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THE NEW RULES OF THE EUROPEAN PUBLIC PROCUREMENT LAW

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1. Introductory thoughts. Antecedents of the reform and the reasons for reviewing the prior regulation

In December 2011, the European Commission (hereinafter Commission) made a proposal on the review of the than European public procurement directives, namely the 2004/17/EC[1] and 2004/18/EC[2]) directives. At the same time the Commission also initiated the adoption of a third directive, which contains separate rules on the concession contract.

Several considerations stood in the background of the overall public procurement reform. One of the defined goals of the reform was the making the European public procurement regulation more transparent and the ensuring a better access of European enterprises, in particular small and medium enterprises (hereinafter SMEs) to the public procurement procedures. Another important aspect was to make the regulation simpler and more effective and to enforce better and stronger the classical public procurement principles (e.g. best value for money, competition etc.)

Nevertheless, the European law-maker also should take into account those economic, social and political changes, which could be observed in the last decade and which had also influence on the development of the European public procurement law.

The regulation package, which was prepared and proposed by the Commission, was passed by the European Parliament on 15th January 2014. As the last step of the legislative process, the European Council adopted the new directives on 11th February 2014.

On the next few pages we intend to stress the most important elements, key features of the above mentioned reform of the European public procurement law and to introduce some new legal instruments. Above the concrete legal changes of the regulation, we also refer to the public procurement reforms taking place in the

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1 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. *OJ L,* 134, 30. 4. 2004, 1–113.

2 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. *OJ L,* 134, 30. 4. 2004, 114–240.

Member States as a necessary consequence of the European changes and the so-called national implementation measures (NIMs), which have been already adopted till now.

2. The legislative package for the modernisation of the European public procurement

The European public procurement legislative package, which was adopted by the European law-maker in several phases, contains three directives. Two of them, namely the 2014/24/EU[3] and the 2014/25/EU[4] served the concrete reform of the public procurement rules, since they replace the previously operating (above already mentioned) public procurement directives. The former regulates the purchases of the classical sector; the latter contains provisions on the public utilities sector. Next to the new public procurement directives, a third measure also keeps the part of the European legislation package. This directive (2014/23/EU[5]) contains single rules on the concession contract. With this legal act the European law-maker not only in the provisions, but formally also separates the concession rules from the public procurement regulation.[6]

The new rules shall be implemented by the national legislator until 18th April, 2016. However, there is also another deadline (September 2018) for the e-procurement rules. The main reason for this two different deadlines, that the preparation work of introducing the above mentioned electronic procurement rules requires more time in certain Member States, because of their low technical preparation level of certain Member States. Naturally, this factor does not significant in some other Member States. As we are going to see under point 6, these Member States have already adopted their national implementation measure either as single legal act (e.g. United Kingdom) or as an amendment of the operating public procurement regulation (e.g. France). An interesting point is, that both mentioned regulation maintained a later deadline (as to the European directives) for the introduction and coming into force of the rules on e-Procurement and electronic communication.

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3 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. *OJ L*, 94, 28. 3. 2014, 65–242.

4 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/EU. *OJ L*, 94, 28. 3. 2014, 243–374.

5 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts. *OJ L*, 94, 28. 3. 2014, 1–64.

6 The detailed review of the European public procurement legislation package see NEUN, Andreas– OTTIG, Olaf: Die Eu-Vergaberechtsreform 2014. In: *Europäische Zeitschrift für Wirtschaftsrecht,* 12/2014, 446–453, 448.

3. Simplification and effectiveness

As it was previously defined, the simplification of the public procurement procedures and the increasing of their effectiveness was one of the main aims of the EU's public procurement reform. Several sign of this intention can be caught in the directives. However, it is also important, that the simplification affects not only the contracting authorities, but all economic operators also, who are involved into the public procurement procedure.

3.1. Shorter deadlines, decreasing bureaucracy

One of the touchable marks of the simplification of public procurement procedures is the foreshortening of the procedural deadlines. With this act – as to the intention of the European legislator – the public procurement procedures became more flexible and faster in the future. The deadlines shorten to 30 days in average.[7] (It is worth to mention, that the foreshortening of the deadlines serves not only the simplification of the public procurement procedures, but the more effective involving of SMEs into these procedures, which was also defined as an aim of the European public procurement reform.)

