The EU Public Procurement Regime and its transposition in Maltese Law: A critical analysis in the light of current developments

Gerd Sapiano

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**ABSTRACT**

This thesis will critically analyse the European Union’s Public Procurement regime with special reference being made to the manner by which the relevant community instruments are transposed into Maltese law in the light of ongoing developments. Whilst doing so, discussing the applicable directives as well as their application in practice by the CJEU and, in Malta, by the Department of Contracts and the Public Contracts Review Board was inevitable. The directives currently being proposed will also be referred to, examining how and whether these will affect the present legal framework. Following an in depth study of the present situation in the public procurement field, as well as the proposed reforms/amendments, the author will discuss whether the transposition of the EU regime into Maltese law was correct or otherwise. An attempt at providing recommendations for a better application of the system, particularly at a national level, will then be made.

Keywords; public procurement, public contracts, transposition, EU, Malta
To my family
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The 2011 Report on the workings of the Public Contracts Appeals Board and the Public Contracts Review Board
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**Table of Abbreviations**

CJEU – Court of Justice of the European Union  
ECJ – European Court of Justice  
EPPPLR – European Public-Private Partnership Law Review  
EU – European Union  
FoI – Freedom of Information  
GCC – General Contracts Committee  
GDP – Gross Domestic Product  
IAER – International Advances in Economic Research (Journal)  
LN – Legal Notice  
MEAT – Most Economically Advantageous Tender  
OUP – Oxford University Press  
PCAB – Public Contracts Appeals Board  
PCRB – Public Contracts Review Board  
PPLR – Public Procurement Law Review  
PPP – Public Private Partnership  
PWC – PricewaterhouseCoopers  
S.L. – Subsidiary Legislation  
SIGMA – Support for Improvement in Governance and Management  
SME – Small and Medium Enterprise  
VAT – Value Added Tax
INTRODUCTION AND METHODOLOGY

Overview
This thesis will critically analyse the European Union’s Public Procurement regime and the transposition of the relevant community legislation into Maltese law in the light of recent developments. The author will attempt to give a comprehensive overview of the regime currently in force as well as its application in practice by the CJEU and, in Malta, by the Department of Contracts and the Public Contracts Review Board. Reference will also be made to the directives currently being proposed examining how and whether the present legal framework will be affected. Due to the various developments taking place (within the sphere of Public Procurement) at time of writing, the contents of this work are to be considered current up till the 30th of March 2013. That said, no developments are foreseen in the immediate future. The proposed directives are currently awaiting 1st reading within the European Parliament - this is forecast for the 10th of September 2013.1 It should be noted that the Maltese regulations on public procurement, particularly with regards to the provisions regulating remedies, were last amended on the 19th of February 2013 by virtue of Legal Notice 65 of 2013.

Main Sources of this thesis
The main source of this thesis is of course legislation, one may list the Public Sector Directive (Directive 2004/18/EC), the Utilities Sector Directive (Directive 2004/17/EC), the Remedies Directives (Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC), the EU’s proposed directives, and Malta’s Subsidiary Legislation 174.04 and 174.06, as the most important. Text books penned by renowned authors in the field of public procurement law provided an excellent point of reference, with access to journals, such as the Public Procurement Law Review, proving to be invaluable, particularly when analysing those grey areas where the law is not so clear. Needless to say, the interpretation given to legislation by the CJEU as well as the Maltese review bodies was also important

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in this regard. Discussions with prominent practitioners in the procurement field also provided a wealth of information and a good basis for discussion.

**Method of Analysis**

This work will be divided into five chapters, each discussing particular aspects of public procurement. The relevant EU provisions will be examined first, followed by an analysis of whether their transposition into Maltese law was correct or otherwise. The effect which the proposed developments will have on both regimes will then be discussed.

Chapter 1- An Overview of the current Public Procurement regime in the EU and the situation in Malta

The first chapter will introduce the reader to the topic at issue. A definition of public procurement will be attempted, highlighting the aims and need for regulation. It will identify the applicable laws, both at EU and national level, as well as the developments which are currently ongoing. Simplified descriptions of the public procurement process, procedures and techniques will also be given. This chapter should lead to a better cognisance of the procurement framework thus facilitating the understanding of the chapters which are to follow.

Chapter 2- The Principles of Public Procurement

The second chapter will identify and discuss the principles inherent to the Public Procurement Directives. The application of the general principles of EU Law within the sphere of public procurement will also be discussed in the light of the aims of public procurement. An analysis of whether these principles are reflected within the Maltese regulations will follow. This chapter will also discuss whether these principles will still be applicable once the proposed directives come into force.

Chapter 3- The Scope and Application of the Law

The third chapter will discuss the scope and application of the law. Being the core legislative instruments Directives 17 and 18 of 2004 will form the basis of the discussion. A detailed analysis of the characteristics required for a contract to fall within the scope of
these directives will also be made. The regulation of concession contracts and contracts falling outside the scope of the directives will also be briefly discussed. The scope and application of Maltese law as well as the changes that will be brought about by the proposed directives will also be tackled.

Chapter 4 – The Public Procurement Process
The fourth chapter will discuss the public procurement process in its entirety. Again, the analysis will focus on Directives 17 and 18 of 2004. The most important stages of the process will be identified and the differences between them highlighted. The transposition of the current regulations into Maltese law will of course be analysed with issues regarding transposition being highlighted. In order to keep the discussion as brief and to the point as possible a general approach will be taken. Since the Commission’s Proposed Directives replacing Directives 17 and 18 of 2004, do not regulate concession contracts, it was felt that the process for awarding such contracts should not be discussed within this thesis. It should be kept in mind however, that a new directive regulating concession contracts has also been proposed.

Chapter 5 – The Remedies available under the Public Procurement Regime
The fifth and final chapter will discuss the remedies which are available to interested parties who feel aggrieved by the decisions of a contracting authority. The enforcement mechanisms, both national and supra-national, set out within the EU’s Remedies Directives will be identified and discussed. An analysis on whether the Maltese regulations transpose these directives correctly will follow.

Conclusions and Remarks
Following the aforementioned discussions on the various aspects of the public procurement regime currently in force, both at national and EU level, as well as the proposed reforms/amendments, conclusions regarding the effectiveness of this legal framework will be drawn. Recommendations for a better application of the system, particularly at a national level, will be made.
CHAPTER I – AN OVERVIEW OF THE CURRENT PUBLIC PROCUREMENT REGIME IN THE EU AND THE SITUATION IN MALTA

1.1 Public Procurement; An attempt at a definition

Public procurement is the process whereby supplies, services and works are acquired by the government, government institutions, the public sector, and local authorities.¹ A definition of this technical term is found under Maltese law where it is stated that public procurement is ‘the acquisition, under works, supplies and services contracts by public bodies or bodies governed by public law falling within the meaning of contracting authorities’.² It is a public law process whereby the government or other identifiable emanations of the state contract with the private sector in order to acquire goods, supplies or services and as such, therefore, Public Procurement Law is a sector-specific area of public law.

1.2 The Importance of the Procurement Process: its aims and the need for regulation

The public procurement process is a matter of great economic significance.³ This appears to be especially true when considering its relationship with the management⁴ and

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¹ Vide;
⁴ PWC, Study Prepared for the European Commission, ‘Public procurement in Europe: Cost and effectiveness’ [2011], available online at
expenditure of public funds. It is in this light that the importance of a regulatory framework which ensures responsible and transparent expenditure becomes apparent. These two facets of public procurement, transparency and responsibility in the utilisation of the public coffers, are emphasised by Bovis who states that the regulation of public procurement entails both an economic and a legal approach. Arrowsmith suggests that the regulation of public procurement is essential in the promotion of free competition and in the elimination of barriers to trade; in fact, studies have shown that the enhanced market transparency brought about by a well thought out system leads to an increase in competition and consequently better value for money. Most developed countries including the Member States of the EU think of themselves as liberal market economies, yet, Public Procurement accounts for a significant part of the EU and individual Member States’ GDP and has a direct effect on the general market architecture. Another important function of the public procurement process is that it may be used as a tool to promote innovation and also to achieve secondary and non-commercial goals. One of the main problems in the field of public procurement is the high susceptibility to corruption. As the process typically involves considerable sums of money, this is unsurprising and further emphasises the need for regulation. It may thus be safely stated that public procurement is a matter of

7 Christopher Bovis, EU Public Procurement Law (Elgar European Law 2007) 4
8 Sue Arrowsmith, EU Public Procurement Law: An Introduction in Sue Arrowsmith (ed) (EU Asia Inter University Network for Teaching), available online at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf, last accessed on 27/04/2013, pg. 48
9 Report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future [03/02/2004], available online at http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf, last accessed on 27/04/2013, pg. 2
10 In the Single Market Act (COM(2011)206 final) it was stated that this importance may be also seen in a European context, as public authorities spend a significant 18% of GDP on goods, works and services.
primary public policy importance.\textsuperscript{14} It can also be said that public procurement is a cornerstone of the EU internal market\textsuperscript{15} and this appears to be especially true when one considers the various fundamental principles of the treaties (such as the free movement of goods and services and the freedom of establishment) safeguarded by the procurement regime.\textsuperscript{16}

1.3 The Applicable Law

1.3.1. EU Legislation

The main legislative instruments governing the EU public procurement regime are Directive 2004/18/EC\textsuperscript{17} - the Public Sector Directive and Directive 2004/17/EC\textsuperscript{18} - the Utilities Directive, together with Directive 2009/81/EC\textsuperscript{19} - the Defence Procurement Directive. These directives are complemented by a number of additional instruments\textsuperscript{20}, through which the EU has incorporated several initiatives such as, green procurement, ethical trading, social considerations, the promotion of innovation, as well as the protection of SMEs, into public procurement procedures.\textsuperscript{21} There is then another set of directives

\textsuperscript{14} European Commission and Internal Market Services, ‘EU Public Procurement Legislation: Delivering Results (Summary of Evaluation Reports)’ available online at \url{http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf}, last accessed on 27/04/2013, pg. 6
\textsuperscript{16} Bovis, \textit{EU Public Procurement Law} (n 7) 4
\textsuperscript{21} European Commission; Europa Website; Other aspects of procurement; available online at: \url{http://ec.europa.eu/internal_market/publicprocurement/other_aspects/index_en.htm#green}, last accessed on 01/05/2013
known as the Remedies Directives, these are Directives 89/665/EEC\(^{22}\) and 92/13/EEC\(^{23}\) as amended by Directive 2007/66/EC\(^{24}\). Reference must also be made to the judgements of the CJEU as these are a fundamental source of EU law.\(^{25}\)

1.3.2 Recent Developments under EU law

In 2010, the Commission set out its vision for Europe’s social and market economy for the upcoming decade - the Europe 2020 strategy.\(^{26}\) Three interrelated yet distinct priorities were put forward, namely; ‘smart growth – the development of an economy based on knowledge and innovation; sustainable growth - the promotion of a resource efficient, greener and more competitive economy and; inclusive growth the fostering of a high employment economy delivering social and territorial cohesion’.\(^{27}\) Due to its pervasive nature in the economic sphere, public procurement, was considered central to the attainment of these goals, thus, the need for reform of the public procurement regime was stated in the Europe 2020 strategy. In 2011, the Modernisation Green Paper\(^{28}\) was launched with the aim of bringing procurement legislation in line with this vision.\(^{29}\) The revision and modernisation of the public procurement legislative framework was set out by the Commission as a key action within the Single Market Act.\(^{30}\) Subsequently, three proposed


\(^{27}\) Ibid. 5

\(^{28}\) COM(2011) 15 final, Green Paper on the modernization of EU public procurement policy; Towards a more efficient European Procurement Market [27/01/2011]

\(^{29}\) Fernando Losada, ‘The Green Paper on the modernization of public procurement policy of the EU: Towards a socially-concerned market or towards a market-oriented society?’[2012] 2 4 Onati Socio-Legal Series 60, 60

directives were drawn up, a directive\textsuperscript{31} replacing Directive 2004/18/EC, a directive\textsuperscript{32} replacing Directive 2004/17/EC and a directive on the award of concession contracts.\textsuperscript{33}

1.3.3 Maltese Law

The main instruments governing public procurement law in Malta are Subsidiary Legislation 174.04 – The Public Procurement Regulations\textsuperscript{34} and Subsidiary Legislation 174.06 – The Public Procurement of Entities Operating in Water, Energy, Transport and Postal Services Sectors Regulations.\textsuperscript{35} The Public Procurement Regulations transpose the EU’s Directive 2004/18/EC and the Remedies Directives, whilst the Public Procurement in Utilities Regulations transpose Directive 2004/17/EC. Another important piece of legislation is Subsidiary Legislation 174.08 – The Public Procurement of Contracting Authorities or Entities in the fields of Defence and Security Regulations\textsuperscript{36} which transposes Directive 2009/81/EC.

