

Chapter 2

The New Directive 2014/24/EU on Public Procurement: A First Overview

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1. Introduction¹

As it is known, the **new “package” of the EU Directives on Public Procurement** (which corresponds one can say to the “*fourth generation*” of Directives on this matter²) was approved last February 26th, comprising:

- i) *Directive 2014/23/EU* of the European Parliament and of the Council, of 26 February 2014, on the award of concession contracts³;
- ii) *Directive 2014/24/EU* of the European Parliament and of the Council, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC⁴;
- iii) *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 service sectors and repealing Directive 2004/17/EC⁵.

Having entered into force on 17 April 2014⁶, the new Directives must be transposed by the Member States of the European Union until 18 April 2016⁷.

It is important, before proceeding, to **delineate the subject of this chapter**. On the one hand, taking into consideration the limited time available, the considerations that follow will solely and exclusively cover the directive on public procurement in general that repeals Directive 2004/18/EC. Furthermore, within this initial limitation, the novelties of this Directive 2014/24/EU in matters of procedures of formation of the contracts will not be treated in this chapter as they are covered by the next author. Taking into consideration that it concerns the text of a directive that has just been published, the objective of this chapter is not presenting an exegetical analysis of the new solutions but just a preliminary overview.

¹ The current text for publication – updated in virtue of the supervening publication of the new directives on public procurement – is based on a preliminary study by José Duarte Coimbra, trainee-lawyer at Sérvulo & Associados, attending a Masters degree and guest lecturer of the Faculty of Law of the University of Lisbon, and served as a base for the presentation of the author at the 7th National Congress on Electronic Public Procurement themed “The New European Directives on Public Procurement: new legislation, innovation and internationalization”, organized by APMEP – the Portuguese National Association of Public Markets, which took place on 10 December 2013

² Cfr., in general, on the successive *generations* of European Directives on Public Procurement, SUE ARROWSMITH, *EU Public Procurement Law: an introduction*, 2011, pp. 55-58; CHRISTOPHER BOVIS, *EU Public Procurement Law*, Cheltenham/Northampton: Edward Elgar Publishing, 2007, pp. 17-62; MARIA JOÃO ESTORNINHO, *Direito Europeu dos Contratos Públicos*, Coimbra: Almedina, 2006, pp. 37-60.

³ Cfr. *JOUE* L 94/1-64, of 28/03/2014.

⁴ Cfr. *JOUE* L 94/65-242, of 28/03/2014.

⁵ Cfr. *JOUE* L 94/243-374, of 28/03/2014.

⁶ Cfr. articles 54 of the Directive 2014/23, 93 of the Directive 2014/24 and 109 of the Directive 2014/25.

⁷ Cfr. articles 51 of the Directive 2014/23/EU, 90 of the Directive 2014/24/EU and 106 of the Directive 2014/25/EU, without prejudice to the possible extension of the deadline with regard to rules on the electronic handling of the procedures (articles 22 of the Directive 2014/24/EU and 40 of the Directive 2014/25/EU) the deadline can be extended until April 2018 (in general) or April 2017 (for the application of these rules to central purchasing bodies).

2. The relevance of the approval procedure of the new “package” of Directives on public procurement

Even before embarking on the journey of some of the main changes brought by the Directive 2014/24/EU, it is important, in any case, to draw attention to the relevance of knowing the procedure that led to the approval of this new “package” of directives. It concerns a *complex* and *phased* process, with an ample participation of the interested parties and an intense discussion on some of the more decisive topics in public procurements matters. Knowing this process thus is fundamental to fully understanding the genesis and intention that underlays the solutions now established by the European legislator.

a) One is reminded that on 3 March 2010, the Commission launched the **Europe 2020 – A strategy for smart, sustainable and inclusive growth**⁸, a policy paper in which a set of measures was announced with the objective of revamping the economy of the Member States in a *post-crisis* scenario, and among which some measures were included regarding Public Procurement. Effectively: *i) it is assumed in general that “Public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide; ii) “[a] wider use of green public procurement” is foreseen, as well as “to deploy market-based instruments such as procurement to adapt production and consumption methods”, with a view to guaranteeing an increased efficiency; iii) furthermore establishing the objective “to improve the business environment, especially for innovative SMEs, including through public sector procurement to support innovation incentives”.*

b) After almost a year, on 27 January 2011, the European Commission published the **Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market**⁹, through which it launched a public consultation, reinforcing the objectives established in the *Europe 2020* Strategy, on a set of possible measures on this matter, which ended on 18 April 2011 with a total of 623 proposals from among others stakeholders, public entities and individuals, which afterwards were synthesised, on 24 June, in the *Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market: Synthesis of replies*¹⁰.

c) Meanwhile, on 13 April 2011, the Commission presented the **Single Market Act - Twelve levers to boost growth and strengthen confidence “Working together to create**

⁸ Cfr. COM (2010) 2020 final, Brussels, 3.3.2010, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:pt:PDF>

⁹ Cfr. COM (2011) 15 final, Brussels, 27.1.2011, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:PT:PDF>

¹⁰ Cfr. http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf.

new growth¹¹, whereby precisely one of these twelve «levers» is the adoption of “a revised and modernised public procurement framework with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works”. This revision should also result in “simpler and more flexible procurement procedures for contracting authorities” aiming to “provide easier access for companies, especially SMEs “. Finally, underling the economical weight of service concessions and their part in public-private partnerships, it is determined that “a specific legislative framework will provide greater legal certainty for this type of partnership”, in a clear reference to the need to approve an autonomous and single Directive on Concessions.

d) All these *driving* documents resulted in **three Directive proposals presented by the Commission on 20 December 2011**¹². Debated in the Council, the proposals were furthermore the subject of opinions by the European Economic and Social Committee¹³ and by the European Committee for Regions¹⁴, as well as of an extended discussion in the European Parliament, which led to the introduction of relevant amendments to the initial proposals¹⁵. Approved in the first reading by the Parliament, on 15 January 2014, and by the Council, on 11 February 2014, the final text was signed by both bodies on 26 February 2014, with the Directives finally published on 28 March 2014.

3. Intention and general objectives

With the exception of the fact that for the first time, and autonomously, a legislation on European level on concession matters¹⁶ was introduced, wherein a common base of legislative framework was intended to be set out from the establishment of a single concept of concession based on the component of the *transfer of an operating risk* to the concessionaire, the “package” of 2014 Directives **does not entail a change of the paradigm in force since 2004**. The line is rather the introduction of changes within a logic of continuity with the regime of the Directives 2004/17/EC and 2004/18/EC, as well as with the jurisprudence of the Court of Justice of the European Union.

¹¹ Cfr. COM (2011) 206 final, Brussels, 13.4.2011, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:pt:PDF>.

