prefer better detailed rules, which will 'protect' them from any audit 'opinion' or 'perceptiveness'. This situation is a very good example of the need for a national approach (which depends on national characteristics), which goes beyond a strict approximation to make a Directive's rule applicable, especially in non-Member States.

4.1.2 Other competitive procurement procedures under PPL

Except for the competitive procedures analyzed above[695], PPL does provide as well for two other procurement procedures, which are open to the competition, but are not provided as such by the relevant EU Directive(s). Here below I will analyze the reasons of providing these procedures by PPL and grounds of using them by the contracting authorities.

4.1.2.a Consultancy services[696]

According to the PPL[697], 'consultancy contracts' are contracts for public consulting services of intellectual and advisory nature, to the exclusion of other types of services, where the physical aspects of the activity predominate. Contracting authorities wishing to

[693] According to Annual Reports of PPA from 2007 to 2014, there is no specific statistical data for the use of design contests. After the legal changes, on this procedure, in the first trimester of the year 2015 are already launched electronically 8 design contests (see contract notices for the design contests procedures launched at www.app.gov.al/ep/ContractNotice.aspx).

[694] See article 38 of the Decision of CoM no. 914, date 29.12.2014 "Rules on Public Procurement".

[695] As discussed above, PPL provides for the same competitive procedures as the Directive, except for the competitive dialogue.

[696] This procedure hasn't been provided as a separate procedure, in the very first law on public procurement in Albania, which dates back to 1995. This procedure has been introduced for the first time in the Law no. 9643, dated 20.11.2006 "On public procurement", which is a little bit contradicting for the fact that the law 9643/2006 aimed at and signed the first steps of approximation with the relevant acquis communautaire. In fact, this procedure has been introduced in the PPL, under the influence of the World Bank' Procurement Rules. As such the whole provisions of this procedure, in the PPL are 'inspired' by the World Bank' Consultant Guidelines. See further „Guidelines selection and employment of consultants under EBRD loans and ida credits & grants by world bank borrowers", available at http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Consultant_GLs_English_Final_Jan2011.pdf.

[697] See article 3/3 of PPL.

launch a consultancy service procedure shall make known their intention by means of a contract notice[698], which shall be published according to respective provisions, as discussed in Chapter IV above. This means that the consultancy procedure is a competitive one, where as in all other competitive procedures provided by PPL, contracting authorities are not allowed to limit the number of economic operators wishing to submit a tender. The procurement rules[699] do provide for detailed rules covering matters such as time limits, conflict of interests, the contents of the documents inviting candidates to participate, or criteria for selection and evaluation. This is the only procedure provided by PPL, where the lowest price is not allowed to be used as award criteria. The tender evaluation in this case is made through a combination of a technical proposal and a financial proposal. It is a sort of MEAT criteria, but in case of the consultancy procedure, a specific formula is applied. According to the statistical data, published in the Annual Reports of PPA, this procedure is ranked at the third place among the competitive procedures used by contracting authorities in Albania[700]. The consultancy service procedure is used mainly for the infrastructure study designs[701]. Taking into consideration the grounds for using design contests procedure, it seems that these two procedures are similar to each-other, and as such they might confuse the procurement officials, in their work. This similarity might be one other reasonable argument, why the use of design contests is in so low levels in Albania.

4.1.2.b Request for proposals

The 'Request for proposals' is a procedure, whereby the contracting authority seeks offers from a limited number of economic operators selected by him, but at the same time should accept also offers submitted by other interested economic operators[702]. The request for proposals may be used for contracts of a value below the low thresholds. Contracting authorities wishing to use a request for proposals procedure shall make known their intention by means of a contract notice[703]. Pursuant to this procedure, contracting authorities, except for the advertising of the procedure, should invite at least 5 economic operators, unless this proves impossible for technical reasons or for lack of sufficient competition. The contracting authority should, in any case, accept tenders from tenderers other than the ones invited by him[704].

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[698] See article 34/1 of PPL.
[699] See article 37 of the Decision of CoM no. 914, date 29.12.2014 "Rules on Public Procurement".
[700] See PPA's Annual Reports available at www.app.gov.al .
[701] See contract notices for Consultancy Services procedure, available at www.app.gov.al/ep/ContractNotice.aspx).
[702] See article 3/20 of PPL. This type of procedure is inspired by the UNCITRAL Model Law, which has been the first act influencing the procurement legislation in Albania (see Chapter III above). As such, initially the request for proposal provided by the PPL has been the same as the request for proposals without negotiation provided by the article 47 of the Model Law at issue.
[703] See article 34 of PPL.
[704] See also article 39 of the Decision of CoM no. 914, date 29.12.2014 "Rules on Public Procurement".

If we analyze the definition of this procedure and also other requirements of the PPL, we will see that the provisions are contradictory to each-other. The name of the procedure is 'request for proposals', meaning that the contracting authority will request proposals from economic operators. The relevant provisions also allow the contracting authority 'to choose' the economic operators from whom it will request such proposals. This is the 'original' version of the request for proposals procedure. Potentially, this can result in less transparency and competition than in both tendering and two-stage tendering but may allow the contracting authorities and suppliers to avoid disproportionate costs in preparing and evaluating proposals (which may be complex and hence costly for both sides)[705]. However, PPL hasn't stopped here, but it implies also the obligation of the contracting authorities to advertise this procedure and accept offers from everyone who is interested. At this stage, the request for proposal procedure has become an open procedure, with an extra administrative requirement; sending the request for proposals to at least five economic operators. As a matter of fact, the request for proposal follows the same procedural steps as the open procedure, with shorter time limits. All this confusing approach of the PPL[706] is done under the fear of abusive behavior of contracting authorities, if they will have the discretion to limit the number of economic operators[707]. Once again, the fear of the legislator from the discretion of the contracting authorities comes out, which is reflected at the attempt to restrict as much as possible its possibility to make subjective decisions. On the other hand, we know that different procurement contracts have their characteristic features, and some flexibility in handling them might be necessary, because if different situations will be governed by strict and unified rules, the procurement process will not be as effective as it should be[708].

4.1.3 Negotiated procedure without prior publication of a notice- a noncompetitive procedure

The contracting authorities wishing to conclude public contracts should start with the assumption that a competitive process is required and the transparency principle should be respected. However, it might happen that in very limited circumstances a contract may be awarded without prior publication of a contract notice and without the use of a competitive process, using the negotiated procedure without publication of a contract

[705] See S. Arrowsmith "Methods for procurement of goods and construction", Public Procurement Regulation-an introduction, pg. 40, Available on-line at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf. Retrieved on, 20.12.2014.

[706] Despite all, this is a procedure which is used very often from the contracting authorities in Albania, as the only option for contracts below the low value thresholds. See PPA Annual Reports available at www.app.gov.al.

[707] The same reason, why the Directive provisions on two-stage procedures, which allow for the limitation of the economic operators, are not introduced by the PPL.

[708] See point 1.3 at Chapter I.

notice[709]. This procedure is similar to a direct contracting or single source procurement method, which may be used only in duly justified circumstances. Since it may be used in respect of only one candidate[710] (which is directly invited by the contracting authority), it is clearly the procedure that risks producing the least competition, which is why strict conditions are attached to its use[711]. The permitted derogations set out in procurement rules do not apply consistently to all types of contracts, and so considerable care must be taken when assessing the availability and justification for use of these derogations for the contract in question. According to the Albanian PPL[712], contracting authorities may use negotiated procedure without prior publication of a contract notice for all contracts of a value above or below the low value thresholds and only on the specific circumstances expressly provided for in this law and in the public procurement rules. Such circumstances shall be strictly construed. This procedure shall not be used in order to avoid competition or in a manner that would discriminate among candidates.

4.1.3.1 Circumstances applied to all types of contracts

There are some specific circumstances, which may be applied to all types of contracts, and some others, which are adequate only for a certain type of contract (respectively, supply, service or work' contracts)[713].

Negotiated procedures without prior publication of a contract notice may be used for all types of public contracts:

a) when the minimal competition has not been met in response to two consecutive procedures, provided there is no substantial alteration to the initial conditions of the contract[714]. 'The minimal competition under the PPL has been used to replace the situation 'when no tenders or no suitable tenders or no applications have been

[709] In the European system negotiations are seen to *limit*, not optimize competition. While in the American procurement system, the negotiations are seen as creating a base for competition and are therefore an *optimizer* of competition. See further R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law, Review Contents Vol. 52 No. 2 April 2015**,** © 2015 Kluwer Law International. Printed in the United Kingdom. pg. 451.

[710] See article 33 of PPL and articles 31 and 32, respectively of Directive 2004/18/EC and 2014/24/EU.

[711] See P. Trepte "Public Procurement in the EU- a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 385, para 7.28.
Either ECJ in several cases has held that the conditions, which permit the use of the negotiated procedure without a call for competition must be interpreted strictly and that the contracting authorities, which seek to on one of those conditions have the burden of proving that the condition at issue has been met. See for example cases C- 71/92 Commission v Kingdom of Spain [1993] ECR I-5923, para 36; C-328/92 Commission v Kingdom of Spain [1994] ECR I-1569, para 15; C-57/94 Commission v Italian Republic [1995] ECR I-1249, para.23; C- 385/02 Commission v Italian Republic [2004] ECR I-8121, paras.19 and 27 and C-394/02 Commission v Hellenic Republic [2005] ECR I-4713, para.33.

[712] See article 33 of the PPL.

[713] This approach is the same as the one followed by the Directives 2004/18/EC and 2014/24/EU (see respectively articles 31 and 32).

[714] See article 33/2/a of PPL.

submitted…' requested by the Directive (s)[715]. On the other hand, this circumstance of 'minimal competition' and of 'non suitable tenders' is somehow not clear and may be confused with the condition of using the negotiated procedure with prior publication of a notice, which might be used 'in the event of irregular tenders or the submission of tenders, which are unacceptable under national legal provisions…'. Either in this case, at last, the 'minimal competition' is not met or an 'irregular tender' may be considered as 'non suitable' tender as well. These equivocal provisions, at least in the Albanian practice, have lead to a not unified approach of situations when a contracting authority chooses to use the negotiated procedure with or without prior publication[716]. To avoid this situation, in the latest changes of the procurement rules[717] the request of 'not meeting the minimal competition' (provided by PPL) has been strictly interpreted as a situation when 'no tenders, or no applications' has been submitted, not giving thus the possibility to the contracting authorities to have the discretion to 'define' a 'non suitable tender'[718].

The other difference with the Directive(s) in this regard, is that PPL does not refer only to the fail of two consecutive 'open' or 'restricted' procedures, as Directive (s) does, giving thus the possibility to use such a procedure, in case of failure of each of

[715] See respectively articles 31/1 (a) and 32/2 (a) of Directive 2004/18/EC and Directive 2014/24/EU. Neither PPL, nor the Directive 2004/18/EC, give a definition of "minimal competition' or "suitable tender", making as such not too clear the circumstances when this requirement is met. Directive 2014/24/EU, on the other hand, has tried to give a definition of the non suitable tender, providing that 'a tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Article 57 (exclusion grounds) or does not meet the selection criteria set out by the contracting authority pursuant to Article 58 (selection criteria).

[716] In these situations, when an 'irregular' tender, may be interpreted as 'not meeting the minimal competition', contracting authorities in Albania, are more predisposed to use negotiated procedure without a prior publication of a notice (see PPA' Annual Reports 2007-2014, available at www.app.gov.al). A solution of this situation might be the new competitive procedure with negotiation, introduced by Directive 2014/24/EU (see article 29), which even though is similar to the former negotiated procedure with prior publication, provided by Directive 2004/18/EC, as analyzed above, is not used under the same circumstances. Thus, in practice will be easier to evaluate when a negotiated procedure without prior publication should be used.

[717] See the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement", article 36.

[718] This is one of the undertaken measures to minimize the number of the negotiated procedures without a call for competition, being in a situation when the usage of this exceptional procedure has been considerably increased. In the year 2014 for example, 2121 negotiated procedures without a prior publication of a notice were conducted, out of 7409 procurement procedures, which were conducted in total during this yeas (see PPA' 2014 Annual Report, available at www.app.gov.al). The concern about the considerable number of this procedure, used by contracting authorities in Albania, has been in the focus of Progress Reports of the European Commission as well (see for example "Albania Progress Report" (2014, October) of the European Commmission, pg. 25).

other competitive procedures, provided by PPL[719]. Directives, on the other hand, require that in case of using such procedure, whenever it is requested, contracting authorities should send a report to the Commission. As this requirement is closely related to the status of a Member State, it is not reflected to the PPL. However, in order to avoid a situation in which a contracting authority drafts an impossible requirement with a view to discouraging tenderers only to then enter into negotiations with its preferred supplier, both acts at issue (PPL and Directive (s) impose the condition that the initial conditions of contract are not substantially altered. In this way, neither the purchaser, nor the 'preferred' supplier would be able to benefit since they could not negotiate away the original terms[720]. Either in this case there is a ground for discussion what will be considered 'substantial alteration'. In the EU context, this interpretation of what is considered a substantial alteration is done by the ECJ[721]. In the Albanian context, this condition is elaborated further in the procurement rules[722], which provide that the contract conditions and the qualification criteria, which are not proportionally related to the estimated fund[723], should be the same as those of the initial procedure. This means that while using the negotiated procedure under this circumstance, the estimated fund may be only decreased, as the quantity of needs may be decreased[724], and as such contracting authority is allowed to change proportionally only the qualification criteria which depend on the estimated fund[725]. This approach of the Albanian legislation aims at

[719] The initial aim of PPL has been to include under this provision, except the Open and Restricted procedure, either the Request for Proposal as well, but not listing the type of procedures, for which it can be used, the contracting authorities in Albania potentially may use the negotiated procedure without prior publication of a notice either in case of consecutive failures of consultancy services, or design contests.

[720] See P. Trepte "Public Procurement in the EU - a practitioner's Guide, Second Edition", published by Oxford University Press Inc., New York, 2007, pg. 388, para 7.36.

[721] See for example Case C-84/03 Commission v Kingdom of Spain [2003] ECR I-139, where the Court addressed a provision of Spanish law, which allowed recourse to the negotiated procedure without a call for competition, following the failure of an open or restricted procedure, provided that the price of the contract did not differ from the indicated estimate by more than 10%. In this case, inter alias, the Court held that in so far as they authorize the use of the negotiated procedure where it has not been possible to award the contract during an open or restricted procedure or where the candidates were not allowed to tender, provided that there were no modifications of the original conditions of the contract apart from the price, which cannot be increased by more than 10%, the Spanish provisions did indeed add a new condition to the use of the negotiated procedure which was capable of undermining both their scope and their exceptional character because such a condition could not be regarded as a non-substantial alteration of the original terms of the contracts.

[722] See the Decision of Council of Ministers no. 914, date 29.12.2014 "Rules on Public Procurement", article 36/2 (a).

[723] See point 3.3.2.4 at Chapter III.

[724] This might be the case of buying foods for example or cleaning services, the needed quantity of which is strongly related with the time of contract execution.

[725] This might be the case of the previous experience, where for example in the case of supply contracts, with regard to previous experience, the contracting authority requires evidence of previous similar contracts carried out in the last three years of business activity. In any case, the amount shall be not more than 40% of the value of contract to be procured.

avoiding open clauses such as 'substantial alteration' provided by Directive(s) which might be misused in practice by the contracting authorities to then enter into negotiations with its preferred supplier. This is another example of the need for adaptation (not just copying) of the Directive' provisions, into the national context.

b) When for technical or artistic reasons, or for reasons connected with exclusive rights or intellectual property rights, the contract may be executed only by a particular economic operator[726]. The contracting authority, which uses the negotiated procedure without prior publication of a notice, under this circumstance, should in any case prove that for one of the reasons provided by the provision, there is only one economic operator capable to execute the contract at issue[727].

c) When for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question the time limits provided by relevant provision of PPL cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority[728]. This circumstance of derogation requires that all conditions must be met cumulatively; a) the need is necessary; b) reasons of extreme emergency; c) brought about events unforeseeable by the contracting authority; d) the time limit required for competitive procedures, cannot be complied with; and e) the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority[729]. The issue of urgency is generally linked to the issue of foreseeability[730]. In any case, when a contracting authority have had the possibility

[726] This circumstance of using a negotiated procedure without prior publication is provided as well by the Directive 2004/18/EC, except for the 'intellectual property rights', which are not explicitly mentioned by Directive. Directive 2014/24/EU, on the other hand, has elaborated and specified more subcategories under this circumstance, providing that 'where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:

(i) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
(ii) competition is absent for technical reasons;
(iii) the protection of exclusive rights, including intellectual property rights;

The exceptions set out in points (ii) and (iii) shall only apply when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement'.

[727] See, for example, case C-57/94, para 24; case C-394/02, para 34; case C-385/02 (no.85 above); joined cases C-20/01 and C-28/01 Commission v Federal Republic of Germany [2003] ECR I-3609;

[728] The same circumstance is provided by Directive 2004/18/EC and Directive 2014/24/EU (see respectively articles 31/1 (c) and 32/2 (c).

[729] See case C-107/92 Commission v Italian Republic [1993] ECR I-4655, para12.

[730] According to the Monitoring Report of PPA for the year 2014, the main finding on the use of the negotiated procedure without a prior publication of a notice, by contracting authorities, was that even though the actual situation had become extremely urgent, the contracting authority fail to prove that the situation is unforeseeable (see PPA'Annual Report for the year 2014, available at www.app.gov.al) .

to foresee an event, even though it is not actually foreseen, it is no longer extremely urgent[731].

4.1.3.2 Circumstances applied to supplies contracts

The negotiated procedure without a prior publication of a notice is used also in some specific circumstances which do apply only for supplies contracts. In concrete, according to the PPL, a contracting authority may use this type of procedure in case of[732]:

a) goods quoted and purchased on a commodity market;
b) for purchases that allow the procurement of goods within a very short time, or in particular advantageous cases that are observed within a short period of time and with a considerable lower price than normal prices in the market and in compliance with the criteria set in the PP-rules.
c) when the goods involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;
d) for additional deliveries by the original supplier, intended either as partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics, which would result in incompatibility or disproportionate technical difficulties in operation and maintenance. In this case, the additional contract shall be signed within a time limit of 3 months from the end of the original contract.

Circumstances of using the negotiated procedure without prior publication of a notice provided by PPL, as described above, are generally the same as the once provided by Directive(s). The only difference is that, while the Directives provide that in case of additional deliveries 'the length of additional contracts as well as that of recurrent contracts may not, as a general rule, exceed three years, PPL does not give any reference on the length of such contracts, but limits the time when the contracting authority has the right to sign additional contracts 'within 3 months from the end of the initial contract' and the value of the additional contract, which cannot be more than 20% of the value of the initial contract. The aim of such limitations (which are stricter that the ones of the Directive(s)) is to avoid the situation where the same supplier is given an indefinite monopoly of supply.

[731] See, for example, case C-318/94 Commission v Federal Republic of Germany [1996] ECR I-1949, and case C- 275/08 Commission v Federal Republic of Germany [2009] ECR I-00168.
[732] See article 33/2 ('ç' and 'd') and 33/3 of PPL and respectively articles 31/2 and 32/3 of Directive 2004/18/EC and Directive 2014/24/EU.

4.1.3.3 Circumstances applied to service contracts

Negotiated procedures without prior publication of a contract notice may be used for service contracts with the successful candidate, following the design contest, procedure[733]. While the PPL limits the possibility of negotiations only with one successful candidate, presuming that there will be always one winner of the design contests, Directive (s) provide for the possibility to negotiate with the successful candidate or with one of the successful candidates and in the latter case, all successful candidates must be invited to participate in the negotiations[734].

4.1.3.4 Circumstances applied to works and service contracts

According to PPL[735], negotiated procedures without prior publication of a contract notice may be used also for additional works and service contracts in following situations:
a) for additional works or services which were not included in the initial contract, but which have, through unforeseen circumstances[736], become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services; as long as the aggregate value of contracts awarded for additional works and services does not exceed 20 % of the value of the initial contract:
i) when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authority;
ii) when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.
b) for new works or services consisting in the repetition of similar works or services entrusted to the economic operator, to whom the same contracting authority awarded the original contract, provided that such works or services are in conformity with a basic project for which the initial contract was awarded on the basis of an open or restricted procedure. As soon as the first project is up for tender, the possible use of this procedure shall be disclosed in the contract notice for the initial contract, and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting

[733] See article 33/4 and article 35 of PPL and article 38/2 (b) of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement", where is provided that 'in cases where a contracting authority organizes a design contest as part of a procedure to award a contract for services, it may use the negotiated procedure without prior publication with the successful candidate of the design contest'.
[734] See respectively articles 31/3 and 32/4 of Directive 2004/18/EC and Directive 2014/24/EU.
[735] See article 33/5 of PPL.
[736] According to the Monitoring Report of PPA for the year 2014, the main finding on the use of the negotiated procedure without a prior publication of a notice, in case of additional contracts, which have, through unforeseen circumstances, become necessary for the performance of the works or services, the contracting authority fails to prove that they have been under unforeseen circumstances (see PPA Annual Report for the year 2014, pg. 13 available at www.app.gov.al) .

authority. The procedure set up by this sub-paragraph may be used only during 3 years following the conclusion[737] of the original contract. In no case the additional contract shall exceed the value of 20% of the total value of the initial contract.

Circumstances of using the negotiated procedure without prior publication of a notice provided by PPL, as described above, are generally the same as the once provided by Directive 2004/18[738]. The only difference is that, while the Directives provide that the aggregate value of contracts awarded for additional works or services may not exceed 50% of the amount of the original contract, PPL provides for a lower value, and in concrete it should not be more than 20% of the value of the initial contract. Still the aim of such limitation (which is stricter that the ones of the Directive) is to avoid the situation where the same contractor is given an indefinite monopoly of supply.

Except for these circumstances, which are generally (in some cases more stricter) in compliance with the relevant provisions of the Directive(s), Albanian procurement rules[739] do allow for the use of the negotiated procedure without prior publication of a notice also for fulfilling the needs at the beginning of the new budgetary year, until the execution of the competitive procurement procedures. In this case, the additional goods or services contracts should be concluded with latest contractors, up to 20% of the initial contract value. This derogation becomes necessary in the Albanian context, because of the lack of coordination between PPL and budgetary legislation. The latest does not allow a contracting authority to launch a procurement procedure, without having first the estimated fund in their accounts. As such, the contracting authority cannot launch a procurement procedure before the end of January, or even mid of February[740] and considering also the necessary time of conducting the procedure up to the awarding of the

[737] Referring to the discussion what should be understood by "the conclusion of the contract", the date on which the contract entered into, or the date on which the contract was completed, in Case C-385/02 Commission v Italy (see footnote no. 85 above), the Court made clear that the 'conclusion' of the contract means, as it does in English, the date on which the contract entered into and not, as was argued by Italy, the date on which the work was completed (concluded). The same approach is followed in the Albanian PPL, as well, using a word in Albanian language, which clearly refers to the moment the contract has been signed.

[738] See article 31/4 of the Directive 2004/18/EC. Directive 2014/24/EU, on the other hand, does not provide any more for the possibility for additional works or services, which were not included in the initial contract, but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services. This Directive provides only for 'new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract…' (see article 32/5).

[739] See article 36/2 (ë) of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[740] See the procurement forecast registers available at the PPA website, or procurement procedures advertised at the e-procurement system, accessed at www.app.gov.al.

contract, a contracting authority will be uncovered with its needs[741] for about three months[742].

4.2 Procurement tools

Except for the procurement procedures used to award public contracts, as analyzed above, the procurement rules provide also some tools, which do help the contracting authorities, being in certain circumstances, to comply with procurement principles and rules and at the same time to fulfill their needs in the most effective way. Procurement tools use one or more of the main competitive procedures as a starting point for the procurement process to be followed and they are optional, meaning that a contracting authority has the option to decide whether or not to implement such tools, depending on its specific situation. In concrete, these procurement tools are:

- Framework agreements
- Electronic auctions
- Dynamic purchasing systems[743]

Here below, I will analyze each of these tools, as they are provided by PPL and relevant EU Directive(s).