1.4 The Procurement Process in a Nutshell

The procurement process is kicked off with a public body issuing a call for tenders. This invitation would be appropriately advertised and subsequently, interested parties tender bids. Such bids are then filtered by means of a selection process, following this; an award mechanism provides a preference ranking.\textsuperscript{37} As stated by the CJEU in the case Gebroeders Beentjes v. The Netherlands,\textsuperscript{38} a clear distinction exists between the selection stage and the

\begin{itemize}
\item \textsuperscript{32} COM(2011) 895 final, Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors [20/12/2011], 2011/0439 (COD)
\item \textsuperscript{34} Public Procurement Regulations, Laws of Malta, S.L. 174.04 (S.L. 174.04 Public Procurement Regulations)
\item \textsuperscript{35} Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, Laws of Malta, S.L. 174.06 (S.L. 174.06 Utilities Procurement Regulations)
\item \textsuperscript{36} Public Procurement of Contracting Authorities or entities in the fields of Defence and Security Regulations, Laws of Malta, Subsidiary Legislation 174.08 (Defence Procurement Regulations)
\item \textsuperscript{37} Dreschler M., De Ridder H. and Beheshiti, ‘A preliminary report on applications of the Most Economically Advantageous Tender (MEAT) Award Mechanism’ [2007] CIB World Building Congress 2852
\item \textsuperscript{38} Case C-31/87 Gebroeders Beentjes BV v. State of the Netherlands [20/09/1988] Court of Justice of the European Union, 4652
\end{itemize}
award stage.\textsuperscript{39} The selection stage is that stage whereby the eligibility of tenderers is assessed following vetting for administrative and technical compliance, whilst the award stage, on the other hand, is that stage whereby the successful tender is selected. Legislation provides two award criteria, the lowest price and the most economically advantageous tender (MEAT).\textsuperscript{40} As the name implies the lowest price award system leads to the contract being awarded to the cheapest offer, on the other hand, the MEAT award system is value based and takes other criteria into consideration.\textsuperscript{41} The contract is subsequently concluded with the winning tenderer. This is of course a simplified description of the process which intentionally oversimplifies it and gives a graphic reproduction of the various stages involved. Needless to say, the procurement process will be discussed in greater detail in later chapters. However, already, at this stage we can attest to various elements including pre-qualification of bidders, award mechanisms, types of contracts offered, bidder-government interaction and the flow of the process of adjudication.

1.5 The Different types of Procurement Procedures available
When issuing a call for tenders, the contracting authority must identify which procurement procedure is to be followed.\textsuperscript{42} Of course this will determine the specific set of rules which are to be followed. The EU Directives identify four main procurement procedures. These are the open procedure, the restricted procedure, competitive dialogue, and the negotiated procedure.\textsuperscript{43}

1.5.1 The Open Procedure
The open procedure is the default and most commonly used procurement procedure. It is defined by the directives as that procedure ‘whereby any interested economic operator may submit a tender’.\textsuperscript{44} The same definition is given by Maltese law.\textsuperscript{45}

\textsuperscript{39} Dimitri Mardas and Dimitri Triantafyllou, ‘Selection criteria and the Award Procedure in Public Procurement’ [1997] 31 IAER 91, 92
\textsuperscript{40} Directive 2004/17/EC, Recital 55
\textsuperscript{41} Dreschler, De Ridder and Beheshti, (n 37) 2852
\textsuperscript{42} Directive 2004/18/EC, Article 28
\textsuperscript{43} Ibid.
\textsuperscript{44} Directive 2004/17/EC, Article 1(9)(a) and Directive 2004/18/EC, Article 1(11)(a)
\textsuperscript{45} S.L. 174.04 Public Procurement Regulations, Regulation 2 and S.L. 174.06; Utilities Procurement Regulations, Regulation 1(2)
1.5.2 The Restricted Procedure

The restricted procedure on the other hand refers to those procedures wherein ‘any economic operator may request to participate but only those candidates invited by the contracting authority may submit a tender’.\(^{46}\) The definitions provided by the EU Directives and by Maltese law\(^{47}\) are analogous.

1.5.3 The Negotiated Procedure

EU law defines negotiated procedures as those procedures ‘whereby the contracting entity consults the economic operators of its choice and negotiates the terms of the contract with one or more of these’.\(^{48}\) Arrowsmith states that even though the negotiated procedure with a notice and the negotiated procedure without notice are both listed as negotiated procedures, they are in truth two different procedures.\(^{49}\)

1.5.4 The Competitive Dialogue Procedure

The Competitive Dialogue procedure is defined by EU law as ‘a procedure in which any economic operator may request to participate and whereby the contracting authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender’.\(^{50}\) The competitive dialogue procedure may only be availed of in the particular situations expressly stated within the law,\(^{51}\) specifically in the case of particularly complex contracts where ‘the use of open or restricted procedures will not allow the award of the contract’.\(^{52}\) A contract is considered to be particularly complex where ‘the contracting authorities are not objectively able to define the technical means capable of satisfying their needs or objectives, and, or they are not objectively able to specify the legal and, or financial make-up of a project’.\(^{53}\) It is

\(^{46}\) Directive 2004/17/EC, Article 1(9)(b); and Directive 2004/18/EC, Article 1(11)(b)
\(^{47}\) S.L. 174.04 Public Procurement Regulations, Regulation 2 and S.L. 174.06; Utilities Procurement Regulations, Regulation 1(2)
\(^{48}\) Directive 2004/17/EC, Article 1(9)(c) and Directive 2004/18/EC, Article 1(11)(d)
\(^{49}\) Arrowsmith, *EU Public Procurement Law: An Introduction* (n 8) 135
\(^{50}\) Directive 2004/18/EC, Article 1(11)(c)
\(^{51}\) Ibid. Article 28
\(^{52}\) Ibid. Article 29
\(^{53}\) Ibid. Article 1(11)(c)
interesting to note that it is only Directive 2004/18/EC which provides for the competitive dialogue procedure, however, it must be stated that under Directive 2004/17/EC there is nothing prohibiting a contracting authority from making use of the rules for competitive dialogue procedure under the negotiated procedure with prior call for competition.\textsuperscript{54} Maltese law mirrors EU law with regards to this procedure.\textsuperscript{55}

1.5.5 Innovation Partnerships – A New Procurement Procedure under the Proposed Directives

The proposed directives introduce a new procedure known as an Innovation Partnership. This new procedure buttresses what is stated in the Europe 2020 strategy, as, as the nomenclature implies, it promotes innovation.\textsuperscript{56} It is a procedure whereby ‘any economic operator may submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works provided that they correspond to the agreed performance level and costs’.\textsuperscript{57}

1.6 Procurement Techniques other than the Procurement Procedures

Apart from the procurement procedures defined above, the directives provide various techniques which may be used by contracting authorities. These are framework agreements, design contests, dynamic purchasing systems, and electronic auctions.

1.6.1 Framework Agreements

A framework agreement may be defined as ‘an agreement between one or more contracting entities and one or more economic operators in order to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and where appropriate the quantities envisaged’.\textsuperscript{58} Due to their nature, it is important that framework agreements are not used in a manner so as to hinder, limit or distort

\textsuperscript{54} COM(2011) 15 final, Green Paper on the modernization of EU public procurement policy; Towards a more efficient European Procurement Market [27/01/2011], pg. 45, footnote 95
\textsuperscript{55} S.L. 174.04 Public Procurement Regulations, Regulations 2, 25 and 48
\textsuperscript{56} Proposal for a Directive on Public Procurement, Detailed explanation of the proposal, pg. 8
\textsuperscript{57} Ibid. Article 29
\textsuperscript{58} Directive 2004/17/EC, Article 1(4) and Directive 2004/18/EC, Article 1(5) and S.L. 174.04 Public Procurement Regulations, Regulation 2 and S.L. 174.06 Utilities Procurement Regulations; Regulation 1
competition. Recently, there has been a substantial increase in the use of framework agreements.

1.6.2 Design Contests
As the name implies, a design contest is a procedure which enables the contracting authority to acquire a plan or design which is selected by a jury after having been put out to competition with or without the award of prizes. This particular procedure is used mainly in the fields of town and country planning, architecture, engineering or data processing. Decisions are made by a jury made up of natural persons who are autonomous and independent from the participants.

1.6.3 Dynamic Purchasing systems
A dynamic purchasing system is an ‘electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting entity, which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification’. The rules to be followed are those of the open procedure.

A dynamic purchasing system can be set up for a maximum of four years and may not be used to prevent, restrict or distort competition.

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59 Directive 2004/17/EC, Article 14
60 PWC, ‘Public procurement in Europe: Cost and effectiveness’ (n 4) pg. 5
62 Ibid.
63 Directive 2004/18/EC, Article 7 and S.L. 174.04 Public Procurement Regulations, Regulation 58 (10)
64 Directive 2004/17/EC, Article 66 and Directive 2004/18/EC, Articles 73 and 74 and S.L. 174.04 Public Procurement Regulations, Regulations 58 (10) and 58 (11) and S.L. 174.06 Utilities Procurement Regulations; Regulation 66(1)
65 Directive 2004/17/EC, Article 1(5) and Directive 2004/18/EC, Article 1(6) and S.L. 174.04 ; Public Procurement Regulations, Regulation 2 and S.L. 174.06 Utilities Procurement Regulations, Regulation 1(2)
66 Directive 2004/17/EC, Article 15(2) and Directive 2004/18/EC, Article 33(2) and S.L. 174.04 Public Procurement Regulations, Regulation 27(2) and S.L. 174.06 ; Utilities Procurement Regulations, Regulation 15(2)
67 Directive 2004/17/EC, Article 15(7) and Directive 2004/18/EC, Article 33(7) and S.L. 174.04 Public Procurement Regulations, Regulation 27(7) and S.L. 174.06 Utilities Procurement Regulations, Regulation 15(7)
1.6.4 Electronic Auctions

An electronic auction is defined as ‘a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods’. 68 Due to the nature of the process, not all contracts can be the subject of an electronic auction. 69 Electronic auctions may be used under both the open and restricted procedures. 70 In certain cases specified by the law, electronic auctions may also be used for negotiated procedures 71, dynamic purchasing systems 72 and also framework agreements 73.

1.7 Public-Private Partnerships

The term Public-Private Partnership, or PPP, is not one which is listed within the directives. A PPP may be defined as ‘an arrangement between public authorities and private parties, based on co-operation, with the aim of providing a mechanism for developing public service provision involving significant assets or services over a period of time’. 74 At EU level, there is no legal framework regulating public-private partnerships 75, but one should note that it is possible for their transactions to fall within the scope of the Public Procurement Directives. 76 Reference should be made to two Commission Communications 77 as well as a resolution of the European Parliament. 78

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68 Directive 2004/17/EC, Article 1(6) and Directive 2004/18/EC, Article 1(7) and S.L. 174.04 Public Procurement Regulations, Regulation 2 and S.L. 174.06 Utilities Procurement Regulations; Regulation 1(2)
69 Ibid.
70 Directive 2004/17/EC, Article 56(2) and Directive 2004/18/EC, Article 54 and S.L. 174.04 Public Procurement Regulations, Regulation 30(2) and S.L. 174.06 Utilities Procurement Regulations; Regulation 56(2)(a)
71 Ibid.
72 Ibid.
73 Directive 2004/18/EC, Article 54 and S.L. 174.04 Public Procurement Regulations, Regulation 30(2)
74 Christina Tvarno, ‘Does the Danish Interpretation of EC Public Procurement Law Prevent PPP?’ [2010] 2 P.P.L.R. 73, 73
75 SIGMA, ‘Concessions and PPPs’ [2011], available online at http://www.oecd.org/site/sigma/publicationsdocuments/48630004.pdf, last accessed on 27/04/2013, pg. 8
77 C(2007)6661, Commission Interpretative Communication on the application of Community law on Public Procurement and Concessions to Institutionised Public-Private Partnerships (IPPP) [05/02/2008], and COM(2005) 569 final, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions [15/11/2005]

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CHAPTER II – THE PRINCIPLES OF PUBLIC PROCUREMENT

The law of the internal market speaks of four fundamental freedoms which relate to the factors of production; the free movement of goods, the free movement of persons, the free movement of capital, and the free movement of services. Upholding the single market as its ethos, the European Union aims to create an area without internal frontiers within which these freedoms can be enjoyed.\(^\text{79}\) Since it is based wholly on the principle that open competition is beneficial to both the economy and society as a whole,\(^\text{80}\) the public procurement regime acts as key element in the attainment of these aims.\(^\text{81}\) In this light, one can understand van Genderen-Naar’s assertion that public procurement may be considered a cornerstone of the EU internal market.\(^\text{82}\) It is therefore important to discuss the interplay between the fundamental principles of the treaty and public procurement, as well as those principles which are inherent to public procurement and the manner with which these principles are reflected within the directives.

2.1 The Principles of the Treaty in the sphere of Public Procurement

2.1.1 The Application of the Principles of the Treaties in the sphere of Public Procurement

In the preamble to the Public Sector Directive, it is stated that ‘the award of contracts concluded in Member States on behalf of the state, regional or local authorities and other bodies governed by public law entities, is subject to the respect of principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle to provide services and to the principles deriving therefrom’.\(^\text{83}\) It then suggests the drawing up of ‘provisions of community

\(^{78}\) European Parliament Resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI))

\(^{79}\) Paul Craig and Grainne de Burca, EU Law Text, Cases, and Materials (5\(^{\text{th}}\) Edition, OUP 2011) 604

\(^{80}\) Catriona Munro, ‘Competition Law and Public Procurement: two sides of the same coin?’ [2006] 6 P.P.L.R. 352, 352

\(^{81}\) Christopher Bovis, EU Public Procurement Law (Elgar European Law 2007) 1


coordination of national procedures for the award of public contracts above a certain value, which, are based on the aforementioned principles in order to ensure their effect and guarantee free competition.\textsuperscript{84} Bovis states that in creating a distinction between contracts having a value equal to or greater than the thresholds and contracts of a lesser value, the directive creates a distinction between the dimensional and the sub-dimensional, thereby, introducing the \textit{De Minimis} principle to public procurement since contracts must exceed a certain value for the directives to be applicable.\textsuperscript{85} Nevertheless, it seems that the fundamental principles of the treaties are applicable across the board and thus to all public procurement within the EU Member States. In fact, within the preamble to Directive 2004/17/EC, it is stated that ‘For public contracts the value of which is lower than that triggering the application of provisions of community coordination, it is advisable to recall the case-law developed by the court of justice according to which the rules and principles of the Treaties referred to above apply’.\textsuperscript{86} Case-law\textsuperscript{87} has repeatedly confirmed that contracting authorities are obliged to abide by the general principles of community law even in cases where the contract in question falls outside the scope of the Procurement Directives, however, it is also stated, in various other cases,\textsuperscript{88} that the application of such principles hinges on the contracts in question being of a cross-border interest.