¹² Cfr. COM (2011) 895 final, Brussels, 20.12.2011; COM (2011) 896 final, Brussels, 20.12.2011; COM (2011) 897 final, Brussels, 20.12.2011 (all available at:

http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals/index_en.htm.

¹³ JOUE C 191/84-96, of 29/06/2012.

¹⁴ JOUE C 391/49-83, of 18/12/2012.

¹⁵ Cfr., to this effect, the intermediate documents that were made available by the European Parliament throughout the year 2013: *Session Document A7-0007/2013*, of 11 January, *Session Document A7-0030/2013*, of 1 February, *Session Document A7-0034/2013*, of 7 February, as well as the *pre-final* versions (dated 13 September 2013) of the texts that were approved (available at:

<http://www.europarl.europa.eu/document/activities/cont/201309/20130913ATT71300/20130913ATT71300EN.pdf>,

<http://www.europarl.europa.eu/document/activities/cont/201309/20130913ATT71292/20130913ATT71292EN.pdf> and

<http://www.europarl.europa.eu/document/activities/cont/201309/20130913ATT71296/20130913ATT71296EN.pdf>).

¹⁶ Even though the possibility had been, for some time, studied and established in acts of *soft law*, of which we draw attention to the *Interpretative Communication on Concessions under Community Law (2000)* and the *Green Paper on public-private partnerships and Community law on public contracts and concessions (2006)*.

In this context, and without any surprises, in terms of legislative policy, **the European legislator opted to maintain the separation between the regulation of the “classic sectors” and the “special sectors”**, inasmuch as it is deemed that the market reasons that led to such division are maintained: on the one hand the strong influence that the state authorities still possess, in general, in the water, energy, transport and postal service markets; on the other hand the continuation of situations of markets that tend to be closed, still marked by the existence of exclusive rights awarded to certain operators. Furthermore, and in conformity with the specific characteristics of this type of contract, always closer to the exercise of *public tasks*, it is opted to regulate in specific legislation the matter of concessions, which in turn implied the joint treatment of public works concessions and service concessions, thus ending the previous existing divide – whereby the first were covered by Directive 2004/18/EC and the latter, in line with the *Telaustria* Judgement¹⁷, (merely) by the general principles of public procurement.

Still within the framework of a *global* assessment of the texts of the new Directives, it is possible to identify, in the proposed amendments, **two main objectives**, namely:

- i) the flexibilisation and simplification of the procurement procedures at the European level
- ii) the reinforcement of the instrumental use of public contracts to pursue secondary policies, especially in the areas of environmental policies, social policies and the promotion of jobs and innovation.

At another level, and though topically, it is furthermore possible to unveil a wide set of the following **secondary objectives**:

- i) to facilitate procedural access to SMEs;
- ii) an increased openness of procedures to foreign operators;
- iii) the reinforcement of electronic public procurement mechanisms and tools;
- iv) the prevention of corruption and the reinforcement of the guarantees of impartiality;
- v) the professionalization of the contracting activity of the contracting authorities;
- vi) to clear interpretation doubts as to the interpretation of the defining concepts within the subjective ambit of the public procurement regime, through the incorporation of the judicial contributions of the Court of Justice of the European Union.

¹⁷ Cfr. Judgment of the Court of Justice of 7 December 2000, proc. C-324/98.

4. Perspective adopted in the following overview

After the summary review of the journey that led to its approval and identifying the main *guiding principles*, it is now time to analyse some of the more significant changes, using merely as a reference the Directive 2014/24/EU.

In any case, precisely because the process that led to the approval of the final text was complex and shared, it is important in the task at hand to also consider the evolution of the prior discussion. In particular, even though concentrated on the provisions of the new Directive, the analysis which follows will identify, whenever suitable, the prior legislative framework and, more specifically, the contributions, of the Economic and Social Committee, the Committee for Regions and the European Parliament.

On the other hand, it is also important to compare the solutions set out in the Directive 2014/24/EU to the options established in the Portuguese Code of Public Contracts (hereinafter referred to as CCP), approved by Decree-Law no. 18/2008, of 29 January (and meanwhile, the object of various amendments). It is known that the transposition of the 2004 directives was an opportunity for Portugal. Some of the solutions that the CCP established were absolutely innovative and are now set out in this new “package” of Directives. The example of electronic handling of procedures or the digitalization of procedures – not referred to in this text - is very enlightening. The same spirit must now also be applied to the Directive 2014/24/EU. Thus it is important to understand the opportunity presented, adopting an open and creative attitude and, furthermore, attentive to the European debate, since there is more beyond the text of the new Directives.

5. The continuity in defining the scope of application of the Directive 2014/24/EU

a) The concept of «a body governed by public law»: an unfruitful discussion

Under Directive 2004/18/EC, all entities that meet the following cumulative criteria fall under the concept of *a body governed by public law*, thus being subject to the public procurement regime as defined by said Directive: *i) established “for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”; ii) having legal personality; iii) whose activity is “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”¹⁸.*

The original proposals of the Commission, regarding this matter, and merely seeking to fine tune *“the definition of certain key notions determining the scope of the Directive”*,

¹⁸ Cfr. article 1, paragraph 9 of the Directive 2004/18/EC.

introduced a clarification of the first of those requirements, fixing, on the one hand, the need to concern organisms *“established for or having the specific purpose of meeting needs in the general interest”*; proposing, on the other hand, the addition of a complement to said requirement according to which *“a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character”*. Notwithstanding these amendments/clarifications, the proposal of the Commission was considered insufficient by the Economic and Social Committee that considered that *“the concept of bodies governed by public law is unclear”* and that, accordingly, *“the concept of a public body as contained in article 2 of the two proposals for the directives requires further clarification”*, even though it did not offer the reasons for this consideration, let alone did it propose the wording of such potential change.

The European Parliament, for its part, at the same time that it suppressed the new references introduced by the Commission, added, as to the industrial or commercial character of the pursued needs, the segment *“not having a merely”*. Thus, and during the Parliament’s works, the first defining element of the concept of body governed by public law is based on the fact that it concerns an entity *“established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”*.

The truth, however, is that the final version of the Directive 2014/24/EU ended up *dropping* all these changes/amendments, registering a true return to the initial state. As such, the definition of what is a body governed by public law does not suffer relevant changes¹⁹.

Here one also sees that, in relation to the impact on the CCP, given that the national legislator imported in 2008, almost literally, the definition of a body governed by public law as set out in the European legislation of 2004²⁰ and that the final version of the Directive 2014/24/EU does not introduce relevant changes on this matter, there is no need in Portugal for an legislative intervention in this matter.