4.2.1 Framework agreements

The term 'framework' can be used to describe a number of commercial and procurement arrangements. However, the procurement rules provide[744] a definition of a 'framework agreement' in the context of the procurement process. A framework agreement is an

[741] The main concern is about certain types of supplies and services contracts, such as for example, buying foods or cleaning services etc.

[742] See also the analysis made at PPA's Annual Report for the year 2014, pg. 23-24, available at www.app.gov.al.

[743] See articles 3/8(1); 3/10; 3/11, 35/1 and 37 of the PPL and respectively articles 32, 33 and 54 of Directive 2004/18/EC and 33, 34, and 35 of Directive 2014/24/EU. Even though both Directives don't have too many differences on rules applicable on these tools, it should be noted that while Directive 2004/18/EC addresses the possibility of using them to the Member States, Directive 2014/24/EU addresses directly to the contracting authority. This means that Directive 2004/18/EC allows the Member State to decide whether to provide these tools by their national legislations or not, while according to the Directive 2014/24/EU, Member States should provide for such tools in their national law, and contracting authorities may choose to use them or not.

[744] Prior to the adoption of the Directive 2004/18/EC, there were no specific provisions covering the establishment and operation of framework agreements in the public sector. However, contracting authorities in many EU Member States operated framework-type arrangements, which were typically used to 'draw on' commonly procured supplies and services as and when needs arose during a given period. The framework agreement has been introduced in the Albanian PPL in 2009 (amended by law no. 10170, dated 22.10.2009 'On some amendments of the law no.9643, date 20.11.2006 "On Public Procurement", as amended), but up to now there are very few cases when contracting authorities has used this tool.

agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given time limit, in particular with regard to price and, where appropriate, the quantity envisaged[745]. In other words, a framework agreement is a general term for agreements between contracting authorities and economic operators that sets out the terms and conditions under which specific purchases may be made.
A framework agreement can be more or less binding on the contracting authority. In theory, it is commonly claimed that a purchasing arrangement between two parties obliging the purchaser to place orders at a certain volume of particular goods or services from the provider over a specified period, should be defined as a Framework Contract, while an agreement between two parties for the supply of an unspecified quantity of a product over a certain period of time should be defined as a Framework Agreement. However, both these types are classified as variants under the concept of Framework Agreements. Therefore, in practice, this type of classification is not relevant or even meaningful, since the directives introduce only one denomination, namely framework agreement[746]. The Albanian legislation[747], on the other hand, clarifies that the FA is legally binding on the parties except for the quantities, although this should be indicated by the FA. It is also stated that contracting authorities, being a party to the FA, are not allowed to use another framework agreement for the same products or services as well not conduct a separate tendering procedure outside the framework agreement for a product area covered by an existing FA. The framework suppliers being a party to the FA are also obliged to fulfill their contractual obligations in accordance with the FA.

4.2.1.1 Suitability of frameworks

Frameworks may not be suitable for all types of purchasing, and contracting authorities need to be certain that a framework will provide an economic and efficient means of purchasing. The most appropriate use of frameworks is where a contracting authority has a repeated requirement for works, services or supplies, but the exact quantities are unknown. To assess the suitability of a framework agreement, contracting authorities need to understand the advantages and disadvantages of framework agreements, the

[745] See article 41 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement", and respectively article 1/5 and 33/1 para 2 of the Directive 2004/18/EC and Directive 2014/24/EU.
[746] See the Manual on The Award and Use of Framework Agreements, prepared by PPA and SIGMA, April 2015, pg. 5, available at www.app.gov.al. However, even under EU umbrella there are different approaches in this regard. For example, contrary to the Procurement Directives, under the Dutch Public Procurement Act 2012 (article 1), framework agreements are considered as 'public contracts'. See further *Gert-Wim van de Meent and Elisabetta R. Manunza (Eds)* Questionnaire General Topic 3 "Public Procurement Law: Limitations, Opportunities and Paradoxes", The XXVI FIDE Congress in Copenhagen 2014 Congress Publications Vol. 3; DJØF Publishing, Copenhagen 2014, pg 611.
[747] See article 44 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

various types of framework agreements, how they are set up and how they operate in practice.

According to the Albanian legislation"[748], the purpose of using a framework agreement is to carry out competitive procurement procedures, when the contracting authorities have certain knowledge of the procurement object, but they are not aware of the quantity, time and/or other terms and conditions.

The contracting authority shall select the implementation of a framework agreement if when the procurement procedure is being carried out:

a) It is impossible to objectively define the quantity/quantities of the procurement object or its elements and/or;
b) It is impossible to objectively define the precise date of delivery of goods, works, services or their parts and/or;
c) It is impossible to objectively define the precise place of delivery of goods, works, services or their parts and/or;
d) It is impossible to establish one or some other terms and conditions that affect the fulfillment of the procurement object and/or;
e) The market prices are not constant and because of technical and technological reasons, the contract object (goods, works, and services) can be delivered by some successful economic operators/suppliers, which makes the re-opening of competition more effective than the initiation of a new procurement procedure due to the price reduction.

In any case, framework agreements should not be set up in such a way as to restrict or distort competition[749]. A concern related to the competition is that framework agreements can be abused as well by economic operators' parties of that framework agreement. However, the contracting authority always has the possibility to include a clause in the framework agreement to obtain the right to terminate the contract, should the collusion be identified[750].

[748] See PPA Instruction no.6, dated 27.01.2015 "On the use of Framework Agreement", point 3/2.

[749] There might be a policy decision of the government to promote SME participation in public procurement that puts constraints on the possibility of aggregation of too large volumes, consequently limiting the use of public sector wide FAs. A resolution for overcoming such a problem is closely linked to the elaboration of appropriate contracting strategies by splitting up the FAs in smaller lots, such as by region, product area/market and/or in time. Thus, for example, according to the Finish practice, to make it possible for small and medium-sized companies to take part in the procedure, the central procurement units often divide the contracts into lots and/or conclude their framework agreements with three or more contractors. See further *Eija Kontuniemi, Markus Ukkola, Anna Kuusniemi-Lain and Anna Dimoulis,* Questionnaire General Topic 3 "Public Procurement Law: Limitations, Opportunities and Paradoxes", The XXVI FIDE Congress in Copenhagen 2014 Congress Publications Vol. 3; DJØF Publishing, Copenhagen 2014, pg 650.

[750] See *Petra Ferk and Boštjan Ferk,* Questionnaire General Topic 3 "Public Procurement Law: Limitations, Opportunities and Paradoxes", The XXVI FIDE Congress in Copenhagen 2014 Congress Publications Vol. 3; DJØF Publishing, Copenhagen 2014, pg 697.

4.2.1.2 Setting up a framework agreement[751]

A framework can be set up by:

- an individual contracting authority;
- a contracting authority acting on behalf of a number of other contracting authorities;
- central purchasing body acting on behalf of a sector or group of contracting authorities.

For the purpose of concluding a framework agreement, the contracting authorities shall follow the rules of competitive procedures, as analyzed above in this Chapter, for all phases up to the award of contracts based on that framework agreement. The parties to the framework agreement shall be chosen by applying the award criteria set in accordance with procurement rules[752].

When awarding contracts based on a framework agreement, the parties may under no circumstances make substantial amendments to the terms laid down in that framework agreement. The term of a framework agreement may not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement. For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

Where a framework agreement is concluded with several economic operators, the latter must be at least three in number, insofar as there is a sufficient number of economic operators to satisfy the selection criteria and/or of admissible tenders which meet the award criteria. Contracts based on framework agreements concluded with several economic operators may be awarded either[753]:

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[751] See article 34/1 of PPL and respectively articles 32 and 33 of Directive 2004/18/EC and Directive 2014/24/EU.

[752] See point 3.4 at Chapter III.

[753] Directive 2014/24/EU, differently from Directive 2004/18/EC and PPL, has provided also a third possibility of awarding contracts based on framework agreements, such as 'where the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned, partly without reopening of competition in accordance with point (a) and partly with reopening of competition amongst the economic operators parties to the framework agreement in accordance with point (c), where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement. The choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement. These procurement documents shall also specify, which terms may be subject to the reopening of competition' (see article 33/4 (b).

- by application of the terms laid down in the framework agreement without reopening competition, or

- where not all the terms are laid down in the framework agreement, when the parties are again in competition on the basis of the same and, if necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;

(b) contracting authorities shall fix a time limit, which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall remain confidential until the stipulated time limit for reply has expired;

(d) contracting authorities shall award each contract to the tenderer, who has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

Generally speaking, the provision of PPL in the framework agreement complies with the relevant provision of Directive 2004/18 (and Directive 2014/24 as well). However, in the relevant secondary legislation, there are some specific provisions, which aim at adapting the use of this tool to the Albanian context. As such, the Albanian legislation does not allow the framework agreement between one contracting authority and one economic operator with all terms laid down[754]. This limitation is done, presuming that the risk of abuse in such a case is higher, as a contracting authority may arrange the procedure in such a way that the winner of the framework agreement will be its preferred economic operator, which in this type of agreement, will be the only one supplying the contracting authority, for the entire duration of the framework agreement.

4.2.2 Dynamic purchasing

A "dynamic purchasing system" is a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority, which is limited in duration and open throughout its validity to any economic operator, which satisfies the selection criteria and has submitted an indicative tender that complies with the specification[755].

[754] See article 47 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".

[755] See article 3/10 of PPL and respectively articles 1/6 and 34/1 of Directive 2004/18/EC and Directive 2014/24/EU. Directive 2014/24/EU, provide further the possibility that a dynamic purchasing system may be divided into categories of products, works or services that are objectively defined on the basis of characteristics of the procurement to be undertaken under the category concerned. Such characteristics may

In order to set up a dynamic purchasing system, contracting authorities shall follow the rules of the open procedure[756] in all its phases up to the award of the contracts to be concluded under this system. All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system; indicative tenders may be improved at any time provided that they continue to comply with the specification. With a view to setting up the system and to the award of contracts under that system, the contracting authorities shall use solely electronic means.

For the purposes of setting up the dynamic purchasing system, the contracting authorities shall:

(a) publish a contract notice making it clear that a dynamic purchasing system is involved;

(b) indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;

(c) offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted.

Any economic operator has the possibility of submitting an indicative tender and of being admitted to the system throughout the entire period of the dynamic purchasing system. The contracting authorities shall complete evaluation within a maximum of 15 days from the date of submission of the indicative tender. However, they may extend the evaluation period provided that no invitation to tender is issued in the meantime[757]. The contracting authority shall inform the tenderer at the earliest possible opportunity of its admittance to the dynamic purchasing system or of the rejection of its indicative tender.

Each specific contract must be the subject of an invitation to tender. Before issuing the invitation to tender, contracting authorities shall publish a simplified contract notice

include reference to the maximum allowable size of the subsequent specific contracts or to a specific geographic area in which subsequent specific contracts will be performed.

[756] While according to the Directive 2014/24/EU, in order to procure under a dynamic purchasing system, the contracting authorities shall follow the rules of the restricted procedure (see article 34/2, para 1).

[757] Directive 2014/24/EU sets more precise time limits, in this regard, providing that the contracting authorities shall finalize their assessment of the requests to participate in the system, in accordance with the selection criteria within 10 working days following their receipt. That deadline may be prolonged to 15 working days in individual cases where justified, in particular because of the need to examine additional documentation or to otherwise verify whether the selection criteria are met. Notwithstanding the first subparagraph, as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued during the extended evaluation period. The contracting authorities shall indicate in the procurement documents the length of the extended period that they intend to apply.

inviting all interested economic operators to submit an indicative tender, within a time limit that may not be less than 15 days from the date on which the simplified notice was sent[758]. Contracting authorities may not proceed with tendering until they have completed evaluation of all the indicative tenders received by that deadline. They shall invite all tenderers admitted to the system to submit a tender for each specific contract to be awarded under the system. To that end they shall set a time limit for the submission of tenders. They shall award the contract to the tenderer, which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system.

In any case, a dynamic purchasing system may not last for more than four years[759], except in duly justified exceptional cases. The contracting authorities may not resort to this system to prevent, restrict or distort competition. The access of the system by the interested economic operators is free of charge.

PPL has provided a definition of the dynamic purchasing system[760] and the possibility of using it[761], but it does not provide any other rule how to operate a dynamic purchasing system. It delegates the 'task" of providing detailed rules on this system, to the procurement rules approved by the secondary legislation, but as a matter of fact, these rules do not provide any rule on how to operate a dynamic purchasing system. As such, the dynamic purchasing is not used in the Albanian procurement system. As the use of this tool according to the Directive 2004/18/EC has been optional for Member States themselves, it might not be considered that PPL was not complying with the Directive at issue. On the other hand, with the new approach of Directive 2014/24, regarding procurement tools, the position of the PPL toward the relevant EU legislation will change; it will be under the obligation to effectively transpose the relevant provisions on procurement tools[762].

4.2.3 Electronic auctions

An electronic auction is a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain

[758] While according to the Directive 2014/24/EU the minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent. No further time limits for receipt of requests to participate shall apply once the invitation to tender for the first specific procurement under the dynamic purchasing system has been sent. The minimum time limit for receipt of tenders shall be at least 10 days from the date on which the invitation to tender is sent (see article 34/2, para 2).

[759] Directive 2014/24/EU does not provide for the maximal duration of the dynamic purchasing system. However, it imposes the obligation to the contracting authorities to indicate the period of validity of the dynamic purchasing system in the call for competition.

[760] See article 3/10 of PPL.

[761] See article 37 of PPL.

[762] The obligation of the PPL to approximate the relevant provision of Directive 2014/24/EU will be analyzed further in the next Chapter.

elements of tenders, which occurs after an initial full evaluation of the tenders, allowing them to be ranked using automatic evaluation methods. Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, may not be the object of electronic auctions[763].

The contracting authorities may decide that the award of a public contract, following the open, restricted or negotiated procedures[764], shall be preceded by an electronic auction when the contract specifications can be established with precision. In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement and on the opening for competition of contracts to be awarded under the dynamic purchasing system.

The electronic auction shall be based:

- either solely on prices when the contract is awarded to the lowest price[765],

- or on prices and/or on new values of the features of the tenders indicated in the specification when the contract is awarded to the most economically advantageous tender.

The contracting authorities that decide to hold an electronic auction shall state that fact in the contract notice. Also, the specifications shall include, inter alia, the following details:

(a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;

(b) any limits on the values that may be submitted, as they result from the specifications relating to the subject of the contract;

(c) the information, which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;

(d) the relevant information concerning the electronic auction process;

(e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences, which will, where appropriate, be required when bidding;

(f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

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[763] See article 3/11 of PPL and respectively articles 1/7 and 35/1 of Directive 2004/18/EC and Directive 2014/24/EU.

[764] According to the Directive 2014/24/EU, an electronic auction may be used in open or restricted procedures or competitive procedures with negotiation (see article 35/2, para 1).

[765] The provisions of the Directive 2014/24/EU on the awarding criteria has been reflected either here, providing that 'The electronic auction shall be based on one of the following elements of the tenders: (a) solely on prices where the contract is awarded on the basis of price only; (b) on prices and/or on the new values of the features of the tenders indicated in the procurement documents where the contract is awarded on the basis of the best price-quality ratio or to the tender with the lowest cost using a cost- effectiveness approach.

Before proceeding with an electronic auction, the contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion/criteria set and with the weighting fixed for them. All tenderers, who have submitted admissible tenders[766], shall be invited simultaneously by electronic means to submit new prices and/or new values; the invitation shall contain all the relevant information concerning the individual connection to the electronic equipment being used and shall state the date and time of the start of the electronic auction. The electronic auction may take place in a number of successive phases. The electronic auction may not start sooner than two working days after the date on which invitations are sent out.

When the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer.

The invitation shall also state the mathematical formula to be used in the electronic auction to determine a new automatic ranking on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications; for that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Throughout each phase of an electronic auction, the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. They may also communicate other information concerning other prices or values submitted, provided that it is stated in the specifications. They may also at any time announce the number of participants in that phase of the auction. In no case, however, they may disclose the identities of the tenderers during any phase of an electronic auction.

An electronic auction should be closed in one or more of the following manners:

(a) the invitation to take part in the auction should indicate the date and time fixed in advance;

(b) when no more new prices or new values which meet the requirements concerning minimum differences are received. In that event, the contracting authorities shall state in the invitation to take part in the auction the time, which they will allow to elapse after receiving the last submission before they close the electronic auction;

(c) when the number of phases in the auction, fixed in the invitation to take part in the auction, has been completed.

When it is the case, the invitation to take part in the auction shall indicate the timetable for each phase of the auction.

[766] The Directive 2014/24/EU, differently from the Directive 2004/18/EC, has elaborated in the relevant article, which will be considered as admissible tender, and which will be considered as an irregular tender (see article 35/5).

After closing an electronic auction, the contracting authorities shall award the contract on the basis of the results of the electronic auction. They may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification.

Same as in the case of the dynamic purchasing system, PPL has provided a definition of electronic auctions[767] and the possibility of using it[768], but it does not provide any other rule how to operate an electronic auction. It delegates the 'task" of providing detailed rules on this tool, to the procurement rules approved by the secondary legislation, but as a matter of fact, these rules do regulate how to operate an electronic auction. As such, in the Albanian procurement system the electronic auction is not used. As the use of this tool according to the Directive 2004/18 has been optional for the Member States themselves, it might not be considered that PPL was not complying with the Directive at issue. On the other hand, with the new approach of the Directive 2014/24, regarding procurement tools, the position of the PPL toward the relevant EU legislation will change; it will be under the obligation to effectively transpose the relevant provisions on procurement tools[769].

4.3 Summary

As indicated in the introduction of this chapter, procurement procedures are the life and soul of public procurement regulations. Contracting authorities should make use of all possible means at their disposal under national law, in order to choose the most appropriate procedure which on the other hand will help them to achieve the objectives of the procurement process.

Generally speaking, the procurement procedures and procurement tools, as provided by the Albanian PPL, are in compliance with the relevant provisions of the Directive 2004/18. Under both acts at issue all types of procedures are provided, which in broad terms may be categorized as standard procedures, special procedures and exceptional procedures[770]. Procedures may be characterized as standard when the contracting authority can use them in any circumstances and for any type of contract covered by the Directive. By contrast, procedures have a special nature when they can be chosen only according to specific grounds for use. Finally, procedures are deemed exceptional when

[767] See article 3/11 of PPL.
[768] See article 37 of PPL.
[769] The need of the PPL to approximate the relevant provision of Directive 2014/24/EU will be analyzed further in the next Chapter.
[770] See also R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law, Review Contents Vol. 52 No. 2 April 2015**,** © 2015 Kluwer Law International. Printed in the United Kingdom. pg. 452.

they function as a final alternative enabling a contract award when all else fails[771]. However, in some cases, as discussed above, PPL provisions are adapted to the national context. This 'adaption' aims mainly at providing stricter rules, than those provided by the relevant Directives. This is also noted, in the fact that all procedural requirements set by PPL are equally applicable for all procurement contracts, despite their estimated value[772]. While, the Directives do not set out specific rules that apply to the award of the procurement contracts under the thresholds, but the basic general law and Treaty principles, including the requirements for transparency, non-discrimination and equal treatment, do apply to the procurement process followed by the contracting authority in procuring those contracts[773]. This stricter approach of the PPL is justified with the 'fear' of the misuse of the law to narrow the competition in a procurement procedure[774]. Also, some of the procurement procedures and procurement tools (such as competitive dialogue, dynamic purchasing system and electronic auctions) are not provided by PPL at all. Thus, formally, the Albanian PPL may be considered in this regard not fully in line with Directive 2004/18/EC, but as the relevant provisions are of facultative character, (and as such, their transposition is left to the discretion of national legislators of Member States), this may be one of the situations when the requirement on 'fully approximation' should not be strictly read. However, it should be noted that referring to the provisions of the new Directive 2014/24/EU on procurement procedures[775] and tools, PPL will need to make considerable amendments to comply with this Directive[776].

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[771] This proposed taxonomy of procedures implies that only the open and restricted procedures are to be classified as standard. The competitive dialogue, the competitive procedure with negotiation and the innovation partnership require specific grounds for use and, as such, are deemed special procedures. Finally, the negotiated procedure without prior notice remains a procedure of final resort if none of the other procedures are suitable. The latter cannot be identified as a regulated procedure as such, rather constituting an authorization to contracting authorities to devise a method of awarding a contract according to circumstances prescribed by the Directive. See further *Pedro Telles and Luke R. A. Butler"* Public Procurement Award Procedures in Directive 2014/24/EU/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernising Public Procurement. The New Directive"; 1. Edition. © 2014 by Djøf Publishing Jurist- og Økonomforbundets Forlag, pg.132-133.

[772] Referring to the request for proposal procedure, as discussed above.

[773] EU Member States may opt 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.

[774] Procurement officials authorized to make single-source decisions have great power over which companies receive the most lucrative contracts. Without evaluative guidance and oversight, individual preference can easily become part of their decision. See further "Bribery in Public Procurement-Methods, Actors and Counter-Measures", OECD Publishing, France-Paris 2007, pg.19-25.

[775] 'With regard to procurement procedures, in Directive 2014/24/EU there have been limited changes to the open and restricted procedures, mostly due to an honest desire to reduce the transaction costs and timescales involved. The biggest change introduced to these procedures was the possibility of running the open procedure as a single stage variant, which should allow for much shorter procedures. Taking into consideration the long history and tradition of these procedures, these changes appear to constitute reasonable modifications in accord with their intended function and do not purport to radically alter their purpose. However, an important qualification concerns the short timescales under which the restricted

CHAPTER V
THE APPROXIMATION OF THE ALBANIAN PROCUREMENT LEGISLATION WITH THE CORRESPONDING EU LEGISLATION; THE RIGHT APPROACH OF THE CONCEPT.

5.Introduction

Public procurement still remains a relatively new concept in Albania nowadays. Using public procurement process to purchase goods, services, or works for the Albanian Government Bodies was possible only after 1990, when the first steps to a free and open market were taken. Given the commitments taken with the purpose of the entry into the European Union, Albania has begun the process of integration, in order to achieve the standards of the European Union. The integration process on public procurement field means the approximation of public procurement law and through it, the entire public procurement system, with the respective EU Directives. The key issue, discussed by this Chapter is, if it is possible to realize a hundred percent approximation while Albania is not yet an EU member, taking into consideration that the purpose of the Procurement Directives is to create an internal market for public contracts among Member States themselves.

5.1 The approximation level of both legislations

The first steps towards the approximation of the public procurement law with Directive 2004/18/EC of the EU were marked in 2006, when a new law on public procurement has been adopted[777]. However, the approximation of PPL with the acquis at this stage was partial. Considering the commitments in the SAA[778] and following the National Plan for the Implementation of SAA[779], public procurement law has been amended several times from 2006 to 2014[780]. Periodical Progress Reports of EC from 2006 to 2009 have

procedure can now be used in circumstances of urgency…Of greater interest are the two new procedures included in the Directive: the competitive procedure with negotiation and innovation partnership…'. Ibid, pg 181.

[776] The concrete needs of the PPL to approximate the relevant provision of Directive 2014/24/EU, regarding the award procedures and procurement tools, will be analyzed in the following chapter.

[777] According to the Albania 2007 Progress Report of EC "…Albania has taken steps towards bringing its legislation into line with the acquis by approving a new public procurement law. Implementing legislation is in force. The new public procurement law takes into account the principles of non-discrimination and equal treatment, transparency, value for money and legal protection of bidders' interests…"

[778] See point 2.4.1 of Chapter II above.

[779] The National Plan for the Implementation of the Stabilization and Association Agreement (NPISAA) is a fundamental document for all public institutions for prioritizing, planning, coordination and monitoring their implementing activities under SAA.

