On March 28 the following “package” of three Directives on Public Procurement was published, repealing the current Directives 2004/18/EC and 2004/17/EC, that would precisely on March 31 celebrate 10 years:


The abovementioned Directives must be transposed by April 18, 2016.


The major innovation of the new European “package” on public procurement.

We must note that the Directive 2014/23/EU arises from two Commission interpretative communications on concessions (Commission interpretative communication on concessions under community law 2000/C 121/02, of April 20, and Commission
interpretative communication on the application of community law on public procurement and concessions to institutionalized public-private partnerships 2008/C 91/02, of April 12).

The Directive shall only be applied to concessions the value of which is equal to or greater than EUR 5 186 000. In addition to that exclusion, the Directive has several other exclusions, namely in the field of water, of electronic communications, of concessions for air transport services or of activities which are directly exposed to competition, pursuant to the Directive 2014/25/EU of the European Parliament and of the Council, of 26 February, on procurement by entities operating in the water, energy, transport and postal services sectors.

It is also made clear in the preamble (paragraph 35) that the Directive 2014/23/EU shall not affect the freedom of Member States to choose, in accordance with Union law, methods for organizing and controlling the operation of gambling and betting, including by means of authorizations.

It is established that the concessions shall be limited. The referred limitation must be estimated on the basis of the works or services requested.

The Directive 2014/23/EU foresees as basic principles the principle of free administration by public authorities, and the principle of equal treatment, non-discrimination and transparency.

The subjective scope of application of the Directive is based on the distinction between contracting authorities and contracting entities: the first ones comprehend, in a broad definition, the classic public law bodies and the bodies governed by public law; the second ones cover, namely, the bodies that pursue their activity in utilities.

Regarding the award procedure, the basic principle is the freedom of choice. Another innovation concerns with the so-called e-procurement: the documentation regarding the award procedure aimed at the conclusion of a concession contract must be available electronically. The goal intended to achieve with this measure is, according to paragraph 74 of the preamble, to greatly simplify the publication of concessions and increase the efficiency, speed and transparency of concession award processes. Consecutively, the Directive foresees technical and functional requirements that may be demanded to the candidates and tenderers. Lastly, the Directive foresees the selection and qualitative assessment of candidates criteria, as well as the award criteria.

Another major innovation introduced consists on the fact that, for the first time, there are rules on the performance on contracts. Here, article 43, which emerges from the Pressetext Case, regarding the modification of contracts during their term, must be highlighted.
Lastly, we must emphasize the fact that the Directive imposes certain grounds for the termination of concessions, without prejudice to the possibility of the Member States establishing other grounds for termination.

II. Directive 2014/24/EU – Public Procurement

Regarding the Directive 2014/24/EU of the European Parliament and of the Council, of 26 February, on public procurement, that repeals the Directive 2004/18/EC, there are two major changes: (i) the existence of a new kind of award procedure; (ii) the existence of rules on the performance on contracts.

(i) Innovation partnership
In this award procedure, the contracting authority, through a contract notice, shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall, however, indicate in a sufficiently precise way which elements define the minimum requirements to be met by all tenderers. The innovation partnership also foresees that contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them – except for the final tender –, in order to improve the content thereof.

(ii) Award procedure
As to the award procedures, it should also be noted that (a) the public procedure is now named open procedure and that (b) the Directive foresees a competitive procedure with negotiation.

(iii) Rules on the contract performance
It is foreseen not only the situation of subcontracting, but also the modification of contracts during their term. It is possible to have a modification:

a) Where the modifications have been provided for in the initial procurement documents;

b) For additional works, services or supplies by the original contractor that have become necessary, where a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the contracting authority;

c) If the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee, if the modification does not alter the overall nature of the contract and if the increase in price is not higher than 50% of the value of the original contract or framework agreement;

d) Where a new contractor replaces the one to which the contracting authority had initially awarded the contract, in certain circumstances;

e) Where the modifications, irrespective of their value, are not substantial. The modifications are substantial where:
a. The modification renders the contract or the framework agreement materially different in character from the one initially concluded;
b. The modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
c. The modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
d. The modification extends the scope of the contract or framework agreement considerably;
e. Where a new contractor replaces the one to which the contracting authority had initially awarded the contract.

There are other points and innovations that are worth mentioning:
- The indication of new thresholds;
- As a new technique and instrument for electronic and aggregated procurement, the appearance of electronic catalogues;
- The possibility of exclusion of an economic operator from an award procedure in which the economic operator has shown significant or persistent deficiencies in the performance of a public contract, which led to early termination of that prior contract, damages or other comparable sanctions.

III. Directive 2014/25/EU – Public Procurement on Utilities

Lastly, we must mention the Directive 2014/25/EU of the European Parliament and of the Council, of 26 February, on procurement by entities operating in the water, energy, transport and postal services sectors, which repeals the Directive 2004/17/EC.

This Directive establishes the rules on the procedures for procurement by contracting entities with respect to contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 15 (EUR 414 000 for supply and service contracts as well as for design contests; EUR 5 186 000 for works contracts; EUR 1 000 000 for service contracts for social and other specific services listed in Annex XVII).

Contracting entities are the contracting authorities or public undertakings which pursue one of the activities referred to in Articles 8 to 14: gas and heat, electricity, water, transport services, ports and airports, postal services and extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels.

As major innovations: the existence of a new award procedure (innovation partnership); rules on the contract performance; the existence of electronic catalogues as a new
technique/instrument for electronic and aggregated procurement; and the grounds for exclusion and selection of candidates criteria – in this last issue, the Directive expressly refers to the Directive 2014/24/EU.