¹⁹ Cfr. article 2., paragraph 1, sub-paragraph 4), of the Directive 2014/24/EU. It is important to register, however, that the initial amendment proposed by the Commission, that is not part of the final text, is referred to in recital 10 of the Directive 2014/24/EU. Therefore, attentive to the *force* of the considerations in the interpretations of the directives, one must not ignore the amendment of the Commission (now embodied in those considerations in the wording *“a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a ‘body governed by public law’ since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character”*). The same considerations further include an interpretative note directly taken from the jurisprudence of the Court of Justice, related to the requirement of funding, determining that *“being financed for ‘the most part’ means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law”*.

²⁰ Cfr. article 2, paragraph 2 of the CCP.

b) The «codification» of «in-house providing» relations

The matter of *in-house providing relations* is a good example of the *codifying* intention of various measures that form part of the new “package” of Directives.

As known, the Directive 2004/18/EC did not deal with the underlying requirements for this type of relation, leaving all to the interpretation of the criteria that the Court of Justice since the *Teckal* Judgment had been setting out²¹.

Recognising that the “*considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules*” and recognizing that “*the relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities*”, the Commission considered in its initial proposal it “[to be] necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public procurement rules”, whereby such clarification should be “*guided by the principles set out in the relevant case-law of the Court of Justice*”. Based hereon an *extensive* article was proposed with the objective of codifying the jurisprudence of the Court on this matter. Thus, and in accordance with this initial proposal²², the public contracts entered into between a contracting authority and another legal person will be excluded from the public procurement regime on the conditions that:

- i) the contracting authority exercises a control over the legal person concerned which is similar to that which it exercises over its own departments, whereby is deemed as this “similar control” the possibility to exercise a “*decisive influence over both strategic objectives and the significant decisions of the controlled legal person*”
- ii) at least 90 % of the activities of the controlled legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority; and
- iii) there exists no private participation in the controlled legal person.

The Committee for Regions noted, however, that “*the proposed rules (...) are framed far too narrowly*”, which could make them difficult to enforce, and which could also lead to conflicts between the directives and internal administrative law of the Member States²³.

The proposal of the Commission was extensively dealt with by the European Parliament, resulting in two essential changes. In concrete terms²⁴:

- i) on the one hand, the percentage of the *destination* of the activity controlled by the contracting authority was *lowered* to 80%;

²¹ Cfr. Judgment of the Court of Justice, of 18 November 1999, proc. C-107/98.

²² Cfr. Article 11 of the Originating Proposal of the Commission (“classic sectors”).

²³ Cfr. point 11 of the Opinion of the Committee for Regions.

²⁴ Cfr. article 12 of the Directive 2014/24/EU.

ii) on the other hand, the criterion of the inexistence of private participation was “nuanceé “, with the addition of the “*exception of non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which does not exert a decisive influence on the controlled legal person*”.

The CCP already foresaw the *exception* of «in-house providing» relations, even though in intentionally cautious wording, or rather, only indicating in its article 5, paragraph 2, the minimum criteria already established by the Court of Justice, by appeal to the criteria of “similar control” and the destination of the “essence of the activity”. Even though it is possible, also here, to leave such task up to the courts, the truth is that the dense terms with which the new directives deal with this matter may justify a legal affirmation of the criteria now established. Article 5, paragraph 2 of the CCP can, following this line of thought, be the target of a revision (in the sense of its *densification*) in light of the demands of the new Directive.

c) The elimination of the distinction between priority services and non-priority services and the special regime for the services to the person: a novelty with mitigated reach

Directive 2004/18/EC, in the definition of the concept “public service contracts”, assumed a *residual* logic. As such, fell within the concept those public contracts “*other than public works or supply contracts having as their object the provision of services referred to in Annex II*”²⁵. As it happens the restrictive effect of this Annex II was diminished, given that the final category of Annex II-B amounted to “Other services” (category 27)²⁶.

The truth however, is that the Directive 2004/18/EC was not applicable in the same manner to all types of services, the normative meaning deduced from it varied depending on whether it concerned the services foreseen in Annex II-A (normally referred to as *priority services*) or in Annex II-B (the *non-priority* services). Thus while the public procurement of priority services was fully subjected to the regime of the Directive, the contracting of services covered by Annex II-B merely had to observe some provisions of the Directive 2004/18/EC (this beyond the specific exclusions as to some services in particular - *e.g.* financial services, broadcasting programs)²⁷. These provisions concerned, specifically, the article 23 and paragraph 4 of article 35, related to, respectively, the technical specifications and the publication of an award announcement (and not, it is underlined, the announcement of the intention to contract), demands that, moreover are transposed into Portuguese law in the articles 49 and 78 of the CCP.

²⁵ Cfr. article 1, paragraph 1, sub-paragraph *d*) of the Directive 2004/18/EC.

²⁶ Regarding this matter, the doctrine already had considered that the only service contracts to be excluded should be those that are to be found in the footnotes of those annexes and the text itself of the Directive – cfr. likewise, SUE ARROWSMITH, *The Law of Public and Utilities Procurement*, Sweet & Maxwell: London, 2005, p. 308, note 17.

²⁷ Cfr. article 16 of the Directive 2004/18 EC.

Since early on, in the revision process of the Directives, the purpose was assumed of ending such distinction, whereby the Commission determined, immediately in its initial proposals that *“the traditional distinction between so-called priority and non-priority services will be abolished. The results of the evaluation have shown that it is no longer justified to restrict the full application of procurement law to a limited group of services”*.

Likewise, the adoption of a broad concept of «public service contracts» was chosen, covering the *“public contracts having as their object the provision of services other than those referred to in point (8)”²⁸* [or works], precisely because it was considered that *“the exclusion of certain services from the full application of the Directive should be reviewed. As a result, the full application of this directive is extended to a number of services (such as hotel and legal services, which both showed a particularly high percentage of cross-border trade)”²⁹*.

The truth, however, is that this proposal did not only continue to foresee a specific exclusion clause in this domain³⁰, in everything identical to the previous existing one, as it also, and more importantly, added that *“the regular procurement regime is not adapted to social services which need a specific set of rules”*. This meant that it was recognised that *“Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions”³¹*. These *services to the person*, afterwards defined in annex XVI of the proposal, should benefit from a higher threshold of 500 000 Euros, this without prejudice, in any case, to the contracts that are below this threshold remaining subjected to the fundamental principles of transparency and equality³² (establishing to this effect a set of specific rules on the publication of announcements and award principles³³).

The proposals of the Commission came in for diverse reactions. On the one hand the Economic and Social Committee *“welcome[d] the application of a simplified procedure for social services and other special services, the higher thresholds and the broader discretion granted to the Member States in introducing the relevant procedures, since it is primarily in the area of personal services that the applicable procedural law must attempt to strike a balance between the principles of competition enshrined in primary law, and the requirements of social law”³⁴*. Differently, the Committee for Regions came to defend that *“the current distinction between A and B services must be retained, and the proposed Articles 74-76 on social and other services should be deleted.”* Adding that *“these services*

²⁸ Cfr. article 2, paragraph 11 of the Originating Proposal of the Commission (“classic sectors”).