2.1.2 The Fundamental Principles of the Treaty in relation to the aims of Public Procurement

The Public Sector Directive lists the principles of ‘free movement of goods, freedom of establishment, and the freedom to provide services as well as principles deriving

\textsuperscript{84} Ibid.
\textsuperscript{85} Bovis, \textit{EU Public Procurement Law} (n 81) 70-72
\textsuperscript{87} Vide: Case C-6/05 \textit{Medipac-Kazantzidis AE v. Venizelio-Pananio (P.E.S.Y. KRITIS)} [14/06/2007] Court of Justice of the European Union I-4590, I-4608, par. 33
Case C-410/04 \textit{Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v. Comune di Bari, AMTAB Servizio Spa} [06/04/2006] Court of Justice of the European Union, par. 18
Case T-258/06 \textit{Federal Republic of Germany v. European Commission} [20/05/2010] Court of Justice of the European Union, par. 74-75
\textsuperscript{88} Vide:
Joined Cases C-147/06 and C-148/16; \textit{SECAP Spa (C-147/06) v. Comune di Torino and Santorso Soc. Coop. arl v. Comune di Torino (C-148/06)} [15/05/2008] Court of Justice of the European Union, par. 21
Case C-376/08 \textit{Serrantoni Srl, Consorzio stabile edili Scrl v. Comune di Milano} [23/12/2009] Court of Justice of the European Union, par. 24
therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency as the most important principles which ought to be safeguarded. It should be noted that the use of the phrases ‘in particular’ and ‘such as’ indicate that the list of principles provided is not one which is exhaustive. Compliance with these fundamental principles of community law ensures that the main aims of regulation of public procurement: - the promotion of free competition and the elimination of barriers to trade are met. In fact, Arrowsmith argues that the application of these principles curtails discriminatory actions against firms or products from other Member States which, in turn, results in a more competitive environment.

2.2 The Principles inherent to the Procurement Directives

2.2.1 The Principles of Transparency, Equal Treatment and Non-Discrimination

Both the Public Sector Directive and the Utilities Directive state that contracting bodies are to ‘treat economic operators equally and non-discriminatorily and act in a transparent manner’. Apart from guaranteeing free competition, the principles of transparency, equal treatment and non-discrimination also act as an effective safeguard in the fight against corruption. As a result, compliance must be ensured throughout the whole procurement process.

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89 Directive 2004/18/EC, Recital 2
90 Sue Arrowsmith, *EU Public Procurement Law: An Introduction* in Sue Arrowsmith (ed) (EU Asia Inter University Network for Teaching), available online at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf, last accessed on 27/04/2013, pg. 44
91 Ibid. pg. 66
93 Case C-91/08 Wall AG v. Stadt Frankfurt am Main, Frankfurter Entsorgungs-und Servive (FES) GmbH [13/04/2010] Court of Justice of the European Union, par. 48
95 Case C-448/01 EVN AG, Wienstrom GmbH v. Republik Osterreich [04/03/2003] Court of Justice of the European Union, par. 92

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2.2.1.1 The Principle of Equal Treatment and Non-Discrimination

The case-law of the CJEU has repeatedly affirmed that the principle of equal treatment and non-discrimination ‘lies at the very heart of the Public Procurement Directives’ and underlies the whole regime. In the Evropaiki Dynamiki series of cases, the CJEU explained that this principle ‘requires comparable situations not to be treated differently and different situations not to be treated in the same way unless such treatment is objectively justified’. Tenderers must therefore, be treated fairly, given equal opportunities and made subject to the same conditions during all the stages of the procurement process.

2.2.1.2 The Principle of Transparency

The duty to act in a transparent manner arises as a corollary of the principle of equal treatment and non-discrimination. Bovis attributes two main objectives to this principle; that of establishing a greater degree of accountability and the introduction of a system of best practice to be followed by the parties involved. Transparency enables contracting bodies to ascertain compliance with the principle of equal treatment and non-discrimination by minimising any ‘risks of favouritism or arbitrariness on the part of the

97 Case C-448/01 EVN AG (n 95) par. 47
99 Ibid.
100 Case C-458/03 Parking Brixen Gmbh v. Gemeinde Brixen, Stadtwere Brixen [13/10/2005] Court of Justice of the European Union, par. 48
101 Joined Cases C-72/10 and C-77/10 References for a preliminary ruling under Article 267 TFEU from the Corte Suprema di Cassazione (Italy), made by decisions of 10 November 2009, received at the Court on 9 February 2010, in the criminal proceedings against Marcello Costa (C-72/10) and Ugo Cifone (C-77/10) [16/02/2012] Court of Justice of the European Union, par. 57
103 Case C-203/08 Sporting Exchange Ltd v. Minister van Justitie [03/06/2010] Court of Justice of the European Union, par. 39
104 Bovis, EU Public Procurement Law (n 81) 65
105 Case C-203/08 Sporting Exchange Ltd (n 103) par. 39
contracting authority’. It should be noted that, like the principle of equal treatment and non-discrimination, the obligation to act in a transparent manner also applies throughout the whole procurement procedure.

2.2.1.3 The Principles as reflected within the Procurement Process

Since compliance with the principles of transparency, equal treatment and non-discrimination must be ensured at every stage of the procurement process, it is unsurprising that they are to a great extent reflected within the substantive provisions of the Public Procurement Directives. Generally speaking, the pre-tendering stage involves the drawing up of the contract notice and the subsequent advertising of such notice. The principle of transparency obliges contracting authorities to list all the conditions, criteria and rules relevant to the procurement procedure within the respective notice in a manner which allows potential tenderers to fully understand what is required and different individuals to form a uniform interpretation of the information set out. Moreover, with regards to advertising, the principle of transparency requires an element of publicity which is sufficient to enable the opening of competition. In Coname v. Comune di Cingia de’ Botti, the CJEU stated that the absence of such rules would result in potential tenderers not being given equal opportunities, hence infringing the principle of equal treatment and non-discrimination. Potential tenderers must have been made aware of the applicable criteria and their respective importance prior to submitting their tenders. Errors made at any stage of the procurement process will lead to an undesirable end-result; in fact, a lack of observance of the aforementioned rules will result in economic

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106 Case C-599/10 SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s., TESLA Stropkov a.s., Autostrade per l’Italia SpA, EFKON AG, Silexport Autostrady SA v. Urad pre verejne obstaravanje [29/03/2012] Court of Justice of the European Union, par. 25
108 Case C-448/01 EVN AG (n 95) par. 56
109 Joined Cases C-72/10 and C-77/10 Costa and Cifone (n 101) par. 73
111 Case C-458/03 Parking Brixen (n 100) par. 49
112 Case C-231/03 Consorzio Aziende Metano (Coname) v. Comune di Cingia de’ Botti [21/07/2005] Court of Justice of the European Union, par. 18
113 Case C-331/04 ATI EAC Srl (n 102) par. 23-24
operators not being on equal grounds at tendering stage – the stage at which tenders are submitted. The principles of transparency, equal treatment and non-discrimination must also be respected during both the selection\(^{115}\) stage and the award\(^{116}\) stage, in fact, as was stated by the CJEU in *Antwerpse Bouwwerken NV v. European Commission*\(^{117}\), contracting authorities must make an objective comparison of the bids submitted at both stages.

2.2.2 The Principle of Objectivity

Like the obligation of transparency, the principle of objectivity is a derivative of the principle of equal treatment and non-discrimination. Contracting bodies are duty bound to act objectively and therefore impartially in all instances where the directives grant them discretion. Again, the duty to act objectively subsists throughout the procurement process. Contracting authorities must ensure; that the conditions, criteria and rules set out in the respective contract notices do not grant any advantage to particular individuals, and that therefore the criteria set out are in themselves objective; that at selection stage, whereby the pool of economic operators eligible to submit tenders is selected, the personal qualifications of the operators are considered in an objective manner; that in determining whether a tender is abnormally low, the constitutive elements of the tenders are analysed objectively; that at award stage tenderers are analysed objectively and the winning bid is chosen in accordance with the award criteria set out\(^{118}\).

2.2.3 The Principle of Confidentiality

Article 6 of Directive 2004/18/EC states that a ‘contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, such information includes in particular, technical or trade secrets and the confidential aspects of tenders’\(^{119}\). The directive is not clear as to which information is

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\(^{116}\) Case C-599/10 *SAG ELV Slovensko a.s.* (n 106) par. 25


\(^{118}\) Bovis, ‘The Effects of the Principles of Transparency and Accountability on Public Procurement and Public-Private Partnerships Regulation’ (n 110)

\(^{119}\) Directive 2004/18/EC, Article 6
covered by this principle. Brown suggests that even though the directive could be interpreted as allowing economic operators to render all the information within their tenders as confidential, the better view is that it is only that information which is genuinely sensitive from a commercial point of view that ought to be covered by the principle of confidentiality. Brown suggests that even though the directive could be interpreted as allowing economic operators to render all the information within their tenders as confidential, the better view is that it is only that information which is genuinely sensitive from a commercial point of view that ought to be covered by the principle of confidentiality. This view is corroborated by the CJEU, in Agrofert Holding a.s. v. European Commission where it was stated that the obligation of professional secrecy does not justify a general and abstract refusal of access to documents and that, therefore, it is only certain information which is covered by confidentiality.

Article 13 of Directive 2004/17/EC then states that contracting entities may ‘impose requirements with a view to protecting the confidential nature of information which they make available’. By obliging economic operators to protect the confidential nature of information made available to them by contracting authorities, the directive extends the obligation of confidentiality to both parties. Again, the directive does not specify which information is covered and leaves the discretion, as regards which information is to be protected and as to when such requirements are to be imposed, in the hands of the contracting authority. Of course, tenderers may request information regarding their own bid or tender, as may be seen under Article 41 of Directive 2004/18/EC. Here it is stated that ‘the contracting authority, on the request of the party concerned, shall as quickly as possible inform; any unsuccessful candidate of the reasons for rejection of his application; any unsuccessful bidder for the reasons for the rejection of his tender; and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer’. It should be noted that, in line with the principle of confidentiality, it is then stated that such requests will not be entertained in cases where; law enforcement may be impeded; it is contrary to the public interest; it might prejudice commercial interests of economic operators; or prejudice the

120 Brown Adrian, ‘Protection of confidential information in procurement cases before national review bodies: Varec v. Belgian State (C-450/06)’ [2008] 4 P.P.L.R. NA119, NA123
121 Case T-111/07 Agrofert Holding a.s. v. European Commission[07/07/2010] Court of Justice of the European Union, par. 69
122 Ibid.
123 Directive 2004/17/EC, Article 13
124 Directive 2004/18/EC, Article 41(2)
fair competition between operators. Similar provisions are found under Directive 2004/17/EC.

2.3 The Principles of Public Procurement as reflected within the Maltese Regulations

2.3.1 The Principles of Equal Treatment, Transparency and non-Discrimination

Regulation 4 of the Public Procurement Regulations transposes Article 2 of the Public Sector Directive and thus introduces the principles of equal treatment, transparency and non-discrimination into Maltese law. It states that ‘Contracting authorities shall ensure that there is no discrimination between economic operators, and that all economic operators are treated equally and transparently in all calls for tenders whatever their estimated value’.

It is interesting to note that this regulation is applicable to all calls for tenders irrespective of their estimated value. In fact, it is found under Part 1 of the regulations which is applicable to all contracts by virtue of regulations 18, 22 and 37. Moreover, regulation 68 of the Utilities Regulations states that ‘Regulation 4…of the Public Procurement Regulations shall mutatis mutandis apply to these [Utilities] regulations’. Therefore, it would seem that, under Maltese law, the principles of equal treatment, transparency and non-discrimination are applicable to all contracts irrespective of their value or subject matter. It may thus be stated that these principles are applicable across the board and therefore also to contracts which are not regulated by the EU Directives, such as, for example, contracts falling below the community thresholds and other matters which fall

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125 Ibid. Article 41(3)
126 Public Procurement Regulations, Laws of Malta, S.L. 174.04 (S.L. 174.04 Public Procurement Regulations), Regulation 4(1)
128 Ibid. Regulation 18
129 Ibid. Regulation 22
130 Ibid. Regulation 37
131 Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, Laws of Malta, S.L. 174.06 (S.L. 174.06 Utilities Procurement Regulations), Regulation 68
outside the scope of the directives (eg. the award of a public service concession contract).\textsuperscript{132}

Review bodies have held that these obligations subsist at all stages of the procurement process. Infact, in Case No. 318\textsuperscript{133}, the PCRB stated that in procurement procedures, it is imperative ‘for full transparency to be felt by, and equal opportunities to be given to, all participating tenderers’.\textsuperscript{134} Likewise, in Case No. 239,\textsuperscript{135} the PCAB reiterated that bidders are to be given the opportunity ‘to participate on a level playing field and that the process is equally transparent for all bidders’.\textsuperscript{136}

It may therefore be stated that the principles of equal treatment, transparency and non-discrimination are manifested within the Maltese regulations in a manner similar to that under the EU Public Procurement Directives.