[780] See point 2.4.2 of the Chapter II above. For details see the consolidated version of the PPL available at www.app.gov.al, retrieved December 20, 2014.

underlined the gradual improvement done in public procurement area, especially toward the approximation of the legislation with the acquis[781]. Meanwhile in the Analytical Report of EC 2010[782], it is clearly expressed that the Albanian legislation is broadly aligned with the general principles applied to public procurement on the internal market. The legislative and institutional framework provides a good basis for development of an effective public procurement system in line with EU rules and so far Albania has fulfilled its SAA commitments in this area. However, according to this Analytical Report, not all the provisions of the public procurement directives were yet transposed by that time. Even though the Analytical Report of 2010 was very positive regarding the public procurement area, the two following Progress Reports of 2011 and 2012[783] stated that the legislative framework on public procurement is not fully in line with acquis. On the other hand, in the National Plan for European Integration[784] covering the period 2015-2020, for the mid-term priorities, which according to that document correspond to the time period 2016-2017, further amendments of public procurement law toward approximation with the new Directive 2014/24[785] were foreseen as a task in the area of public procurement.

5.1.1 Albanian PPL provisions compared to the corresponding Directive(s) provisions

As analyzed in the previous chapters, it results that in light of the approximation process, there are three categories of EU Public Procurement Directive provisions[786]:

i) EU Procurement Directive provisions not implemented to Albanian PPL. As such provisions, we might mention for example provisions providing for the Common Procurement Vocabulary (CPV), the 'competitive dialogue' procedure, subsidized contracts, reserved contracts, obligations related to publication of procurement notices in the Official Journal of EU, etc.

ii) EU Procurement Directive provisions partially implemented (Albanian provisions not fully compliant with EU law). As such provisions, we might mention for example provisions providing for the definition of the public work contracts, the conditions for application of the restricted procedure, the participation of consortia, etc.

[781] See the Progress Reports of EC 2006-2009. Available at www.mie.gov.al, retrieved December 20, 2014.
[782] See the Analytical Report of EC 2010. Available at www.mie.gov.al, retrieved December 20, 2014.
[783] See the Progress Reports of EC 2011-2012. Available at www.mie.gov.al, retrieved December 20, 2014.
[784] The National Plan for European Integration substituted the National Plan for the Implementation of the Stabilization and Association Agreement.
[785] See Chapter 5 "Public Procurement", in the National Plan for European Integration 2015-2012, pg 156-163. Available at http://www.integrimi.gov.al/al/dokumenta/dokumente-strategjike/plani-kombetar-per-integrimin-evropian&page=1, retrieved December 20, 2014.
[786] This comparison is made referring to both Directives; to Directive 2004/18/EC, as the corresponding Directive with which PPL is approximated so far and to Directive 2014/24/EU, as the corresponding Directive, with which PPL should be further approximated.

iii) EU Procurement Directive provisions more flexible as compared with the Albanian PPL provision (Albanian PPL provisions more rigorous as compared with EU Directive). As such provisions, we might mention for example provisions providing for the cancellation notice, the application of negotiated procedure with and without prior publication of a contract notice, the extension of time limit in case of modification of tender documents etc.

5.1.2 EU Directive provisions which need to be transposed into the Albanian PPL

This section will analyze the impact of the provisions of the New Directive 2014/24, in the Albanian PPL. This analysis will be made considering the fact that PPL is still partially approximated with the Directive 2004/18 and on the other hand, the New Directive 2014/24 brings some other novelties compared to the Directive 2004/18.

- **Sub-central contracting authorities**[787]

The new directive covers contracting authorities, which are defined in the same way as under the directive 2004/18, but except for that list[788], it provides also for a new definition of sub - central contracting authorities[789]. According to this definition, sub-central contracting authorities are all contracting authorities other than central government authorities. The new provision leaves the Member States scope to establish regulations by which sub-central contracting authorities receive more discretion and greater flexibility[790]. In concrete, higher thresholds apply to sub-central contracting authorities[791]. Also, the sub - central contracting authorities can use the prior information notice as a means for calling for competition (in the case of the restricted procedure and competitive dialogue)[792]. Furthermore, Member States may provide that all or specific categories of sub-central contracting authorities may establish a time period for the 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 negotiations)[793]. As in the latest situation, Directive provides that Member States *may provide* for such solution, this provision is facultative for Member States themselves. The introduction of this definition for a separate category of contracting authorities, in the

[787] See article 2/3 of Directive 2014/24/EU.
[788] See the analysis done in Chapter I above.
[789] The differentiation between central and sub-central contracting authorities provided by Article 2 follows the WTO Agreement on Government Procurement (GPA), by which the EU is bound. See further *M. Burgi* "Contracting authorities, in-house services and public authorities cooperation"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg.50.
[790] Ibid, pg 52.
[791] See article 4 (c) of Directive 2014/24/EU
[792] See articles 26/5 and 48/2 of Directive 2014/24/EU.
[793] See article 28/4 of Directive 2014/24/EU.

PPL, should be considered together with the introduction of the prior information notice[794] and should be seen in the light of flexibility that should or is needed to be applied to this category of the contracting authority.
However, even if PPL decides not to implement such a definition, it should not be considered as not approximated in this regard, as long as the relevance of using it is only for situations which are strictly applicable only for Member States (as is the prior information notice[795]), or they are optional even for Member States themselves (as is the possibility of establishing time limits by mutual agreement between the contracting authority and selected candidates).

- **Definition of public works contracts**

According to the new Directive[796] (which provides the same as Directive 2004/18 in this regard[797]), 'public works contracts' means public contracts having as their object one of the following: (a) the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II…"

The definition of "public works contract" included in Article 3 (8) of the PPL generally, is in accordance with the EU definition. However, while a "work" is defined in Article 3 (9), there is no definition of works either by reference to other pieces of Albanian legislation (which would define this term for purposes of general application, such as for instance Construction law), or by reference to the list of specific works covered by the PPL, as it is the case of relevant Directive.

- **Social services and other specific services[798]**

With regard to services the new directive represents a significant change. The new directive abolishes the distinction between the so called priority and non - priority services[799]. In principle, all services are to be awarded in line with the same rules regardless of their subject. An exception has been made, however, in the Directive 2014/24, with regard to the so called "social services and other specific services"[800]. The regime of awarding those contracts under the new directive is more flexible than other

[794] As it is discussed in Chapter III above, Prior Information Notice is an option for the contracting authorities of the Member States, and as such use of Prior Information Notices is therefore not obligatory.
[795] Ibid.
[796] See article 2/6 of Directive 2014/24/EU.
[797] See article 1/ 2 (b) of Directive 2004/18/EC.
[798] See articles 74-76 of Directive 2014/24/EU.
[799] These services were accordingly listed in two annexes (A and B) to the Directive 92/50 and then 2004/18/EC.
[800] "Social services and other specific services", which are listed in Annex XIV of the directive are governed by special rules provided in Articles 74 – 76 of the directive. Unlike the list of non - priority services under Directive 2004/18/EC, the list of social and other special services is exhaustive one (there is no category of "other services", which would cover all services not listed elsewhere).

services (in particular, the threshold value above which such rules kick in is after all much higher[801]) but, nonetheless, it is more demanding than the regime under 2004/18 directive, which governs the award of non - priority services. Thus, the new directive requires that: the contracting authorities which intend to award a contract for those services should make known their intention by means of a contract notice or a prior information notice (unless there are conditions, which allow the contracting authority to award a contract without prior notice publication, as in the case of the negotiated procedure without notice). After the award of contract, the contracting authorities should publish a contract award notice[802]. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question[803].

The PPL (which does not provide for a distinction between priority and non priority services)[804] should consider the implementation of a specific regulation for social services and other specific services. The implementation of such specific regime will be very helpful for an effective implementation in practice of these types of services. This is because according to the actual regime, the rules applicable for procuring such services are the same as those followed for all other type of services, but taking into consideration the specific nature of social services, procurement of such services has encountered a lot of difficulties in practice[805]. Because of the lack of specific regulations in the field, social enterprises are not clear if they should exercise their activity as non-profit organizations or as business undertakings and especially the social enterprises registered as non-profit organizations are unsatisfied with their status[806]. One of the reasons of their dissatisfaction is related with the lack of incentives and a differentiated treatment, especially regarding their access to the procurement process (meaning more flexible and appropriate rules)[807], considering their social mission[808]. In any case, the implementation

[801] See article 4/d of Directive 2014/24/EU.
[802] See article 75 of Directive 2014/24/EU.
[803] Member States should ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also 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 social services (see article 76 of Directive 2014/24/EU).
[804] As discussed in Chapter IV above, regarding the service contracts, according to PPL, the specific regime is available to consultancy services only.
[805] According to a study done in 2014, it results that the majority of the Social Enterprises in Albania, have begun their activity as non-profit organizations, about 15 years ago. Their activities are focused mainly on employment, education, economic development, and children and social care. Mostly, these kinds of organizations serve to youth, women and disadvantaged and vulnerable groups as well. See "Development of Social Enterprises, possibility for job vacancies for disadvantaged groups", a study of Partners Albania, Center for Change and Conflict Management, Albania 2014, pg. 85-86 available at http://www.partnersalbania.org/zhvillimi_ndermarrjeve_sociale.pdf, retrieved May 5, 2015.
[806] Ibid.
[807] Ibid, pg 46.

of relevant provisions of the new directive concerning social services into Albanian law would require the establishment of a procedure for awarding such services, which would ensure the principles referred to in the directive and which would start, in principle, with the publication of a call for competition in any of two forms set in the directive.

- **Specific exclusions in the field of electronic communications**

The new Directive provides a specific exclusion in the field of electronic communications[809], providing that it shall not apply to public contracts and design contests 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 communications services.

For the purposes of this Article, the 'public communications network' and the 'electronic communications service' shall have the same meaning as in Directive 2002/21/EC of the European Parliament and of the Council[810].

This provision should be implemented in the PPL, as actually it does not provide for such exclusion[811]. It should be noted, however, that the implementation of this exclusion should be done, providing that the definitions of the 'public communications network' and the 'electronic communications service' have been implemented as well by the relevant Albanian legislation. This is one of the situations when only the approximation of PPL is not enough, and this is a clear example illustrating the fact that approximation is not a separate process in specific fields; it is rather a complex and coordinated process, especially in the procurement area where different fields cross cut with each other.

- **Exemptions from scope of application[812]**

Except for the exemptions already provided by the Directive 2004/18[813], the new directive adds some new ones, namely:

Any of the following legal services:

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[808] According to this study, is founded that the financial sources from government, loans, philanthropy, and public procurement, are at very low levels. Ibid, pg. 47.

[809] See article 8 of Directive 2014/24/EU.

[810] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

[811] PPL do not provide either for the sspecific exclusions in the field of telecommunications, as provided in article 13 of Directive 2004/18/EC.

[812] See article 10 of Directive 2014/24/EU.

[813] As analyzed in Chapter I, the exemptions provided by Directive are already transposed into the Albanian PPL.

(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 above 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 (within the meaning of Article 1 of Directive 77/249/EEC);

(iii) Document certification and authentication services, which 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, which in the Member State concerned are connected, even occasionally, with the exercise of official authority;

- Employment contracts;
- Civil defense, civil protection, and danger prevention services that are provided by non - profit organizations or associations, except patient transport ambulance services (which are covered by CPV codes 75250000-3, 75251000-0, 75251100-1, 75251110-4, 75251120-7, 75252000-7, 75222000-8, 98113100-9 and 85143000-3);
- Public passenger transport services by rail or metro;
- Political campaign services when awarded by a political party in the context of an election campaign[814].

With the latest amendments of the PPL, as adopted in 2014,[815] only 'employment contracts' are introduced as an exemption. This means that all other new exemptions provided by this Directive are not envisaged by PPL. At first glance, their transposition would require simple repetition in the PPL but for an effective transposition a deeper analysis is needed. Thus, the approximation of the provision on the exemption of 'legal

[814] According to the Recital 29 of Directive 2014/24/EU, '…*political parties in general, not being contracting authorities, are not subject to its provisions. However, political parties in some Member States might fall within the notion of bodies governed by public law."* Thus, the Directive is applicable to political parties only to the extent they are bodies governed by public law.
[815] See point 2.4.2 in Chapter II above.

advice given in preparation of any of the proceedings referred to above 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', should be done on condition that the Albanian legal system has introduced also the 'the meaning of Article 1 of Directive 77/249/EEC[816]', because this exemption is strongly related to that meaning. Also, referring to the exemption of the 'civil defense, civil protection, and danger prevention services that are provided by non - profit organizations or associations, except patient transport ambulance services', PPL before adopting it, should consider what is covered under that CPV codes[817]. Also, referring to the last case of 'political campaign services when awarded by a political party in the context of an election campaign', a prior analysis is needed to evaluate whether the implementation of this exemption is necessary in Albania. On one hand, political parties in Albania do not fall under the definition of a contracting authority, and on the other hand, if PPL implements such an exemption related to political parties may imply that with regard to other contracts not covered by this exemption the political parties should apply public procurement rules[818].

- **Contracts between entities within the public sector (public – public)[819]**

The new directive provides (following the case law of the CJEU as analyzed in Chapter II above) for the exemption related to *in house contracts*; those situations are collectively referred to in the directive as contracts between entities within the public sector (public – public cooperation[820]).
There are three types of situations covered by new rules:

- A contracting authority awards a contract to a legal person governed by private or public law where all of the following conditions are fulfilled:

[816]According to the Article 1 of Directive 77/249/EEC 'To facilitate the effective exercise by lawyers of freedom to provide services' (OJ L 78, 26.3.1977, p. 17), this Directive shall apply, within the limits and under the conditions laid down herein, to the activities of lawyers pursued by way of provision of services. Notwithstanding anything contained in this Directive, Member States may reserve to prescribed categories of lawyers the preparation of formal documents for obtaining title to administer estates of deceased persons, and the drafting of formal documents creating or transferring interests in land. In the second paragraph of this Article, are listed the official title used when referring to a lawyer, in each of the Member States.
[817] As discussed in Chapter III, PPL has not introduced the CPV codes. This issue will be analyzed also here below.
[818] If the Recital 29 (see footnote no.25 above) of the Directive and this exemption, provided in article 10/j is analyzed, it will be concluded that this exemption addresses only that Member State, where the political parties fall within the notion of bodies governed by public law. This provision of the new Directive is somehow contradictory.
[819] See article 12 of Directive 2014/24/EU.
[820] See also J. Wiggen "Directive 2014/24/EU: the new provision on co-operation in the public sector", Public Procurement Law Review, 2014, 3, Sweet & Maxwell, London 2014, pg. 83-93.

a) The contracting authority exercises over the legal person concerned a control that is similar to that which it exercises over its own departments (first "Teckal" condition[821]);

b) 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 or by other legal persons controlled by that contracting authority (second "Teckal condition[822]); and

c) There is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person[823] (condition stemming from CJEU case law).

- A contracting authority, which does not exercise its authority over a legal person governed by private or public law control, may nevertheless award a public contract to that legal person without applying the directive where all of the following conditions are fulfilled.

a) The contracting authority exercises jointly with other contracting authorities its control over that legal person which is similar to that which they exercise over their own departments;

b) More than 80 % of the activities of that legal person are carried out in performance of tasks entrusted to it by the controlling contracting authorities or by other legal persons controlled by the same contracting authorities; and

c) There is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

- A controlled legal person, which is a contracting authority, awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a

[821] See case C-107/98 Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Regio Emilia [1999] ECR I -8121.
[822] Ibid.
[823] A contracting authority is deemed to exercise over a legal person a control similar to that which it exercises over its own departments where it 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, which is itself controlled in the same way by the contracting authority.

decisive influence on the controlled legal person.

- A contract is concluded exclusively between two or more contracting authorities where all of the following conditions are fulfilled:

a) The contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common;

b) The implementation of that cooperation is governed solely by considerations relating to the public interest; and

c) The participating contracting authorities perform on the open market less than 20% of the activities concerned by the cooperation.

The Albanian PPL does not yet provide for the exemption concerning either of the above mentioned forms of "in house" arrangements. The implementation of those provisions would require adding new exemptions in the PPL containing all the conditions specified in the new directive. However, while considering the implementation of such provision, the impact that this arrangement might have in the market[824] should also be considered.

- **Rules concerning estimation of contract value**

Directive(s)[825] provide for detailed rules on methods for calculating the estimated value of public contracts according to which, with regard to public works contracts, calculation of the estimated value shall take account of both, the cost of the works and the total estimated value of the supplies necessary for executing the works and placed at the contractor's disposal by the contracting authorities. With regard to public service contracts, the value to be taken as a basis for calculating the estimated contract value shall, where appropriate, be the following: (a) for the following types of services: *(i)* insurance services: the premium payable and other forms of remuneration; *(ii)* banking and other financial services: the fees, commissions, the interest and other forms of remuneration; *(iii)* design contracts: fees, commission payable and other forms of remuneration; (b) for service contracts, which do not indicate a total price: (i) in the case of fixed-term contracts, if that term is less than or equal to 48 months: the total value for their full term; *(ii)* in the case of contracts without a fixed term or with a term greater than 48 months: the monthly value multiplied by 48.
PPL, however, does provide for rules concerning estimation of contract value, but they are not fully implementing the Directive rules. As such, further changes of PPL should be made in this regard.

- **Rules concerning mixed contracts[826]**

[824] See R. Caranta, 'The changes to the public contract directives and the story they tell about how EU law works', Common Market Law, Review Contents Vol. 52 No. 2 April 2015; Printed in the United Kingdom. pg. 439-445.
[825] Both, Directive 2004/18/EC (see article 9) and Directive 2014/24/EU (see article 5).
[826] See article 3 of Directive 2014/24/EU.

As discussed also in Chapter II above, the new directive provides for fairly detailed provisions concerning application of the relevant regime (relevant provisions) in the case when the subject matter of public procurement covers various items, which:

- are subject to the same directive,
- Are subject to different regimes.

The first option refers to the situation where a given contract has as its subject two or more types of procurement, all of them covered by the directive (such as works, services or supplies). Except for this case[827], the Directive at issue provides also new rules governing the award of mixed contracts where the subject matter is covered both by this directive as well as other legal regimes (other directives). Here everything depends whether the different parts of a given contract are objectively separable or not. This implies that the contracting authorities are now expressly empowered to shape complex contractual arrangements provided that this does not translate in bringing the resulting contract outside the scope of application of the Public Sector Directive[828]. If they are objectively separable[829] and the contracts cover both elements, which are subject to this directive as well as those which are not subject to this directive the contracting authority has two options:

- to award separate contracts for separate parts or
- To award a single contract.

In the case of a separate contract, the application of the relevant regime depends on the characteristics of a given part. In the case of a single contract, this directive is applicable to the mixed contract, regardless of the value of the parts, which if they were awarded separately would fall under a different legal system.

[827] The applicable rules for mixed procurement, which are all covered by the directive, are the same as in the Directive 2004/18/EC, which are fully implemented by the PPL. See the detailed analysis done at point 1.2.5.2 in Chapter I.

[828] See R. Caranta 'Mapping the margins of EU public contracts law: covered, mixed, excluded and special contracts'; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 78.

[829] According to Recital 11 of the Directive 2014/24/EU, 'in the case of mixed contracts, the applicable rules should be determined with respect to the main subject of the contract where the different parts, which constitute the contract, are objectively not separable. It should therefore be clarified how contracting authorities should determine whether the different parts are separable or not. Such clarification should be based on the relevant case-law of the Court of Justice of the European Union. The determination should be carried out on a case-by- case basis, in which the expressed or presumed intentions of the contracting authority to regard the various aspects making up a mixed contract as indivisible should not be sufficient, but should be supported by objective evidence capable of justifying them and of establishing the need to conclude a single contract. Such a justified need to conclude a single contract could for instance be present in the case of the construction of one single building, a part of which is to be used directly by the contracting authority concerned and another part to be operated on a concessions basis, for instance, to provide parking facilities to the public. It should be clarified that the need to conclude a single contract may be due to reasons both of a technical nature and of an economic nature'.

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. In the case of mixed contracts containing elements of supply, works and services and concessions, such mixed contracts should be awarded in accordance with this directive, provided, however, that the value of that part of contract, which is covered by this directive, is equal to or greater than the threshold of this directive.
The new directive regulates also mixed contracts[830], which have as their subject procurement covered by directive 2009/81[831] or Article 346 of TFEU[832].
In case of such a mixed contract, 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:

- to award single contracts, or
- to award separate contracts.

If the contracting authority decides to award separate contracts for separate parts, the application of the relevant regime depends on the characteristics of a given part. However, if the contracting authority opts for one single contract then the relevant regime is determined on the basis of the following criteria:

- if part of a contract is subject to Article 346 TFEU, the contract may be awarded without applying this directive, provided that the award of a single contract is justified by objective reasons,
- if part of a contract is covered by directive 2009/81, the contract may be awarded in accordance with the provisions of directive 2009/81, provided that the award of a single contract is justified by objective reasons.

PPL contains provisions on how to categorize a contract containing elements of works and/or supplies and/or services, which are all covered by the PPL. Another step to be made in this regard is to provide such rules in a specific article, as the new Directive does[833]. However, PPL does not provide the situation of mixed contracts which are covered by different regimes. The approximation in this regard should be made taking also into consideration the approximation of the relevant national law with the Directive

[830] See article 16 of Directive 2014/24/EU.
[831] This Directive regulates the award procedures in the field of defense and security.
[832] This article provides that: "(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any 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 material; such measures shall not adversely affect the conditions of competition in the internal market regarding products, which are not intended for specifically military purposes".
[833] Actually, PPL provides for definitions of mixed contracts, only at article 3, together with the definitions of works, supplies and services contracts.

2009/81[834].

- **Subsidized contracts**

The new Directive has provided for the same rules on subsidized contracts, as Directive 2014/18, except for thresholds, which are decreased[835].

In any case, the contracting authorities providing the subsidies shall ensure compliance with this Directive where they do not themselves award the subsidized contract or where they award that contract for and on behalf of other entities.

PPL does not provide rules on subsidized contracts. As such, it should implement the Directive provision, adjusting it into the national context[836].

- **Reserved contracts**

The new directive[837] gives the possibility to Member States to reserve the right to participate in public procurement procedures to sheltered workshops and economic operators, whose main aim is the social and professional integration of disabled or disadvantaged persons or to 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[838]. Directive 2014/24 introduces also a new provision allowing Member States to provide that contracting authorities may reserve the right to allow organizations to participate in procedures for awarding public contracts exclusively in health, social and cultural services[839]. In this case, an organization should fulfill all the following conditions:

a) Its objective is the pursuit of a public service mission linked to the delivery of the services referred to in above;

b) Profits are reinvested with a view to achieving the organization's objective. Where profits are distributed or redistributed, this should be based on participatory considerations;

[834] Directive 2009/81 is not yet implemented by the Albania legal system. However, in the National Plan for European Integration 2014-2016, it has been foreseen to have a partial approximation by the year 2016.
[835] See respectively article 8 of Directive 2004/18/EC and article 13 of Directive 2014/24/EU.
[836] It should adjust at least the relevant thresholds.
[837] See article 20 of Directive 2014/24/EU.
[838] Reserved contracts have been provided also by Directive 2004/18/EC, article 19. However, the scope of this provision in the new Directive is much wider than its equivalent under the directive 2004/18/EC since the percentage requirement referred to above has been reduced from more than 50 % (most of most of the employees concerned are handicapped persons) to at least 30 % and the new directive refers to much wider category of "disadvantaged workers.
[839] See articles 74 and 77 of Directive 2014/24/EU.

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

d) The organization has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

The maximum duration of the contract may not be longer than three years[840].

PPL has no specific provisions regulating reserved contracts, but as analyzed above, non-profits organizations are not prohibited to participate in a procurement process[841]. Despite this, a specific regulation will clear up and facilitate even more the position of these organizations toward the procurement process. However, if PPL decides not to implement such provisions, be considering the fact that relevant provisions on reserved contracts are optional even for Member States themselves, it should not be considered as not approximated in this regard.

- **Principles of procurement[842]**

Except for the principles provided by Directive 2004/18 (which are implemented by PPL, as well[843]), the new directive has listed explicitly the proportionality principle[844], and has highlighted the importance of the competition in a procurement process, providing that 'the design of the procurement shall not be made with the intention of excluding it from the scope of the directive or of artificially narrowing competition. Competition is considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favoring or disadvantaging certain economic operators. The provision of Article 18 (2) of the new directive is entirely new, according to which Member States should take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions listed in Annex X to the directive[845].