²⁹ Cfr. consideration 10 of the Originating Proposal of the Commission (“classic sectors”).

³⁰ Cfr. article 10 of the Originating Proposal of the Commission (“classic sectors”).

³¹ Cfr. consideration 11 of the Originating Proposal of the Commission (“classic sectors”).

³² Cfr. article 4 sub-paragraph d) of the Originating Proposal of the Commission (“classic sectors”).

³³ Cfr. articles 74, 75 and 76 of the Originating Proposal of the Commission (“classic sectors”).

³⁴ Cfr. point 4.41 of the Opinion of the Economic and Social Committee.

have very little cross-border interest”, whereby “the proposed model for social services does not make up for the disadvantages of scrapping the separate system for B services” It further stated that “The exemption should not apply only to social and health services: for example, legal services also involve a significant element of personal trust and do not lend themselves well to standard forms of tendering”³⁵.

For its part the intervention of the European Parliament on this matter, afterwards inserted in the final versions of the Directives, amounted to, in addition to many other aspects, the following essential elements:

- i) increase of the threshold, below which the social services and other services specified in Annex XVI are excluded from the regime of public procurement, to the amount of 750 000 Euros³⁶;
- ii) maintaining the specific procedural rules for the services listed in Annex XIV, defined by *minimum* demands of publicity³⁷; basically, and it being the topic that shapes this new *division* of the service contracts, the Directive 2014/24/EU came to finally recognise that “*certain categories of services continue by their very nature to have a limited cross-border dimension*”³⁸, whereby such circumstance justifies the provision of the *simplified regime*.
- iii) increasing the list of the so-called *services to the person*: thus, beyond the health services and the social services, the administrative services in the areas of education, health and culture, the services related to mandatory safety, the services related to social benefits and other community, social and personal services, provided by trade unions or religious organisations, whose inclusion on the list stemmed already from the original proposal of the Commission, are added, in addition to some types of legal services, large part of the hotel and restaurant services³⁹;
- iv) provision of a large number of situations of *specific exclusions for service contracts* within the ambit of application of the Directives⁴⁰. In particular, in relation to the legal services, distinction between situations in which the legal services are listed in the (current) Annex XIV and, therefore, merely are subjected above the threshold of 750 000 Euros fixed for social services⁴¹ - previously referred – and the cases in which, pure and simply, the procurement of legal services is not subjected to the new Directive 2014/24/EU⁴².

³⁵ Cfr. point 19 of the Opinion of the Committee for Regions.

³⁶ Cfr. article 4, sub-paragraph *d*) of the Directive 2014/24/EU.

³⁷ Cfr. articles 74 to 77 of the Directive 2014/24.

³⁸ Cfr. consideration 114 of the Directive 2014/24.

³⁹ Cfr. Annex XIV of the Directive 2014/24, line 7.

⁴⁰ Cfr. article 10 of the Directive 2014/24.

⁴¹ Cfr. Annex XIV of the Directive 2014/24, line 8.

⁴² Which comprises the legal representation services of a client by a lawyer in arbitration or judicial proceedings or administrative proceedings before courts or public authorities, legal counselling rendered in preparation of such proceedings, certification and authentication services of documents that must be provided for by notaries, legal services provided by administrators or nominated tutors and other legal services that are linked in the Member State at hand, even if occasional, to the exercise of public authority – cfr. article 10 sub-paragraph *d*) of the Directive 2014/24.

As to the impact that these amendments may have in view of legislative review of the CCP, it is important to start by noting that the national legislator in 2008 already opted to not distinguish between the services of Annex and of Annex B⁴³. Attentive, however, to the new configuration adopted in this domain by Directive 2014/24/EU, the Portuguese legislator will have to consider if he aims to be more restrictive than the European legislator and, if such is not the case, if it makes sense, in particular, to reformulate article 5, introducing new situations of *specific exclusion*, or to foresee a special regime for the social services and others (*e.g.* the introduction of a specific higher threshold– 750 000 Euros).

6. Public procurement as an instrument of public policies

-As set out, the process that led to the approval of the 2014 Directives was *shaped* by the objectives set out in the *Europe 2020* Strategy, in which three priorities for the European development were set out⁴⁴: *i)* a *smart* growth founded on an economy based on knowledge and innovation; *ii)* a *sustainable* growth, promoting a more resource efficient, greener and more competitive economy; *iii)* an *inclusive* growth, fostering a high-employment economy delivering social and territorial cohesion. In terms of objectives, the European Union aims to achieve the following headline targets in 2020: *i)* 75 % of the population aged 20-64 should be employed; *ii)* 3% of the EU's GDP should be invested in R&D; *iii)* the "20/20/20" climate/energy targets should be met; *iv)* the share of early school leavers should be under 10%; *v)* 40% of the younger generation should have a tertiary degree; *vi)* 20 million less people should be at risk of poverty. It is precisely from this framework that the new "package" of Directives arises, which thus assumes the *instrumental* character of public procurement. This is what will be analysed next, in a telegraphic form.

6.1 Facilitating SMEs

The use of public procurement as a *lever* to facilitate small and medium sized enterprises responds to a European preoccupation, which is not new. Remember that, already in 2008,

⁴³ Even though from the beginning an important exclusion in article 5, paragraph 4, sub-paragraph f) was admitted in relation to the acquisition of health services and social services, as well as the acquisition of services of education and professional training– this without prejudice to the application of articles 48 (technical specifications) and 78 (announcement of award).

⁴⁴ Cfr., in general on the interpretation of the *Europe 2020* Strategy in European administrative politics, HOFMANN/ROWE/TURK, *Administrative Law and Policy of the European Union*, Oxford/New York: Oxford University Press, 2011, pp. 314-315.

in the *European code of best practices facilitating access by SMEs to public procurement contracts*⁴⁵, the main guiding principles to be adopted hereon were identified, as follows:

- i) increasingly subdividing contracts into lots;
- ii) the making use of the possibility given to economic operators to group themselves and join forces regarding the respective economical, financial and technical capacities;
- iii) the use of the possibility to enter into framework-agreements with various economic operators and not just with one single supplier;
- iv) the increased visibility to be given to the opportunities of subcontracting, ensuring the equality of treatment of subcontractors;
- v) the progressive reduction of red tape in all procedural phases.