2.3.2 The Principle of Objectivity

The principle of objectively is also manifested within Maltese law. As was confirmed by the PCAB in Case No. 202\textsuperscript{137}, evaluation boards should evaluate all information submitted by economic operators in an ‘objective and transparent manner’.\textsuperscript{138}

Maltese law introduces various safeguards in order to guarantee objectivity. Persons ‘having a financial or other interest that is likely to prejudice the discharge of their functions as members of the contracts committee are to be disqualified from being appointed to and from remaining as members of a Committee’.\textsuperscript{139} Similarly, persons

\textsuperscript{133} PCRB Case No. 318 Birgu SS05/11; Services Tender for Street Sweeping and Cleaning in Birgu [2011], The 2011 Report on the Workings of the PCAB and the PCRB 444
\textsuperscript{134} Ibid. 447
\textsuperscript{135} PCAB Case No. 239 Adv CT 88/2010 – CT 2040/2010 – DH 3566/09; Leasing of Chauffeur Driven Transportation Facility for the Distribution of Pharmaceuticals for the Pharmacy of Your Choice Scheme [2010], Report on the Working of the GCC, PCAB and PCRB during 2010 612
\textsuperscript{136} Ibid. 618
\textsuperscript{138} Ibid. 319
\textsuperscript{139} S.L. 174.04 Public Procurement Regulations, Regulation 80(4)
‘having any direct or indirect interest in any contract dealt with by such committee are to disclose the nature of their interest at the first meeting of that committee after the facts have come to their knowledge, such disclosure is to be recorded in the minutes of that meeting of the committee and the member having an interest as aforesaid shall withdraw from any meetings at which such contract is discussed’. Moreover, individuals participating in the evaluation of tenders or proposals are to sign a Declaration of Impartiality and Confidentiality, whereby, they are to confirm their independence and promise to act in an honest and fair manner. It should also be noted that the ethics clauses found within the tender templates provided by the Department of Contracts state that attempts by candidates or tenderers to influence an evaluating committee or the Central Government authority during the process of examining, clarifying, evaluating and comparing tenders will lead to a rejection of the candidacy or tender and may also result in an administrative penalty.

2.3.3 The Principle of Confidentiality

The obligation of confidentiality as set out under Article 6 of Directive 2004/18/EC and Article 13 of Directive 2004/17/EC is also transposed by virtue of regulation 4. Regulation 4(4) states that ‘Contracting authorities shall respect fully the confidential nature of any information furnished by economic operators. Such information includes in particular, technical or trade secrets and the confidential aspects of tenders’. Moreover, sub-regulation 5 then states that, ‘In the context of provision of technical specifications to interested candidates and tenderers, of qualification of candidates and selection of tenderers and of award of contracts, contracting authorities may impose requirements with a view to protecting the confidential nature of information which they make available’. It may thus be stated that the obligation of confidentiality on the part of both parties also subsists under Maltese law. In fact, the tender templates provided by the Department of Contracts require all interested parties to sign a Declaration of Impartiality and Confidentiality.

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140 Ibid. Regulation 80(5)
141 Evaluation Report Template; Department of Contracts (Malta) Website; available online at; https://secure2.gov.mt/eprocurement/templates; last accessed on 28/03/2013
142 Tender Templates; Department of Contracts (Malta) Website; available online at; https://secure2.gov.mt/eprocurement/templates; last accessed on 28/03/2013
143 S.L. 174.04 Public Procurement Regulations, Regulation 4(4)
144 Ibid. Regulation 4(5)
Contracts provide that economic operators and their staff are obliged to maintain professional secrecy during the duration of the contract and also after its completion. With regards to the obligation of confidentiality on the part of the contracting authority, the templates provide that personal information submitted is to be processed pursuant to the Data Protection Act, moreover, the declaration of impartiality and confidentiality obliges the persons participating in the evaluation of tenders or proposals to hold in trust and confidence any information disclosed, discovered or prepared as a result of the evaluation and not to disclose any information to third parties or keep copies of any such information.

The question thus arises as to what would happen in the case where a party seeks information regarding bids or tenders. It is generally accepted that tenderers may seek information regarding their own bid or tender, however they cannot ask for information regarding the bids of other participants. In fact, in Case No.217, the PCAB stated that it is standard practice for a tenderer not to be given access to the bid of other tenderers in line with the obligation of confidentiality. Matters could be complicated in the event that an individual makes a request for information under the Freedom of Information Act - a legislative instrument which grants eligible persons the right to access documents held by public authorities. The tender templates state that ‘the provisions of the contract are without prejudice to the obligations of the Central Government Authority in terms of the Freedom of Information Act’. It would therefore appear that contracting authorities could be obliged to divulge information on the basis of a freedom of information act request. That said, the Freedom of Information Act itself states that it does not apply, to documents which contain personal data subject to the Data Protection Act, or information the disclosure of which is prohibited by any other law. Therefore it is clear, that any

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145 Tender Templates (n 142)  
146 Data Protection Act, Chapter 440 of the Laws of Malta  
147 Evaluation Report Template (n 141)  
149 Ibid. 424  
150 Freedom of Information Act, Chapter 496 of the Laws of Malta (FoI Act)  
151 Ibid. Article 3  
152 Tender Templates (n 142)  
153 FoI Act, Article 5(3)
information which is considered to be confidential under Regulation 4 cannot be subject to a freedom of information request, however, like the EU Directives, Maltese law does not define which categories of information should be considered as confidential. It is therefore humbly submitted that the legislator ought to clarify the situation by providing better guidelines as to which information may be rendered confidential.

2.3.4 Is Maltese Law in line with the Directives?
It appears that the principles of public procurement as reflected under the EU Directives are also manifested within the Maltese Regulations. It seems that in certain instances Maltese law even goes beyond what is stated within the directives in order to safeguard these principles. This is particularly evident with the ‘separate packages in tender offer’ procedure whereby Maltese law guarantees equal treatment and non-discrimination by maximising objectivity and transparency. Moreover, as regards the application of the principles of transparency, equal treatment and non-discrimination, the Maltese regime does not merely rely on the basic principles of community law as expounded by the treaty, but renders these principles applicable to all contracts irrespective of their value. It would therefore seem that there has been a correct transposition of the principles of public procurement into Maltese law.

2.4 Will the changes proposed to the EU Public Procurement Regime change anything?

2.4.1 The Proposed Directives
Like the directives currently in force, the proposed directives also distinguish between contracts having a value greater than or equal to the thresholds set out and contracts of a lesser value.\(^\text{154}\) The notion that the fundamental principles of community law are applicable to all contracts of a cross-border interest will also remain.\(^\text{155}\)

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The obligation on the part of the contracting authority to treat economic operators equally and non-discriminatorily and to act in a transparent manner is also present, however, the proposed directives also oblige contracting authorities to act proportionately and to ensure that the procurement procedure is not one which is aimed at excluding itself from the scope of the directives or at distorting competition. ¹⁵⁶

The principle of confidentiality is also manifested within the proposed directives ¹⁵⁷. Its application remains similar to that under the current directives with both economic operators and contracting authorities being obliged to treat certain information as confidential. The lack of clarity as to which information ought to be covered by this principle still remains.

Two new provisions are introduced by the proposed directives, one dealing with conflict of interest ¹⁵⁸ and the other with illicit conduct ¹⁵⁹. The 2011 Modernisation Green Paper had suggested the introduction of such provisions in order to minimise the risk of unsound business practices, such as favouritism and corruption and to ensure fair competition on an equal basis whilst ensuring efficient use of the tax-payer’s money. ¹⁶⁰ Within the compromise texts, however, the provision on conflict of interest ¹⁶¹ was watered down whereas the provision on illicit conduct was totally removed ¹⁶².

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¹⁵⁶ Proposal for a Directive on Public Procurement, Article 15 and Proposal for a Directive on the procurement of Utilities, Article 29
¹⁵⁷ Proposal for a Directive on Public Procurement, Article 18 & Proposal for a Directive on the procurement of Utilities, Article 32
¹⁵⁸ Proposal for a Directive on Public Procurement, Article 21 & Proposal for a Directive on the procurement of Utilities, Article 36
¹⁵⁹ Proposal for a Directive on Public Procurement, Article 22 & Proposal for a Directive on the procurement of Utilities, Article 37
¹⁶⁰ COM(2011) 15 final, Green Paper on the modernization of EU public procurement policy; Towards a more efficient European Procurement Market [27/01/2011]
2.4.2 Maltese Law in the light of these developments

Even though it seems that the Maltese public procurement regime is already compliant with what is being proposed, certain provisions would still require amendment in order to reflect the developments as set out under the proposed directives.
CHAPTER III – THE SCOPE AND APPLICATION OF THE LAW

As aforesaid, the core legislative instruments governing the EU public procurement regime are Directives 17 and 18 of 2004. Before analyzing the substantive provisions regulating the procurement process, it was felt that a discussion on the scope and application of the directives is essential.


Directive 2004/18/EC applies ‘to public contracts which are not excluded in accordance with the exceptions provided within the directive itself and which have a value which is estimated to be equal or greater than the thresholds provided’.163 Therefore, in order to determine whether a contract falls within the scope of the directive, one has to analyse the nature of the contract, its value, and whether any exclusionary rule within the directive applies. In Helmut Muller GmbH v. Bundesanstalt fur Immobilienaufgaben164, the CJEU affirms that the concept of ‘contract’ is fundamental in defining the directive’s scope.165

3.1.1 Public Contracts

The directive defines public contracts as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and have as their object the execution of works, the supply of products or the provision of services’.166 Hence, a public contract is to have four concurrently existing features, it must be a contract for a pecuniary interest, concluded in writing, between at least one economic operator and at least one contracting authority, and finally, the object of the contract must be the execution of works, the supply of products or the provision of services.

164 Case C-451/08 Helmut Muller GmbH v. Bundesanstalt fur Immobilienaufgaben [25/03/2005] Court of Justice of the European Union, par. 46
165 Ibid.
166 Directive 2004/18/EC, Article 1
3.1.1.1 The Pecuniary Nature of the contract
The term pecuniary indicates a financial or monetary aspect. In the Helmut Muller\textsuperscript{167} case, the CJEU affirms that in order for a contract to qualify as a public contract, it must have been concluded for a pecuniary interest. Referring to Ordine degli Architetti v. City of Milan\textsuperscript{168} and Auroux v. Commune de Roanne\textsuperscript{169}, the court states that the pecuniary nature of a contract relates to the payment of a consideration in exchange for the performance of a contractual obligation.\textsuperscript{170}

3.1.1.2 The Requirement for a Public Contract to be concluded in Writing
The directive defines the phrase ‘in writing’ as ‘any expression consisting of words or figures which can be read, reproduced and subsequently communicated’\textsuperscript{171} The requirement that a public contract must be in the written form was reiterated by the CJEU in numerous cases such as Grifoni v. EAEC\textsuperscript{172} and Embassy Limousines & Services v. European Parliament.\textsuperscript{173}

3.1.1.3 The Contracting Entities to a Public Contract
The directive makes it clear that there must be at least two parties to a public contract for it to qualify as such, one being an economic operator and the other a contracting authority. The directive defines an economic operator as ‘any natural or legal person or public entity or group of such persons and/or bodies which offers on the market respectively, the execution of works and/or a work, products or services’.\textsuperscript{174} This term is used interchangeably with the terms contractor, supplier and service provider.

\textsuperscript{167} Case C-451/08 Helmut Muller (n 164)
\textsuperscript{169} Case C-220/05 Jeanne Auroux & others v. Commune de Roanne [18/01/2007] Court of Justice of the European Union
\textsuperscript{170} Case C-451/08 Helmut Muller (n 164), par. 48
\textsuperscript{171} Directive 2004/18/EC, Article 1
\textsuperscript{172} Case C-330/88 Alfredo Grifoni v. European Atomic Energy Community (EAEC) [05/03/1991] Court of Justice of the European Union, par. 10
\textsuperscript{174} Directive 2004/18/EC, Article 1
A contracting authority is then defined as ‘the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law’. The terms state, regional or local authorities are not defined within the directive, however, the CJEU has interpreted the term ‘the State’ to encompass all bodies exercising legislative, executive and judicial powers both at national and federal level.

With regards bodies governed by public law, the directive states that to be considered so, a body must satisfy three requisites. In Arkkitehtuuritoimisto Riitta Korhonen Oy and others v. Varkauden Taitotalo Oy it was stated that these three conditions must exist cumulatively. The body must first of all have as one of its duties the satisfaction of needs in the general interest, not having an industrial or commercial character. Referring to Mannesmann Alangbau Austria AG and others v. Strohal Rotationsdruck GesmbH, the CJEU, in Gemeente Arnhem and others v. BFI Holdings BV states that this requisite does not imply that the body must solely be concerned with such needs. In the aforementioned case of Varkauden Taitotalo Oy, the court defines these needs, stating that, these are ‘generally needs which are satisfied otherwise than by the availability of

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175 Ibid.
177 Case C-18/01 Arkkitehtuuritoimisto Riitta Korhonen Oy, Arkkitehtitoimisto Pentti Toivanen Oy, Rakennuttajatoimisto Vilho Tervomaa v. Varkauden Taitotalo Oy [22/05/2003] Court of Justice of the European Union, par. 32
178 See also;
Case C-283/00 Commission of the European Communities v. Kingdom of Spain [16/10/2003] Court of Justice of the European Union, par. 69
Case C-44/96 Mannesmann Anlagenbau Austria AG and others v. Strohal Rotationsdruck GesmbH [15/01/1998], Court of Justice of the European Union I-102, I-113, par. 21
180 Case C-44/96 Mannesmann Anlagenbau Austria AG and others v. Strohal Rotationsdruck GesmbH [15/01/1998], Court of Justice of the European Union I-102
181 Case C-360/96 Gemeente Arnhem (n 179)
182 Ibid. I-6866, par. 55
183 Case C-18/01 Varkauden Taitotalo Oy (n 177), par. 47
goods and services in the market place and which, for reasons associated with the general interest, the State chooses to provide itself or over which it wishes to retain a decisive influence'.\footnote{184} As was confirmed in the later cases of *Agora and Excelsior*\footnote{185}, this term does not exclude needs which can be catered for by private undertakings. Moreover, in *Adolf Truley GmbH v. Bestattung Wien GmbH*\footnote{186}, it was stated that even though the presence of competition may indicate the absence of ‘a need in the general interest, not having an industrial or commercial character’, the absence of the said competition is not essential for defining a body governed by public law.\footnote{187} The second criterion is that of ‘legal personality’.\footnote{188} In order to be considered a body governed by public law, the said body must have a separate legal personality. Finally, the third requisite requires the body to be ‘financed, for 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 whose members are appointed by the state, regional authorities or by other bodies governed by public law’.\footnote{189} The use of the conjunction ‘or’ indicates that the scenarios put forward are alternative; therefore only one need exist in order for the requisite to be satisfied.\footnote{190} It seems that the main concern is the issue of dependence, an issue which is important due to the close connections which it has to the influence which public authorities may have on decisions concerning public contracts.\footnote{191}

### 3.1.1.4 The Object of the Contract

It is clear that in order to qualify as a public contract a contract must have as its object the execution of works, the supply of products or the provision of services. A distinction is thus created between contracts of works, contracts for supply and contracts of services. All

\footnote{184} This was also stated in *Case C-283/00 Commission of the European Communities v. Kingdom of Spain* [16/10/2003] Court of Justice of the European Union, par. 80


\footnote{186} *Case C-373/00 Adolf Truley GmbH v. Bestattung Wien GmbH* [27/02/2003] Court of Justice of the European Union, par. 59

\footnote{187} *Case C-360/96 Gemeente Arnhem (n 179), I-6865, par. 47-49

\footnote{188} Directive 2004/18/EC, Article 1

\footnote{189} Ibid.