[840] See generally S. Smith "Articles 74 to 76 of the 2014 Public Procurement Directive: the new "light regime" for social, health and other services and a new category of reserved contracts for certain social, health and cultural services contracts" Public Procurement Law Review, 2014, 4, Sweet & Maxwell, London 2014, pg. 159-168.

[841] According to article 39 of Law no. 8788, date 07.05.2001 "On non-profit organizations" 'non-profit organizations, as all other legal persons, are eligible to participate in the field of undertakings, tenders and procurement of grants…".

[842] See article 18 of Directive 2014/24/EU.

[843] See point 3.1 in Chapter III above.

[844] According to PPL, this is not a principle listed in article 2 of PPL, but despite this, in the provision of qualification criteria, PPL requires the contracting authority to respect the principle of proportionality (see article 46 of PPL).

[845] See also S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 7-28 and 7-29.

PPL, in its principles' provision, provides only for the obligation of the contracting authority to respect the non-discrimination, equal treatment and transparency principles. As such, the transposition of the whole principles' provision of Directive 2014/24 into the PPL will only improve the legal frame of public procurement in Albania.

- **Common Procurement Vocabulary (CPV)**

Same as Directive 2004/18[846], even new Directive[847] defines CPV as "the reference nomenclature applicable to public contracts as adopted by Regulation (EC) No 2195/2002"[848]. However, differently from Directive 2004/18, the new Directive does not refer to any other reference nomenclatures, except for CPV[849].

This coding system is not provided by the Albanian PPL. Formally[850], since CPV is adopted by means of EU regulation it would be directly applicable in Albania as of the date of Albania's accession to the European Union[851].

- **Procedures of awarding public contracts[852]**

The new Directive has brought some slight differences on the existing procedures and has introduced some other new procedures compared to the Directive 2004/18.

➢ Open and restricted procedures[853]

It keeps, without any significant changes, the open and restricted procedures as the basic procedures of awarding public contracts. As regards the open procedure two main changes comprise shorter time limits for receipt of tenders and the possibility of contracting authorities to examine tenders before checking if any of the grounds for exclusion apply or if the tenderer meets the selection criteria. Member States may, however, make provision prohibiting this, or permitting it only in certain types of procurement or in specific circumstances.

Although PPL is considered generally approximated as regards these two procedures, still, also in the light of the new Directive, there is some room for further approximation. As such, in regard to open procedure, required changes include:

(i) Shortening of minimum time periods for receipt of tenders in open procedure;

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[846] See article 1 (14) of Directive 2004/18/EC.
[847] See article 23/1 of Directive 2014/24/EU.
[848] See footnote no. 462 above.
[849] See article 23/2 of Directive 2014/24/EU.
[850] It should be noted however, that even though formally CPV is adopted by means of EU regulation, it is not forbidden for Albania to refer to CPV during this transitional phase. Referring to the CPV during this phase might be helpful for preparing both, public and private stakeholders for such a coding system.
[851] According to the article 288 of the Treaty on the functioning of the European Union (former Article 249 of the Treaty establishing the European Community), 'A regulation shall have a general application. It shall be binding in its entirety and directly applicable in all Member States'.
[852] See article 26-32 of Directive 2014/24/EU.
[853] See articles 27 and 28 of Directive 2014/24/EU.

(ii) Providing the possibility that contracting authorities may decide to examine tenders before verifying the absence of grounds for exclusion and the fulfillment of the selection criteria[854].

However, the second situation should be considered together with the implementation of the possibility of self-cleaning, or declaration on oath, provided by the Directive at issue.

In regard to the restricted procedure, required changes include:

(i) Allowing for the possibility of limiting the number of participants;

(ii) Abolishing the conditions in place for the use of the restricted procedure;

(iii) If it is the case[855], providing an option for sub-central contracting authorities to set a time period for receipt of tenders by means of mutual agreement with all selected candidates in the case of the restricted procedure.

Implementation of such changes in the relevant provision will give the restricted procedure the right 'value' and 'position' in the procurement procedures pool, and encourage contracting authorities to use it when it is the relevant case[856].

- Competitive dialogue and Competitive procedure with negotiations (former negotiated procedure with a prior notice publication) [857]

The competitive dialogue is not an optional procedure under the new directive, which means that Member States have to offer a possibility of using this procedure to its contracting authorities. The same mandatory requirement is with the competitive procedure with negotiations.

The competitive dialogue and the competitive procedure with negotiations share the same conditions, under which those procedures may be applied[858]. The analysis of those conditions indicates that *de facto* those procedures have become basic procedures with the exception of standard, off - the - shelf products or services.
The new Directive provides also for the definition of 'irregular tenders' and 'unacceptable tenders'.
As irregular are defined tenders which, in particular:

- Do not comply with the procurement documents, which were received late,
- Where there is evidence of collusion or corruption, or which

[854] The verification of absence of grounds for exclusion and fulfillment of the selection criteria should be carried out in an impartial and transparent manner so that no contract is awarded to a tenderer that should have been excluded or that does not meet the selection criteria set out by the contracting authority.
[855] See the discussion above on introducing the sub-central contracting authorities.
[856] As analyzed in Chapter IV above, the provision of the restricted procedure in the PPL is very ambiguous and this ambiguity is reflected in the very low number of use of the restricted procedure from the contracting authority in Albania.
[857] See articles 29 and 30 of Directive 2014/24/EU.
[858] See article 26/4 of Directive 2014/24/EU.

- Have been found by the contracting authority to be abnormally low, shall be considered as being irregular.

Unacceptable tenders are, in particular, tenders submitted by tenderers that do not have the required qualifications, and tenders, whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure.

The competitive procedure with negotiations as compared with the current negotiated procedure with notice is regulated in much more detail[859]. In any case, in using this procedure, contracting authorities may award contracts on the basis of the initial tenders without negotiation, where they have indicated in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

As it is discussed in Chapter V above, PPL has not implemented the competitive dialogue procedure. This has been somehow justified by the fact that Directive 2004/18/EC provided this procedure, as optional for Member States themselves. The new approach of Directive 2014/24/EU changes the position of PPL in this regard. Full implementation of provisions related to those two procedures would require mandatory and optional changes in Albanian PPL and in concrete:

- Transposing the procedure of the competitive dialogue,
- Replacing the provisions regulating the conduct of the negotiated procedure with a notice by provisions concerning competitive procedure with negotiations,
- Transposing conditions allowing for the use of the competitive dialogue and competitive procedure with negotiations,
- Introducing an option for sub central contracting authorities to set a time period for receipt of tenders by means of mutual agreement with all selected candidates (optional),
- Providing the possibility of inviting competition by means of a prior information notice (the competitive procedure with negotiations conducted by sub - central contracting authorities) (optional),

[859] The new procedure has clearly defined the following stages:
1. Publication of a call for competition;
2. Submission by economic operators of requests to participate and information for qualitative selection that is requested by the contracting authority;
3. Qualification of economic operators (candidates) and invitation to submit initial tenders by all candidates meeting the minimum qualification criteria or limited number of candidates (short listed in accordance with Article 65);
4. Negotiations of initial tenders and all other subsequent tenders;
5. Conclusion of negotiations and informing about this fact participants;
6. Invitation to submit final tenders.

- Introducing a possibility that the competitive procedure with negotiations is finalised without negotiations, directly after submission of initial tenders by invited candidates (optional).

However, the transposition of the relevant directive provisions should be made by considering both; the Directive' perspective, and the Albanian context as well. The directive perspective with these two procedures seems to establish grounds for the use of flexible procedures. It is not entirely clear from the wording of the substantive provision how flexible the new provision is intended to be. However, if you scrutinize the wording of the Recitals, you get the impression that the grounds should be interpreted in an extremely flexible manner[860]. Such approach of the Directive might be confusing and will be reflected directly at the national approach. The practice has showed that the lack of clarity on scopes and grounds of using the competitive dialogue procedure, for example, led to an unfortunate uncertainty with regard to the scope of the procedure and to a very hesitant application of the procedure in a broad range of Member States[861]. The same situation has been experienced with the negotiated procedure with prior publication in Albania[862]. Considering the past experience with this approach, adding here the 'supposed extreme flexibility' of these procedures[863], they might be, legally speaking, transposed into the PPL, but it is not sure if they will really be implemented in practice. As such, aiming at their effective implementation, they should not only be transposed into PLL, but first they should be adapted into the national context, especially when speaking for optional changes.

➢ Innovation Partnership[864]

The directive provides for a completely new procedure, which is mandatory for Member States, such as Innovative Partnership. The purpose of this procedure should be the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.
The contracting authority may decide to set up the innovation partnership with one

[860] *S. Treumer* "Evolution of the EU Public Procurement Regime: The New Public Procurement Directive"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 24.
[861] See the extensive and comparative analysis in S. Arrowsmith and S. Treumer (eds.), Competitive Dialogue in EU Procurement, Cambridge University Press, 2012.
[862] See the analysis on the use of the negotiated procedure with prior publication in Albania, in Chapter IV, above.
[863] As discussed earlier, it seems that in Albania not only the legislator fears the discretion of the contracting authorities, but also contracting authorities fear their own discretion. The 'flexibility' of the rules leaves officials open to criticism and to prejudices mainly of the audit bodies, and for this reason they prefer better detailed rules, which will 'protect' them from any audit 'opinion' or 'perceptiveness'.
[864] See article 31 of Directive 2014/24/EU

partner or with several partners conducting separate research and development activities. Thus, the innovation partnership appears to be applicable in situations where close cooperation between the parties is envisaged over a long-term relation and requires the development of products or services, which are not otherwise available on the market[865]. A cursory glance at the three procedures, regulated in successive articles of the Directive, creates an instant impression that all three procedures (including the competitive dialogue and the negotiated procedure with prior publication, as well) are very similar. Each has its own specificities but there is more by way of commonality than distinction between them[866]. As such, the underlying rationale for providing two or three very similar procedures with similar grounds for use might be questioned[867]. It can be argued in favor of the new setup that by having multiple different procedures for use in the same situations, the contracting authorities have more choice at the time of selecting a procedure. However, as discussed also in Chapter IV above, the practice in Albania has already shown that having two or three similar procedures for the same situations confuses procurers and leads to non-adoption as it leaves officials open to criticism should a procedure fail or the results are not as good as anticipated[868]. Yet, the same concern as per competitive dialogue and competitive procedure with negotiations will arise as well as per innovation partnership; legally speaking, this procedure might be transposed into the PPL[869], but because of its specifies as discussed above it is not sure if it will really be implemented in practice[870].

- Negotiated procedure without prior publication of a notice

The new directive has not introduced any major changes to the provisions concerning conduct of this procedure. There were, however, some changes such as for example:
1. The list of circumstances allowing the contracting authorities to apply these procedures[871].

[865] See Recital no.49 of Directive 2014/24/EU.
[866] According to Recital 49 of Directive 2014/24/EU 'The innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation and contracts should be awarded on the sole basis of the best price- quality ratio, which is most suitable for comparing tenders for innovative solutions', suggesting that innovation partnership, is not a proper procedure in its own.
[867] See *P. Telles and L. R. A. Butler* "Public Procurement Award Procedures in Directive 2014/24/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 143.
[868] See point 4.1.1.c, Chapter IV, above.
[869] It should be noted, however, that the procedure of innovation partnership up to the moment of conclusion of innovation partnership is practically the same as the competitive procedure with negotiations (both procedures have the same steps listed) with certain modifications. When implementing the new provisions, Albanian authorities may then state that the innovation partnerships are awarded by means of the competitive procedure with negotiations and add a few provisions specific only for IP.
[870] See also P. C. Gomes "The innovative innovation partnerships under the 2014 Public Procurement Directive", Public Procurement Law Review, 2014, 4, Sweet & Maxwell, London 2014, pg. 211-218.
[871]Accordingly, the negotiated procedure without prior publication may be used:

The Directive at issue determines also 'a non-suitable' tender or request for participation[872]. This provision contains more details than its equivalent from Article 31 (1) b) of 2004/18/EC Directive: "artistic reasons" were replaced with "creation or acquisition of a unique work of art or artistic performance"; an example of "exclusive rights" is provided – intellectual property rights[873].

2. For new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded in a procedure with previous call for competition[874]. The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.

Also, the new directive does not contain the equivalent of the provision related to the award of additional works or services in the circumstances described in Article 31 (4) a) of 2004/18/EC Directive. This does not seem necessary in the light of the new provisions concerning modifications of contracts[875].

The relevant provision of PPL on negotiated procedure without prior publication of a notice should be adapted with the respective changes of the new Directive, having also into consideration the grounds for abusive behavior of this kind of procedure[876].

- **Modified rules concerning publication of procurement notices**

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a) for public works contracts, public supply contracts and public service contracts in any of the following cases: where no tenders or no suitable tenders or no requests to participate or no suitable requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission where it so requests.
b) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons:
   i. the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;
   ii. competition is absent for technical reasons;
   iii. the protection of exclusive rights, including intellectual property rights;

[872] A tender is not suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents. A request for participation is not suitable where the economic operator concerned is to be or may be excluded pursuant or does not meet the selection criteria.
[873] See also J. Davey "Procedures involving negotiation in the new Public Procurement Directive: key reforms to the grounds for use and the procedural rules", Public Procurement Law Review, 2014, 3, Sweet & Maxwell, London 2014, pg. 103-111.
[874] In this case, instead of reference to the open or restricted procedure (as Directive 2004/18/EC[874]), the new Directive makes a reference to any procedure with previous call for competition (i.e. the competitive procedure with negotiations and the competitive dialogue).
[875] Modification of contracts will be discussed below.
[876] See the analysis made in Chapter IV.

Even though the new Directive does not bring significant changes regarding procurement notices, it has provided, however, for some more facilities if PIN[877] is used. Thus, sub – central contracting authorities may use PIN[878] as a means of calling for competition in the restricted procedure and in the new competitive procedure with negotiations. In such case, the publication in the buyer's profile does not suffice; the notice must be published in the OJEU[879]. Another change in this regard is that the threshold values referred to in the Directive 2004/18/EC[880] have been abolished. According to the new Directive at issue, there are no limitations concerning the value of (future) contracts covered by PIN[881].

With regard to the contract notice, there are no notable modifications but one, concerning the publication of the contract notice. Under the 2004/18/EC Directive, the publication of a contract notice at national level may not take place before the date on which it was sent to the Commission[882], while under the new rules, the notice "shall not be published at national level before the publication pursuant to Article 51. However, publication may in any event take place at the national level where contracting authorities have not been notified of the publication within 48 hours after confirmation of the receipt of the notice in accordance with Article 51" [883].

With regard to a contract award notice, the new Directive provides a rule that such a notice should be published not later than 30 days following a decision to award a contract[884], shortening as such the time period provided by Directive 2004/18/EC[885].

As discussed earlier[886], the PPL have no provisions on prior information notice (PIN). However, as this instrument is optional even for Member States, even if it is not implemented in the PPL, the latter should not be considered as inconsistent with EU law. Also, regarding the time period for publication of the contract award notice, at the time being, PPL provides for much shorter period than it is required by both the old (48 days) as well as the new directive (30 days). In this case, the Albanian PPL can opt for keeping the current time period or extending it to maximum allowed by the directive (i.e. 30 days).

- **Time periods**

[877] The new Directive does not provide significant changes concerning PIN, the basic advantage of its publication for the contracting authority remains that it can shorten, after having duly published PIN, time periods for submission of tenders. See the analysis in Chapter III above.

[878] However, as mentioned above, the option concerning the use of PIN instead of a contract notice is facultative for Member States. They can make it available for all or a part of the sub – central contracting authorities.

[879] See article 48/2 of Directive 2014/24/EU.

[880] See article 35/1 of Directive 2004/18/EC.

[881] See article 48/1 of Directive 2014/24/EU.

[882] See article 36/5 of Directive 2004/18/EC.

[883] See article 52 of Directive 2014/24/EU.

[884] See article 50 of Directive 2014/24/EU.

[885] See article 35/4 of Directive 2004/18/EC

[886] See the detailed analysis in point 3.2, Chapter III.

The new directive significantly reduced minimum time periods for receipt of requests or tenders[887]. Thus, notwithstanding the basic rule that requires taking account of the complexity of the contract and the time required for drawing up tenders, the minimum time periods provided by the Directive at issue are as follows:

- In principle, the time period for submission of tenders in an open procedure should be at least 35 days counted from the date of sending the contract notice[888]. The minimum time periods in case of using a restricted procedure should be:
  - receipt of requests for participation 30 days counting from the dispatch of the contract notice (or, in the case of using PIN as a means for calling for competition since the date of sending the invitation to confirm interest);
  - receipt of tenders 30 days since the date of sending the invitation to tender[889].
- Minimum time periods for the competitive dialogue procedure are 30 days for the receipt of requests for participation.
- Minimum time periods in case of using a competitive procedure with negotiations should be:
  - receipt of requests for participation 30 days from sending the notice (or, in the case of application of PIN – 30 days from sending the invitations to confirm interest);
  - receipt of initial tenders 30 days since the date of sending the invitation to tender.
- Minimum time periods for the innovation partnership procedure are 30 days for the

[887] See also G. Fletcher "Minimum time limits under the new Public Procurement Directive", Public Procurement Law Review, 2014, 3, Sweet & Maxwell, London 2014, pg. 94-102.

[888] According to the new Directive, shortened time periods are allowed in the following situations:

- in the case of publication of PIN not being a call for competition, the time period is shortened to 15 days;
- in the case of a state of urgency duly substantiated by the contracting authority, the time period is shortened to 15 days;
- in the case of submitting tenders electronically, the time period is shortened to 30 days.

[889] These time limits may be shortened:

- in the case of publication of PIN not being a call for competition, the time period is shortened to 10 days;
- in the case of contracting authorities other than central contracting authorities, the time period may be set by mutual agreement between the contracting authority and the selected candidates, provided that all selected candidates have the same time to prepare and submit tenders. In the absence of agreement on the time limit for the receipt of tenders, the time limit shall be at least 10 days from the date on which the invitation to tender was sent[889];
- in the case of submitting tenders electronically, the time period is shortened to 25 days;
- in the case of a state of urgency duly substantiated by the contracting authority, the time period is shortened to:

15 days for the receipt of requests and 10 days for the receipt of tenders.

receipt of requests for participation.

As discussed in Chapter IV above, PPL foresees different time limits from both Directives at issue. Thus, in case of open procedures it provides for a longer time period compared to the new Directive[890]. In case of restricted procedures, the time periods provided by PPL are shorter than those provided by both Directives. Considering these differences, and time periods for new procedures, which are not yet implemented by PPL, new time limits, respectively for each of the procedures should be introduced.

- **Central purchasing**

According to the new Directive[891], Member States may provide that contracting authorities may acquire supplies and/or services from a central purchasing body offering the centralized purchasing activity. Member States may 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 a framework agreement concluded by a central purchasing body offering the centralized purchasing activity. Where a dynamic purchasing system, which is operated by a central purchasing body, may be used by other contracting authorities, this shall be mentioned in the call for competition setting up that dynamic purchasing system.

Member States may provide that certain procurements have to be made by having recourse to the central purchasing bodies or to one or more specific central purchasing bodies[892].

However, the contracting authority concerned should be responsible for fulfilling the obligations pursuant to the directive in respect of the parts it conducts itself, such as:

a) awarding a contract under a dynamic purchasing system, which is operated by a central purchasing body;

b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body;

c) determining which of the economic operators, a party to the framework agreement, should perform a given task under a framework agreement that has been concluded by a central purchasing body.

[890] The comparison is done referring to the time limits provided for open international procedures, which have implemented the relevant time limits of Directive 2004/18/EC, 52 days.

[891] See article 37 of Directive 2014/24/EU. The provision of the new Directive, in this regard, is much more detailed than relevant provisions of Directive 2004/18/EC (see articles 1/2 (10) and article 11).

[892] See also C. R. Hamer "Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies", Public Procurement Law Review, 2014, 4, Sweet & Maxwell, London 2014, pg. 205-206.

It should be underlined that according to the new Directive all procurement procedures conducted by a central purchasing body should be performed using (exclusively) electronic means of communication[893].

Contracting authorities may, without applying the procedures provided for in the directive, award a public service contract for the provision of centralized as well as ancillary purchasing activities. The latter are defined as activities consisting in the provision of support to purchasing activities, in particular in the following forms[894]:

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.

As PPL has already introduced the central purchasing instrument[895] (even though it is optional for Member States), it has to change its relevant provisions, to comply with relevant provisions of the new Directive. The main change should be regarding the use of the dynamic purchasing system and the framework agreement. As per the obligation of using only electronic means for procurement procedures conducted by a central purchasing body, it should be noted that the procurement legislation in Albania has already been accomplished[896].

- **Access of SMEs to public contracts**

One of the purposes of adoption of a new directive on public procurement was making access to the procurement market easier for small and medium entrepreneurs[897]. Accordingly, the new directive contains four main 'innovations' directed at the promotion of SMEs: the division of contracts into lots[898], the European Single Procurement Document[899], the limitations of requirements for participation[900], and direct payments to subcontractors[901]. Behind the promotion of SMEs, there is often the intention to promote the local economy; smaller companies will often be local companies. Since

[893] However, it should be noted that the aapplication of the electronic communication may be postponed by Member States until 36 months after the entry into force of the directive.
[894] See article 1/1 (15) of Directive 2014/24/EU.
[895] Article 11 of PPL.
[896] See the discussion on the mandatory use of the electronic system in Albania, point 2.4.3, Chapter II.
[897] This purpose has been stated in Recital 2 of Directive 2014/24/EU, providing among others that "…Directive 2004/18/EC of the European Parliament and of the Council should be revised and modernized in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement..,".
[898] See Recitals no.78-79 and article 46 of Directive 2014/24/EU.
[899] See article 59 of Directive 2014/24/EU.
[900] See article 58 of Directive 2014/24/EU.
[901] See article 71 of Directive 2014/24/EU.

'local' normally means national, this implies a protectionist objective which cannot be reconciled with the objectives of the Internal Market and its procurement Directives[902]. As such, one of the main mechanisms proposed by the Directive to promote and facilitate the access of SMEs throughout the EU market is the encouragement of contracting authorities to divide the contracts into lots.

According to new Directive[903], the contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots[904]. Even though the wording used in this provision "may" implies that the contracting authorities are allowed but not obliged to award contracts in separate parts, the new Directive is more than 'optional' in this regard[905] providing in the same provision that "Contracting authorities shall, except in respect of contracts, whose division has been made mandatory, provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the individual report[906]."

When the procurement is divided into lots, the contracting authorities should indicate in the contract notice or in the invitation to confirm interest, whether tenders may be submitted for one, for several or for all of the lots. It seems that this provision provides for a possibility that the contracting authority prohibits application by the same economic operator for all lots.

The directive then goes on stating that the contracting authorities may, even where tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is stated in the contract notice or in the invitation to confirm the interest. The contracting authorities should indicate in the procurement documents the objective and non-discriminatory criteria or rules they intend to apply for determining which lots will be awarded, where the application of the award criteria would result in one tenderer being awarded more lots than the maximum number.

There is a facultative solution in the directive for which Member States may opt that, where more than one lot may be awarded to the same tenderer, the contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.

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[902] See further *M. Trybus* "The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?" François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 257.

[903] See article 46 of Directive 2014/24/EU.

[904] However the EU approach is heavily oriented toward simplification policies to reduce the burden for SMEs of participating to tenders, but it excludes the possibility of set-asides or preferences in public procurement. See further M. Fana and G. Piga 'SMEs and public contracts. An EU based perspective', 'EU Public Procurement-Modernisation, Growth and Innovation. Discussions on the 2011 proposals for Procurement Directives' 1st Edition, Djøf Publishing, Copenhagen, Denmark, 2012, pg. 33-54.

[905] The Directive 2004/18/EC, on the other hand does not provide for such requirement.

[906] See article 84 of Directive 2014/24/EU.