The roll-back of the bureaucratic elements of the public procurement is aimed in several forms in the new European directives. Some measures appear in the field of exclusion from public procurement procedure. (The exclusion from the public procurement procedure always stands at the core of public procurement examinations, since it is one of the most sensible questions, because it has a strong impact on the future of a certain tenderer.)

a) Demonstrating of reliability

The old directives (and the connecting judicial practice) have already known the legal institution of self-cleaning, i.e. the possibility for an economic operator, who is in such a situation, which grounds exclusion from the public procurement procedure, to prove its trustiness.[8] Nevertheless, such a possibility for exculpation still missed any legal ground at that time.

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[7] See FLETCHER, Glenn: Minimum time limits under the new Public Procurement Directive. In: *Public Procurement Law Review*, Issue 3 (2014), 94–102.

[8] ARROWSMITH, Sue–PRIEß, Hans-Joachim–FRITON, Pascal: Self-Cleaning as a Defence to Exclusions for Misconduct – An Emerging Concept in EC Public Procurement Law? In: *Public Procurement Law Review*, Issue 6 (2009), 257–282, 259; PRIEß, Hans-Joachim–STEIN, Roland M.: Nicht nur sauber, sondern rein: Die Wiederherstellung der Zuverlässigkeit durch Selbstreinigung. In: *Neue Zeitschrift für Baurecht und vergaberecht*, Nr. 13 (2008), 230; HJELMENG, Erling–SØREIDE, Tina: Debarment in Public Procurement: Rationales and Realisation. In: RACCA, Gabriella Margherita–YUKINS, Christopher (eds.): *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*. Bruylant, 2014, 226–227.

Directive 2014/24/EU – contrary to its antecedent – *expressis verbis* declares, that the economic operator that is in one of the situations referred to in paragraphs (1) and (4) may 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.[9] [10] This provision got place in the directive upon the practice of the Court of Justice of the European Union (hereinafter CJEU), since the possibility for self-cleaning has already been recognized in it.

As to the Article 57, paragraph (1) of the Directive 2014/24/EU, the exclusion of the economic operator is based on the committing of a certain crime (e.g. participation in a criminal organisation, corruption, fraud, terrorism, money laundering, child labour and other forms of trafficking in human). In these cases the contracting authority shall exclude the economic operator from the public procurement process. Article 57 paragraph (4) of the above mentioned directive contains those circumstances (e.g. grave violation of professional obligation, detaining information, giving untrue information, undertaking unduly influence the decision-making process of the contracting authority), under which the contracting authority has right to exclude the economic operator, but the exclusion is not prescribed by law.

The economic operator's duty of proving is very complex. On the one hand, the economic operator shall prove that it *has paid* or *undertaken to pay compensation* in respect of any damage (injury) caused by the criminal offence or misconduct. This means the reparation aspect of the duty. One the other hand, economic operator also shall prove that it – manner by actively collaborating with the investigating authorities – clarified the facts and circumstances in a comprehensive and taken such *concrete technical, organisational and personnel measures* which are appropriate to prevent further criminal offences or misconduct. (Such measure can be for instance the realignment of the organisation or the sending-off of the employee, who is personally responsible for the act, upon which the economic operator would have been excluded from the public procurement procedure.) This other aspect of the proving serves the prevention.

It is substantial that there is no general "recipe" for accept the economic operator's demonstration of reliability. Therefore, the measures taken by the economic operators shall always be evaluated with 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 shall receive a statement of the reasons for that decision.[11]

In the case, when the evidence given by the economic operator is satisfactory, the contracting authority shall not exclude the certain economic operator from the

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9 Directive 2014/24/EU, Article 57, paragraph 6.

10 PRIEß, Hans-Joachim: Rules on Exclusion and Self-Cleaning Under the 2014 Public Procurement Directive. In: *Public Procurement Law Review*, Issue 3 (2014), 112–121.