\footnote{190} *Case C-237/99 Commission of the European Communities v. French Republic* [01/02/2001], par. 44

\footnote{191} *Case C-373/00 Adolf Truley GmbH (n 186), par. 70
three are defined within the directive. Public works contracts are defined as ‘public contracts having as their object either the execution, or both the design and execution of works related to one of the activities within the meaning of Annex 1 or a work, or the realisation by whatever means, of a work corresponding to the requirements specified by the contracting authority’. A public supply contract is then defined as ‘a public contract, which is not a public works contract and has as its object the purchase, lease, rental or hire purchase, with or without the option to buy products’. Finally, the directive defines public service contracts as ‘public contracts, not being public works or supply contracts having as their object the provision of services referred to in Annex II’. It should be noted that Annex II is divided into Annex IIA and Annex IIB which refer to priority and non-priority services respectively. This sub-division was discussed in the case Felix Swoboda GmbH v. Österreichische Nationalbank.

The possibility of having what is known as a mixed contract also exists. This is a contract which contains work, supplies and/or services in a single contract. The classification of such contracts is regulated by the directive.

3.1.2 The Thresholds
In order to fall within the scope of the directive, a contract must have a value which is equal to or greater than the thresholds provided. Bovis terms this the monetary applicability of the directive. Two categories of thresholds are provided, those for public contracts and those for contracts which are subsidized by more than 50% by the contracting authorities. It should be noted that for ‘public contracts’ the values

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192 Directive 2004/18/EC, Article 1
193 Ibid.
194 Ibid.
195 Case C-411/00 Felix Swoboda GmbH v. Österreichische Nationalbank [14/11/2002] Court of Justice of the European Union
196 Sue Arrowsmith, EU Public Procurement Law: An Introduction in Sue Arrowsmith (ed) (EU Asia Inter University Network for Teaching), available online at http://www.nottingham.ac.uk/prrg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf, last accessed on 27/04/2013, pg. 100
197 Directive 2004/18/EC – Article 1
198 Christopher Bovis, EU Public Procurement Law (Elgar European Law 2007) 86
199 Directive 2004/18/EC, Article 7
200 Ibid. Article 8
considered should exclude VAT, whilst for the said ‘subsidized contracts’ the values considered should be net of VAT. The methods for estimating the contracts’ values are explained under Article 9. Due to an ever changing economic and financial environment, the thresholds should, from time to time, be revised. Under Article 78, the directive states that the thresholds are to be verified every two years and that these are to be revised if the need arises.

3.1.3 The Exclusionary Rules
The directive lists a number of exclusionary rules under Articles 12 to 18. Contracts expressly listed under these articles are excluded from the scope of the directive.

The first exclusionary rule states that the directive does not apply to contracts ‘which under Directive 2004/17/EC are awarded by contracting authorities exercising one or more of the activities referred to therein and are awarded for the pursuit of such activity,’ 201 nor does it apply to ‘contracts excluded from the scope of that directive under Article 5(2) and Articles 19, 26 and 30 thereof’ 202.

The second rule excludes public contracts permitting contracting authorities to provide or exploit public telecommunications networks or to provide to the public one or more telecommunication services. 203

Article 14 then excludes contracts declared to be secret, or requiring special security measures. This exclusionary rule also applies when the protection of the essential interests of the Member State so require. 204

The directive is also not applicable to ‘public contracts governed by different procedural rules and awarded; pursuant to international agreements concluded in conformity with a treaty between a Member State and a third country and concerning supplies or works

201 Ibid. Article 12
202 Ibid.
203 Ibid. Article 13
204 Ibid. Article 14
intended for the joint implementation or exploitation of a work by the signatory states or services intended for the joint implementation or exploitation of a project by the signatory states; a concluded international agreement relating to the stationing of troops and concerning the undertakings of a Member State or a third country; pursuant to the particular procedure of an international organisation’ by virtue of Article 15.205

The fifth exclusionary rule, under Article 16 lists a number of public service contracts which fall outside the scope of the directive. These are contracts for; the acquisition or rental of immovable property or rights thereon;206 the acquisition, development or co-production of programme material intended for broadcasting by broadcasters and contracts for broadcasting time;207 arbitration and conciliation services:208 financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments, in particular transactions by the contracting authorities to raise money or capital, and central bank services;209 employment contracts;210 and certain contracts regarding research and development services.211

Service concessions are also excluded from the scope of the Directive,212 as are public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right.213

3.2 Directive 17 of 2004 – the Utilities Directive; Its scope and application

The Utilities Directive coordinates the procurement procedures of entities operating in the water, energy, transport and postal services sector. This special set of rules was enacted due to the closed nature of these markets214 and the various ways by which national

205 Ibid. Article 15
206 Ibid. Article 16(a)
207 Ibid. Article 16(b)
208 Ibid. Article 16(c)
209 Ibid. Article 16(d)
210 Ibid. Article 16(e)
211 Ibid. Article 16(f)
212 Ibid. Article 17
213 Ibid. Article 18
authorities can influence the behaviour of entities operating in such markets. In order to fall within this directive’s ambit, a contract must; concern one of the activities listed; have one of the contracting entities specified as a party to it; have a value which is not less than the thresholds provided; and not be subject to any of the exclusionary rules set out. The restrictive scope of this directive is immediately evident.

3.2.1 The Contracting Entities and Activities covered

The directive applies to “contracting entities” which are contracting authorities or public undertakings which pursue one of the activities referred to within the directive, which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities aforesaid, or any combination thereof and operate on the basis of special or exclusive rights granted by the competent authority of a Member State.

3.2.1.1 The Entities Covered

It is clear that the directive covers three different contracting entities; contracting authorities, public undertakings and undertakings operating on the basis of special or exclusive rights granted by the respective Member State.

The definition of a contracting authority under this directive is analogous to that given by Directive 2004/18/EC. This concept has already been discussed and thus reference should be made to Section 3.1.1.3.

The directive defines a public undertaking ‘as any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it’.

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215 Directive 2004/17/EC, Recital 2
216 Case C-393/06 Ing. Aigner, Wasser-Warme-Umwelt GmbH v. Fernwarme Wien GmbH [10/04/2008]
217 Directive 2004/17/EC, Article 2(2)
218 Case C-393/06 Ing. Aigner (n 216) par. 25
219 Directive 2004/17/EC, Article 2
Commission v. Spain, the CJEU points out that, the main difference between bodies governed by public law and public undertakings, is that, unlike the former, public undertakings operate to meet industrial or commercial needs.

With regards to the concept of special or exclusive rights, these are defined as ‘rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the activities stated within the directive to one or more entities, and which substantially affects the ability of other entities to carry out such activity’. 221

3.2.1.2 The Activities Covered
Contracting entities must have as their object particular activities in order for the directive to be applicable. Five sets of activities are listed within the directive, these are gas, heat and electricity, water, transport services, postal services, exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as the provision of ports and airports.

3.2.2 The Thresholds
As with Directive 2004/18/EC, in order to fall within the scope of the directive, a contract must have a value which is not less than the thresholds set out. The estimated values considered should exclude VAT. The directive provides two thresholds, that for supply and service contracts and that for works contracts. Again, these thresholds are to be

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220 Case C-214/00 Commission of the European Communities v. Kingdom of Spain [15/05/2003] Court of Justice of the European Union, par. 44
221 Directive 2004/17/EC, Article 2
222 Ibid. Article 3
223 Ibid. Article 4
224 Ibid. Article 5
225 Ibid. Article 6
226 Ibid. Article 7
227 Ibid. Article 16
228 Ibid. Article 16
verified every two years and revised if the need arises. The methods for estimating the respective values are also listed.

3.2.3 Exclusionary Rules

The directive excludes a number of contracts from its scope. It lists four categories of excluded contracts. The first category excludes all works and service concessions. The second excludes; contracts awarded for purposes of resale to third parties; contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country; contracts which are secret or require special security measures; contracts awarded pursuant to international rules and contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture. The third category applies to all contracting entities but to service contracts only. It excludes; service contracts for the acquisition or rental of immovable property or rights thereon; arbitration and conciliation services; financial services relating to the issue, sale, purchase or transfer of securities or other financial instruments; employment contracts; and certain contracts regarding research and development services. Service contracts awarded on the basis of an exclusive right are also excluded under this category. The fourth category, then, excludes; certain contracts for the purchase of water as well as certain contracts for the supply of energy or fuels.

Another important exclusionary rule is that provided by Article 30. Here it is stated that contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out shall not be subject to this directive if, in the Member State in which it is performed, the activity

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229 Ibid. Article 69
230 Ibid. Article 17
231 Ibid. Article 18
232 Ibid. Article 19
233 Ibid. Article 20
234 Ibid. Article 21
235 Ibid. Article 22
236 Ibid. Article 23
237 Ibid. Article 24
238 Ibid. Article 25
239 Ibid. Article 26
240 Ibid. Article 26
is directly exposed to competition on markets to which access is not restricted’. The procedure for establishing whether a given activity is directly exposed to competition and whether access to a market is restricted or otherwise is set out in Article 30.

### 3.3 Concession contracts and Contracts falling outside the Scope of the Directives

#### 3.3.1 Concession contracts: Do these contracts fall within the scope of the directive?

Both Directive 2004/18/EC and Directive 2004/17/EC define works and service concessions ‘as contracts where the consideration for the work or service to be carried out consists either solely in the right to exploit such work or service or in this right together with payment’. Even though both directives provide analogous definitions for the terms, they do not regulate concessions in the same manner. As aforesaid, directive 17/2004/EC expressly excludes both works and service concessions from its scope. On the other hand, Directive 2004/18/EC only expressly excludes contracts for service concessions, and regulates public works concessions by virtue of a set of special rules under Title III.

#### 3.3.2 Contracts falling outside the scope of the Directives – Are these contracts regulated?

It goes without saying that the directives do not apply to contracts which fall outside their scope. Of course, this does not mean that EU law is inapplicable to such contracts. Settled case law has shown that the general rules and principals found within the treaties apply. One may mention the principles of freedom of establishment, freedom to provide services and the principles deriving therefrom as examples.

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241 Ibid. Article 30
242 Directive 2004/18/EC, Article 1
243 Directive 2004/17/EC, Article 1
244 SIGMA, ‘Concessions and PPPs’ [2011], available online at [http://www.oecd.org/site/sigma/publicationsdocuments/48630004.pdf](http://www.oecd.org/site/sigma/publicationsdocuments/48630004.pdf), last accessed on 27/04/2013, pg.2
245 Directive 2004/17/EC, Article 18
246 Directive 2004/18/EC, Article 17
247 Ibid. Articles 56-65
249 Directive 2004/17/EC, Recital 9
250 Directive 2004/18/EC, Recital 2
3.4 Maltese Law: Is Maltese Law in line with the Directives?

The Public Procurement Directives are minimum harmonization directives. This means that the directives set out a minimum framework which must be met; however Member States are left free to go beyond what is stated within the directives by setting higher standards.\textsuperscript{251} An analysis of whether the scope of Maltese law is akin to that of the Directives is thus important.

3.4.1 Subsidiary Legislation 174.04 – The Public Procurement Regulations

Directive 2004/18/EC was transposed into Maltese law by virtue of Subsidiary Legislation 174.04 - The Public Procurement Regulations.\textsuperscript{252} These regulations ‘provide for the regulation of public contracts awarded by contracting authorities on the coordination of procedures for the award of public works contracts, public supply contracts, works concessions, and public service contracts, unless such contracts are excluded by the regulation themselves’.\textsuperscript{253} It is immediately evident that a great similarity exists between the scope of the Public Sector Directive and that of the Public Procurement Regulations. Both sets of rules provide the same definitions of public contracts, contracting authority, body governed by public law, public works contracts, public supply contracts, public service contracts and concession contracts.\textsuperscript{254} Moreover, the contracts excluded from the scope of SL 174.04\textsuperscript{255} are the same as those excluded by the directive. The same thresholds apply to both sets of rules, in fact, regulation 12 states that ‘such thresholds shall be equal to, and categorised in the same fashion, as the thresholds established pursuant to the relevant EU Directives’.\textsuperscript{256} It must be stated however, that the Public Procurement regulations, unlike the EU Directive, also regulate contracts which fall beneath such thresholds. Keeping in mind that the EU Directive is a minimum harmonization directive, it may be stated that as regards the scope, the Maltese legislator has transposed Directive 2004/18/EC correctly.