It is thus important to see how these concerns are contained in the Directive 2014/24/EU, as well as to verify in what measure the solutions now established by the European legislator relate to the provisions of the CCP – which will allow to demonstrate that, in significant aspects, the Portuguese legislation in force was pioneering and forerunning.

a) Having in mind the **reduction of red tape in the access to procedures**, the Directive 2014/24/EU foresees the possibility of acceptance of “*self-declaration*” of the applicants or candidates as substitute documents for the verification of the fulfilment of the requirements and conditions contractually demanded and that, in accordance with the intervention of the European Parliament, afterwards embodied in the final texts, assumed the form of a *European Single Procurement Document*⁴⁶.

However, this European *novelty* goes in the direction of the solution that the Portuguese legislator established in 2008, given that from the combination of article 57, paragraph 1, sub-paragraph a) with article 81 of the CCP, it already follows that the qualification documents are only demanded from the contracting entity.

b) The concern regarding the **division into lots** is not new⁴⁷. In any case, since the beginning of the revision process of the 2004 Directives⁴⁸, in a solution that, after the changes introduced by the European Parliament, was inserted in the final text of the Directive 2014/24/EU, the preoccupation was visible of the European Union of establishing on this matter the following guidelines: a) the general provision of the possibility to divide

⁴⁵ Cfr. SEC (2008) 2193, Brussels, 25.6.2008

(http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf).

⁴⁶ Cfr. article 59 of the Directive 2014/24, which defines it as follows: “*an updated self-declaration*” which will serve “*as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the following conditions (...)*”.

⁴⁷ Cfr. article 9 of the Directive 2004/18/EC.

⁴⁸ Cfr. article 44 of the Originating Proposal of the Commission (“*classic sectors*”).

contracts into various lots; *b*) the obligation that, where the contracting authority opts to not divide the contract into lots, the procedure documents should contain an indication of the reasons for this choice; *c*) even if the same operator can tender for various lots, the provision of the possibility of the contracting authorities to limit the maximum number of lots that may be awarded to any one tenderer; *d*) fixing the rule according to which each Member State can determine some situations in which the public procurement by lots is not presented as a *possibility*, but rather as an *obligation*⁴⁹. The adopted perspective is, thus, to encourage to develop tender specifications, which, whenever possible and justified, submit to competition the public purchases organised by smaller lots or subdivided territorially, to allow for smaller companies that are not able to present a proposal for one single big contract or nationwide, to be able to *participate in the game* in one or more of the lots.

The perspective of applicable Portuguese law, when in article 22 of the CCP the regime of the “division in lots” is regulated, is a different one, since it is intended to prohibit that the division in lots will serve to artificially lower the value of the contract and, as such, to choose a contracting procedure for public contracts that is less *friendly* to competition than the one that should be legally applied. But this also means that the CCP does not forbid – already currently – the division into lots, demanding merely, if there are lots, that the value of the contract for the purpose of determining the due procedure for the public procurement corresponding to each lot should result from the sum of the value of all lots⁵⁰.

c) Likewise, the Directive 2014/24/EU fixes a rule on the flexibility of the conditions of access to procedures by **groups of economic operators**. Remember that one of the concerns of the Commission is “*to avoid unjustified barriers in the way of participation by SMEs, the proposed Directive contains an exhaustive list of possible conditions for participation in procurement procedures and states explicitly that any such conditions shall be restricted to those that appropriate to ensure that a candidate or tenderer has the capacities and abilities to perform the contract to be awarded*”⁵¹. Furthermore, in the wake of the provisions of article 48, paragraphs 3 and 4 of the Directive 2004/18/EC, the new Directive established the possibility, in order to observe the criteria related to the economic and financial situation and the technical and professional capacity, that “*an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them*”⁵².

Truth is, however, that here the CCP also already contains solutions in the same line. Concretely, in addition to article 54 of the CCP dispensing any “*legal modality of association*” for groups of operators, article 182 of the CCP establishes that, in the case of

⁴⁹ Cfr. article 46 of the Directive 2014/24/EU.

⁵⁰ Anyway, the preoccupation in encouraging division in lots is not unknown in the Portuguese legislation. Remember that in Portugal the Decree-Law no. 1/2005, of 4 January, meanwhile revoked, by establishing *the regime of public procurement regarding the rental and purchase of goods, services and electronic communication means, as well as of the connected equipment and services*, provided in its article 7, paragraph 5 that “*whenever possible, the tender specifications must include options of answer by lots to foster the competition in the sector, in particular; Geographical lots; b) Lots by type of service; c) Combination of lots*”.

⁵¹ Cfr. Originating Proposal of the Commission, p. 11.

⁵² Cfr. article 63, paragraph 1 of the Directive 2014/24/EU.

grouping of operators, the minimum requirements of technical and professional capacity may be met by just one of the members of the group or jointly by various members of the group. Article 168, paragraph 4 of the CCP, for its part, expressly admits that “for the effect of meeting the minimum requirements of technical and professional capacity, the candidate may resort to third parties, regardless of the relationship that it establishes with them, in particular de relationship of subcontracting (...)”.

d) Another relevant rule is the rule of article 58, paragraph 3 of the Directive 2014/24/EU. This provision establishes the impossibility for contracting authorities to demand as **requirement of economic and financial capacity** a minimum yearly turnover that exceeds by two times⁵³ the estimated contract value, “*except in duly justified cases such as relating to the special risks attached to the nature of the works, services or supplies*”. The matter is not regulated in Portugal, resulting from the combination of article 164, paragraph 1, sub-paragraph i) with Annex IV of the CCP, that the Portuguese legislation in force does not establish any limit to this respect, even if article 165 of the CCP introduces some limitations as to the determination of the “minimum requirements” of technical, economical and financial capacity, and that alerts to the need for this determination to be made within the framework of the principle of proportionality (in particular when the respective paragraph 5 demands that it shall not be made in a discriminatory manner).

e) One last note on the participation of small and medium sized enterprises dealt by the Directive 2014/24/EU concerns the issue of **subcontracting**. Among other aspects⁵⁴, and to refer merely to one left out matter in the Portuguese legislation – omission, at no rate, meaning prohibition -, the description of motives of the original Proposal of the Commission underlines, for example, the relevance of the possibility of direct payment to the subcontractors, adding that it is important that the Member States “*can provide that subcontractors may request for direct payment by the contracting authority of supplies, works and services provided to the main contractor in the context of the contract performance. This offers subcontractors which are often SMEs an efficient way of protecting their interest in being paid*”⁵⁵. This principle was approved and included in Article 71-3 already quoted.

6.2 Promotion of the environment, employment and innovation

Even though it does not represent a truly *new* aspect, the *instrumentalisation* of public procurement in view of promoting public policies is particularly enforced in the Directive 2014/24/EU, whereby the following innovations in this matter can, summarily, be identified:

⁵³ Note that the Originating Proposal of the Commission (“classic sectors”) fixed this requirement at three times the volume of the business, whereby the final version resulted from the intervention of the European Parliament.