11 About the self-cleaning see in detail WIMMER, Jan Philipp: *Zuverlässigkeit im Vergaberecht: Verfahrensausschluss, Registereintrag und Selbstreinigung, Schriften zum Vergaberecht.* Schrift 38, Nomos Verlag, 2012.

public procurement procedure. Otherwise, particularly in those cases, when the measures taken by the economic operator are not appropriate as to the contracting authority and therefore the demonstrating of the non-existence of the ground for exclusion is not satisfactory, the contracting authority shall justify its exclusive decision to the economic operator.

b) The European Single Procurement Document

The Directive 2014/24/EU also makes possible for the economic operator to demonstrate previously the non-existence of the ground for exclusion by using the so called European Single Procurement Document (hereinafter ESPD). In this document the economic operator can proclaim that it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded or it meets the relevant selection criteria that have been set out pursuant to Article 58. On the other hand, it can give relevant information required by the contracting authority. Moreover, the statement of the economic operator shall name the public authority (or third person), who is responsible for the issue of the supplementary documents, certificates. The economic operator also shall declare that it can show the above mentioned document for demand.[12]

As it can been seen, the ESPD has double content. In narrower sense it has proving function, but in wider sense it not only proves, but provides information related to the status of the economic operator.

The uniformity of the ESPD is assured by the fact that it shall be drawn up on the basis of a standard form, which is to be established by the Commission by means of implementing acts. The ESPD shall be provided exclusively in electronic form.

As to the intention of the European legislator, the using of the ESPD is going to lead to the decreasing of the administrative burdens and costs of public procurement procedures, since the certifying document shall effectively be submitted to the contracting authority exclusively by the winner.

c) The e-Certis database

Introducing the ESPD seems to be a good measure. However, a wholly electronic document as the ESPD can only reach its goal, if the technical background also exists. To ensure this technical background, the European legislator obliges the Member States to use the – at present already existing – e-Certis information system. At this time the e-Certis is ensured and maintained by the Commission, but the updating and controlling of the data is in the competency of the Member States. The national authorities do these activities voluntary, therefore the using of e-Certis presently does not give sufficient safety for the actors of the public procurement procedures. In the future, the "up-keeping" of the e-Certis will be compulsory for the Member States. One the one hand they shall ensure that the information con-

[12] Directive 2014/24/EU, Article 59, paragraph 1.

cerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up-to-date.[13] On the other hand, Member States shall make available and up-to-date in e-Certis a complete list of databases containing relevant information on economic operators which can be consulted by contracting authorities from other Member States. Upon request, Member States shall communicate to other Member States any information related to these databases.[14]

In some Member States some electronic databases and registries already exist, which are very useful in the course of public procurement procedure. In Germany there is a special registry form, the so-called *Korruptionsregister*, which is still used only in some states, albeit there were initiations at the introduction of a federal registry.[15] At present, there are both single and joint registries in Germany. North Rhine-Westphalia was the first, who introduced such a registry in 2004 by its Act on the Fight against Corruption.[16] In the next few years (between 2004 and 2007) some other states (Bavaria,[17] Baden Württemberg[18] and Berlin[19]) also adopted legal acts, which contain provision on the state corruption registry. From 2010 the registry also exists in Hessen and from 2011 in Bremen.[20]

As it is defined in all of the above mentioned state acts, the registries primarily aim at the demonstration of reliability. (As it can be seen, the main aim of the act corresponds with the European public procurement regulation, which also puts emphasis on ensuring the possibility for economic operators to demonstrate their reliability.) It is a common feature that in all registries both natural and legal persons are registered, who are guilty of a certain crime. The certain registry always determines the scope of those crimes, which results the registration. It is interesting, that typically not only those crimes are named, which have corruption nature, but some other crimes, which relate for example to the unfair competition.

Next to the above mentioned single, on state level existing registries, there is another Korruptionsregister, which has been operating from 1st January 2014. The

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13 Directive 2014/24/EU, Article 61, paragraph 1.

14 Directive 2014/24/EU, Article 59, paragraph 6.

15 About the registry see FÜLLING, Daniel: *Korruptionsregister: Zwischen Anspruch und Wirklichkeit.* Brandenburgische Studien zum Öffentlichen Recht, Kovac, Dr. Verlag, 2013.