\textsuperscript{251} Catherine Barnard, \textit{The Substantive Law of the EU: The Four Freedoms} (2\textsuperscript{nd} Edition OUP 2007) 600
\textsuperscript{252} Public Procurement Regulations, Laws of Malta, S.L. 174.04 (S.L. 174.04 Public Procurement Regulations)
\textsuperscript{253} S.L. 174.04 Public Procurement Regulations, Regulation 3
\textsuperscript{254} S.L. 174.04 Public Procurement Regulations, Regulation 2 and Directive 2004/18/EC, Article 1
\textsuperscript{255} S.L. 174.04 Public Procurement Regulations, Regulations 17 and 77
\textsuperscript{256} Ibid. Regulation 12
3.4.2 Subsidiary Legislation 174.06 - The Public Procurement of Entities Operating in Water, Energy, Transport and Postal Services Sectors Regulations

Subsidiary Legislation 174.06 - The Public Procurement of Entities Operating in Water, Energy, Transport and Postal Services Sectors Regulations, transposes the Utilities Directive into Maltese law. These Regulations apply to ‘contracting entities: which are contracting authorities or public undertakings and which pursue one of the activities referred to within the regulations; which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities aforesaid, or any combination thereof and operate on the basis of special or exclusive rights granted by the competent authority of Malta’. This provision is identical to Article 2(2) of the directive. The activities covered, contract thresholds and exclusionary rules are also the same in both sets of rules. It is thus seems that as regards the scope of Directive 2004/17/EC, the transposition was correct.

3.5 Do the current developments in EU Law change anything?

Three directives have been proposed by the Commission, a directive replacing Directive 2004/18/EC, a directive replacing Directive 2004/17/EC and a new directive on the award of concession contracts. These proposed directives aim to enhance legal certainty in the field of Public Procurement by reflecting what has been said in case-law whilst at the same time keeping a continuity with the notions, concepts and practices which have been developed over time.

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257 Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, Laws of Malta, S.L. 174.06 (S.L. 174.06 Utilities Procurement Regulations)
258 S.L. 174.06 Utilities Procurement Regulations, Regulation 2(2)
262 COM(2011) 15 final, Green Paper on the modernization of EU public procurement policy; Towards a more efficient European Procurement Market [27/01/2011]
263 Proposal for a Directive on Public Procurement, Detailed explanation of the proposal

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3.5.1 Proposal for a Directive on Public Procurement, replacing Directive 2004/18/EC

It is clear from the offset that the Commission aimed to deliver a clearer picture of the scope of the directive than that given by Directive 2004/18/EC. Apart from being written and set out in a manner which is easier to understand, unlike previous directives, it defines the concept of public procurement. That said, it appears that the legal mechanism determining whether a contract falls within the scope of the directive remains unchanged. Like its predecessor, the proposed directive covers contracts of a public nature, having a value greater than or equal to the thresholds provided, which are not subject to any of the exclusionary rules set out.

With regards to the public nature of a contract, the proposed directive adopts as its own most of the relevant definitions given by Directive 2004/18/EC, however it adds a number of new ones and also revises others in order to better reflect the case-law of the CJEU. A major change in this regard is that the proposed directive removes the distinction between priority and non-priority services.

The concept of thresholds remains unchanged, with contracts requiring a value greater than or equal to the thresholds set out, in order to fall within the ambit of the proposed directive.

With regards to exclusionary rules, in the 2011 Modernisation Green Paper, the Commission held that that even though it was possible to review such rules, any review
should not prejudice the international commitments of the EU. As with the Public Sector Directive, the proposal lists a number of contracts which are to be excluded from its scope. Contracts in water, energy, transport and postal services sectors remain excluded. The exclusionary rule regarding certain contracts in the field of telecommunications is substituted with a new provision excluding certain contracts is the field of electronic communications. With regards to contracts awarded pursuant to international rules, the proposed directive adds ‘contracts which the contracting authority is obliged to award in accordance with procurement rules provided by an international organisation or international financial institution for public contracts fully financed by this organisation or institution’ to those excluded under Directive 2004/18/EC. As regards the specific exclusions for certain service contracts, the proposed directive also excludes ‘public passenger transport services by rail or metro’. A further number of service contracts were added to this exclusionary rule by virtue of the Presidency Compromise Text for the proposal which adds contracts concerning legal services, contracts for loans and contracts for political campaign services also fall outside the ambit of the directive. Research and development services are no longer tackled in the same provision as service contracts, instead, the proposed directive deals with such contracts under a separate provision. It must be added that contracts between entities in the public service are governed by provisions which are more detailed than those within the directive currently in force, as are the rules for certain contracts in the fields of defence and security. The Compromise Text also excludes service contracts awarded on the basis of an exclusive right from the scope of the directive. Initially this exclusionary rule, which could be found in Directive 2004/18/EC, had not been included in the proposed directive.

272 Green Paper on the modernization of EU public procurement policy (n 262)
273 Proposal for a Directive on Public Procurement, Article 7
274 Directive 2004/18/EC, Article 13
275 Proposal for a Directive on Public Procurement, Article 8
276 Ibid. Article 9
277 Ibid. Article 10
280 Proposal for a Directive on Public Procurement, Article 13
281 Ibid. Article 11
282 Ibid. Article 14
Concession contracts are not listed under the proposed directive. This is justified as, as said, a new directive on concession contracts has been proposed.

3.5.2 Proposal for a Directive on Procurement by entities operating in the water, energy, transport and postal services sectors, replacing Directive 2004/17/EC

It is again evident that the Commission’s attempt to clarify the scope of the Utilities Sector Directive was successful. Besides giving a definition of the concept of public procurement, the proposed directive codifies the distinction between the personal\textsuperscript{283} and material scope.\textsuperscript{284} The personal scope incorporates the activities and entities covered whilst the material scope relates to the thresholds and exclusionary rules.

With regards to the personal scope of the proposed directive, the entities\textsuperscript{285} covered are the same as those under Directive 2004/17/EC, moreover, most relevant definitions remain unchanged.\textsuperscript{286} Some definitions were amended\textsuperscript{287} in order to better reflect the CJEU’s case law whilst others are new additions.\textsuperscript{288} As with the proposed directive on public procurement, the distinction between priority and non-priority services has been abolished. The activities covered\textsuperscript{289} remain largely unchanged; however, one can observe that the exploration of oil and gas are no longer covered.\textsuperscript{290}

The second facet of the purview of the directive is the material scope. In this regard, the threshold system\textsuperscript{291} is more or less the same as that currently in force. As regards the exclusionary rules, the proposed directive also lists a number of contracts which are to be excluded from its scope. The directive, like its predecessor, is inapplicable to contracts

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{283} Proposal for a Directive on the procurement of Utilities, Chapter II
    \item \textsuperscript{284} Ibid. Chapter III
    \item \textsuperscript{285} Ibid. Articles 5-11
    \item \textsuperscript{286} The definitions of; contracting authorities, public undertakings, special or exclusive rights, works and supply contracts all remain unchanged.
    \item \textsuperscript{287} The definitions of body governed by public law and mixed procurement may be listed as examples. It should be noted that the definition of body governed by public law was reverted back to that under Directive 2004/17/EC under the “General approach – Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in water, energy, transport and postal services sectors of the 20/12/2012;
    \item \textsuperscript{288} Terms such as regional and local authorities were not defined under previous directives.
    \item \textsuperscript{289} Proposal for a Directive on the procurement of Utilities, Article 4
    \item \textsuperscript{290} Ibid. Detailed explanation of the proposal
    \item \textsuperscript{291} Ibid. Articles 12-14
\end{itemize}
\end{footnotesize}
awarded for the purposes of resale or lease to third parties, contracts awarded for purposes other than the pursuit of an activity covered or for the pursuit of such an activity in a third country, as well as contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy. Contracts awarded pursuant to international rules also remain subject to an exclusionary rule however the proposed directive adds ‘contracts awarded in accordance with procurement rules provided by an international organisation or international financing institution for contracts fully financed by this organisation or institution’ to what was already listed under Directive 2004/17/EC. With regards to the specific exclusions for service contracts, the proposed directive adds ‘public passenger transport services by rail or metro’ and ‘contracts for broadcasting time that are awarded to broadcasters’. In doing so, it removes research and development services from this category of excluded contracts, however, these contracts are still excluded by virtue of another article. The general approach document adds a further number of service contracts – contracts for legal services, contracts for loans as well as contracts for broadcasting time or programme provision awarded to audiovisual or radio media service providers are added to article 19. The proposed directive regulates contracts relating to defence and security and contracts awarded to affiliated undertakings, joint ventures or to contracting entities forming part of joint ventures in a manner which is more detailed than that in Directive 2004/17/EC. It also introduces a new provision regulating contracts between contracting entities. The exclusionary rule regarding activities directly exposed to competition is still found within the proposed directive. The same cannot be said for the exclusionary rule regarding service contracts awarded on the basis of an exclusive right – this was however

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292 Ibid. Article 15
293 Ibid. Article 16
294 Ibid. Article 20
295 Ibid. Article 18
296 Ibid. Article 19
297 Ibid. Article 25
299 Proposal for a Directive on the procurement of Utilities, Article 17
300 Ibid. Article 22
301 Ibid. Article 23
302 Ibid. Article 21
303 Ibid. Article 27
reintroduced by virtue of the General Approach document.\textsuperscript{304} As with the proposed directive on public procurement, this proposed directive makes no mention of concession contracts.

\subsection*{3.5.3 Proposal for a Directive on Concessions}

There is currently no specific framework regulating the award of concession contracts. Works concessions are governed by a limited number of secondary law provisions whilst service concessions are only regulated by the general principles of the treaty.\textsuperscript{305} The possibility of a legislative initiative on concession contracts was first mentioned in the Commission’s PPP Green Paper\textsuperscript{306} of 2004.\textsuperscript{307} The decision to adopt such an initiative was then put forward in 2011, with the proposal for a directive\textsuperscript{308} being drafted later that same year.\textsuperscript{309}

The proposed directive ‘establishes rules on the procedures for procurement by contracting authorities and by contracting entities with respect to concession contracts whose value is estimated to be not less than the thresholds set out’.\textsuperscript{310} Therefore it applies to concession contracts; procured by a contracting authority or a contracting entity; having a value greater than or equal to the thresholds provided; and not falling under any of the exclusionary rules the directive itself lists.\textsuperscript{311}

\subsection*{3.5.4 Maltese law in the light of these developments}

Needless to say, when the proposed directives come into force, Maltese law will have to be amended to reflect the developments set out. With regards to the proposed directives on public procurement and that on utilities, the existing legislation would have to be amended,

\begin{flushright}
\textsuperscript{304} Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors – General Approach [20/12/2012] Interinstitutional File 2011/0439(COD), Article 19a  \\
\textsuperscript{305} Proposal for a Directive on the award of Concession Contracts, Explanatory Memorandum  \\
\textsuperscript{308} Proposal for a Directive on the award of Concession Contracts,  \\
\textsuperscript{309} Ibid. Explanatory Memorandum  \\
\textsuperscript{310} Ibid. Article 1  \\
\textsuperscript{311} Ibid. Chapter I, Section I
\end{flushright}
on the other hand, since there is currently no legislative framework on concession contracts, a new set of regulations will have to be enacted.
CHAPTER IV – THE PUBLIC PROCUREMENT PROCESS

Having discussed the scope of the applicable law in the previous chapter, an in depth discussion on the procurement process and the substantive provisions by which it is regulated, is required. Public procurement is a process whereby state entities enter into contracts with private operators for the acquisition of goods, supplies or services. It is composed of four main stages, the pre-tendering stage which involves the preparation for and the publication of a call for tenders, the tendering stage whereby individuals from the private sector tender bids or offers, a selection process which filters the bids, and finally the award stage which as its name suggests results in the award of the contract. The importance of each stage may be seen when viewing public procurement as a multi-stage process, whereby a mistake at any stage is bound to have an adverse effect on the end result.\(^\text{312}\)

4.1 Directive 18 of 2004 – the Public Sector Directive

4.1.1 The Pre-Tendering Stage

The procurement process is kicked off with a contract notice,\(^\text{313}\) however, in certain circumstances, contracting authorities are obliged to issue prior information notices, these are notices stating the contracts which a contracting authority intends to award in the future.\(^\text{314}\) Nevertheless, the general rule remains that the process is initiated with the publication of a contract notice. That said, however, prior to the issuing of such notice, and therefore, prior to the initiation of the tendering procedures, the contracting authority must undertake various preparatory arrangements. It must first and foremost decide exactly what it wishes to purchase as well as the particular procurement procedure which will be used. Once these decisions have been taken, the contracting authority will start drafting the contract notice.

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\(^{314}\) Directive 2004/18/EC, Article 35(1)
4.1.1.1 The Contract Notice

Bovis defines the contract notice as that document by which a contracting authority makes known its intention to award a public contract.\textsuperscript{315} The information to be contained in contract notices is set out in Annex VII to the directive. This includes the details of the contracting authority; details regarding the contract and its subject matter; the procedure chosen; the selection and award criteria; the technical specifications\textsuperscript{316}; whether variants\textsuperscript{317} and subcontracting\textsuperscript{318} are permissible; conditions for the performance of the contract\textsuperscript{319}; as well as obligations relating to taxes, environmental protection and work conditions.\textsuperscript{320} Once drawn up, contract notices are published by the Office for Official Publications of the European Communities as per Annex VIII of the directive. Publication is not mandatory in all cases, but, contracting authorities may still publish contract notices in such cases.\textsuperscript{321} Following publication, it would be then up to the interested private entities to either submit tenders or express an interest in submitting tenders, depending on the procurement procedure chosen.