Also, Member States may implement provisions on division of contracts into lots in such a way that makes obligatory to award contracts in the form of separate lots under conditions to be specified in their national law and having regard for Union law.
The Albanian implementing rules already provide for mandatory division of contracts into lots, but it provides and allows for this mandatory division, only in the case of contracts made up of a set of homogenous works, goods, or services as well as contracts where, due to their significant value, the competitions is limited, precisely in order to enable better access of SMEs to the public procurement market[907]. As such, the approach of the Albanian legislation is still much narrower especially compared with the new Directive's approach. As emphasized above, in the Albanian system the division into lots is allowed only in the case of homogenous works, goods, or services, while according to the Directive, the division into lots is encouraged in any case, without any precondition. However, the analysis of the necessity of division of a contract into lots and furthermore, making it mandatory, should be done, considering at the same time the concrete environment where this provision will be implemented. Thus, the provisions of EU Directive, which intend to facilitate the access of SMEs in the public procurement process, should be read under the current context of the European Union. The Europe 2020 Strategy requires a more efficient use of public funds by improving the conditions for business to innovate and supporting the shift towards a resource-efficient and low-carbon economy. Directive 2014/24/EU has introduced simplified rules and procedures with the aim of opening EU markets (especially for SMEs). It aims, among other objectives, to overcome barriers to aggregation of public demand of goods, services and works and to foster cooperation between public entities, preventing any distortion of competition[908]. The mechanisms proposed by Directive, especially the one related with the (mandatory) division of the contracts into lots is justified with the need of the European Union to improve the business environment for SMEs throughout EU. The Albanian context, on the other hand, is rather different in this regard. As it is discussed earlier, procurement legislation in Albania promotes the access of SMEs in the procurement process through direct provisions (such as the one, requiring the division into lots) and through indirect provisions (such as the requirement on turn over of economic operators, which should not be more than the estimated value of the contract, requirement on past experience, which may vary from 0-40% for supplies and services contracts and 0-50% for works contracts, the implementation of e-procurement system, the possibility of direct payments to the sub-contractors, etc). Except for mechanisms of public procurement legislation, another important factor, which impacts the business environment of SMEs in Albania, is the economic power of the country[909]. According to

[907] See article 9/5 of the Decision of Council of Ministers no. 914, date 29.12.2014 "Rules on Public Procurement".
[908] See *G. M. Racca* Joint Procurement Challenges in the Future Implementation of the New Directives; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 226-227.
[909] The Gross Domestic Product (GDP) in Albania was worth 12.90 billion US dollars in 2013. The GDP value of Albania represents 0.02 percent of the world economy. GDP in Albania averaged 5.41 USD

the Sectorial Structural Reforms to Promote Competiveness and Growth[910], the main objective of this reform initiative is to increase innovation capabilities and technological changes for SME-s. This objective is in compliance with the recommendations of the EC, under the Sub Committee for Trade, Industry, Taxation and Customs 2014 (SC TITC 2014 recommendation), to encourage competitiveness in all policy areas affecting SME-s. The SME sector has a substantial contribution to the economic growth and employment, respectively 80% of GDP and over 70% of total employment[911]. Considering that the SME sector has a substantial position in the Albanian economy on one hand and considering that the public funds at disposal of contracting authorities in Albania, to be procured, generally are not high values[912], the possibility of SMEs to participate in the procurement process is considerably high. Also, the mandatory use of the e-procurement system, either for very low values[913], facilitates a lot the access of SMEs in the procurement process[914]. As such, even if there is not a division into lots, generally the values of the procured contracts are not so high to serve as obstacles for SMEs to participate. In these conditions, the solution proposed by the Directive at issue, to encourage the division of contracts into lots, may serve as a very good one in the EU context, but will not necessary effect the Albanian system in this regard. However, apart for the transparent process provided to the SMEs in Albania, to promote and increase their participation in procurement procedures, it should be considered also the (low) level

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Billion from 1984 until 2013, reaching an all time high of 12.90 USD Billion in 2013 and a record low of 0.71 USD Billion in 1992. GDP in Albania is reported by the World Bank Group. See http://www.tradingeconomics.com/albania/gdp, retrieved on May 20, 2015.

[910] National Economic Reform Programme of Albania 2015 – 2017 Sectorial Structural Reforms to Promote Competiveness and Growth *(Part II) January 2015, available at http://www.ekonomia.gov.al/files/userfiles/Albania_NERP_2015.pdf, Retrieved May 20, 2015.*

[911] Strengthening technological capacities of SMEs is part of the Business and Investment Development Strategy 2014-2020 and in full compliance with SEE 2020 National Action Plan. That it contributes to Smart Growth pillar, and will contribute to headline target about increasing GDP per person employed through enhanced value added and productivity gains. Ibid, pg. 17.

[912] Referring to the statistics on the type of procedures used by the contracting authorities, we will see that the procedure, which is used most during a year is the request for proposal (See PPA' Annual Report 2010-1014, available at www.app.gov.al, retrieved on April 10, 2015). As explained in Chapter V above, this procedure is used for relatively low value contracts (from ALL 800 000 up to ALL 8 million for supplies and services and ALL 12 million for works. Converted in euro these thresholds are approximately from 5.700 euro up to 57.000 euro for supplies and services and 85.000 euro for works).

[913] The e-procurement system in Albania should be used for all procedures with a value up to around 7 hundred Euros.

[914] According to a study done in 2013, economic operators, subject of the study, have stated that the use of the e-procurement system has increased the efficacy of the procurement process and the access of the economic operators in the process, compared to the paper based system. Some of the aspects, which are positively evaluated from the economic operators in this regard, are the speed of the process, increase of the competition, decrease of corruptive practices and decrease of administrative costs. See "The use of electronic system at a local level", a study of Partners Albania, Center for Change and Conflict Management, Albania, 2013, pg. 20 and 29; available at http://www.partnersalbania.org/skedaret/1379588431-shqip_e_prokurimet.pdf, retrieved on May 18, 2015.

of specialization in the field, of the SMEs personnel. In this case an effective measure will be preparation of simplified procurement documents and trainings of SMEs[915].
Considering the above analysis, when implementing this provision, the Albanian PPL may decide to stick to the wording of the directive and transpose the minimum requirements of this provision or to go further and to render division into lots obligatory, but this will not make any evolution in this regard.

- **European Single Procurement Document:**

The new Directive introduces the concept of the so called European Single Procurement Document (ESPD)[916]. According to this instrument, at the time of the submission of requests to participate or of tenders, the contracting authorities should accept the European Single Procurement Document, consisting of an updated self-declaration as preliminary evidence in the replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator meets the following conditions:

a) It is not in one of the situations in which economic operators must or may be excluded;

b) It meets the relevant selection criteria;

c) Where applicable, it fulfills the objective rules and criteria that have been set out pursuant to Article 65 (short - listing).

ESPD may be characterized as a document (in exclusively electronic form, two years after the expiry of the time period for implementation of the directive) which:

- Consists of a formal statement by the economic operator that the relevant ground for exclusion does not apply and/or that the relevant selection criterion is fulfilled and provides the relevant information as required by the contracting authority;
- Identifies the public authority or third party responsible for establishing the supporting documents and contain a formal statement to the effect that the economic operator will be able, upon request and without delay, to provide those supporting documents;
- Where the contracting authority can obtain the supporting documents directly by accessing a public database, the EPSD contains the information required for this purpose, such as the internet address of the database, any identification data and, where applicable, the necessary declaration of consent;

[915] See also C. Evans "Public Sector Tendering Challenges for SMEs, Procurer Feedback Provision and Tendering Support Mechanisms: Insights from the Welsh Tender Review Services", Charting a Course in Public Procurement Innovation and Knowledge Sharing, G. L. Albano, K.F.Snider and K.V.Thai (eds), by PrAcademics Press, USA, 2013, pg. 119-149.
[916] See article 59 of Directive 2014/24/EU.

- Could be reused provided that the economic operators confirm that the information contained therein continues to be correct.

Introduction of such instrument is very helpful for economic operators and especially the SMEs, because it eliminates administrative burdens and administrative costs of participation, particularly with regard to documentation for the qualification of candidates (evidence for selection criteria)[917]. However, the basic problem with the reduction of the administrative burden in this context is of course that this can be taken too far. After all, this documentation for the qualification of tenderers is collected for a good reason: to protect the contracting authority and ultimately the taxpayer from unreliable, incompetent and incapable economic operators and the negative consequences for the procurement procedures and the completion of the eventual contract that the selection of such companies can have. A certain level of administrative burden is justified to avoid additional costs, the waste of time and effort in dealing with unqualified bidders, and the delay or other problems during contract implementation. Thus, there needs to be a balance between the administrative burden involved in proving qualification, on the one hand, and the protection of contracting authorities from unqualified bidders on the other hand[918]. As such, the effective application of this instrument requires an environment with high level integrity, which seems not to be the Albanian case. Still, this instrument should coexist together with the self-cleaning concept. Considering that the current approach of the PPL (which is considerably stricter than Directive (s)) does not provide for optional grounds for exclusions and does not accept self-declarations (from Albanian bidders[919]), the implementation of the instrument at issue is almost impossible. However, maybe it's time for Albania to consider more flexible rules on this regard, aiming at the reduction of administrative costs and increase of the efficiency in the procurement process. In any case, the introduction of more flexible rules should occur, providing that there is no risk for abusive behavior especially from economic operators' side.

- **e-Certificates information mechanism (e-CERTIS)[920]**

[917] See Recital no.84 of Directive 2014/24/EU, according to which 'Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through use of a European Single Procurement Document (ESPD) consisting of an updated self-declaration, could result in considerable simplification for the benefit of both contracting authorities and economic operators'.

[918] See *M. Trybus* "The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?" François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 266.

[919] It should be noted, however, that PPL does accept self-declaration for proving at list their legal situation, only from foreign economic operators. This differentiated treatment is a clear indicator of the negative opinion on the level of integrity of the Albanian economic operators.

[920] See articles 59-61 of Directive 2014/24/EU.

The new Directive has introduced another solution in order to facilitate the access of economic operators to public procurement procedures by reducing the paperwork, such as the application of e-Certificates information mechanism (e-CERTIS). This is a tool, which can help an economic operator wishing to submit a proposal in response to a call for tenders held in another country covered by eCERTIS as well as a contracting authority that has to evaluate a foreign tender to understand what information is being requested or provided. It can also help to identify documents that match certificates and attestations that are required in a given country.
According to the new directive, eCERTIS is an online repository of certificates, where suppliers can find out the type of documents, which they may be asked to provide in any EU country, even before they decide to bid. This should be of particular help when suppliers wish to bid cross-border, as they may be unfamiliar with the detailed requirements of other EU Member States.
As it is prescribed, the application of this information mechanism is strictly related and dedicated to the EU Member States, and seems to 'support' the Single European Procurement Document' instrument. In this context, it is not a requirement that should be imposed on a non- Member State. However, PPL might consider the application of this tool as it might be with high importance especially for foreign economic operators, submitting a request for participation or a tender in Albania.

- **Dynamic Purchasing System**

Differently from Directive 2004/18, where the dynamic purchasing system was an option for Member States[921], Directive 2014/24 provides this system as an option for contracting authorities[922].
The most important innovations in applied rules for the dynamic purchasing system are the following:

- In order to procure under a dynamic purchasing system, the contracting authorities should follow the rules of the restricted procedure (unlike under 2004/18/EC Directive where it is the open procedure)[923];
- Since the open procedure is not applied in order to set the dynamic purchasing system, the economic operators do not submit indicative tenders but request to be admitted to the system (within 30 days since dispatch of a contract notice);

[921] See article 33 of Directive 2004/18/EC.
[922] See article 34 of Directive 2014/24/EU.
[923] However, the reference to the restricted procedure may be slightly misleading since the dynamic purchasing system and the restricted procedure share only the first stage of the restricted procedure. Unlike it is the case of the restricted procedure, while using the dynamic purchasing system, the contracting authority may not limit the number of candidates admitted to the system; all candidates, who meet the minimum qualification criteria set by the contracting authority should be admitted to the system. Once this system is established, it is open to all potentially interested economic operators, who may submit a request to be admitted at any time;

- There is no publication of any simplified contract notices in the event the contracting authority procures goods or service covered by the system, but the contracting authority invites directly economic operators included in the system to submit tenders within the minimum time period which is 10 days.

Since the dynamic purchasing system is not yet provided under the Albanian procurement provisions (other than its definition[924]), the implementation of the directive in that regard requires the transposing of relevant provisions practically from scratch. While according to the Directive 2004/18/EC, this was an optional tool, according the new Directive it is not any more optional and as such, the position of PPL in this regard has changed and formally speaking, there is not much choice but to implement provisions at issue. Nevertheless, the implementation of the dynamic purchasing system will not be impossible and inappropriate in the Albanian context. This might require a further development of the electronic platform, already in use, but in practice it will be easily absorbed (from both sides; the contracting authorities and the economic operators) in a working environment, where the e-procurement is being used from several years now.

- **Electronic auctions**

The situation with the provisions on electronic auction is generally the same as with the dynamic purchasing system. The new Directive contains generally the same provisions on e – auctions[925], compared to the Directive 2004/18[926] but as in the case of the dynamic purchasing system, the use of e- auctions under the new Directive is not facultative for Member States[927].

Same as in the case of the dynamic purchasing system, PPL (apart of providing a definition) has not effectively implemented the electronic auctions. While according to the Directive 2004/18, this was an optional tool, according to the new Directive it is not any more optional. Consecuently, the position of PPL in this regard has changed and as such the relevant provisions of the new Directive should be transposed into the PPL.

- **Qualification and award criteria**

  - **Exclusion criteria**

The new directive, as well as the Directive 2004/18[928], provides for mandatory and facultative criteria (conditions) for the exclusion of economic operators. As regarding the

[924] See the analysis made in point 4.2.2, Chapter IV above.
[925] See article 35 of Directive 2014/24/EU.
[926] See article 54 of Directive 2004/18/EC.
[927] Also Directive 2014/24/EU, differently from the Directive 2004/18/EC, has elaborated in the relevant article, which will be considered as admissible tender, and which will be considered as an irregular tender (see article 35/5).

mandatory grounds for exclusion, apart from the list provided by the Directive 2004/18, the new Directive has added 'terrorist financing' and 'child labor as well as other forms of trafficking in human beings'[929]. The obligation to exclude an economic operator applies also where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein.

Additionally, one ground for exclusion, which is optional under Directive 2004/18 became a mandatory one in accordance with the new rules and in concrete, according to the new Directive, an economic operator should be excluded from participation in a procurement procedure where the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and where this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority[930].

Directive 2014/24 includes in its list of explicit exclusions not only grounds for exclusion relating to professional qualities of economic operators, but also grounds of exclusion that are designed to ensure equal treatment[931].

- **Optional grounds for exclusion**

According to the new Directive, except for the optional grounds provided by Directive 2004/18, the following grounds may be used also by the contracting authorities to exclude economic operators[932]:

- Where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18 (2) of the directive (i.e. environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provision);
- Where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable (new is a part of the provision linking misconduct with (lack) of integrity);
- Where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting the competition;
- Where a conflict of interest within the meaning of Article 24 of the new directive cannot be effectively remedied by other less intrusive measures;

[929] See the detailed analysis done at point 3.3.2.1.a, Chapter III, above.
[930] See article 57/2 of Directive 2014/24/EU.
[931] See further S. Arrowsmith "Law of Public and Utilities Procurement", Volume 1, Third Edition, Sweet & Maxwell, London 2014, para. 12-142.
[932] A novelty of Directive 2014/24/EU is that it allows that a Member State may, however, make those grounds, all or some of them, mandatory (see article 57/4).

- Where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure, as referred to in Article 40 (preliminary market consultations), cannot be remedied by other, less intrusive measures;
- Where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract, which led to the early termination of that prior contract, damages or other comparable sanctions;
- Where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award;
- Where the economic operator has breached obligations to pay taxes or social security obligations,
- Where a mandatory exclusion has not been triggered by a formal judicial or administrative finding;
- Has violated social/environmental/labor laws;
- Is bankrupt/insolvent (though the contracting authorities may decide, or may be required by Member States, not to exclude the operator where it can be established that the operator will be able to perform the contract[933]);
- Has committed grave professional misconduct;
- Has attempted to distort competition in various kinds of way; has significantly or persistently under-performed in previous public contract(s);
- Has attempted to unduly influence the decision-making process;
- **Self-cleaning**

The New Directive 2014/24, on the other hand, is more flexible than even Directive 2004/18, regarding the obligation to provide evidences. It gives the possibility to the economic operators to provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion (so called "self – cleaning")[934]. Notwithstanding the existence of grounds for exclusion, any economic operator being in one of the situations referred to above as mandatory or optional grounds for exclusion may provide evidence

[933] With regard to bankruptcy, the directive allows Member States to require or allow for the possibility that the contracting authority does not exclude an economic operator, which is in one of the situations referred to in that point, where the contracting authority has established that the economic operator in question will be able to perform the contract, taking into account the applicable national rules and measures on the continuation of business.

[934] See article 57/6 of Directive 2014/24/EU.

to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. This is an entirely new solution under the directive. If such evidence is considered as sufficient, the economic operator concerned should not be excluded from the procurement procedure[935].
Also, in case of taxes and social security contributions, it gives the possibility to economic operators to fulfill their obligations by paying or entering into a binding arrangement with a view to pay the taxes or social security contributions due, including, where applicable, any interest accrued or fines[936].
The measures taken by the economic operators should be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator should receive a statement of the reasons for that decision[937].
The Directive at issue provides also that Member States must specify, by law, regulation or administrative provision, the implementing conditions for the mandatory exclusion. They shall, in particular, determine the maximum period of exclusion (subject to self-cleaning – see below) up to a maximum of 3 or 5 years (depending on the exclusion ground concerned). The choice here is whether to opt for the maximum exclusion periods allowed by the directive, or limit these to shorter periods[938].

As the new Directive has brought some novelties in this regard, PPL will need to be changed as well to implement such novelties. However, it should be noted that, as new Directive gives the possibility that all optional grounds for exclusion may be made mandatory grounds for exclusion (and PPL provides only for mandatory grounds for exclusion), the only change may be the transposition in the PPL of the new grounds for exclusion. In addition, regarding the new requirement of the Directive on determining the maximum period of exclusion (subject to self-cleaning – see below) up to a maximum of 3 or 5 years (depending on the exclusion ground concerned), PPL has already provided for such rule[939]. As per 'self-cleaning' possibility, before implementing it, the

[935]For this purpose, the economic operator is obliged to prove that:

- It has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct,
- Clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and
- Taken concrete technical, organizational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

[936] See article 57/2 of Directive 2014/24/EU.

[937] There is, however, an exception to the obligation to accept as reliable the economic operator, who undertaken above mentioned (self – cleaning) measures. It is the case where an economic operator has been excluded by a final judgment from participating in procurement or concession award procedures; in such a case it is not be entitled to make use of the possibility provided for under this provision during the period of exclusion resulting from that judgment in the Member State where the judgment is effective.

[938] See also H. J. Priess "The rules on exclusion and self-cleaning under the 2014 Public Procurement Directive" Public Procurement Law Review, 2014, 3, Sweet & Maxwell, London 2014, pg. 112-123.

[939] See the analysis done at point 3.3.2.1, Chapter III, above.

circumstances of application of such possibility should be carefully evaluated to avoid any possible abusive behavior from the economic operators[940].

- **Selection criteria**

The new Directive makes it clear that qualification (selection of the economic operators) in procurement procedures may concern only the following elements:

a) Suitability to pursue the professional activity;

b) Economic and financial standing;

c) Technical and professional ability.

The contracting authorities are obliged to limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded. All requirements should be related and proportionate to the subject-matter of the contract.

➢ The new Directive (same as Directive 2004/18)[941], except for the requirement for the economic operator to prove that they are enrolled on trade or professional registers in their Member State of establishment, in the case where no relevant register exists in these states, does allow economic operators to produce a declaration on oath or a certificate as described in relevant Annexes[942].

PPL, on the other hand, does not provide for the possibility of 'a declaration on oath'. In any case, according to PPL, the economic operators should submit the relevant documents to prove their suitability to pursue the professional activity, as required.

➢ With regard to economic and financial standing, the contracting authorities may impose requirements ensuring that the economic operators possess the necessary economic and financial capacity to perform the contract. The difference of the new Directive (comparing with Directive 2004/18/EC) is that it does not provide as a proof statements from banks[943]. Furthermore, the new Directive (same as Directive 2004/18/EC) [944] provides in this regard for the possibility of an economic operator to rely on the resources of other entities to prove its economic and financial standing. Also, the Directive (s) at issue gives to the economic operator the possibility to prove his economic and financial standing by any other document, which the contracting authority considers appropriate, if, for any valid reason, it is unable to provide the references requested by the contracting authority as such[945]. The Albanian legislation, on the other hand, does not

[940] See also discussion on European Single Procurement Document, above.
[941] See article 46/1 of Directive 2004/18/EC and article 58/2, para.1 of Directive 2014/24/EU.
[942] Both Directives do provide in their relevant Annexes a list of registers and corresponding declarations or certificates for each EU Member State, in respect of works, supplies and services. See Annex IX A for public works contracts, in Annex IX B for public supply contracts and in Annex IX C for public service contracts of Directive 2004/18/EC and Annex XI of Directive 2014/24/EU.
[943] See article 47/1 of Directive 2004/18/EC and article 58/3 of Directive 2014/24/EU.
[944] See article 47/2 and 3 of Directive 2004/18/EC and article 63 of Directive 2014/24/EU.
[945] See article 47/5 of Directive 2004/18/EC and article 60/3 of Directive 2014/24/EU.

explicitly provide for such possibilities. As discussed in Chapter IV, above, according to PPL, the only possibility for an economic operator to rely on the capacities of other entities is when they have a legal relation between them, as envisaged by the legislation on trade companies[946]. In all other cases, the economic operator should prove that it can fulfill by himself the required capacities[947].

- With regard to the technical and professional ability, the contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. Regarding the required time for the past experience, the Directive 2014/24/EU, differently from Directive 2004/18/EC, which requires it for past five years[948], does not provide such time limitation at all[949]. While PPL requires past experience during past three years.
- Possibility of requiring economic operators to supplement or clarify evidences.

According to the new Directive, where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, the contracting authorities may, unless otherwise provided by the national law implementing this Directive, request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency[950]. PPL does not foresee at all the possibility of economic operators to supplement the already submitted documents.
Implementation of those provisions will require changes in the Albanian PPL. However, while implementing these rules, PPL should also consider, which will be the necessary measures to prevent the untrue declarations and to ensure the contracting authority that the economic operator submitting an offer is professionally suitable, in case of self-declaration, and to prevent the possibility of mis-implementation of the rules from the contracting authorities, in case of accepting submission, supplement, clarification or completion of the relevant information or documentation within an appropriate time limit. It should be noted, however, that the latest situation is left somehow optional from Directive, providing that 'national law implementing this Directive may provide

[946] See articles 207, 208, 209 of the law no.9901, dated 14.04.2008 "On trade and trade companies", as amended.
[947] This stricter approach of PPL is reflected also at the condition of joint ventures among economic operators, applying in a procurement procedure. According to article 74 of the Decision of Council of Ministers No. 914, dated 29.12.2014 "On approval of the public procurement rules", the members of the joint venture should fulfill proportionally with the percentage of their participation in the contract execution, all required capacities. As such, they cannot rely on capacities of other members of the joint venture. This stricter provision of the PPL, is explained with the need of the contracting authority to put insurance mechanisms for the satisfactory performance of the contract, related this with the legal and economic environment where this law is applied.
[948] See article 58/2/a.
[949] See article 58/4.
[950] See article 56/3 of Directive 2014/24/EU.

otherwise'. As such, if PPL will 'provide otherwise', it should not be considered as not approximated.