16 *Gesetz zur Verbesserung der Korruptionsbekämpfung und zur Errichtung und Führung eines Vergaberegisters in Nordrhein-Westfalen (Korruptionsbekämpfungsgesetz – KorruptionsbG)*

17 *Richtlinie zur Verhütung und Bekämpfung von Korruption in der öffentlichen Verwaltung (Korruptionsbekämpfungsrichtlinie – KorruR)*

18 *Verwaltungsvorschrift zur Verhütung unrechtmäßiger und unlauterer Einwirkungen auf das Verwaltungshandeln*

19 *Gesetz über die Einrichtung und Führung eines Registers über korruptionsauffällige Unternehmen in Berlin (Korruptionsregistergesetz – KRG)*

20 *Bremisches Gesetz zur Errichtung und Führung eines Korruptionsregisters (Bremisches Korruptionsregistergesetz – BremKorG)*

introduction of this registry is a result of an agreement between the City of Hamburg and Schleswig-Holstein, who intended to cooperate in the field of the fight against corruption. Contrary to the above mentioned registries, this latter operates jointly.)

As it can be seen, the European public procurement reform primarily intends to reduce the administrative burdens of the public procurement procedures by different electronic measures. An important provision of the directive 2014/24/EU, which prescribes for the Member States to ensure that all communication and information exchange (e.g. submission of an offer) are performed using electronic means of communication.[21] Regarding these electronic means, the Directive also prescribe that 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 shall not restrict economic operators' access to the procurement procedure.

3.2. Changing procedural rules, new procedures

Thy selectable types of public procurement procedures have been increasing in the past decade. Next to the near classical open, restricted and negotiated procedure, the European legislator made possible the application of competitive dialogue after the European public procurement reform in 2004. The application of this new type was not compulsory for the Member States, but they could decide about the implementation of the relevant provisions into the national public procurement regulation.

Albeit the new – in 2014 adopted – European public procurement directives intend to simplify the public procurement procedures, the scale of procedure types has been broadened, since the European law-maker introduced the competitive procedure with negotiation and the innovation partnership. It is worth to mention that the application of the new procedure types will be compulsory for the Member States in the future, i.e. they shall implement the relevant provisions into their national public procurement law.[22]

a) Competitive procedure with negotiation

As it was mentioned before, a special procedure appears within the types of public procurement procedures, which washes away the borders existing between competitive dialogue and negotiated procedure, but at the same time mixes the most favourable features of them. Opposite to the "traditional" competitive dialogue, in the case of competitive procedure with negotiation the contracting authority has the

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[21] Directive 2014/24/EU, Article 22, paragraph 1.

[22] About the procedures see in detail: TELLES, Pedro–BUTLER, Luke R. A.: Public Procurement Award Procedures in Directive 2014/24/EU. In: LICHERE, Francois–CARANTA, Roberto–TREUMER, Steen (eds.): *Novelties in the 2014 Directive on Public Procurement.* DJØF Publishing, 2014, 131–184.

right to negotiate with all tenderer in order to facilitate the submission of the best tenders.

Compared to the negotiated procedure there is a significant difference, namely that the contracting authority negotiates not only with those tenderers, who are chosen, qualified and invited for submit tender by itself, but the possibility to negotiate is given for every tenderer. Otherwise, the negotiations are based on the offers, which have been submitted at the beginning of the procedure (so-called "initial tender") and serve the improving of the content of these tenders. The negotiating phase of the procedure formally terminates, when – after the negotiations – the contracting authority asks again the tenderers to submit their – by this time revised – offers.

With taking account this latter act, it can be stated that the examined new type of public procurement procedures – leastwise with regard to its character – is more similar to the competitive dialogue, than the negotiated procedure. Nevertheless, several differences also can be drafted. While the proposals ("outline solutions", "project proposals" etc.) submitted in the first phase of the "traditional" competitive dialogue expressly conform with the requirements and needs framed by the contracting authority, in the case of competitive procedure with negotiation the tenderers submit their offers at the beginning of the procedure and these offers keep the base of the further negotiations. After finishing negotiations, these offers can be revised and they get finality with their "re-submitting".