4.1.1.2 Technical Specifications

An important feature of the contract notice is that it must set out the technical specifications. The Directive, defines technical specifications under Annex VI, stating that these are a collection of characteristics of a technical nature to which adherence is required in order for the aims of the contracting authority to be met.\textsuperscript{322} Therefore, in a tender offer, a tenderer must prove to the satisfaction of the contracting authority, that what is being proposed meets the performance and/or functional requirements of the same contracting authority and thus that his tender offer is technically compliant.\textsuperscript{323}

\textsuperscript{315} Christopher Bovis, \textit{EU Public Procurement Law} (Elgar European Law 2007) 113
\textsuperscript{316} Directive 2004/18/EC, Article 23
\textsuperscript{317} Ibid. Article 24
\textsuperscript{318} Ibid. Article 25
\textsuperscript{319} Ibid. Article 26
\textsuperscript{320} Ibid. Article 27
\textsuperscript{321} Ibid. Article 37
\textsuperscript{322} Ibid. Annex VI
\textsuperscript{323} Ibid. Article 23
4.1.2 The Tendering Stage

4.1.2.1 Who may participate in the procurement process?

Both natural and legal persons may participate in the tendering process as was confirmed in cases such as *Frigerio Luigi & C. Snc v. Comune di Triuggio*[^324] and *CoNISMa v. Regione Marche*.[^325] It is also possible for economic operators to participate as groups; however such groups may be required to assume a specific legal form following the award of the contract.[^326] This issue was discussed by the CJEU in the case *Makendoniki Metro and others v. Elliniko Dimosio*.[^327] It must be said that whilst in open procedures, following the contract notice, tenders may be submitted by any interested economic operator,[^328] in restricted procedures,[^329] competitive dialogue[^330] and negotiated procedures[^331], any economic operator may request to participate in the process, but it is the contracting authority, following a selection process, which chooses the candidates who may submit tenders, negotiate or take part in the dialogue, by issuing the respective invitation to tender, dialogue or negotiate.[^332]

4.1.2.2 The invitation to tender

The invitation to tender is that document sent to the selected candidates inviting them to submit a tender.[^333] It must contain; a reference to the contract notice published at an earlier stage; a copy of the specifications or of the descriptive document and any supporting documentation; any additional information which is deemed necessary by the competent

[^324]: Case C-357/06 *Frigerio Luigi & C. Snc v. Comune di Triuggio* [18/12/2007] Court of Justice of the European Union, par. 20-22
[^325]: Case C-305/08, *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v. Regione Marche* [23/12/2009], par. 31
[^326]: Directive 2004/18/EC, Article 4
[^327]: Case C-57/01 *Makedoniko Metro, Mikhaniki AE v. Elliniko Dimosio* [23/01/2003] Court of Justice of the European Union, par. 60-63
[^328]: Directive 2004/18/EC, Article 1(11) (a)
[^329]: Ibid. Article 1(11)(b)
[^330]: Ibid. Article 1(11) (c)
[^331]: Ibid. Article 1(11)(d)
[^332]: Ibid. Article 40
authority; relevant timeframes and deadlines; as well as the award criteria and their
respective weightings if these had not already been listed in the contract notice.\textsuperscript{334}

4.1.3 The Selection and Award Stages

Directive 2004/18/EC states that ‘contracts shall be awarded on the basis of the criteria laid
down in the directive, after the suitability of the economic operators not excluded under the
directive has been checked by contracting authorities’.\textsuperscript{335} The directive therefore indicates
that there are two processes at play; it emphasizes that the award of the contract on the
basis of the award criteria laid down, is to take place after the suitability and eligibility of
the economic operators is checked. In \textit{Gebroeders Beentjes v. The Netherlands},\textsuperscript{336} the
CJEU stated that the selection stage and the award stage are two different stages of the
procurement process governed by different rules and that, it is possible for both stages to
be executed simultaneously, as long as the rules governing both procedures are respected.
\textsuperscript{337} This line of thought was confirmed in various cases\textsuperscript{338} of the CJEU. Therefore, it can be
stated that the selection stage is that process, by which the eligibility and suitability of
tenderers or candidates is vetted, whilst on the other hand, the award stage, is that stage
whereby the successful tender is identified and the contract awarded on the basis of the
award criteria specified by the directive.

\subsubsection*{4.1.3.1 The Selection Stage}

The selection process involves the vetting of the eligibility and suitability of candidates or
tenderers. The general rule is that it precedes the award stage; with the directive

\begin{itemize}
\item \textsuperscript{334} Directive 2004/18/EC, Article 40
\item \textsuperscript{335} Ibid. Article 44
\item \textsuperscript{336} Case C-31/87 \textit{Gebroeders Beentjes BV v. State of the Netherlands} [20/09/1988] Court of Justice of the
European Union, 4652
\item \textsuperscript{337} Ibid. 4656 par. 15-16
\item \textsuperscript{338} Vide
\item Case C-199/07 \textit{Commission of the European Communities v. Hellenic Republic} [12/11/2009] Court of Justice of
the European Union par. 51-53
\item Case C-535/06 Case C-532/06 \textit{Emm. G. Lianakis AE, Sima Anonymi Techniki Etairia Meleton kai
Epivelepseon, Nikolaos Vlachopoulos v. Dimos Alexandroupolis, Plantiki AE, Aikaterini Georgoula, Dimitrios
syntes OS Filon OE, Nikolaos Sideris} [24/01/2008] Court of Justice of the European Union, par. 26
\item Case T-39/08 \textit{Evropaiki Dinamiki – Proigmata Sistimata Tilepikinon Pliroforikis kai Tilematikis AE v.
European Commission} [08/12/2011] Court of Justice of the European Union, par. 18
\item Case T-148/04; \textit{TQ3 Travel Solutions Belgium SA v. Commission of the European Communities} [06/07/2006]
Court of Justice of the European Union, par. 86
\end{itemize}
emphasising that contracts are awarded on the award criteria listed in the directive after the suitability of economic operators not excluded by the directive have been checked.\(^ {339}\) It should be noted that in order to simplify selection proceedings, Member States may make use of official lists of approved economic operators as well as systems of certification by certification bodies established under public or private law.\(^ {340}\)

(A) The Exclusionary Rules

The directive provides two exclusionary rules under article 45. The first rule found under sub-article (1) being mandatory whilst the second, found under sub-article (2), discretionary. The first rule states that candidates or tenderers who have been convicted by final judgment for; participation in criminal organization; corruption; fraud; or money laundering are to be excluded from participating in the procurement process.\(^ {341}\) The directive makes use of the word ‘shall’ thereby indicating the rule’s mandatory nature. The second rule provides that economic operators may be excluded from participation in a contract where such operator is; bankrupt or being wound up; the subject of proceedings for a declaration of bankruptcy, compulsory winding up or administration; convicted by a judgment having the force of a \textit{res judicata} on any offence concerning his professional conduct; has been guilty of grave misconduct; has not fulfilled obligations relating to the payment of social security contributions; has not fulfilled the obligations relating to the payment of taxes; or is guilty of serious misrepresentation in supplying information required for qualitative selection.\(^ {342}\) Contrary to the first exclusionary rule, the directive makes use of the word ‘may’, indicating that in this case, the contracting authority has the discretion to decide whether to exclude the economic operator in question or otherwise. Case-law has held that the grounds for exclusion listed under sub-article (2) are exhaustive.\(^ {343}\)

\(^{339}\) Directive 2004/18/EC, Article 44
\(^{340}\) Ibid. Article 52
\(^{341}\) Ibid. Article 45(1)
\(^{342}\) Ibid. Article 45(2)
\(^{343}\) Vide Case C-465/11 Forposta SA, ABC Direct Contact sp. z o.o. v. Poczta Polska SA [13/12/2012] Court of Justice of the European Union, par. 38

Case C-74/09 Batiments et Ponts Construction SA, WISAG Produktionsservice GmbH v. Berlaymont 2000 SA [15/07/2010], Court of Justice of the European Union, par. 43
(B) The Suitability of Economic operators

Economic operators, who are not excluded by virtue of article 45, are then checked for suitability in accordance with criteria of economic and financial standing; technical and professional knowledge or ability; as well as quality assurance and environmental management standards. It is only on the basis of these criteria that economic operators can be scrutinised. The economic operator must himself ensure compliance by proving to the contracting authority that the set criteria are satisfied.

As the terminology implies, the criterion of economic or financial standing, ensures that an economic operator has sound finances and can afford to take on the project. Good economic and financial standing can be proved by; submitting copies of bank-statements; balance sheets; and statements indicating the overall turnover, of the economic operator in question. On the other hand, the criterion of technical and/or professional ability ensures that the economic operator is the capable of performing the contract to the standards required by the contracting authority. In order to prove compliance, the economic operator may submit; a list of previous projects carried out; a description of the technical facilities and measures used; an indication of the technicians or technical bodies involved; his educational and professional qualifications; a statement on the workforce pertaining to the operator; a statement on the tools and plants or technical equipment available; an indication of the proportion of the contract that the economic operator wishes to sub-contract; an indication of the environment management measures to be taken where appropriate and in the case of products samples and the relevant certificates attesting conformity with the specifications or standards required.

Case C-213/07 Michaniki AE v. Ethinko Simvoulio Radiotileorasis, Ipgourgos Epikratias [16/12/2008], Court of Justice of the European Union, par. 43
Joined cases C-226/04 and C-228/04, La Cascina Soc. Coop, arl, Zilch Srl v. Ministero della Difesa, Ministero dell’Economia e delle Finanze [09/02/2006] par. 22
Directive 2004/18/EC, Article 44

Case C-31/87 Gebroeders Beentjes BV (n 336) 4657, par. 17
Claude H. Maley, Project Management Concepts, Methods and Techniques (CRC Press, Taylor & Francis Group 2012) Section 6.5.5.1

Directive 2004/18/EC, Article 47
Maley, Project Management Concepts, Methods and Techniques (n 346)
Directive 2004/18/EC, Article 48
With regards to the two aforementioned criteria of economic and financial standing and technical, professional knowledge or ability, contracting authorities may require candidates or tenderers to meet certain minimum capacity levels.\textsuperscript{350} The directive lists another two criteria to which contracting authorities may require compliance, quality assurance\textsuperscript{351} and environmental management standards.\textsuperscript{352} Economic operators should present certificates in order to prove adherence to these standards. In the cases of \textit{CEI and Bellini}\textsuperscript{353} the CJEU stated that ‘these provisions were not enacted to limit the powers of the Member States to fix the levels of economic and financial standing and technical ability required by an economic operator to participate in the procurement procedure, but to determine the reference or evidence which may be presented in order to establish the operator’s suitability’.\textsuperscript{354}

\section*{4.1.3.2 The Award Stage}

Having checked the eligibility and suitability of economic operators, the contracting authority will pass on to the award stage. Contracts may only be awarded on the basis of two criteria laid down in the directive.\textsuperscript{355} These are the criteria of the ‘Most Economically Advantageous Tender’ and the ‘lowest price only’.\textsuperscript{356} It is the contracting authority which has the discretion to decide which of the two criteria is to be applied, however there are certain instances whereby no such discretion is granted and the award criterion to be used is expressly stated within the directive.

(A) \textit{The Lowest Price Only}

The award criterion of the lowest price only results in an award based solely on the element of price with the contract being awarded to the tenderer making the cheapest

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\begin{itemize}
\item \textsuperscript{350}Ibid. Article 44
\item \textsuperscript{351}Ibid. Article 49
\item \textsuperscript{352}Ibid. Article 50
\item \textsuperscript{353}Joined Cases 27 to 29/86 SA Constructions et entreprises industrielles (CEI) v. Societe cooperative ‘Association intercommunale pour les autoroutes des Ardennes’ (Case C-27/86), and, Ing. A. Bellini & Co. SpA v. Regie des batiments (Case C-28/86), and, Ing. A. Bellini & Co. SpA v. Belgian State (Case C-29/86) [09/07/1987] Court of Justice of the European Union, 3368
\item \textsuperscript{354}Ibid. 3373, par. 13
\item \textsuperscript{355}Jorgen Ulff-Moller Nielsen and Lars Gottlieb Hansen, ‘The EU Public Procurement Regime – Does it work?’ [2001] Intereconomics 255, 256
\item \textsuperscript{356}Directive 2004/18/EC, Article 53(1)(b)
\end{itemize}
offer. It is often stated in common parlance that quality comes at a price, it is therefore debatable whether the use of this award criterion results in the best value for money, however, Arrowsmith points out that the criterion of the lowest price only is usually availed of in straightforward contracts where there is little discrepancy between items offered by different suppliers. This is probably why the use of the ‘lowest price only’ award criterion is more common in lower value contracts.

(B) The Most Economically Advantageous Tender (MEAT)

The award criterion of the most economically advantageous tender, commonly known as the MEAT criterion, enables contracting authorities to consider criteria, other than the price element, which are relevant to the contract in question. The directive states that ‘when the award is made to the tenderer most economically advantageous from the point of view of the contracting authority, the award shall be based on various criteria linked to the subject matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion’. It should be noted that it is settled case-law that the list of criteria which may be used to determine the most economically advantageous tender provided within the directive, is not exhaustive, moreover, the directive itself makes use of the words ‘for example’ which point towards the said list being indicative. Since the award criterion of the MEAT allows such flexibility in choosing the award criteria, it is

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358 Sue Arrowsmith, EU Public Procurement Law: An Introduction in Sue Arrowsmith (ed) (EU Asia Inter University Network for Teaching), available online at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf, last accessed on 27/04/2013, pg. 168
361 Directive 2004/18/EC, Article 53(1)(a)
362 Case C-368/10 European Commission v. Kingdom of the Netherlands [10/05/2012] Court of Justice of the European Union, par. 84

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unsurprising that, as was stated in *Renco SpA v. Council of the European Union*[^363], these will vary greatly from one contract to another. Case-law has seen the acceptance of criteria such as reliability of supplies[^364], the ultimate cost as determined by an expert[^365], as well as social[^366] and ecological considerations[^367] as award criteria under the MEAT, thereby clarifying that criteria need not be economic or quantitative but may also be qualitative as long as a link to the subject matter of the contract exists[^368]. Apart from the award criteria chosen, contracting authorities must also list the weighting afforded to each criterion within the contract notice, where possible listing the respective criteria in descending order of importance[^369]. It can therefore be stated that, contracting authorities are free to select the award criteria as well as their respective weighting, provided that these enable the identification of the most economically advantageous tender[^370].

