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IMPACT OF THE DIRECT EFFECT OF PUBLIC PROCUREMENT DIRECTIVES ON THE SPANISH LEGAL SYSTEM AS A RESULT OF NOT COMPLETING THEIR TRANSPOSITION WITHIN THE DEADLINE

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## INTRODUCTION. FAILURE TO TRANSPOSE PUBLIC PROCUREMENT DIRECTIVES WITHIN THE DEADLINE

The deadline for EU Member States to incorporate the new public procurement directives into their domestic Law expired on **April 18, 2016**.

As we know, on March 28, 2014, the fourth-generation public procurement directives approved by the European Parliament and the Council were published in the OJEU: (i) **Directive 2014/23/EU**, on the award of concession contracts; (ii) **Directive 2014/24/EU**, on public procurement and (iii) **Directive 2014/25/EU** on procurement by entities operating in the water, energy, transport and postal services sectors, granting EU Member States a two-year transposition deadline.

Although Spain has initiated various procedures aimed at implementing them,<sup>1</sup> the general elections held on December 20, 2015, and the consequences of failing to form a new government, have prevented the Draft Bills on Public Sector Contracts and Procurement Procedures in the water, energy, transport and postal service sectors from being sent for approval by the Spanish Parliament.

This being the case, since the full transposition of the directives to Spanish legislation has not yet occurred, and aside from any proceedings for non-compliance that may be brought under article 258 of the TFEU, the **direct effect of several aspects of the directives will become enforceable** from April 18, 2016.

This means that individuals may invoke any provisions that are sufficiently clear, precise and unconditional, overruling domestic legislation, if any, and, in particular, the Consolidated Text of the Spanish Public Sector Contracts Act (*Texto Refundido de la Ley de Contratos del Sector Público*, TRLCSP), where it contradicts the Directives.

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<sup>1</sup> The Draft Bills on Public Sector Contracts and Procurement Procedures in the sectors of water, energy, transport and postal services were submitted to public hearing proceedings on April 17, 2015. In addition, on June 11, 2015 the Plenary Session of the General Judicial Council (CGPJ) approved the corresponding reports on those Drafts. For its part, on July 16, 2015 the Spanish National Commission on Financial Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*, CNMC) passed a report on the Draft Bill, published the following October 13. More recently, at its meeting of March 10, 2016 the State Council approved Opinions relating to both texts (Opinions number 1116/2015 and 1115/2015, respectively), which are pending publication.

## DIRECT EFFECT OF THE DIRECTIVES AFTER THE TRANSPOSITION PERIOD HAS ELAPSED

The case law of the Court of Justice of the European Union ("CJEU") has recognized the possibility that individuals (natural or legal persons) may directly invoke before public authorities the rights conferred by the Directives in the event that a Member State fails to comply with the obligation to transpose a specific directive within the established deadline or if it has inadequately implemented it.

However, the CJEU has conditioned this **vertical direct effect** of the Directives to compliance with a number of cumulative requirements:<sup>2</sup>

- a. The deadline for transposition into domestic Law has expired.
- b. Failure, insufficiency or deficiency in implementing the Directive into domestic Law.
- c. The provision invoked is sufficiently clear, precise and unconditional to give rise to the recognition of rights in favor of individuals or to the imposition of obligations on them without further development.

The direct effect is confined to a vertical, ascending and one-way relationship, i.e., the individual can require the public authorities<sup>3</sup> apply the provisions of a directive, but, as a rule, the authorities cannot require private individuals to comply with a directive that has not been implemented.

## ASPECTS OF PUBLIC PROCUREMENT DIRECTIVES SUSCEPTIBLE TO DIRECT APPLICATION FROM APRIL 18, 2016

Based on the above criteria, from April 18, 2016, and until the regulations to implement the full transposition into domestic law of the new procurement Directives enter into force, it will be necessary to determine which specific provisions of these Directives have a direct effect and can, therefore, be invoked by companies and private individuals against public authorities and other contracting authorities.

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<sup>2</sup> CJEU judgment of Apr. 5, 1979, Case 148/78, *Ratti*, of Jan. 19, 1982, Case 8/81, *Becker*, of Apr. 10, 1984, Case 14/83, *Von Colson v. Kamann*, of Nov. 13, 1990, Case C-106/89 *Marleasing*, of Mar. 3, 1994, Case C-316/93, *Vaneetveld*, of July 14, 1994, Case C-91/92 *Faccini Dori* and of July 3, 1996, Case C-192/92, *El Corte Inglés*.

<sup>3</sup> In particular, for these purposes, public authorities include administrative authorities, contracting authorities, administrative courts in procurement matters and the courts.