⁵⁴ Cfr. article 71 of the Directive 2014/24/EU.

⁵⁵ Cfr. Originating Proposal of the Commission, p. 12.

a) Within a concern to fight social dumping or environmental dumping, there is an unequivocal rise of **the relevance of non-compliance with the obligations of labour, social and environmental law**, more concretely:

i) as a reason for excluding applicants⁵⁶ - one is reminded that in the CCP, even though such possibility is not foreseen in the list of impediments of article 55, article 70 paragraph 2, sub-paragraph f) determines that “those proposals are excluded whose analysis reveals that entering into a contract would imply the violation of any legal or regulatory obligations applicable”;

ii) as a justification to provide for a *duty* to exclude a proposal, in those cases in which the price is abnormally low in virtue of the non-compliance with the obligations of labour, social and environmental law⁵⁷ - in any case, in Portugal, this results from article 70, paragraph 2, sub-paragraph f), of the CCP that determines that “those proposals are excluded whose analysis reveals that entering into a contract would imply the violation of any legal or regulatory obligations applicable”).

b) Another innovation of Directive 2014/24/EU – but one that shall not be analysed here, given that the scope of this paper does not include innovations with regard to procedures for forming the contracts – is to be found in the provision of a new procedural model – **the Innovation Partnership** –, a model reportedly conceived to favour innovation and stimulate technological development. The initial idea of the Commission was to allow – the rule is optional⁵⁸ - Member States to create “*a new special procedure for the development and subsequent purchase of new, innovative products, works and services, provided they can be delivered to agreed performance levels and costs*”⁵⁹, which should be “*structured in such a way that it can provide the necessary “market-pull”, incentivizing the development of an innovative solution without foreclosing the market*”⁶⁰. In this type of two stage procedure any economic operator can present a request for participation in answer to a tender announcement with a view to establishing a structured partnership for the development of products, services or innovative works and for the subsequent purchase of the resulting innovative products, works or services.

c) Finally, in the field of secondary policies associated to public procurement, one must further underline the provision of the possibility that the technical specifications of the procurement specifications include references to the production process of certain products, including the indication as to the **life-cycle costing**, something that can also serve as an assessment factor for the proposals⁶¹. The relevance, in the award criterion, of the

⁵⁶ Cfr. articles 18, paragraph 2 and 57, paragraph 4, of the Directive 2014/24/EU.

⁵⁷ Cfr. article 69, paragraph 2, sub-paragraph d) of the Directive 2014/24/EU.

⁵⁸ The rule is maintained in the final text – cfr. article 26, paragraph 3 of the Directive 2014/24/EU.

⁵⁹ Cfr. Originating Proposal of the Commission (“classic sectors”), p. 11 (Detailed Explanation).

⁶⁰ Cfr. consideration 17 of the Originating Proposal of the Commission (“classic sectors”).

⁶¹ Cfr. articles 42, 6, paragraph 2, sub-paragraph a) and, moreover 68 of the Directive 2014/24/EU.

life-cycle costing of the products, services or works to be purchased can contain, not only internal costs (e.g. the maintenance costs of a car one acquires), but also external environmental costs, as long as they are quantifiable.

7. Public procurement as an instrument of a policy of public purchasing not exclusively guided by the reduction of expenditure, but focused on a better satisfaction of public needs

a) The criterion of the lowest price vs. the criterion of the most economically advantageous tender

The 2004 Directives fixed a rule of regarding the award criteria of adjudication: with the exception of the competitive dialogue, in which the adoption of the criterion of the most economically advantageous tender⁶² prevails, the logic was that of a free choice between this and the criterion of the lowest price⁶³.

It was the Commission itself that in the *Green Paper*, that launched the public consultation prior to the presentation of the proposals of the new Directives, raised the question of pertinence of maintaining the criterion of the lowest price. Effectively, admitting that *“the criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives”*, hence it was questioned whether it *“would be useful to change the existing rules to eliminate the criterion of the lowest price only”*⁶⁴.

However in its initial proposals of December 2011, the dual logic is maintained with regard to this matter. The Commission considered that *“contracting authorities should be allowed to adopt as award criteria either “the most economically advantageous tender” or “the lowest cost”, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions”*⁶⁵. Following this line, in article 66 the free option between the two award criteria is maintained, this without prejudice to maintaining the exception as to the competitive dialogue⁶⁶, which in fact is extended to the new procedure of partnerships for innovation⁶⁷.

The Committee for Regions defended, in the following discussion, that *“it must be possible both to make procurement decisions based on the lowest price or the most economically advantageous tender, at the choice of the contracting authority”*, affirming that *“for a large number of standard products such as petrol, price is the only relevant criterion; the same is true for many complex products such as certain medicines whose*

⁶² Cfr. article 29, paragraph 3 of the Directive 2004/18/EC.

⁶³ Cfr. consideration 46 and article 53, paragraph 1 of the Directive 2004/18/EC.

⁶⁴ Cfr. question 70.1.1 of the *Green paper on the modernisation of EU public procurement law*.

⁶⁵ Cfr. consideration 37 of the Originating Proposal of the Commission (“classic sectors”).

⁶⁶ Cfr. article 28, paragraph 1 of the Originating Proposal of the Commission (“classic sectors”).

⁶⁷ Cfr. article 2, paragraph 3 of the Originating Proposal of the Commission (“classic sectors”).

quality has already been tested for their official marketing authorization”. Moreover, still in accordance with the same understanding, “basing procurement on the lowest price certainly does not imply that no quality requirements are set: in such procedures, the quality requirements are made obligatory, and then the tender that meets those requirements for the lowest price is accepted” and, furthermore, one cannot forget that “lowest-price procedures also benefit small business because they often have low administrative costs and can offer competitive process”⁶⁸.

On the contrary, the Economic and Social Committee considered necessary “*encouraging selection of the most economically advantageous offer rather than the one with lowest price, which should be the exception rather than the rule, in order to encourage smarter and more efficient public procurement*”.⁶⁹ Thus, “*use of the “most economically advantageous” criterion must therefore be increased, to assess the sustainably most advantageous tender, in economic as well as in environmental and social terms. In this way, the award criteria can also take account of these aspects in a broad, imaginative and non-restrictive way*”⁷⁰.

In the line of thought set out by the Economic and Social Committee, the European Parliament equally defended the most economically advantageous tender criterion. Alerting to the fact that “*public procurers often have to prioritise legal certainty above policy needs and, given the pressure on public budgets, frequently have to award the contract or service in question to the cheapest offer rather than the most economically advantageous tender*”, the European Parliament expressed the fear that “*this will weaken the EU’s innovative base and global competitiveness*”, calling on the Commission “*to remedy this situation and to develop strategic measures to encourage and empower public procurers to award contracts to the most economical, highest-quality offers*”⁷¹. In fact, also in 2011, and looking to develop solutions that would allow to “*develop the full potential of public procurement*”, the European Parliament expressed the opinion according to which “*the criterion of lowest price should no longer be the determining one for the award of contracts, and it should, in general, be replaced by the criterion of most economically advantageous tender*”⁷².