- **Contract award criteria**

The new directive introduces a number of significant changes with regard to the contract award criteria[951]. First of all, it does away, at least formally, with a distinction between the lowest price criteria and the criterion of the most economically advantageous tender.
According to this Directive[952], the contracting authorities shall base the award of public contracts on the most economically advantageous tender. The most economically advantageous tender from the point of view of the contracting authority is to be identified on the basis of the price or cost, using a cost-effectiveness approach, such as the life-cycle costing and may include the best price-quality ratio[953]. The best price-quality ratio should be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. The wording "may include the best price-quality ratio" seems to imply that the analysis of the best price - quality ratio is possible but by no means is it mandatory.
Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts. The analysis of this provision indicates also that the new concept of the most economically advantageous tender covers both situations: when the award is based on the number of criteria (former MEAT) as well as the lowest price (cost) only.
Such conclusion seems to be confirmed also by the provision that the contracting authority shall specify, in the procurement documents, the relative weighting it gives to each of the criteria chosen to determine the most economically advantageous tender, except where this is identified on the basis of price alone.
Secondly, the criteria which can be used when the contracting authority decides to award a contract on the basis of the best price quality ratio may comprise, for instance:

a) Quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;

b) Organization, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or

c) After-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

[951] See generally P. B. Faustino "Award criteria in the new EU Directive on public procurement", Public Procurement Law Review, 2014, 3, Sweet & Maxwell, London 2014, pg. 124-133.
[952] See Article 67 of Directive 2014/24/EU.
[953] See also article 68 of Directive 2014/24/EU.

Thirdly, the award criteria, as it was already made clear by the settled case law[954], should be linked to the subject-matter of the public contract. This requirement is satisfied where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

a) The specific process of production, provision or trading of those works, supplies or services; or

b) A specific process for another stage of their life cycle, even where such factors do not form part of their material substance.

Fourthly, the award criteria cannot have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, the contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.
It should also be noted that the new directive allows the contracting authorities to decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in Article 18 (2) of the directive[955].

Another novelty of the new Directive is the possibility of using so called life-cycle costing[956].

According to the directive, life-cycle costing should, to the extent relevant, cover parts or all of the following costs over the life cycle[957] of a product, service or works:
a) Costs, borne by the contracting authority or other users, such as:

(i) Costs relating to acquisition,

(ii) Costs of use, such as consumption of energy and other resources,

(iii) Maintenance costs,

(iv) End of life costs, such as collection and recycling costs.

b) Costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant

[954] See case law analyzed in point 3.4.2.2, Chapter III, above.
[955] Referring to the fulfillment of obligations related to social or labor law.
[956] See article 68 of Directive 2014/24/EU.
[957] According to the definition provided in Article 2 (20) of Directive 2014/24/EU: "life cycle" means all consecutive and/or interlinked stages, including research and development to be carried out, production, trading and its conditions, transport, use and maintenance, throughout the existence of the product or the works or the provision of the service, from raw material acquisition or generation of resources to disposal, clearance and end of service or utilization.

emissions and other climate change mitigation costs.
The method used for the assessment of costs imputed to environmental externalities should fulfill all of the following conditions:

a) It is based on objectively verifiable and non-discriminatory criteria. In particular, where it has not been established for repeated or continuous application, it shall not unduly favor or disadvantage certain economic operators;

b) it is accessible to all interested parties;

c) The data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound.

Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union, that common method should be applied for the assessment of life-cycle costs[958].
As analyzed in Chapter IV, above, the Albanian PPL[959] provides for a choice between applying the lowest price only criterion and the criterion of the most economically advantageous tender. In the latter case, the contracting authority applies a number of factors linked to the subject matter of public procurement, which should be objective and non – discriminatory. The PPL seems to provide a free choice between those two criteria but the secondary legislation limits options available to the contracting authorities[960]. Thus, the lowest price criterion is to be applied with regard to simple, standardized goods, services, and works, while the most economically advantageous tender with regard to complex contracts, of special nature, which except for the price, includes also other components with an economic value that should be borne by the contracting authority, such as costs of after sale services, maintenance (spare parts) costs, most favorable technical solutions, technical support and technical solutions, which are less harmful to the environment. Furthermore, according to the PPL, to determine the most economically advantageous tender, a contracting authority should take into account several criteria linked to the subject-matter of the public contract such as: quality, price, technical merits, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion In any case, the weight of the price, when more than one criterion is used, should not be less than 50 %. As it is seen, the Albanian procurement legislation does generally provide for the elements of the life-

[958] A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XIII to the directive. The Commission is empowered to adopt delegated acts in accordance with Article 87 concerning the update of that list, when an update of the list is necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legal acts. (See article 68/3 of Directive 2014/24/EU).
[959] See article 55 of PPL, which was amended in 2012 for this purpose.
[960] See article 31 of the Decision of Council of Ministers no. 914, date 29.12.2014 "Rules on Public Procurement".

cycle costing, but first they are not so structured and clear as provided by the new Directive (PPL does not explicitly provides for 'costs of use, such as consumption of energy and other resources' or 'end of life costs, such as collection and recycling costs' and 'costs imputed to environmental externalities') and second, PPL is still too bound to price, even when it decides to go with MEAT, so in practice the cost-effectiveness approach**,** such as the life-cycle costing, will be hampered somehow by the price.

Considering the fact that the practice in the Albanian procurement system has showed that MEAT criterion is rarely used by the contracting authorities and this is explained with the low level of professionalism and "fear from discretion", which associate the procurement process[961], it should be admitted that it will be very difficult to effectively implement in the Albanian procurement regime, the new approach proposed by the Directive especially regarding the life-cycle costing (LCC).

The first difficulty is related with the fact that according to the new Directive's provisions, the boundaries between the lowest price and MEAT are not as clear as before. The fact that MEAT now includes the award of contracts based on price or cost only may lead to some confusion, as under the Directive 2004/18, it implied that factors other than cost were included[962]. Resorting to LCC makes the award procedure using the lowest price criterion a complex one. The difference from MEAT will be that in the case of an award based on the lowest price, which in its turn is based on LCC, the price remains the only criterion for the award, so all the externalities have to be incorporated and monetized as elements of the price. MEAT, on the other hand, may be based on LCC that includes non-monetized externalities (externalities that don't necessarily have a financial value)[963].

The second situation is related with the way of calculation in practice of the LCC. In the realm of public procurement, the calculation of LCC has to be different for products/works and for services. The life cycle of a product or work covers all stages from raw material acquisition until the final disposal: production, transport and maintenance. The life cycle of a service includes all into account; it includes direct monetary expenses as well as external environmental costs, if the latter can be somehow valued in monetary terms. The most common LCC methodologies used by governments are based on a purely financial valuation, and they consider four main cost categories: investment, operation, maintenance and end-of-life disposal expenses. In order to become an environmentally-relevant methodology, the LCC needs to include external costs associated with the work/service/product. In this way, the "externalities" are internalized

[961] Using MEAT will need some extra engagement from the contracting authority and they will be always prejudiced from the audit institutions, because of the discretion they have by law to decide, which will be the criteria for MEAT and their specific weight. See point 4.4, in Chapter IV, above.

[962] See A. Semple 'A practical guide to public procurement', Oxford University Press, United Kindom, 2015, pg. 112.

[963] See further *D. C. Dragos, B. Neamtu "*Sustainable public procurement in the EU: experiences and prospects"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg, 324.

and are given a financial value[964]. The requirement to determine and verify the monetary value of the environmental externalities linked to the object of the contract, as far as there is no given methodology, will be very difficult for the Albanian contracting authorities and will let them exposed to the audits institutions[965]. On the other hand, considering the actual practice, where the lowest price is applied in more than 90% of procurement procedures, there is a need of imposing new rules, aiming at a better quality and efficiency of the procurement process. In this context, the new approach proposed by the directive might be very helpful, but except for the necessary changes in the legal framework, two key actions should be undertaken for this purpose (to implement MEAT and LCC in the procurement procedures); the approval of a methodology based in the international experience and the education of the procurement officials and auditing officials in this regard.

- **Abnormally low tenders**

Regarding the abnormally low tender, the new directive generally provides for the same rules as Directive 2004/18[966], however, there are a number of changes related to the following issues:

➢ The contracting authorities are obliged to require economic operators to explain the price or costs proposed in the tender where the tender appear to be abnormally low in relation to the works, supplies and services[967]. However it should be noted that unfortunately, this Directive' requirement is not accompanied by any definition or example of what might constitute an abnormally low tender. The absence of this definition may create a disincentive to apply the provision unless national legislation has already covered this issue with specific rules[968].

➢ There are new elements listed, with regard to factors, which may be taken into account in explaining the low level of price proposed in the tender such as:

- Compliance with obligations referred to in Article 18(2) i.e. obligations related to the fields of environmental, social and labor law;
- Compliance with obligations referred to in Article 71 (subcontracting).

As analyzed in Chapter IV, the Albanian PPL in general complies with the requirement of the new directive. However, in order to fully reflect changes in the directive it would

[964] Ibid, pg. 325.
[965] Even now, this is one of the reasons used by the contracting authorities to justify themselves, why they do not apply MEAT, in practice.
[966] See Article 55 of Directive 2004/18/EC and article 69 of Directive 2014/24/EU.
[967] According to directive 2004/18/EC the contracting authority is obliged to do so only in the event it wants to reject such a tender (see article 55 (1)).
[968] See also See A. Semple 'A practical guide to public procurement', Oxford University Press, United Kindom, 2015, pg. 116.

be necessary to further modify the provision by adding new (abovementioned) elements, which should be taken into account when explaining the low level of price tendered.

- **Extension of time limit for receipt of offers**

The new Directive provides[969] that the contracting authorities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases:

(a) Where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest six days before the time limit fixed for the receipt of tenders. In the event of an accelerated procedure as referred to in Article 27(3) and Article 28(6), that period shall be four days;

(b) Where significant changes are made to the procurement documents.

The length of the extension shall be proportionate to the importance of the information or change. Where the additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, the contracting authorities shall not be required to extend the time limits.

PPL is stricter and rigid in this regard, providing that the request for modification must be done only within the legal time frame and in any case of a decision to modify tender documents, PPL provides for an obligatory extension by 10 days for submission of tenders for procurements above the high monetary thresholds[970]. In these conditions, PPL needs to implement a more flexible approach as is the one proposed by the Directive at issue.

- **Conditions for implementation of contracts**

The new directive states, in the same terms as Directive 2004/18[971] that the contracting authority may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract[972] and indicated in the call for competition or in the procurement documents. Except for social and environmental considerations (provided also by Directive 2004/18), new provision suggests that those conditions may include economic, innovation-related and employment – related considerations.

Implementation of rules at issue will require changes in the relevant provision of the Albanian PPL, which actually provides for the general rule for conditions relating to the performance of a contract but does not suggest any specific consideration, provided by both relevant Directives.

- **Group of economic operators**

[969] See article 47/3 of Directive 2014/24/EU.
[970] See article 42 of PPL.
[971] See article 70 of Directive 2014/24/EU and article 26 of Directive 2004/18/EC.
[972] Within the meaning of Article 67 (3) of Directive 2014/24/EU.

Regarding groups of economic operators, the new Directive[973] brings some novelties, compared to the Directive 2004/18[974]. Thus, it provides also for the possibility of contracting authorities, where necessary, to clarify in the procurement documents how groups of economic operators have to meet the requirements as to economic and financial standing or technical and professional ability provided that this is justified by objective reasons and is proportionate. Member States may establish standard terms for how groups of economic operators have to meet those requirements. Any conditions for the performance of a contract by such groups of economic operators, which are different from those imposed on individual participants, shall also be justified by objective reasons and shall be proportionate. These new rules are closer to the approach of PPL for groups of economic operators, which determines the way that such a group can submit a tender and how they have to meet the requirements as to economic and financial standing or technical and professional ability.

- **Sub-contracting**

The new directive has introduced significant changes with regard to subcontracting. New rules are much more detailed but at the same time offer much discretion to the Member States as to whether to regulate certain issues or not[975].
There are the following areas where the Member States have some policy options:

- Member States may make it compulsory (instead of discretionary) for the contracting authorities to ask economic operators to indicate in tender documents any share of the contract they may intend to subcontract to third parties and any proposed subcontractors;
- Member States may provide for direct payment of subcontractors;
- Member States may impose obligations directly on the main contractor, to provide information about its subcontractors, and further down the supply chain, and to apply other information obligations to categories of contract beyond those required by the Directive. Member States may require contracting authorities to verify whether there are grounds for exclusion of any subcontractors, and may require that the main contractor finds a substitute subcontractor where appropriate;
- Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request this;
- Where a member state exercises the above options on subcontracting, it must specify the implementing conditions, which may include limitations on the scope of the requirement;

[973] See article 19/2 of Directive 2014/24/EU.
[974] See article 4/2 of Directive 2004/18/EC.
[975] See article 71 of Directive 2014/24/EU and article 25 of Directive 2004/18/EC.

- Member States must ensure that the contracting authorities are able to terminate contracts in certain circumstances "under the conditions determined by the applicable national law".

PPL, on the other hand, states that the contracting authority shall, in the invitation to tender or in the tender documents, require tenderers to indicate in their tenders the percentage of the contract they may wish to subcontract to third parties and any proposed subcontractors[976]. This provision is in compliance with the relevant provision of Directive 2004/18. However, secondary legislation has provided for more detailed rules, which obviously set new rules on this regard[977]. Thus, according to these rules, subcontracting is allowed only if the contracting authority permits it explicitly in the tender dossier and may not exceed 40 % of the contract value. The tender documents should also clearly specify if the contracting authority will do direct payments to the subcontractors. Subcontractors must possess qualification and technical requirements provided for works, services or goods they would perform and must be approved by the contracting authority before they enter into contractual relations with a contractor. Before signing the contract, the contractor must deliver to the contracting authority a notarized copy of the subcontracting agreement[978]. Having analyzed all of the above, it seems that the Albanian provisions on this regard are closer to the new Directive than to the existing one. However, for further alignment with the new provision, some other changes in PPL and its secondary legislation are needed.

- **Modification of contracts**

The new Directive introduces for the first time the concept of 'modification of contracts during their term'[979]. According to this new provision, there are two types of modifications of contracts:

- Modifications, which constitute a new contract and require a new procedure to award it; and
- Modifications without a need to conduct a new procurement procedure.

The new directive defines the notion of substantial modifications, i.e. changes, which are considered to be a new contract for which it is necessary to conduct a new procurement procedure. By a substantial modification the directive implies: modification where it renders the contract or the framework agreement materially different in character from the one initially concluded. Further, the Directive provides for detailed rules on

[976] See article 61/1 of PPL.
[977] See article 75 of the Decision of Council of Ministers no. 914, dated 29.12.2014 "Rules on Public Procurement".
[978] Considering the fact that subcontracting, in accordance with the general PPL rule is without prejudice to the issue of liability of principal contractor with regard to the contracting authority for the contract as a whole (regardless of subcontracting he remains responsible for proper implementation of the contract as a whole (Article 61 (4) of PPL), these rules PPL and its secondary legislation are too strict.
[979] See article 72 of Directive 2014/24/EU.

modification conditions and modalities.
Article 72 ensures that the contracting authorities can adopt a flexible approach to a broad range of contract changes. Article 72(1) (d) on corporate restructuring operations and insolvency is a noteworthy example with a very flexible approach to changes after insolvency. Article 72(1) (a) also allows diligent contracting authorities a broad margin for changes through careful drafting of the contract terms. The regulation of changes caused by unforeseen circumstances is relatively flexible and clearly allows more scope for changes than the current regime. The provision on small-scale-modifications in Article 72(2) is also important and flexible in its approach[980]. As there are currently no provisions in the Albanian PPL dealing with the issue of modification of contracts during their term[981], and considering the importance and the relevance of such rules, the implementation of those provisions into Albanian law will be more than necessary. However, their introduction into the PPL should be done in coherence with the approach followed for the procedural rules applied up to the conclusion of the contract, especially regarding the "flexibility" issue.

- **Termination of contracts**

The new directive obliges Member States to put in place provisions enabling the contracting authorities to terminate contracts during their terms, at least in the following situations[982], where:

a) The contract has been subject to a substantial modification, which would have required a new procurement procedure (see above);

b) The contractor has, at the time of contract award, been in one of the situations referred to as mandatory grounds for exclusion and should therefore have been excluded from the procurement procedure;

c) The contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the directive that has been declared by the Court of Justice of the European Union in a procedure pursuant to Article 258 TFEU[983].

[980] See further *S. Treumer* "Regulation of Contract Changes in the New Public Procurement Directive"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 281-299.
[981] Except for the possibility of amending the initial contract up to 20% of its value, using the negotiation procedure without prior publication of a notice. See the analysis done in Chapter IV, above.
[982] See article 73 of Directive 2014/24/EU.
[983] Article 258 of TFEU provides that 'If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union'.

Same as in the case of contract modification, there are currently no provisions in the Albanian PPL dealing with the issue of termination of contracts. As such, the implementation of those provisions into Albanian law would require introducing provisions dealing with termination of contracts accordingly[984].

- **Governance**

The new directive imposes certain obligations on the Member States concerning the effective and correct implementation of public procurement rules[985]. By no means new provisions impose on Member States specific solutions concerning establishment or functioning of specific administrative structures. The directive in its final version limits itself to stating that Member States "*shall ensure that at least the tasks set out in the Article are performed by one or more authorities, bodies or structures*." Member States should also communicate to the Commission all authorities, bodies or structures competent for those tasks.

Taking into account the institutional set up in Albania and especially the legal tasks of Public Procurement Agency[986] it seems that the current structures and institutions already perform practically all the functions and tasks required by the new directive (monitoring, advising, training, being a contact points) so no significant changes are necessary in the context of the national view. The other changes are related to the fact of being a Member State.

- **Variants**

According to the new Directive, contracting authorities not only may authorize the bidders to submit variants[987] but they may also require them to propose variants[988].

As PPL has actually implemented, the relevant provision of Directive 2004/18, should be changed accordingly to implement new provisions of the Directive 2014/24, enabling the contracting authorities not only to authorize, but also to require the submission of variants.

- **Technical specifications**

Differently from the Directive 2004/18, the Directive 2014/24, while providing for technical specifications, goes further with its prescription providing also that 'characteristics required of a work, service or supply, may also refer to the specific

[984] It should be noted that the third situation provided by the provision at issue, should not be implemented as such, but at least should be adjusted within the context of national legal system.
[985] See articles 83-86 of Directive 2014/24/EU.
[986] See article 13 of PPL.
[987] The Directive 2004/18/EC provides only the situations where contracting authorities 'may authorize tenderers to submit variants (see article 24).
[988] See article 45 of Directive 2014/24/EU.

process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives. The technical specifications may also specify whether the transfer of intellectual property rights will be required'[989].

Implementation of those provisions will require changes in the provisions of PPL dealing with technical specifications used to describe the subject matter of public procurement. These changes should be considered in connection to the award criteria, especially in case of LCC application.

- **Conflict of interest**

The new directive requires Member States to ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures[990] so as to avoid any distortion of competition and to ensure equal treatment of all economic operators[991].
According to the directive, the concept of the conflict of interest should at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest, which might be perceived to compromise their impartiality and independence in the context of the procurement procedure[992].
Even though such a provision was not provided by Directive 2004/18, the issues of conflict of interest are dealt already by the PPL in Article 26 and it seems that at least at the level of legislative provisions, no further intervention is needed[993].

- **Electronic communication**

According to the new Directive, 54 months after entry into force Member States should ensure that all communication and information exchanged under the directive, in particular the electronic submission, are performed using electronic means of

[989] See article 42/1 of Directive 2014/24/EU.
[990] This requirement is confirmed by ECJ as well, that in the case C-538/13 "eViglio" has stated, inter alia, that the contracting authority is required to determine whether any conflicts of interest exist and to take appropriate measures in order to prevent and detect conflicts of interest and remedy them. See further case C-538/13 "eVigilo Ltd v Priešgaisrinės apsaugos ir gelbėjimo departamentas prie Vidaus reikalų ministerijos", Judgment ECLI:EU:C:2015:166 .
[991] See article 24/1 of Directive 2014/24/EU.
[992] See article 24/2 of Directive 2014/24/EU.
[993] The 'anticipated' provision of such article in PPL is explained with the context in which this law is applied, where the risk of such situation of conflicts of interests is potentially high.

communication[994]. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure[995].
However, the Directive provides also for exceptional situations, where contracting authorities are not obliged to require electronic means of communication in the submission process[996]
As analyzed in Chapters III and IV above, in the public procurement system in Albania, according to the Decision of the Council of Ministers No. 918, dated 29.12.2014, all public procurement procedures are performed through the e-procurement system.[997] In this regard, public procurement legislation in Albania is not only in compliance but even more advanced than the respective requirements of the Directive 2014/24. This is a reflection of the fact that PPL is a national law, and a national law will be "shaped" also by the concrete context and environment where it is applied.

- **Electronic catalogues**

The New Directive introduces detailed rules on e-catalogues[998]. According to this directive, in the case where the use of electronic means of communication is required[999], the contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue**.**
PPL does not provide rules for using electronic catalogues. Considering the fact that in Albania an electronic platform is used to perform procurement procedures, the implementation of the respective provisions of the Directive at issue, on an electronic catalogue, will be in accordance with the electronic solution already given by Albania.

5.1.3 Summary

Having analyzed all provisions of the new Directive, which should be implemented in the PPL, and comparing at the same time with the relevant provisions of the existing Directive (2004/18), it is easily noticed that the new directive brings considerable novelties in the field.

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[994] See generally R. Bickerstaff "E-procurement under the new EU procurement Directives", Public Procurement Law Review, 2014, 3, Sweet & Maxwell, London 2014, pg. 134-147.
[995] See article 22 of Directive 2014/24/EU.
[996] See article 22/1, para. 2 of Directive 2014/24/EU.
[997] The application of the e-procurement system has been started in 2009, with DCoM no 45, dated 21.01.2009. From this rule the negotiation without prior publication of the notice and small value procurement were excluded. Furthermore, small value procurements were included in the e-procurement platform in January 2013, according to the DCoM No. 47, dated 23.01.2013.
[998] See recital 55 and article 36 of Directive 2014/24/EU.
[999] Member States may render the use of electronic catalogues mandatory for certain types of procurement.

One of the main objectives of the revision of the EU public procurement regime including the new Public Procurement Directive 2014/24 has been simplification and so-called flexibilization of the regime[1000]. As main novelties of this Directive, which directly impact the procurement process, might be listed:

- More freedom to public purchasers to negotiate (constraints on using the competitive negotiated procedure have been relaxed, so that this procedure is available for any requirements that go beyond "off - the - shelf" purchasing). The increased flexibility is ensured through the introduction of the new procedure "innovation partnership" and more importantly by a truly remarkable widening of the scope of the flexible tender procedures, the negotiated procedure and competitive dialogue. It is apparent that the contracting authorities after the implementation of the new Public Procurement Directive frequently will have access to the flexible tender procedures contrary to the current state of law[1001]. The new rules encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times. Thus, it is supposed that more flexible procedures may help to deliver value for money in certain cases-although this is entirely dependent on the ability of contracting authorities to negotiate effectively[1002];
- Possibility of assessing credentials of candidates and bidders through suppliers' self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status and also self-cleaning measures, for suppliers who have cleaned up their bad practices;
- Poor performance under previous contracts is explicitly permitted as ground for exclusion of an economic operator;
- The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tenders or requests have been reduced by about a third;
- Improved rules on social and environmental aspects have been designed, making it clear that:
    - Social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects, which had previously been allowed),
    - Contracting authorities can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives, and refer to factors directly linked to the production process;

[1000] See COM (2011)896 final, 2011/0438 (COD). Proposed procurement directive. Explanatory Memorandum section 1. However, one can argue that considering the volume and specific rules set by Directive 2014/24/EU, the regime is not simplified. See further *S. Treumer* "Evolution of the EU Public Procurement Regime: The New Public Procurement Directive"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 9-11.

[1001] Ibid, pg. 13.

[1002] See A. Semple 'A practical guide to public procurement', Oxford University Press, United Kindom, 2015, pg. xI.

- Electronic communication/e-procurement will become mandatory following 54 months after the directive's entry into force;
- Various safeguards from corruption are required such as:
  - Specific safeguards against conflicts of interest where declarations are signed by procurement staff to confirm they have no outside interests with bidders etc.;
  - Similar provision against illicit behavior by candidates and tenderers, such as attempts to improperly influence the decision-making process or collusion,
  - Safeguards against undue preference in favor of participants, who have advised the contracting authority or been involved in the preparation of the procedure[1003].
- Contracting authorities are encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate.