To clarify these provisions, in recent weeks both the Administrative Procurement Consultancy Board (*Junta Consultiva de Contratación Administrativa*) and the administrative courts on matters of procurement have published their own recommendations and guidelines, which, although not binding, are of interest as they include their interpretation criteria in relation to the application of certain aspects of the Directives after April 18, 2016.<sup>4</sup>

Notwithstanding the above and the case-by-case analysis generally required, the following novelties could emerge, among others, from the direct applicability of the Directives:

- a. The recognition of the direct effect of art. 5 of Directive 2014/23/EU, on contract definitions, will involve implementing the definition of service concession and moving the category of public service management contracts under art. 8 of the TRLCSP.
- b. Also noteworthy is the direct effect on the provisions on thresholds established in Delegated Regulations (EU) 2015/2170 and 2015/2172, which involve no changes with regard to those established by Regulation 2014/2342 and Order HAP/2846/2015.
- c. We understand that art. 5 of Directive 2014/24/EU, on the calculation methods for the estimated procurement value and the provisions of art. 8 of Directive 2014/23/EU on the method for calculating the estimated value of concessions also have direct effect.
- d. With regard to in-house providing between public sector entities, we can interpret that the requirements of art. 12 of Directive 2014/24/EU and art. 17 of Directive 2014/23/EU, that 80% of the in-house activities must be performed by the entity entrusted to perform them, will have direct effect. Furthermore, the provisions of art. 13 of Directive 2014/23/EU concerning concessions awarded to associated companies must also be understood to have direct effect.

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<sup>4</sup> These include the Recommendation of the Administrative Procurement Consultancy Board (JCCA - *Junta Consultiva de Contratación Administrativa*), on the direct effect of the new EC Directives on public procurement (published in the Official Gazette of the Spanish State -*Boletín Oficial del Estado*, BOE- No. 66 of March 17, 2016), the Study on the effects of the Directives in light of the expiry of the transposition deadline without a new Public Sector Procurement Act, prepared by a Procurement Courts committee appointed at their 4th coordination meeting, and the Recommendation of the State Administrative Procurement Consultancy Board with regard to the use of the European Single Procurement Document (ESPD).

- e. The regulation of the duration of concessions contained in art. 18 of Directive 2014/23/EU has direct effect.
- f. With regard to negotiated procedures, these may only be used for awarding contracts subject to harmonized regulations in those cases provided by art. 170 to 174 of the TRLCSP that also fall under art. 26.4 or art. 32 of Directive 2014/24/EU, in the case of works, supply and service contracts, or under art. 31, paragraphs 4 and 5 of Directive 2014/23/EU, in the case of contracts for awarding public works or public service management contracts.
- g. Contracting under dynamic procurement systems must be in accordance with the restricted procedure rules, in the terms and conditions established by art. 34 of Directive 2014/24/EU. Provisions on electronic auctions and electronic catalogs also have direct effect.
- h. Regarding the European Single Procurement Document (ESPD), we believe that paragraphs 1, 2, 4 and 5 of art. 59 of Directive 2014/24/EU will have direct effect, together with Regulation (EU) 2016/7, which establishes the standard form of the ESPD.
- i. The requirements on advertising and publication under art. 50.1 and 75.2 of Directive 2014/24/EU, and 32.1 of Directive 2014/23/EU should also be understood to have direct effect.
- j. In the same vein, the provisions on minimum tender submission deadlines are also directly applicable. These include, in particular, the direct effect of art. 47.3 of Directive 2014/24/EU, which requires contracting authorities to extend the deadline for submission of tenders in the cases and under the conditions it establishes.
- k. The provisions of art. 68 of Directive 2014/24/EU on life cycle as criterion for award should also be considered to have direct effect.
- l. Some of the provisions on the amendment of contracts can be considered to be of direct application including, in particular, the prohibition to alter the overall nature of the contract and the obligation to publish amendments in the OJEU.
- m. As a rule, from April 18, all contracting authorities must provide electronic access to bidding conditions of contracts subject to harmonized regulation

through their contractor profile, specifying, where appropriate, alternative forms of access if confidentiality requirements impede electronic access.

- n. The object of the special procurement appeal will have to be adapted to the content of the Directives. Recognition of the direct effect of art. 46 of Directive 2014/23/EU, would involve, among other changes, the extension of the scope of application of art. 40 of the TRLCSP, in particular to public services management contracts subject to harmonized regulation.

Notwithstanding the above, a specific analysis of the circumstances that apply in each case will be necessary, as well as monitoring the criteria and interpretations applied by procurement bodies, contracting authorities and administrative and judicial courts with regard to direct applicability of the various stipulations of the new procurement Directives until they are fully transposed into the national legislative framework.

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