The meaning of the final solution adopted in the Directive 2014/24/EU is not unequivocal. Apparently, in a *prima facie* analysis, the European legislator seems to reveal a preference for the criterion of most economically advantageous tender. He determines, in truth, in article 67 that “*without prejudice to national laws, regulations or administrative provisions concerning the price of certain services, contracting authorities shall base the award of public contracts on the most economically advantageous tender*” (red: our

⁶⁸ Cfr. consideration 22 of the Opinion of the Committee for Regions.

⁶⁹ Cfr. consideration 1.4 of the Opinion of the Economic and Social Committee.

⁷⁰ Cfr. consideration 4.34 of the Opinion of the Economic and Social Committee.

⁷¹ Cfr. point 3 of the *European Parliament Resolution of 18 May 2010 on new developments in public procurement*, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2010-0173+0+DOC+PDF+V0//EN>

⁷² Cfr. point 13 of the *European Parliament Resolution of 25 October 2011 on modernisation of public procurement*, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0454+0+DOC+PDF+V0//EN>

underling). It is possible however that a terminology evolution underlies this wording. Effectively ultimately, “*the most economically advantageous tender*” can be determined either based on the lowest *price*, as well as based on the criteria of *cost-effectiveness* (connected to the costs inherent to the useful life-cycle of the asset, that may even be connected to environmental or social externalities) or even quantitative criteria. In any case, by allowing in article 67, paragraph 2, *in fine*, that the Member States prohibit the use of the lowest price or cost criterion “*as the sole award criterion*” or that they restrict “*their use to certain categories of contracting authorities or certain types of contracts*”, the European legislator revealed a clear distrust as to the lowest price criterion.

The discussion that took place on the European level regarding this matter should justify a serious and profound reflection by the Portuguese legislator. One is reminded that, in 2008, the national legislator adopted a dual logic in relation to the award criteria⁷³, even if the award based on the lowest price criterion demands that the tender specifications define all the remaining aspects of performance of the contract to be entered into, leaving merely to the *game of competition* the price to pay, in other words adopting the criterion of the lowest price demands the elaboration of totally *closed* tender specifications. In practice, once can frequently see in the public procurement market in Portugal the preference to *buy cheap*. The consequences of this option can be disastrous. The lesson one can learn from the debate at the European Union level is that it demonstrates, precisely, the benefits that may come from adopting the criterion of the most economically advantageous proposal. Basically, the *crusade* in search of the lowest price may, in time, have substantially higher costs.

b) The debate on the abnormally low price

In a continuous line with what was already determined in the first and second generation of the Directives on public procurement, the 2004 Directives dealt with the problem of «abnormally low tenders» based on two essential concepts:

- i) not fixing automatic methods that would allow to determine an abnormally low price, leaving this determination *in the hand* of the contracting authorities, taking into consideration the *contractual context*;
- ii) the prohibition of the exclusion of tenders based on this ground if verified outside a procedure founded on a previous clarification request addressed to the applicant.

Inverting the *discretionary* method of determination of an abnormally low price, the Originating Proposal of the Commission came to foresee a *semi-automatic* determination model, since it:

⁷³ Cfr. article 74, paragraph 1 of the CCP.

- i) considered as abnormally low tenders all those that, cumulatively, would meet the following three conditions: a) *“the price or cost charged is more than 50% lower than the average price or costs of the remaining tenders”*; b) *“the price or cost charged is more than 20% lower than the price or costs of the second lowest tender”*; c) in cases in which *“at least five tenders have been submitted”*⁷⁴;
- ii) did not exclude the possibility that the tenders were abnormally low *“for other reasons”*⁷⁵;
- iii) further associated this matter to the non-compliance with Union legislation on social, labour and environmental law matters, referring that in these situations *“contracting authorities shall reject the tender, where they have established that the tender is abnormally low”* in virtue of this non-compliance⁷⁶.

This proposal received a negative response by the Committee for Regions, which stated that it *“prefers the wording in article 55 of the current Directive 2004/18/EC on abnormally low tenders, because the proposed text would impose an administrative burden both on contracting authorities and on suppliers. The proposed text also reduces the contracting authority’s room for manoeuvre in this field, which is unfortunate”*⁷⁷.

In turn, even before addressing the proposals of the Commission, the European Parliament already had *“cal[ed] on the Commission to assess the problems associated with exceptionally low bids and to propose appropriate solutions”*⁷⁸. Afterwards pronouncing itself on the proposal of the Commission, Parliament opted to eliminate the new provision on the automatic determination of an abnormally low price, merely maintaining, both the general clause according to which *“contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services”*⁷⁹, and the provision on consequences of non-compliance with social or environmental legislation⁸⁰.

Compared to the CCP, it is important to underline that, regarding this matter, the national legislator adopted a mixed model, depending on whether a base price was fixed or not: in the situations in which a base price existed, the determination of what would be an abnormally low price *tends* to be made through the coefficients referred to in paragraph 1 of article 71 of the CCP (even though one can understand that the contracting entity continues to be able to formulate a judgment on the abnormality of the proposed price in

⁷⁴ Article 69, paragraph 1 of the Originating Proposal of the Commission (“classic sectors”).

⁷⁵ Article 69, paragraph 2 of the Originating Proposal of the Commission (“classic sectors”).

⁷⁶ Article 69, paragraph 4, second par. of the Originating Proposal of the Commission (“classic sectors”).

⁷⁷ Cfr. Opinion of the Committee for Regions, p. 73.

⁷⁸ Cfr. Point 46 of the *European Parliament Resolution of 25 October 2011 on modernisation of public procurement*.

⁷⁹ Article 69, paragraph 1 of the Directive 2014/24/EU.

⁸⁰ Cfr. article 69, paragraph 3 of the Directive 2014/24/EU.

relation to the proposals that do not reach the coefficients foreseen in article 71 of the CCP⁸¹); if no base price exists, the decision involves an extensive dose of discretionality.

The legal option is, in any case, too open. On the one hand, the discretionality is very intense when – as is permitted by paragraph 1 of article 47 of the CCP – the tender specifications do not establish any base price. It is from the start strange how one can adopt a decision to contract, grounded on criteria of economical rationality and guided by the principle of pursuing the public interest, that is not preceded by a rigorous assessment of the maximum price that the contracting entity is willing to pay for the performance of the contract. The proper consideration on the *need* for a public purchase depends on this assessment. And, within a framework of competition, one cannot understand that this prior assessment is not necessarily communicated to the interested parties, so that these have a rigorous and objective base to elaborate the respective proposals.