The competitive procedure with negotiation presumably will mean real possibility for the purchases of those contracting authorities, whose purchasing demands can fairly and precisely be drafted and therefore the preparation of the offer and the making-up of the documentation basically will not cause problems. In these cases maintaining the possibility to negotiate (as a "back-stair") can be advantageous for the contracting authority, if questions arise from the side of tenderers, which questions have to be negotiated.[23]

b) Innovation partnership

There is another public procurement procedure type, which is introduced by the directive 2014/24/EU. The innovation partnership is basically appropriate for those purchases, which aimed at innovation and typically planned for long-term.

The preamble of the directive remind that research and innovation (including eco-innovation and social innovation) are among the main drivers of future growth and therefore play key-role in the "Europe 2020" strategy for smart, sustainable and inclusive growth. In order to inspire the innovation, contracting authorities shall make the best strategic use of public procurement.

[23] About the competitive negotiated procedure see in details: DAVEY, Jonathan: Procedures Involving Negotiation in the New Public Procurement Directive: Key Reforms to the Grounds for Use and the Procedural Rules. In: *Public Procurement Law Review*, Issue 3 (2014), 103–111.

With the introduction of the innovation partnership, the European legislator intended to ensure the application of special procedures for the contracting authorities for those cases, in which a need for the development of a certain innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market.

The innovation partnership means a long-term cooperation, which shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include one the one hand the manufacturing of the products, but the provision of the services or the completion of the works, one the other hand. Innovation partnership – according to the decision of the contracting authority – can be set up only with one partner or with several partners, who conduct separate research and development activities.[24]

The provisions of the innovation partnership mainly based on the procedural rules that apply to the competitive procedure with negotiation. It is also important that contracts can solely be awarded on the basis of the best price-quality ratio, since – as the preamble of the directive also emphasizes –, this aspect is the most appropriate in the course of comparing innovative solutions. The directive also stresses, that innovation partnership should not use in such a way, which prevent, restrict or distort competition.[25]

4. Supporting the participation of SMEs in the public procurement

Promoting the participation of SMEs in the public procurement was defined as one of the key-elements of the European public procurement reform. As the Commission's Green Paper on the modernisation of EU public procurement policy[26] worded in 2011, these enterprises keeps the backbone of the European economy by acting significant role in the field of creating workplaces, growth and innovation.

Although the new directives aimed at taking the SMEs into public procurement, it is worth to pin down that the intention of the legislator does not and could not spread over this goal, since the favouring or ensuring different preferences for SME-s would be opposite to the principle of equal treatment and restraint of discrimination, which are worded as essential elements of the European public procurement regulation. With regard to the SMEs, several element of the regulation should be mention.

In the course of public procurement procedures it was common that the participation of an SME was legally possible, but because of other factor (typically because of the measure of the contract) the certain enterprise *de facto* could not submit appropriate offer. Contrary to the prior regulation, which expressly prohibited

[24] Directive 2014/24/EU, Article 31 paragraph 11.

[25] Directive 2014/24/EU, preamble paragraph (47)–(49).

[26] Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market, COM/2011/15 final, Brussels, 27th January 2011.

the division of a contract into lots, under the new rules 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.[27] In the case of such a "divided contract" an SME has better chance to submit appropriate offer, since the individual contracts better correspond to the capacity of SMEs and the their content can be more closely to the specialised sectors of SMEs or in accordance with different subsequent project phases.[28]

The previous public procurement regulation had another weakness; it declared such unreasonable requirements with regard to the economic and financial capacity of tenderers', which often meant groundless burden for the participation of SMEs in public procurement. The new directives intend to "soften" the rigour of the above mentioned requirements. It is true, that contracting authorities also may require the economic operators to have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the certain public procurement contract. Nevertheless, the directive 2014/24/EU introduces a strong limitation, when it defines that the minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value.[29] Next to this strict burden the directive recognizes that the application of more rigorous requirements can be justified in certain exceptional cases, in particular, when the performing of contract goes with higher risks or the appropriate performing has special significance for the contracting authority (e.g. the correct performing is a pre-condition of other contracts).