Except for the above mentioned new rules, generally speaking, the Directive 2014/24/EU provide for mostly mandatory rules that have to be implemented by Member States. Many provisions that were optional under 2004 directives became mandatory in accordance with 2014 directives. This new approach will change the position of PPL, toward the Directive provisions. However, it should be noted that interestingly some of the new rules introduced by the new Directive come in the same line with some of the existing rules as provided by PPL, such as for example, using as ground for exclusion of economic operators the poor performance under previous contracts; mandatory use of electronic means; various safeguards from corruption etc.
On the other hand, the implementation of Directive provisions, as analyzed above, should be done considering also the environment and national context, where they will be implemented. The national context and environment should be considered especially for that type of provision which does suggest more flexibility. The increased flexibility might be misused by the contracting authorities to discriminate some tenderers and/or favor others. Another obvious disadvantage closely linked to the first mentioned is that the increased flexibility to some extent will scare off potential tenderers as they might fear that contracting authorities will take advantage of the increased lack of transparency by discriminating the tenderers. The same concern should be also about the possibility of technical dialogue prior to the start of the tender procedure. Such a dialogue can lead to a violation of the principle of equal treatment, and a tenderer that has been involved in technical dialogue may, or in some cases, shall be excluded as a consequence. This follows from the fact that the technical dialogue might have given these firms a clear advantage in the competition for the public contract as they may have obtained additional information concerning the contract in question and an advantage in time compared to the competitors. The technical dialogue also implies an apparent risk of distortion of competition as the firm can seek to influence/affect the elaboration of the tender specification and arrangement of the tender procedures to its own advantage[1004]. The

[1003] See also R. Williams "Anti-corruption measures in the EU as they affect public procurement" Public Procurement Law Review, 2014, 4, Sweet & Maxwell, London 2014, pg. NA95-NA99.
[1004] Ibid, pg.13.

Albanian environment is still too fragile for such flexibility[1005]. Thus, it is recommended that the implementation of Directive provisions at issue should be done gradually, activating at the same time the appropriate mechanisms of avoiding abusive and corruptive behavior from both sides; contracting authorities and economic operators.

5.2 The factors which impact the level of approximation

As thoroughly analyzed above, the PPL is compatible, but not compliant, with the *acquis* on public procurement. The legal framework reflects the fundamental EU Treaty principles in terms of transparency, equal treatment and non-discrimination. The procedural focus is designed to primarily ensure the fairness, transparency and integrity of the procurement processes. The main procedures and provisions of the EU Directives are implemented in the PPL. These apply not only above the EU thresholds, but also within the bands of specific national thresholds, which generate formalistic practices. Competitive procedures regarding the publication of tender notices are generally required for the award of all contracts irrespective of their value[1006].
The factors, which impact the level of approximation of PPL with the relevant EU Directive (s) may be categorized in two main categories; (i) factors related to the status of the Directive(s) and (ii) factors related to the development stage of the country.

5.2.1 Factors related to the status of the Directive(s)

The Albanian PPL is not fully approximated with the respective EU Directives, and this is strongly related to the fact that Albania is not an EU Member State yet.

- These differences exist mainly because of different scopes of both acts. Albanian PPL's scope, being a national law, is to regulate the public procurement system in the country. The respective EU Directives' scope, being supranational laws, is to regulate the public procurement system within the European Union. Directives are addressed to Member States, instructing them to implement (in whatever way is required) certain Union policies within a fixed timetable[1007]. Practically, the aim of the Procurement Directives is to create an internal market where there is free movement of goods and

[1005] According to the Albania Progress Report of European Commission, October 2014, 'there has been little progress in the area of public procurement, in extending the e-procurement system to concession contracts and public private partnerships. Substantial work is needed to develop qualified human resources, better integrate procurement and concessions systems, further decrease financial losses to the state and increase transparency in this area. The increasing use of unpublished and opaque procurement procedures and exceptions from the law on concessions and public private partnerships are issues of concern'. See Chapter 5 Public Procurement, pg. 25, Available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-albania-progress-report_en.pdf.
[1006] See also SIGMA, "Public Administration Reform assessment of Albania", April 2014, available at http://www.sigmaweb.org/publications/Albania-Assessment-2014.pdf .
[1007] R. H. Folsom "Principle of European Union Law", Concise Hornbook Series, Thomson West, 2005 Pg.73.

services and effective competition for public contracts. This aim is clearly expressed at the preamble of both procurement Directives stated among others that the award of contracts concluded in the Member States is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving there from, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency[1008]. Contracts should be awarded on the basis of the objective criteria, which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition[1009]. The aim of the procurement directives to create an internal market has been stated also by the Court of Justice in several cases[1010]. For sure that, as discussed and analyzed above, another objective of the procurement rules is to ensure that the public receives the 'best value for money'. However, it could be argued that element such as this, as well as avoiding corruption, are not the aims of the procurement rules themselves, but an added benefit gained from the rules. It has been argued that getting the best value for money is more the aim of national rules governing procurement, whereas the EU regime has the aim of opening up procurement to trade between Member States[1011].

As such, a comparison of the aim of the acts and the general principles of the Albanian Public Procurement Law and the respective EU Directives, demonstrates that there are differences in these aspects too.

In a first view, the principles provided by the PPL are the same as the ones provided by the Directives[1012], but seeing them on their respective environments of application, their perspectives are different. According to the Albanian PPL, the principle of non-discrimination and equal treatment of economic operators is one of the basic principles. This principle comes in line with the commitments undertaken on article 74 of SAA, as analyzed earlier. The same principle is also foreseen by the Public Sector Directive, but the interpretation of the principle itself and its scope are different. The Albanian provision is focused on non-discrimination and equal treatment among economic operators without specifying any reason for discrimination. In any case because of this general context, the prohibition of the discrimination on national basis is included[1013]. On

[1008] See respectively Recital no. 2 of Directive 2004/18/EC and Recital no. 1 of Directive 2014/24/EU.

[1009] See also the Report from the Commission to the Council and the European Parliament - EU Anti-corruption Report COM (2014) 38 final, pg. 22, available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human trafficking/corruption/docs/acr_2014_en.pdf.

[1010] See for example Case C-213/07 Michaniki AE, para.39; and Joined Cases C-285/99 and C-286/99 Impresa Lombardini, para.34.

[1011] C.R.Hansen "Contracts not covered, or not fully covered, by the Public Sector Directive", DJØF Publishing, Copenhagen 2012, pg. 54.

[1012] See point 3.1, Chapter III, above.

[1013] This general provision of the principle of non-discrimination in the Albanian PPL is considered as fulfilment of the commitment undertaken in the Central European Free Trade Agreement (CEFTA), Chapter VI, C- Government Procurement, article 35, which provides among others that: "Each Party shall

the other hand, the Directive, except for the general principle of equal treatment and non-discrimination of the economic operator, does provide explicitly for the prohibition of discrimination on national basis. By this explicit provision, it is clear that one of the particular aims of the procurement directives is to ensure that foreign undertakings have the opportunity to bid for public contracts. The same position is maintained from the Court of Justice, which has expressly stated that the main purpose of the EU's provisions on public contracts is: 'to ensure the free movement of services and the opening-up to undistorted competition in all the Member States"[1014]. The opportunity to bid for public contracts is closely connected with the regulation of the EU's internal market, where every restriction on trade is closely assessed pursuant to relevant provisions of the Treaty on the Functioning of European Union (TFEU)[1015]. Thus, in the internal market, there is a prohibition of giving different treatment to undertakings on the ground of their nationality[1016].

- Another factor which impacts the level of approximation is directly related with the scope of the EU Directives, meaning that some of the Directive's provisions are 'dedicated' to Member States only.

To illustrate the above said let's recall for example the analysis done on Prior Information Notice (PIN), regulated in article 35/1 of the Public Sector Directive, which is not provided by the PPL. These notices have the same function, to indicate the intention of the Contracting Authorities to award contracts in the future, but do not guarantee the award of such contracts[1017]. The benefit of using these notices is the shortening of deadlines for the receipt of tenders and further more this requirement is not obligatory for the Member States, but according to the respective Directives, publication of the PIN shall be compulsory only where the contracting authorities take the option of shortening the deadlines for the receipt of tenders[1018].

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no later than 1 May 2010 ensure the progressive and effective opening of its government procurement market so that, with respect to any relevant laws, regulations, procedures and practices, the goods, services and suppliers of the other Parties are granted a treatment no less favourable than that accorded to domestic goods, services and suppliers. In particular, the Parties shall ensure that their entities:
a. do not treat a locally-established supplier less favourably than another locally-established supplier on the basis of the degree of foreign affiliation to, or ownership by, a person of another Party; and
b. do not discriminate against a locally-established supplier on the basis that the goods or services offered by that supplier for a particular procurement are goods or services of another Party".

[1014] See Case C-454/06 pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung [2008] ECR I-04401, para. 31.

[1015] See for example articles 40 and 63 of TFEU.

[1016] See also S.T. Poulsen, P.S. Jakobsen and S.E. Kalsmose-Hjelmborg, "EU Public Procurement Law; The Public Sector Directive, The Utilities Directive, 2nd Edition", DJØF Publishing, Copenhagen 2012, pg. 31.

[1017] Ibid, para.8.12, pg.492.

[1018] See the analyses in Chapter III.

- Another factor, which impacts the level of approximation of PPL, is the fact that some of Directive's provisions are optional for Member States themselves. Thus, referring to the detailed analysis done above, we might recall as optional provisions for Member States, those related for example to the reserved contracts, central purchasing, sub-contracting etc. In the case of optional provisions, it will be in the discretion of the national law (especially of a non-member country) to decide either to implement them or not[1019].

- Another factor is related with the reference of some of the provisions of the procurement Directive to other EU Directives. For example, article 10/d (ii) of Directive 2014/24/EC provides that '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 within the meaning of Article 1 of Directive 77/249/EEC'. As far as this article refers to a specific article of another EU Directive (which does make sense for Member States, which have the obligation to transpose all Directives), to implement it into a national law of a non- Member State, the referred Directive (and article) should be implemented first.

5.2.2 Factors related to the development stage of the country.

As analyzed in Chapter III above, the public procurement system in Albania has rather a short history[1020], while the public procurement system is known within the EU for about 50 years, and it is a system which has undergone drastic changes and improvements to come to the current procurement system of today. Furthermore, the Albanian legal framework on public procurement in the first ten years of its existence was not at all following the relevant EU system. As such, the first legal framework on public procurement in Albania was based on the model law on procurement of goods, civil works and services adopted by UNCITRAL (United Nations Commission on International Trade Law)[1021]. The World Bank procurement regime[1022] has impacted the

[1019] However, considering the mechanism, which connects the provisions to each other (as is the case of sub-central contracting authorities with the prior information notice or the possibility of establishing time limits by mutual agreement between the sub-central contracting authority and selected candidates), we might say that even in cases when one provision of Directive is not optional (and not tightly applicable for Member States only), it should not by necessarily implemented in a national law of a non- Member State, if the relevance of using it, is only for situations, which are strictly applicable only for Member States (PIN), or they are optional even for Member States themselves (as is the possibility of establishing time limits by mutual agreement between the contracting authority and selected candidates).

[1020] The first law regulating public procurement system in Albania, is approved in 1995 (See Law no.7971/1995 'On public procurement').

[1021] See footnote no. 216 above.

[1022] Albania is a member of World Bank and International Monetary Fund since October 15, 1991.

Albanian procurement system as well[1023]. Even now, after almost 10 other years of changing the procurement regime from UNCITRAL to EU, the previous legal regime has still left some traces in the PPL[1024]. Thus, one of the main interior factors, which have impacted the level of approximation of PPL with EU Directive, is definitely the 'historic factor'.

- Apart from the historic factors, the level of approximation of PPL is impacted by the internal political, economic and social environment. All these three components impact directly the level of integrity of the procurement system. As it is seen several times in the analysis of the approach followed by PPL, it is clearly noticed that its provisions are adapted to the national context. This 'adaption' aims mainly at providing stricter rules than those provided by the relevant Directives. This stricter approach of the PPL is justified by fear' from the lack of integrity[1025] and the 'fear' of the misuse of the law, which does impact directly to the scale of the competition. Thus, reflecting this fear, the Albanian procurement system is a system that places great weight on accountability providing for detailed and rigid rules, which allow for close public monitoring of the procurement process. A clear example of this PPL approach is the mandatory use of e-procurement. The implementation of e-procurement was one of the most effective means, which really impacted the reduction of corruptive behaviors in public procurement in Albania[1026].

5.3 "Full approximation" vs. "copying" the EU System - Summary

More than the assessment of the fulfillment of the obligations stemming by SAA, a deeper analysis by comparing the contents of the SAA and the European Union Directives themselves, demonstrates that the respective Directives not only are directly

[1023] See the discussion on 'Consultancy Cervices" in Chapter IV, above.

[1024] They are mainly reflected on some of procurement procedures provided by PPL, such as request for proposals and consultancy services. See the detailed analysis done in Chapter IV.

[1025] According to a World Bank Study Strengthening Country Procurement Systems: Results and Opportunities. Capacity development- Country Case: Albania, 'there has been a very common situation in Albania, when a public procurement official, does not provide tender documents to an economic operator, aiming at favoring another economic operator. In this case, we have a corruptive "no-action", because this is in breach of the regulation and at the same time, it is a breach of the competition principle'.

[1026] Nevertheless, aiming at a comprehensive fight against corruption, the implementation of the anti-corruption strategy should take place, because it's important to fight corruption from all directions and in all its possible forms. Transparency (through the use of e-procurement) alone cannot make it; rather it should come along with good and appropriate rules. Good rules on the other hand are not enough; they should be well implemented from all stakeholders. To be well implemented, all stakeholders and mainly procurement officials and economic operators, should be well trained and with high integrity. To be with high integrity, the entire political, economic and social environment where they live and work should be so. This is why even after introducing e-procurement system in Albania, the corruption is not uprooted, but only reduced. See further R. Kashta "Corruption and Innovation in the Albanian Public Procurement System", published in the Academicus International Scientific Journal, Nr. 10, 2014.

addressed to the EU Member States, but they also show that they are not binding one hundred percent even for these countries. On the other hand, according to the commitments and obligations of SAA Albania is required and committed to *fully approximate* the Albanian procurement legislation with respective EU Directives as a preliminary step to join the EU.

Analyzing the expression "fully approximation with EU Directives", which lies in the foundations of the integration process, it is very important to understand and interpret in the right way these two words; "fully" and "approximation". Their understanding should not be done separately to each other. It is true that the requirement and commitment from the other side is for *full* approximation of the legislation on the public procurement sector, but at the end it is only *approximation*[1027], and not a copy of the respective Directives. To this respect, this is one of the key aspects which should be taken into consideration along the integration process. The approximation and/or adaptation theory is not worthy only for countries like Albania, which aspire to become an EU Member, but also for the EU Member States themselves[1028]. This approach of transposition of EU Directives into the national legislation of the Member States is affirmed clearly from the ECJ, which in a case[1029] has stated that "…is not necessarily required that its provision be incorporated formally and verbatim in express, specific legislation, and that a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner…".

Following the same line with this statement of ECJ, another aspect which should be considered along the integration process, is the entire environment where this process takes place.

The precondition for Albania in this sector is to fully approximate its legislation in a relatively short period of time, meaning that in such short period of time, the Albanian public procurement system should move from a very infantile phase of some years ago, toward a much consolidated phase the EU Member States are nowadays. It is true that Albania has only to follow models, which already exist in the European Union, but it is

[1027] According to Wikipedia-the free Encyclopedia 'an approximation is anything that is similar, but not exactly equal to something else. The term can be applied to various properties (e.g. value, quantity, image, description) that are nearly but not exactly correct; similar, but not exactly the same'. See https://en.wikipedia.org/wiki/Approximation, accessed May 16, 2015.

[1028] See *P. Telles and L. R. A. Butler* "Public Procurement Award Procedures in Directive 2014/24/EU"; François Lichère, Roberto Caranta and Steen Treumer (eds.) "Modernizing Public Procurement. The New Directive"; 1. Edition, Djøf Publishing, Copenhagen 2014, pg. 133, where it is held among others that '…Interestingly, whilst Member States previously exercised freedom to decide whether or not to introduce new procedures like the competitive dialogue, this is no longer possible under Directive 2014/24/EU, which requires that all the special procedures mentioned above must be transposed. Importantly, however, Member States remain free to adapt such procedures through national legislation...'

[1029] See Court of Justice Case C-433/93, Commission v Germany, paragraph 18.

also obvious that only the full approximation of the legislation, in the theoretical plan, does not mean the accomplishment of the process. The final objective is to make the legislation applicable. Making the public procurement legislation applicable and realizing a fully functional procurement system, in line with EU standards, does not mean only harmonization with the respective EU Directives, but it is necessary to harmonize this legislation with other legal framework in Albania. Otherwise, it will not be applicable.

As discussed above, internal factors are very important as well. Such legislative interventions should go along with economic and social changes, as public procurement is not only a legal process, but it is also an economic and social process[1030]. As each country has its own culture and its cultural, administrative, economic, legal and social traditions, adopting any preconceived procurement system is not effective and appropriate[1031].

Analyzing all of the above, the approximation process, at the end there can be stated with certainty that in the public procurement sector Albania has made a lot of progress toward the approximation with the acquis. It is important to keep in mind that the approximation process is not a process of "translation" of Directives into the national legislation, but it should be focused in finding the appropriate mechanism of realizing the full effectiveness of EU rules and normally achieving the main objective of public procurement rules, as is the efficiency, or value for money[1032].

[1030] See R. Kashta "Corruption and Innovation in the Albanian Public Procurement System", published in the Academicus International Scientific Journal, Nr. 10, 2014.
[1031] See further Khi V. Thai "International public procurement: Concepts and Practices", International Handbook of Public Procurement, edited by Khi V. Thai, Auerbach Publications, Taylor & Francis Group, 2009, pg. 5-8.
[1032] See also S. Arrowsmith, J. Linarelli, and D. Wallace, "Regulating Public Procurement: National and International Perspectives", Kluwer Law International, London, 2000.

CHAPTER VI

CONLUSIONS AND RECOMMENDATIONS

6.Introduction

The analysis and discussion in this work lead to the conclusion that public procurement is a relatively new concept in Albania, compared to other European countries. This is due to the political past of the country and the communist system, which did not recognize private entrepreneurship. After the 1990s, in parallel with the market economy, a system of public procurement started to be established and implemented in Albania. Initially, this system was established based on the UNCITRAL model, and afterwards, considering Albania's aspirations to join the EU and the signing of the SAA, the system was oriented towards the EU model.
The overall objective of this thesis was to analyze the approximation process of the public procurement legislation in Albania with the corresponding EU Directives, and to answer to question: which is the best approach to be followed for this purpose?
The main finding of this study is that 'approximation' does not mean to merely copy the relevant EU Directives. In the light of this process, with 'full approximation' should be understood the customization of the Directive's perspective and its provisions into the national law of non-EU member state.
Below will be stated the final conclusions and main recommendations for an efficient approximation process, in the field of public procurement.

6.1 Final conclusions

- **The Albanian public procurement system has a rather short history**

The initial regulation of public procurement in Albania dates back to the '30s of the last century. In 1995, after an interruption of more than 50 years, a law on public procurement was approved. However, only in 2006, a law was passed aiming at the approximation with the EU Directives. The approximation process has been gradual. During the almost 10 years of its existence, this law has gone through several amendments, aiming at progressively approximating to the Directives.
Meanwhile, a public procurement system has been known within the EU for more than 50 years, and it is a system, which has undergone drastic changes and improvements to reach the actual procurement system of today. The description and history of the development of this system show clearly that the full assimilation of the EU procurement system by its Member States has been and is still done gradually and in parallel with the consolidation of the EU itself and the improvement of its public procurement system. On the other hand, the Albanian public procurement system has a rather short history and as such it has yet to go through some 'maturing' phases, to achieve the required standard.

- **The analysis of several provisions of the PPL and their comparison with the respective provisions of the Directive(s), clearly shows that the (low) level of integrity in the country is a very important factor, which has 'shaped' the procurement system in Albania.**

The public procurement process per se is a competition for the winning of a contract by a private company and executing it in favor of a public institution, with rules rigorously provided for in the legislation. Such firmness is closely linked to the fact that the funds for execution of these contracts are public funds. Considering that the misuse of public funds does not directly affect the interests of any individual (although public funds are indirectly funds of all taxpayers), be him even an employee of public institutions, their good use may be assured only in two ways; either by providing detailed rules for selecting the winner, to limit as a far as possible the discretion of the contracting authorities, or by providing more flexible rules and at the same time trusting the self-consciousness (integrity) of public employees for the good use of public funds. The first way may to avoid as a far as possible the misuse of public funds, but the rigidity of norms brings us to the rigidity of the process, which might be "translated" in time, quality and sometimes even in effectiveness. While the second way, theoretically, might be more effective (by avoiding bureaucracy you save time, gain quality, increase competitiveness).

The approach followed by the Albanian public procurement legislation is placing great weight on process legitimacy, providing for detailed rules, which limit the discretion of contracting authorities and enable close public monitoring of the procurement process. This approach is closely linked to the political, economic and social environment, where it will be implemented. The analysis of several provisions of the PPL and their comparison with the respective provisions of Directive(s), clearly shows that the (low) level of integrity in the country is a very important factor, which has 'shaped' the procurement system in Albania. The fear of the discretion of the contracting authorities is actually the fear of the low level of integrity of the officials in charge of the procurement process, and the legal reaction towards this level of integrity is the provision of rigid rules, even to the extent that adherence to rigid rules may compromise value for money or efficiency in specific procurement procedures.

- **Currently, the Albanian public procurement legislation is partially approximated with the corresponding EU Directive (s)[1033].**

[1033] Currently, the Albanian public procurement legislation is partially approximated, however, there are in one side provisions that have not been approximated, even though they should have been harmonized (the case of the review system), and in the other side, there are issues where the legislation and the system in general has gone beyond the plan (the case of electronic procurement). Some of the commitments under the SAA were to be fulfilled within a period of 4 years after the entry into force of this Agreement (referring to the mid-term priorities set-out in the National Plan for the SAA Implementation, companies of the Community not resident in Albania should enjoy access in the procurement procedures according to the Albanian legislation, not later than 4 (four) years after the enter into force of the SAA) and have been fulfilled since the Public Procurement Law of 2006, eventhough the SAA was not yet ratified by all

As analyzed in the previous chapters, it appears that in light of the approximation process, there are three categories of EU Public Procurement Directive provisions:

i) EU Procurement Directive provisions not transposed in the Albanian PPL. As such provisions are for example, the provisions concerning the Common Procurement Vocabulary (CPV), the 'competitive dialogue' procedure, rules on subsidized contracts, the reserved contracts, the obligations related to the publication of procurement notices in the Official Journal of EU, etc.
ii) EU Procurement Directive provisions partially transposed (Albanian provisions not fully compliant with EU law). As such provisions, we might mention, for example, the provisions concerning public work contracts, the conditions for application of the restricted procedure, the participation of consortia, etc.
iii) EU Procurement Directive provisions more flexible when compared with an Albanian PPL provision (Albanian PPL provisions more rigorous as compared with the relevant EU Directive). As such provisions we might mention, for example, provisions concerning cancellation notices, application of the negotiated procedure with and without prior publication of a contract notice, extension of time limits in case of modification of tender documents etc.

- **The procurement principles provided by the Albanian PPL, in the light of the approximation process, are the same as the ones provided by the Public Sector Directives, but they are applied in a different context.**

As a conclusion, we can certainly say that principles stay at the foundations of the procurement process. Their importance does not stand only at each of them alone, but also at the impact they have to each-other. Such as, for instance, if the non-discrimination principle is violated, the equal treatment principle might be violated too, and competition will be distorted. If the requirement for transparency will not be respected, equal treatment and non-discrimination might be violated, proportionality might be violated and competition will be distorted. Analyzing all the above principles it seems that it might be divided into two main categories; principles (such as equal treatment, non-discrimination, and proportionality) that in a way or another make the competition happen, and transparency, which more than a principle is an instrument or vehicle that observes and supports the implementation of other principles.