On the other hand, if the base price was taken seriously and the subject of a reasoned determination by the contracting authority, one does not understand the amplitude with which article 71 fixes the threshold as of which a tender represents an abnormally low price – 40% for works and 50% for other contracts (article 71, paragraph 1). The consequences are in sight, with the multiplication of tenders close to the minimum threshold, with the inevitable repercussion for the quality of the work that ends up being provided, or for the economic-financial sustainability of our business sector.

The attention that the theme of abnormally low tenders got in the European debate should form an added reason to not neglect a matter of such relevance in the Portuguese public domain.

8. The importance of an integrated vision of the contractual relation: the interconnection between forming and performing the contract

a) The modification regime of contracts in particular

As an innovation with regard to the 2004 Directives, the Directive 2014/24/EU foresees a set of rules on the contract performance⁸², definitely putting aside the idea that European regulation was merely concerned with the formation of public contracts, and the matter of their performance being an irrelevant area in light of the European Union law.

Concretely, regarding the topic of modification of the contracts, the intervention of the European legislator initially appears with a meaning that essentially *codifies* the guidelines already formed since the *Pressetext* Judgment⁸³. In fact, immediately in the originating proposal, the Commission admitted “[to be] necessary to clarify the conditions under which

⁸¹ Cfr., for all, JOÃO AMARAL E ALMEIDA, *As propostas de preço anormalmente baixo*, in *Estudos de Contratação Pública*, III, Coimbra Editora, 2010, pp. 87 ss.

⁸² Cfr. articles 70 to 73 of the Directive 2014/24/EU.

⁸³ Cfr. Judgment of the Court of Justice of 19 June 2008, proc. C-454/06 (cfr. PEDRO GONÇALVES, *Acórdão Pressetext: modificação de contrato existente vs. adjudicação de novo contrato*, in *CJA*, no. 73 (2009), pp. 3 ss..

*modifications of a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice*⁸⁴.

The theme was however not peaceful. Concretely, the inclusion of rules in this area was not received well by the Committee for Regions. In the respective opinion one can read that *“the current directives include procedural rules for carrying out procurement. They do not include provisions on the modification of contracts during their term, and nor should the new directives, as these provisions impose an unnecessary administrative burden on contracting authorities and reduce flexibility. If the Commission wants to provide information on case law in this area, an interpretative communication would be a better solution*”⁸⁵.

It is certain that, after the intervention of the European Parliament, article 72 of the Directive 2014/24/EU established a specific regime of contract modification *in general* during their contract term, allowing objective modifications with some latitude. Concretely, the *objective* modification of contracts is permitted during their performance in the following cases:

- i) when the modifications *“irrespective of their monetary value”* have been **foreseen in the initial tender procedure documents** in a clear and precise manner and do not imply a change to the *“overall nature of the contract”*;
- ii) *“for additional works, services or supplies”* (which do not exceed 50% of the value of the original contract), on the condition that the change of the co-applicant cannot be done for economical or technical reasons or if the change would be highly inconvenient or provoke a substantial duplication of the costs for the contracting authority;
- iii) when *“circumstances which a diligent contracting authority could not foresee”* occur, provided that such modification does not alter the *“overall nature of the contract”* and that the increase in price does not surpass 50% of the amount of the original contract;
- iv) when **the modifications “irrespective of their value, are not substantial”**, whereby substantial modifications are deemed all those that, alternatively: (i) form changes that, if foreseen at the moment of contracting, would have affected the award decision; (ii) mean a change to the economic balance of the contract in terms not previously foreseen; (iii) *“considerably”* extend the ambit of the contract;
- v) finally, when the new value of the alteration is below the following thresholds: (i) thresholds of subjection to the rules of procurement; and (ii) 10% or 15% of the initial value of the contracts, depending on whether, respectively, contracts for the purchase of goods and services are concerned, or works contracts.

This new regulation of the modifications of contracts will make a reconsideration of the Portuguese regime compulsory. As is known, the CCP already contains rules on the

⁸⁴ Consideration 45 of the Originating Proposal of the Commission (“classic sectors”).

⁸⁵ Opinion of the Committee for Regions, p. 75.

modification of contracts, whether regarding the general regime (article 311 to 315), or specifically concerning public works (articles 370 to 382). But also there is no one that is not familiar with the fact that the applicable regime has been interpreted very restrictively by the Portuguese Court of Auditors (*Tribunal de Contas*). In this perspective the new European regulations form an excellent impulse to revisit the matter.

b) The centrality of the performance

Another innovation regarding the performance of contracts that deserves to be underlined, is the attention that the Directive 2014/24/EU gives to the performance of the co-applicant.

On the one hand the possibility is foreseen for the contracting authorities to “*lay down special conditions relating to the performance of a contract*” linked to the subject-matter of the contract. Those conditions may include economic, innovation-related, environmental or social considerations, provided that these have been foreseen in the initial procurement documents⁸⁶. To justify this solution, that is in line with the reinforcement of the concerns as to public policies, as mentioned before, the Commission stated that “*contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition on the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration or animal welfare*”, quoting as an example of these situations, the obligation of recruitment of the long-term unemployed⁸⁷.

On the other hand, and this second aspect must not be neglected - in addition to the already referred non-compliance with the obligations of labour, social and environmental law constituting a ground for the exclusion of applicants –, situations in which 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 early termination of that prior contract liability for damages or other comparable sanctions*”⁸⁸ are foreseen as motive for the exclusion of said economic operator (even though it is allowed that any applicant that finds itself in this situation “*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*”⁸⁹).

⁸⁶ Cfr. article 70 of the Directive 2014/24/EU.

⁸⁷ Consideration 43 of the Originating Proposal of the Commission (“classic sectors”).

⁸⁸ Cfr. article 57, paragraph 4, sub-paragraph *g*) of the Directive 2014/24/EU.

⁸⁹ Cfr. article 57, paragraph 6 of the Directive 2014/24/EU.

This last aspect is another good example of how the Directive 2014/24/EU offers an excellent opportunity to revise the Portuguese legislation on public procurement. This last example is illustrative. The solution set out in the text of the Directive is, by itself, relatively friendly. But underlying the solution now established – and the knowledge of the genesis of the Directive is, within this context, particularly clarifying –, is an idea that justifies a profound reflection: the parting from the old paradigm based on the separation through a kind of *Berlin wall* between matters regarding the formation and problems regarding the performance of public contracts. An integrated vision – which answers, in particular, to the prior performance of the co-applicant – may open the way to significant improvements in the market of public procurement in Portugal.