5. Improving the rules of in-house exemption

The adjudication of in-house procurement (elsewhere in-house exemption) has always been a "hot topics" in the European public procurement law, not only in legislative level, but in the judicial practice of the CJEU too. Directive 2014/24/EU makes a clean breast of this question and contains detailed – and partly revised – rules on those public contracts, which are concluded between entities within the public sector. These rules were mostly improved upon the CJEU's several judgements, which were born in the last decade in the field of in-house procurement.[30]

1. Under paragraph 1 of Article 12 of the Directive 2014/24/EU, public contract awarded by a contracting authority to a legal person governed by private or

[27] Directive 2014/24/EU, Article 46 paragraph 1.

[28] Directive 2014/24/EU, preamble paragraph 78.

[29] Directive 2014/24/EU, Article 58, paragraph 3.

[30] About the judicial background and the built-in judgements see: WIGGEN, Janicke: Directive 2014/24/EU: The New Provision on Co-operation in the Public Sector. In: *Public Procurement Law Review,* Issue 3 (2014), 83–93; JANSSEN, Willem A.: The Institutionalised and Non-Institutionalised Exemptions from EU Public Procurement Law: Towards a More Coherent Approach? In: *Utrecht Law Journal,* Issue 5 (2014), 168–186.

public law *falls outside the scope of this Directive*, if certain conditions (so-called "Teckal criteria"[31]) are fulfilled. These –cumulative – conditions are the followings:

(a) *the contracting authority exercises* over the legal person concerned *a control*, which is *similar to* that, which *it exercises over its own departments* ("control criterion");

(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 ("activities criterion"); 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.

The notion of "similar control" is precisely worded by the Directive. As to the referred paragraph of the Directive, control exercised by the contracting authority is similar to that, which it exercises over its own departments, if the contracting authority exercises a *decisive influence* over both strategic objectives and significant decisions of the controlled legal person (*direct control*). Such control may also be exercised by another legal person, which is itself controlled in the same way by the contracting authority (*indirect control*).

The third criterion under point c) is introduced by the new directives as a further limitation of the in-house exemption. Summing up, in essence, the above conditions all more or less correspond to the content of the in-house exemption as outlined by the CJEU.

2. As to the judicial practice of the CJEU, new provisions also take into account other kinds of relationships existing between entities governed by public law. Accordingly, those cases fall outside the scope of the Directive (i.e. the paragraph 1 of Article 12 shall be applied), in which

a) a contracting authority ("daughter company") awards a contract to its controlling contracting authority ("mother company"), or

b) to another legal person controlled by the same contracting authority ("sister company"). In this latter case, there is a further prerequisite, namely, 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 decisive influence on the controlled legal person. Point a) of the referred para-

[31] See the Judgement of the Court in the Case C-107/98 in Teckal Srl v Commune di Viano and AGAC di Reggio Emilia, ECR [1999] ECR, I-08121.

graph covers the so-called "reverse vertical" constellation, whereas point b) concerns on the "horizontal relationship".

As to the paragraph 3 of Article 12, not only those situations fall outside the Directive, whereby a contracting authority exercises control on its own ("individual control"), but those cases, where the required control ("similar to that, which it exercises over its own departments") is exercised jointly by several contracting authorities ("joint control").

According to paragraph 4 of Article 12, a contract concluded exclusively between two or more contracting authorities also shall fall outside the scope of the new directive, if the following – cumulative – 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 ("horizontal co-operation");
(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.

6. The impact of the new European rules on the national public procurement legislations

As it was mentioned before, the adoption of the new public procurement directives naturally have effect on the public procurement law of the Member States, since national legislators have a duty to implement these new legal acts into their law until the deadline determined by the directives. Although the deadline for the implementation is 18th April, 2016, some Member State (namely France and the United Kingdom) already fulfilled this duty and the preparation and adoption of the new public procurement acts is already in process in several other Member States (e.g. Hungary).

In September, 2014, the French legislator adopted a decree about the measures of the simplification applied in the public procurement.[32] With this legal act, which came into force on 1st October, 2014, the French Public Procurement Code (*Code des marchés publics*, *CMS*) was amended, i.e. the French legislator took a stand on the modification of the existing public procurement rules instead of adopting a wholly new legal act.