Apart for the principles provided by Directive 2004/18, the new Directive has listed explicitly the proportionality principle, and has highlighted the importance of competition in a procurement process. In the new Directive, under the principle provision it is foreseen for the first time as well that Member States should take appropriate measures to ensure that in the performance of public contracts, economic operators comply with the

Member States, thus not yet into force (The Stabilization and Association Agreement between Republic of Albania and European Communities and their Member States, has been signed in June 12, 2006, and entered into force in April 1, 2009).

applicable obligations laid out in environmental, social and labor law established by Union law, national law, collective agreements or by the international environmental, social and labor law provisions.

Nevertheless, an interesting issue coming up in the analysis of the procurement principles is the fact that the Albanian PPL has generally absorbed the same principles, with those foreseen in the Public Sector Directives (respectively Directives 2004/18/EC and 2014/24/EU) even though it is not in the same context. The reasons and the explanation of determining such principles on the foundation of the procurement process, in the EU context, are found on the objectives of the EU, discussed above, as it is, for example, to create a common market that eliminates barriers to trade in goods and services between EU Member States. In this case, creating a common procurement market means removing any barriers to trade arising from the procurement context. As such the procurement principles provided by the Directives are closely related and have to comply with the main principles set out in the Treaty. Following this argument the Member States do not just 'copy' the said Directive as such, but they have a certain amount of discretion for the purpose of adopting measures intended to ensure compliance with procurement principles, which are binding on the contracting authorities in any procedure for the award of public contracts.

On the other hand, the principles provided by the Albanian PPL, in the frame of the approximation process, are the same as the ones provided by the Public Sector Directives, but in any case they are applied in a different context. The aim of these principles in the Albanian PPL, as it is a law ruling the procurement system of a given state (not the procurement system of more than one state as it is the case of the Public Sector Directive) is to provide for equal treatment, nondiscrimination, transparency, fair competition etc., in a narrower aspect, meaning that these principles should be respected in a procurement process, to achieve the goals and objectives of this process, but they are not meant to be used 'to create a common market that eliminates barriers to trade in goods and services between countries', at least as far as Albania is not a member state of the EU.

- **Considering the measures undertaken towards transparency in the procurement process (the most important of which is the implementation of the e-procurement system), regarding the publication of the notices, the Albanian procurement legislation is approximated to the relevant EU Directives at the highest level possible, considering the fact that it is a national law of a non-EU Member State.**

Analyzing the requirement of the respective Directives for publication of notices, such as the place they should be published, the time scale, the language, etc., it is clearly understood that these requirements refer to the contracting authorities of EU Member States only. As such, they might not be applicable to a country, which is not a member state yet, meaning that a national law of such a country cannot introduce such concrete requirements, even though it might be under an approximation process. Having said that, the Albanian PPL does not 'comply' with the respective Directives, regarding the requirements on notice' publications, but on the other hand, it is for sure that the

respective PPL requirements do one hundred per cent comply with the overall requirements of Directives toward transparency. The secondary legislation as well does require that all contracting authorities (in Albania) should use the electronic procurement system (eps) (placed at the PPA website), not only to publish their procurement notices, but also to perform their procurement procedures, making the use of the electronic procurement system mandatory. Using such an electronic system, the Albanian procurement system (even though the procurement notices are not published in the OJEU), is quite an open system toward the international business community. The e-procurement system allows for any interested economic operators, irrespective of their nationality, to be registered in the electronic procurement system. It is important to emphasize that the requirement to use the e-procurement system does refer to all types of procedure (except for the negotiated procedure without prior publication), irrespective of their value. The requirement of the Albanian legislation in this regard goes further than the relevant Directives, which oblige contracting authorities to advertise only those contracts of a certain value and type that are subjected to the Directive. This stricter requirement might raise a discussion on evaluating means and goals to be achieved. It might happen in practice that stricter requirement (as the obligation to publish a contract notice even for very low value contracts) might result as non-cost-effective solution (by allowing everyone to submit an offer, the number of bids will be considerably high, which means that first you will need time to evaluate, second complaints can take place, etc.). Despite this, having taken into consideration the "need for transparency" in the system, the procurement legislation 'insists' on the advertising requirement.

Having analyzed all the above, the answer to the question if the Albanian procurement legislation is fully approximated to the relevant EU Directives, regarding the publication of the notices, is that it is approximated at the highest level possible, considering the fact that it is a national law of a non EU-Member State.

- **Generally speaking the PPL tends to be stricter than the Directives when providing rules on technical specifications and qualification criteria. The PPL tends to minimize the situations which leave decisions in the contracting authority's discretion. This way of ruling the system, facilitates monitoring and controlling the activities of contracting authorities in this regard, and aims to ensure the good implementation of procedural rules. On the other hand this "detailed ruled situation", might lead to situations which are not cost-effective.**

Description of the characteristics of goods services or works that a contracting authority need, is a key step in a procurement procedure. This description is done through the technical and service specifications. Apart for the technical specifications, another important step of the contracting authority is to describe the criteria of the potential economic operators, which will be considered eligible to implement such a contract. These are actions done by the contracting authority, under the preparatory stage, but have a direct and important (inevitable) effect on the selection stage.

Generally speaking the requirements of the PPL, on preparation of technical specifications and qualification criteria, are in line with those of Directive(s). However,

considering also that the new Directive while envisaging rules on technical specifications provides also that they should refer as well to the specific process or method of production or provision of the requested works supplies or services or to a specific process for another stage of its life cycle even in this case, it is clear that the relevant PPL' provisions are not fully approximated. The main feature making the difference is 'flexibility'. The PPL tends to be stricter than the Directives, because it does reflect in its provisions the general context (such as economic, social, political considerations). As analyzed in detail above, the PPL tends to minimize the situations which leave decisions to the contracting authority's discretion. This way of ruling the system, facilitates to monitor and control the activities of contracting authorities in this regard, and aims to ensure the good implementation of procedural rules. On the other hand this "detailed ruled situation" might lead to situations which are not cost-effective (for example, a very good offer might be disqualified for an unessential non-compliance with set requirements, only because the contracting authority does not have the discretion to decide differently).
Additionally, the requirements of the PPL on technical specifications and qualification criteria are applied to all public procurement procedures, despite the financial threshold, while the Directive does not apply to public procurement procedures relating to contracts that are below certain financial thresholds set by the Directive itself. This difference is explained by the different status and different objectives of the Directive on the one hand and the PPL, as a national law of a non-EU Member State, on the other hand.

- **The new approach proposed by the Directive on award criteria, especially regarding life-cycle costing (LCC), might be very helpful to the Albanian procurement system, but except for the necessary changes in the legal framework, two key actions should be undertaken for this purpose; the approval of a methodology based on international experience and the education of procurement officials and auditing officials in this regard.**

The Albanian procurement rules generally comply with the relevant Directive (s) rules on defining the award criteria. They provide as well for two types of award criteria; the lowest price and the most economically advantageous tender (MEAT). Even the context of applying such criteria is the same, despite the fact that Albania is not an EU member. However, there are still some differences, which reflect the environment where PPL is applied. The environment impact is clearly reflected by the fact that, in practice more than 90% of the contracting authorities use the lowest price criterion. MEAT is mandatorily used only in case of consultancy services procedures. This situation is explained by the low level of professionalism and "fear of discretion" in the public procurement system in Albania. To promote the use of MEAT, the PPL, differently from the Directive, has even provided for some conditions when CA are allowed to use the lowest price. Along the same line come also the limitations of the PPL, not providing for the possibility of expressing weightings of the criteria by providing for a range with an appropriate maximum spread, and for the possibility of indicating in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive

document, the criteria in descending order of importance, where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons.

However, considering the fact that new Directive introduces a number of significant changes with regard to contract award criteria on one hand and considering the fact that the practice in the Albanian procurement system has showed that MEAT criterion is rarely used by the contracting authorities and this is explained with the low level of professionalism and "fear of discretion", on the other hand, it should be admitted that it will be very difficult to effectively implement in the Albanian procurement regime the new approach proposed by the Directive especially regarding life-cycle costing (LCC). As such the new approach proposed by the Directive might be very helpful, but except for the necessary changes in the legal framework, two key actions should be undertaken for this purpose (to implement MEAT and LCC in the procurement procedures); the approval of a methodology based on international experience and the education of the procurement officials and auditing officials in this regard.

- **The transposition of the relevant directive's provisions on procurement procedures should be done, considering both, the Directive's perspective and Albanian context as well. Aiming at their effective implementation, EU rules should not only be transposed into the PPL, but first they should be adapted to the national context, especially when speaking for optional changes.**

Procurement procedures are the life and soul of public procurement regulations. Contracting authorities should make use of all possible means at their disposal under national law in order to choose the most appropriate procedure, which on the other hand will help them to achieve the objectives of the procurement process. Procurement procedures in broad terms may be categorized as standard procedures, special procedures and exceptional procedures. Procedures may be characterized as standard when the contracting authority can use them in any circumstances and for any type of contract covered by the Directive. By contrast, procedures have a special nature when they can be chosen only according to specific grounds for use. Finally, procedures are deemed exceptional when they function as a final alternative enabling a contract award when all else fails.

Generally speaking, the procurement procedures and procurement tools, provided by the Albanian PPL, are in compliance with the relevant provisions of the Directive 2004/18. However, in some cases, PPL provisions are adapted to the national context. This 'adaption' aims mainly to provide stricter rules than those provided by the relevant Directives. This is also evident by the fact that all procedural requirements set by PPL are equally applicable for all procurement contracts, despite their estimated value. This stricter approach of the PPL is justified with the 'fear' of the misuse of the law to narrow the competition in a procurement procedure. Some of the procurement procedures and procurement tools (such as competitive dialogue, dynamic purchasing system and electronic auctions) are not provided at all in the PPL.

Considering also changes that the new Directive brings to the procurement procedures, the PPL should be changed in this regard, as well. However, the transposition of the relevant Directive's provisions should be done, considering both, the Directive's perspective and Albanian context as well. The Directive's perspective seems to be the ground for the use of flexible procedures. It is not entirely clear from the wording of the substantive provision how flexible the new provision is intended to be. However, if you scrutinize the wording of the Recitals you get the impression that the grounds should be interpreted in an extremely flexible manner. Such approach of the Directive might be confusing and will be reflected directly at the national approach. Considering the past experience with this approach, adding here and the 'supposed extreme flexibility' of these procedures, they might be legally speaking, transposed into the PPL, but it is not sure if they will really be implemented in practice. As such, aiming at their effective implementation, they should not only be transposed into the PPL, but first they should be adapted to the national context, especially when speaking for optional changes.

- **The New Public Sector Directive aims to provide for more simplified and flexible public procurement regime. The Albanian procurement law, while considering the implementation of new directive, should consider also the internal environment especially, for that type of provision suggesting more flexibility.**

One of the main objectives of the revision of the EU public procurement regime including the new Public Procurement Directive 2014/24 has been the simplification and so-called flexibilization of the regime. Thus, this Directive provides more freedom to public purchasers to negotiate (constraints on using the competitive negotiated procedure have been relaxed, so that this procedure is available for any requirements that go beyond "off - the - shelf" purchasing). The new rules also encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times. In the light of flexibilization of the regime, the Directive provides as well for the possibility of assessing credentials of candidates and bidders through suppliers' self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status and also self-cleaning measures, for suppliers who have cleaned up their bad practices.

Apart for the flexible approach, generally speaking, Directive 2014/24/EU provides for mostly mandatory rules that have to be implemented by Member States. Many provisions that were optional under 2004 Directives became mandatory in accordance with the 2014 Directives.

This new approach will change the position of the PPL towards the Directive's provisions. Several 2004/18/EC Directive provisions, which up to today are not implemented and justified with the fact that they were not mandatory even for Member States, now should be implemented in the Albanian procurement law as well. However, the implementation of the Directive's provisions, as analyzed above, should be done considering also the environment and national context where they will be implemented. The national context should be considered especially for that type of provisions

suggesting more flexibility. The increased flexibility might be misused by contracting authorities to discriminate some tenderers and/or favor others. Another obvious disadvantage closely related to the first mentioned is that increased flexibility to some extent will scare off potential tenderers as they might fear that contracting authorities will take advantage of the increased lack of transparency by discriminating tenderers. The same concern should be also about the possibility of technical dialogue prior to the start of the tender procedure. Such a dialogue can lead to a violation of the principle of equal treatment, and a tenderer that has been involved in technical dialogue may, or in some cases, shall be excluded as a consequence. This stems from the fact that the technical dialogue might have given these firms a clear advantage in the competition for the public contract as they may have obtained additional information concerning the contract in question and an advantage in time compared to the competitors. The technical dialogue also implies an apparent risk of distortion of competition as a firm can seek to influence/affect the elaboration of the tender specification and arrangement of the tender procedures to its own advantage. Albanian environment is still too fragile for such flexibility.

- **National context and internal factors are very important factors regarding the approximation process. Such legislative interventions, to implement the relevant Directives should go along with economic and social changes, as public procurement is not only a legal process, but it is also an economic and social process.**

Another aspect which should be considered along the integration process is the entire environment where this process takes place.

The precondition for Albania in this sector is to fully approximate its legislation in a relatively short period of time, meaning that in such short period of time the Albanian public procurement system should move from a very infantile phase of some years ago toward a much consolidated phase the EU Member States are in nowadays. It is true that Albania has only to follow models which already exist in the EU, but it is also obvious that only the fully approximation of the legislation does not mean the accomplishment of the process. The final objective is to make the legislation applicable. Making the public procurement legislation applicable and realizing a fully functional procurement system in line with EU standards, does not mean only harmonization with the respective EU Directives, but it is necessary to harmonize this legislation with other legal framework in Albania. Otherwise it will not be workable.

As discussed above, internal factors are very important as well. Such legislative interventions should go along with economic and social changes, as public procurement is not only a legal process, but it is also an economic and social process. At the end of the day, PPL is a national law, and a national law will be “shaped” also by the concrete context and environment where it is applied.

- **Some of the Directive's provisions are strictly related to the fact of the state subject to them is an EU Member State and some of them are optional for Member States themselves.**

As discussed and analyzed in several situations above, some of Directive's provisions are applicable only to Member States, which is quite loyal considering the fact that Directives aim to regulate public procurement within EU. If we recall the example of the case of application of the Common Procurement Vocabulary (CPV), in Albania, this coding system might not be directly implemented and applicable in Albania, as of the date of Albania's accession to the EU, since CPV is adopted as such by means of an EU regulation.

Another example of this situation comprises implementation of the Prior Information Notice (PIN). The Albanian PPL does not foresee such an instrument. Seen in the context of the obligation and commitments undertaken with the SAA, it will not be the case of 'non-approximation' as this is optional even for Member States. On the other hand, if it will be the case that Albanian law will provide for such mechanism anyway (even though it is not obligatory), in practice it will not be possible to implement it, because it is required that the notice itself, or the fact of publication of this notice on the buyer profile, should be published in any case, by the Publications Office of the EU. As such, it seems that this mechanism is meant only for states which are directly subject to the Directive, and there is no meaning to require a non-Member State to introduce such a mechanism in its national procurement law, because the required objective will not be achieved.

- **The EU Public Sector Procurement Directive(s) and Albanian Public Procurement Law have different natures and different objectives (for the time being).**

The Albanian PPL is a national law which aims to regulate the public procurement system in the country. The respective EU Directives are supranational laws, which aim to regulate the public procurement system within the EU, instructing Member States to implement (in whatever way is required) certain Union policies within a fixed timetable. From this different nature of both acts induces the differences in their objectives.

From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU Member States. Creating a common procurement market means removing all barriers to trade arising from the procurement context. Practically the aim of the Procurement Directives is to create an internal market where there is a free movement of goods and services and effective competition for public contracts. This aim is clearly expressed at the preamble of both procurement Directives. This aim of the procurement directives to create an internal market has also been stated by the Court of Justice in several cases. On the other hand, the PPL calls for the principle of competition in those same situations as Directive does. However referring to the objective and scope of the PPL, it is obvious that the function of this principle is to support the efficiency of the procurement system and this is understandable considering the fact that PPL is a national law.

- **One of the key aspects which should be taken into consideration along the integration process is that despite the fact that requirement and commitment from both sides is for *fully approximation* of the legislation on the public procurement sector, at the end it is only *approximation*, and not a copy of the respective Directives.**

The analysis of the EU Directives' contents demonstrates that the respective Directives not only are directly addressed to the EU Member States, but show also that they are not binding one hundred percent even for these countries. On the other hand, according to the commitments and obligations of SAA Albania is required and committed to *fully approximate* the Albanian procurement legislation with respective EU Directives as a preliminary step to join the EU.

Analyzing the expression "*full approximation* with EU Directives", which lies in the foundations of the integration process, it is very important to understand and interpret in the right way these two words; "*full*" and "*approximation*". Their understanding should not be done separately to each other. It is true that requirement and commitment from both sides is for *full approximation* of the legislation on the public procurement sector, but at the end it is only *approximation*, and not a copy of the respective Directives. To this respects, this is one of the key aspects which should be taken into consideration along the integration process. The approximation and/or adaptation theory is not valid only for countries like Albania, which aspire to become EU Member, but also for the EU Member States themselves. This approach of transposition of EU Directives into the national legislation of the Member States, is affirmed clearly by the ECJ, which has stated that "…is not necessarily required that its provision be incorporated formally and verbatim in express, specific legislation, and that a general legal context may, depending on the content of the directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner…"[1034].

Having analyzed all above the approximation process, at the end it can be stated with certainty that in the public procurement sector Albania has made great progress toward the approximation with the acquis[1035]. It is important however, to keep in mind that the

[1034] See Court of Justice Case C-433/93, Commission v Germany, paragraph 18.

[1035] According to the National Plan for European Integration 2015-2020 "The current public procurement law is partially approximated with relevant EU legislation. Although some provisions have been fully or partially aligned, further legislative work is needed to the full approximation in the field, as specified in the MSA. At the beginning of 2014 they were approved new EU directives on public procurement, and the Albanian legislation in this area should be subject to the necessary changes to ensure alignment with the following Directives". See further Chapter 5 "Public Procurement", in the National Plan for European Integration 2015-2020, pg. 158-159. Available at http://www.integrimi.gov.al/al/dokumenta/dokumente-strategjike/plani-kombetar-per-integrimin-evropian&page=1, retrieved December 20, 2014.
The same position is held also by SIGMA "Public Administration Reform assessment of Albania", 2014 when providing that "*The PPL is compatible, but not compliant, with the acquis on public procurement. The legal framework reflects the fundamental EU Treaty principles in terms of transparency, equal treatment and non-discrimination. The procedural focus is designed to primarily ensure the fairness,*

approximation process is not a process of "translation" of Directives into the national legislation, but it should be focused on finding the appropriate mechanism of realizing the full effectiveness of EU rules and normally achieving the main objective of public procurement rules, as is the efficiency, or value for money, in a given context.

6.2 Recommendations

Following the final conclusions of this thesis, aiming at an effective approximation process, I will recommend as follows:

- **A clear understanding of expression "full approximation" of both parties**[1036]

Both parties; the EU and Albania, should 'agree' on what should be understood by the expression *"full approximation"*, in light of the integration process and to what extend the Directive's provisions should be implemented as such, in the Albanian procurement legislation. This clarification should be conducted, to avoid misinterpretations during the integration process and to avoid different expectations of both sides;

- **A 'transitional' approach should be followed by the EU in the integration process.**

The approach followed by the EU (through the European Commission) with non EU Member Countries, during the integration process, should not be rigid. The EU should be aware that countries like Albania, which aim to join EU, are mostly countries in transition, meaning that they are in a different state of development (economic, social and politic) compared to the countries which are already in the EU (even though there are considerable differences among them as well). In this context, it will be more realistic to have some 'transitional rules" for countries which aim to join EU, then requiring them to

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transparency and integrity of the procurement processes. The main procedures and provisions of the EU Directives are implemented in the PPL. These apply not only above the EU thresholds, but also within the bands of specific national thresholds which generate formalistic practices. In addition, there are national procedures for low-value procurement, such as the request for proposals and small-value purchases. Competitive procedures regarding the publication of tender notices are generally required for the award of all contracts irrespective of their value. Negotiated procedures without prior publication should be used on an exceptional basis only, but still the numbers are significant 103. The open procedure is the preferred method, while all other procedures are conditional either with reference to the threshold values or to the nature of the tender. In practice the restricted procedure is not used". See further "Public Administration Reform Assessment for Albania", April 2014, pg. 40-38; Available on http://www.sigmaweb.org/publications/Albania-Assessment-2014.pdf; Retrieved, May 5, 2015.

[1036] The same wording is used also by National Plan for European Integration, when providing that "In general, the obligations arising from the SAA, in the field of public procurement, are met. The regulatory framework in this area is generally compatible, but not *fully approximated* with the acquis. Law no. 9643, dated 20.11.2006, "On public procurement", as amended, is partially harmonized with the relevant directives…" See further Chapter 5 "Public Procurement", in the National Plan for European Integration 2015-2012, pg. 158-159. Available at http://www.integrimi.gov.al/al/dokumenta/dokumente-strategjike/plani-kombetar-per-integrimin-evropian&page=1, retrieved December 20, 2014.

fully implement some rules which are meant for countries which are at a different level of development.

- **A gradual implementation of Directive's provisions into the Albanian procurement legislation**

In any case, it is recommended that the implementation of Directive provisions at issue should be done gradually, activating at the same time the appropriate mechanisms of avoiding abusive and corruptive behavior from both sides; contracting authorities and economic operators. In this gradual approach the principle of equivalence[1037] and the principle of effectiveness[1038] have to be taken into account.

- **A coherent approximation of PPL with other national legal developments and other economic and social developments**

The approximation of Albanian procurement legislation with the respective EU Directives should also be conducted in coherence with the other legislation in force in the country and the needed economic and social changes.

- **Opening up of PPL towards flexibility, to increase the efficiency of the procurement process**

Despite all, the Albanian procurement law should be opened toward more flexibility, to increase the effectiveness of using public money. In any case this flexibility should be increased gradually, and should be accompanied by an improved integrity level of officials in charge of procurement processes.

- **Including procurement knowledge in the academic level**

Capacity building of the administration contributes to a higher level of professionalism and the alignment with European standards. Gaining a basic knowledge of the procurement system within university level education study programs would ensure the sustainability of such knowledge[1039].

- **Introduction of a licensing system for procurement officials**

Considering that public procurement is a process which happens in all public administration institutions, without exclusions, besides the knowledge gained in the university level education study programs, another factor of high impact consolidation and improvement of the procurement system in Albania would be the creation of the profession of procurement officials. Apposite professionals would carry out public

[1037] The principle of equivalence means that procedural rules are not less favorable than those governing similar domestic actions. See G. Gruber "Community law and national law", Public Procurement in the European Union, NWV Neuer Wissenschaftlicher Verlag, Vien, Graz 2006, pg. 41.

[1038] The principle of effectiveness means that procedural rules do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law. Ibid.

[1039] A public procurement course is included in the curricula of the Albanian School of Magistrates (Judiciary system), but not in the university level education study programs.

procurement procedures. To this sense, the establishment of professional courses by the state, which would license the successful attendees as "procurement officials", providing also that such officials be the only persons who can be employed for carrying out public procurement procedures in the public administration, would highly improve the system.

- **Education of procurement officials and procurement auditors to release the Albanian procurement system from the "fear from discretion"**

Trainings also play an important role in capacity building of the administration in public procurement. Given the fact the public procurement process is a very dynamic process, the training of employees being responsible for carrying out of public procurement procedures should be done on a regular and continuous basis. The procurement process is well regulated and prescribed by the PPL, including the supporting documentation, which the contracting authorities are bound to follow, but the process is not designed to foster professionalism and performance oriented attitudes and practices[1040], education of the administration (those who carry out procurement procedures and those who audit them) for being open minded is more than necessary, in order to make the system in practice as more effective as possible. Otherwise the emphases on control, sanctions and the risk of complaints will still lead to the unwillingness to introduce quality factors and to achieve the best efficiency and value for money of the procurement process.

[1040] See "Public Administration Reform Assessment of Albania", April 2014, pg.38-40; Available on http://www.sigmaweb.org/publications/Albania-Assessment-2014.pdf; Retrieved, May 5, 2015.

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