Contrary to the French solution, the Parliament of the United Kingdom implemented the European public procurement directives by adopting a new legal act (No.12 of 2015). Most of its provisions came into effect on 26th February 2015. It is worth to mention, that the new regulation concerns the public procurement only

[32] Décret n° 2014–1097 du 26 septembre 2014 portant mesures de simplification applicables aux marchés publics.

in England, Wales and Northern Ireland, since in Scotland the EU reforms are being implemented separately.

With regard to the implementation deadline determined by the European directives, other Member States outside the above mentioned also shall implement the new provisions into their national public procurement law. As to the timetable deigned by the German Federal Ministry for Economic Affairs and Energy, the adoption of the new rules is to be happened during the autumn 2015, the planned time of coming into force is 18th April 2016.

In order to fulfil the implementation duty, which is set up in the new European directives, in October 2014 the Hungarian Prime Minister's Office published a so-called Conceptional Proposal[33] on the implementation of the European public procurement directives and the adoption of a new public procurement act. In this document the Prime Minister's office made clear, that Hungarian legislator would comply with the EU rules not by the overall modification of the operating public procurement act,[34] but the adoption of a whole new national regulation. Though the Hungarian Parliament's legislation program for the spring 2015 did not contain the planned adoption of the new act, on 18th May 2015 the Minister heading the Prime Minister's Office submitted to the Parliament the Proposal No. T-4849 on the Public Procurement. As to the statement of the Minister, the closing vote on the new act presumably takes place during the autumn 2015 and the provisions comes into force on 1st November 2015.

7. New rules on scale: sonorous goals – pretence solutions?

After a short and only for the most important elements extending review of the European reform of public procurement law it seems to be unambiguous that the revision of the prior regulation was necessary. One and a half year after the adoption of the legislation package, the adjudication and evaluation is difficult and probably untimely. However, it is sure, that positive and negative features already can be draw up.

It is welcomed, that in the course of the working up of the new public procurement provisions the European legislator had due foresight and turned with due sensibility to the CJEU's judicial practice, in which several notion has been developed, which are crucial not only for the effective application of public procurement rules, but for the legal certainty. As a result of this positive attitude of the European legislator, several, in the judicial practice precisely outworked definition took place in the directives and we face with a much more precise definition-making from the part of the legislator too.

Within the factors motivating the supervision of the European public procurement law European Commission stressed the promoting of a better access of SMEs

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[33] http://www.kormany.hu/download/a/e8/20000/%C3%9Aj%20Kbt%20koncepci%C3%B3.pdf (Downloaded: 4th March 2015)

[34] Act No. CVIII of 2011 on Public Procurement

to the public procurement. At first sight this goal has been realised, since new directives annul those limitations, which balked the participation of SMEs in public procurement procedures, but also facilitate the application some other measures, which implicitly promote the situation of SMEs.

New European directives unambiguously have epoch-making character, since different electronic solutions get bigger role, than ever had. In this field the compulsory maintaining and using of the e-Certis system shall be heightened. Moreover we may not forget about the introduction of the ESPD, which certifies the non-existence of a certain ground for exclusion from the public procurement process and which can only be submitted electronically to the contracting authority.

Beyond the positive features of the adopted European legislative package, we may not pass the negatives, which mostly mean the non-realisation of certain factors, which were defined by the Commission as a goal of the revision.

Though the simplification of the public procurement regulation was one of the primary aims of the reform defined by the Commission, in deed the adopted provisions far fail from the expectations: concrete simplifications did not occur, but the regulation partially became broader and sadly more complicated. Flexibility realised also in part, since flexible procedures (or procedures, which leastwise are intended to be flexible) can only be applied optionally in certain special cases

Several serious fault are generated by the fact, that European legislation missed to having regard during the reform process to the structural and administrational differences existing between the Member States and to taking into account, that the future working-up and the introduction of the different electronic registries is going to cause thoughtful difficulties in certain Member States.

Summing up, we can state that the reform of the European public procurement law and consequently the national laws was timely and definitely necessary. The elaboration of such an overall reform was a hard and enormous work, which – because of its grandeur –naturally carries the possibility for making mistakes. Now, the decision is in the national legislators' hand; by adopting their national implementation measures only they have the chance to correct the new regulation's smaller (or sometimes bigger) faults and to eliminate the unreasonable solutions existing in it. We hope they do that.