### 4.1.3.3 Abnormally Low Tenders

In the case that a tender appears to be abnormally low, the directive provides that prior to rejecting the tender, the contracting authority must request in writing certain details relating to the constituent elements of such tender which may include; the economics of the subject matter of the tender; the technical solutions chosen and/or any favorable conditions available to the tenderer, the originality of the subject matter of the tender, compliance with the provisions of employment protection and working conditions as well

[^363]: Case T-4/01 *Renco SpA v. Council of the European Union* [25/02/2003] Court of Justice of the European Union, par. 64
[^364]: Case C-324/93 *The Queen v. Secretary of State for the Home Department ex parte Evans Medical Ltd. and Macfarlan Smith Ltd.* [28/03/1995] Court of Justice of the European Union, I-596
[^365]: Case C-19/00 *SIAC Construction v. County Council of the County of Mayo* [18/10/2001] Court of Justice of the European Union
[^366]: Case C-368/10 *Commission v. The Netherlands* (n 362)
[^367]: Vide Case C-448/01 *EVN AG, Wienstrom GmbH v. Republik Osterreich* [04/12/2003] Court of Justice of the European Union
[^369]: Vide Case C-368/10 *Commission v. The Netherlands* (n 362) par. 86
[^366]: Directive 2004/18/EC, Article 53(2)
[^367]: Case C-234/03 *Contse SA, Vivisol Srl, OXigen Salud SA v. Instituto Nacional de Gestion Sanitaria (Ingesa), formerly Instituto Nacional de la Salud (Insalud)* [27/10/2005] Court of Justice of the European Union, I-9317, I-9336, par. 68
as the possibility of the tenderer obtaining state aid.\footnote{371 Directive 2004/18/EC, Article 55(1)} In \textit{SAG ELV Slovensko a.s. and others v. Urad pre verejne obstaravanie},\footnote{372 Case C-599/10, \textit{SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s., TESLA Stropkov a.s., Autostrade per l’Italia SpA, EFKON AG, Stlexport Autostrady SA v. Urad pre verejne obstaravanie}, [29/03/2012] Court of Justice of the European Union} the CJEU points out that although this list is not exhaustive, it is not merely indicative and thus contracting authorities are not given a free hand in determining the factors which are to be scrutinized prior to rejecting a tender which is abnormally low.\footnote{373 Ibid. par. 30}

The directive thus imposes a duty on the contracting authority to verify the constituent elements of tenders which appear to be abnormally low by consulting with the tenderer and taking into account the evidence supplied.\footnote{374 Directive 2004/18/EC, Article 55(2); See also; Case T-121/08 \textit{PC-Ware Information Technologies BV v. European Commission} [11/05/2010] Court of Justice of the European Union, par. 72} It is only if the contracting authority, following this verification procedure, still finds that the tender is abnormally low, that it may reject the tender.\footnote{375 Case T-494/04 \textit{Belfast SPRL v. Council of the European Union} [21/05/2008] Court of Justice of the European Union, par. 88} Case-law provides that a tender which appears to be abnormally low cannot be rejected without this verification procedure.\footnote{376 Case C-304/96 \textit{Hera SpA v. Unità Sanitaria Locale No 3 – Genovese (USL), Impresa Romagnoli SpA} [16/10/1997] Court of Justice of the European Union, par. 16} It should be pointed out that the discretion in determining whether a tender appears to be abnormally low rests wholly with the contracting authority.

\begin{quote}
4.1.3.4 The Contract Award Notice
\end{quote}

Once the contracting authority has identified the successful tenderer, it would then inform the participants of its decisions\footnote{377 Directive 2004/18/EC, Article 41(1)} by means of a contract award notice.\footnote{378 Ibid. Article 35} This notice gives the results of the award process by identifying; the successful economic operator; the price or range of prices paid; the values of the tender retained or the higher tender and the lowest tender taken into consideration for the contract award; as well as other information relevant to the contract.\footnote{379 Ibid. Annex VIIA} It must also give the details of the body responsible for appeal and where
appropriate details regarding mediation procedures. The directive also states that ‘the contracting authority, on request, shall as quickly as possible inform; any unsuccessful candidate of the reasons for rejection of his application; any unsuccessful bidder for the reasons for the rejection of his tender; and any tenderer who has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer’ Such information may however be withheld in cases where law enforcement may be impeded; it is contrary to the public interest; it might prejudice commercial interests of economic operators; or prejudice the fair competition between operators.

4.2 Directive 17 of 2004 – the Utilities Directive
A great deal of similarity exists between the procurement process as found under the Utilities Directive, and that under the Public Sector Directive. In both cases, the process is composed of four stages, with each corresponding stage having the same function and purpose. That said, there are some differences which need to be identified and discussed.

4.2.1 The Pre-Tendering Stage
The pre-tendering stage under the Utilities Directive also involves the preparation of and the eventual declaration of intent by a contracting entity to award a contract. The general rule is that the procurement process is initiated with a call for competition; however, the directive expressly lists cases whereby the use of a procedure without the call for competition is allowed.

4.2.1.1 The Call for competition
A call for competition may be made by means of; a contract notice; a periodic indicative notice, where the contracting authority publishes such notice; or by means of a notice on the existence of a qualification system, where such a system is used. The requisites of

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380 Ibid. Annex VIIA
381 Ibid. Article 41(2)
382 Ibid. Article 41(3)
384 Directive 2004/17/EC, Article 42

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these notices are set out in Annexes XV A, XIV and XIII of Directive 2004/17/EC and are more or less the same as those of the contract notice under Directive 2004/18/EC. Generally speaking the contracting entity must include; its details; details regarding the contract and its subject matter; the minimum financial and technical requirements of economic operators; the award criteria chosen; whether variants and subcontracting are permissible; any conditions for performance of contracts; as well as any obligations relating to taxes, environmental protection provisions and working conditions.

4.2.1.2 Technical Specifications

The technical specifications are also an important requisite of the respective notices under this directive. It may be stated that the relevant substantive provisions regarding the technical specifications as well as the definition found under Annex XXI are the same as those found within the Public Sector Directive.

4.2.2 The Tendering Stage

4.2.2.1 Who may participate in the procurement process?

As with the Public Sector Directive both natural and legal persons, individually or in groups, may participate in the procurement process. A similar scenario also exists with regards the procurement procedures, in open procedures, tenders may be submitted by any interested economic operator, whilst in restricted procedures, and negotiated procedures, any economic operator may request to participate, but it is the contracting authority, following a selection process, which chooses the candidates who may submit tenders or negotiate, by issuing the respective invitation to tender or negotiate.

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385 Ibid. Article 36
386 Ibid. Article 37
387 Ibid. Article 38
388 Ibid. Article 39
389 Ibid. Article 11
390 Ibid. Article 1(9) (a)
391 Ibid. Article 1(9)(b)
392 Ibid. Article 1(9)(c)
393 Ibid. Article 47
**4.2.2.2 The invitation to tender**

The requisites of the invitation to tender are similar to those under the Public Sector Directive with such an invitation being required to contain; a copy of the specifications and any supporting documentation; the relevant timeframes and deadlines; reference to any published contract notice; an indication of the documents attached; as well as the criteria for the award of the contract and their respective weightings. The directive specifies that where the call for competition is made by means of a periodic indicative notice, contracting entities must ask candidates to confirm their interest prior to proceeding to the selection stage.

**4.2.3 The Selection and Award Stages**

**4.2.3.1 The Selection Stage**

Under the Utilities Directive, both the selection and exclusionary criteria are to be identified by the contracting entity conducting the procedure. Contracting entities may decide to include the exclusionary rules listed under Article 45 of Directive 2004/18/EC as selection criteria; however in cases where the contracting entity is one which falls within the meaning of Article 2(1) (a), and therefore a contracting authority, the inclusion of the mandatory exclusionary rules listed under Article 45(1) of Directive 2004/18/EC is required. It should be noted that in order to simplify proceedings, contracting entities may introduce qualification systems as well as a system of mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence.

**4.2.3.2 The Award Stage**

Having verified that the tenders submitted by the selected tenderers are compliant with the rules and requirements applicable to tenders, the contracting entity, shall award the
contract on the basis of the award criteria specified by the directive, after having been satisfied that such tender is not abnormally low. The contract award criteria listed under the Utilities Directive are the same as those listed under the Public Sector Directive – the ‘MEAT’ and the ‘lowest price only’. The provision on abnormally low tenders is also analogous to that found under the Public Sector Directive. Once the successful tenderer is chosen in accordance with the provisions of the directive, the contracting entity must send a contract award notice to the participating economic operators. The requisites of this notice are listed under Annex XVI to the directive.

4.3 When is the procurement process concluded?
The procurement process is concluded once a contract is signed between the winning tenderer and the contracting authority or entity, however, such contract can only be concluded following a mandatory standstill period. This is a period of time, following the contract award notice, within which unsuccessful bidders can challenge the decisions of the contracting authority. The importance of this standstill period was brought to the fore by the CJEU in the case Alcatel Austria AG and others v. Bundesministerium für Wissenschaft und Verkehr. This, along with the remedies available and the procedures for review, will be analysed and discussed in a subsequent chapter.

4.4 Maltese Law: Is Maltese Law in line with the Directives?

4.4.1 Subsidiary Legislation 174.04 – The Public Procurement Regulations

The Public Procurement Regulations transpose Directive 2004/18/EC into Maltese law. It has to be kept in mind that these regulations also regulate contracts falling outside the

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400 Ibid. Article 52(3)
401 Ibid. Article 55
402 Ibid. Article 57
403 Ibid. Article 43
405 Case C-81/98 Alcatel Austria AG and Others, Siemens AG Österreich, Sag-Schrack Anlagentechnik AG v. Bundesministerium für Wissenschaft und Verkehr [29/10/1999] Court of Justice of the European Union
scope of the EU Directive. With regards to the main stages of the procurement process, Maltese law also speaks of four main stages, the pre-tendering stage, the tendering stage, the selection stage and the award stage.

4.4.1.1 The Pre-Tendering Stage

Under Maltese law, the procurement process is kicked off with a call for tenders.\textsuperscript{406} This is defined as a contest for the award of a public contract made pursuant to a formal notice or an EU notice.\textsuperscript{407} There are also instances where Maltese law requires prior information notices.\textsuperscript{408} The required content which is to be included within public contract notices is set out in Schedule 10 of the regulations, which, is analogous to Annex VIIA of Directive 2004/18/EC. It should also be pointed out that with regards to the technical specifications, an important feature of contract notices, the public procurement regulations, under Regulation 46, give the same definition as that given in Annex VI of the directive. It may thus be safely stated that as regards the pre-tendering stage there has been a correct transposition of Directive 2004/18/EC into Maltese law.

4.4.1.2 The Tendering Stage

(A) Who may participate in the procurement process?

As with the EU Directive, it is possible for both natural and legal persons, individually or in groups, to participate in the procurement process. With regards to the procurement procedures, an analogous scenario also exists, in open procedures, tenders may be submitted by any interested economic operator, whilst in restricted procedures, competitive dialogue and negotiated procedures, any economic operator may request to participate in the process, but it is the contracting authority, following a selection process, which chooses the candidates who may submit tenders or negotiate, by issuing the respective invitation to

\textsuperscript{406} Public Procurement Regulations, Laws of Malta, S.L. 174.04 (S.L. 174.04 Public Procurement Regulations), Regulation 25
\textsuperscript{407} S.L. 174.04 Public Procurement Regulations, Regulation 2
\textsuperscript{408} Ibid. Regulation 49
tender or negotiate. The contents of the invitation to tender are the same as those required by the directive.

(B) *The manner by which tenders are submitted*

Directive 2004/18/EC does not set out the manner by which tenders are to be submitted, therefore leaving Member States free to decide the procedure in this regard. The Maltese Public Procurement Regulations state that tenders are to be submitted in writing, however, contracting authorities may stipulate otherwise provided that certain conditions are satisfied. That said, in cases where tenders are to be awarded by open or restricted procedure and the contract is of a value greater than the threshold set out at law or for contracts of a lower value or tenders awarded through the negotiated or competitive dialogue procedure, where the Director of Contracts so decides, the regulations oblige contracting authorities to make use of the separate package procedure.

The ‘separate packages in tender offer’ procedure, more commonly known as the ‘three-envelope procedure’ or the ‘three package procedure’, requires tenderers to submit their tender offer in three separate packages, the first containing an original and valid bid bond, the second containing the technical offer and other information as requested in the tender documents, and the third containing details relating to pricing and payment. In the process of adjudication, each package is to be opened individually with compliance being assessed after the opening of each package. In *Case No. 201*, the PCRB stated that the regulations regarding the three package system supersede anything that may be written in the tender document. This system was incorporated into Maltese law to ensure a better technical evaluation of the tenders submitted. Human nature dictates that when presented with two options, individuals tend to favour that which is cheaper. When using the three

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409 Ibid. Regulation 2
410 Ibid. Regulation 44
411 Ibid. Regulation 29
412 The threshold is currently set at €2,000,000
413 S.L. 174.04 Public Procurement Regulations, Regulation 83
414 Ibid.
416 Ibid. 298
package procedure, adjudicators are unaware of the price element when adjudicating the
tenders and therefore, the use of this system ensures that the cheapest offer is not given any
unfair advantage over other tenders. In fact, the PCRB, in Case No. 150\textsuperscript{417} affirms that the
disclosure of the price before the opening of Envelope 3 goes against both the letter and the
spirit of the tender adjudication process as contemplated under this procedure.\textsuperscript{418}

It is evident that here, Maltese law goes beyond what is stated within Directive
2004/18/EC, however, since the Directives on Public Procurement are minimum
harmonization directives, it seems that transposition in this regard is correct.

4.4.1.3 The Selection and Award Stages

S.L. 174.04 states that ‘contracts shall be awarded on the basis of the [award] criteria laid
down in this regulation and regulation 29 [abnormally low tenders]...after the suitability
of economic operators not excluded under the regulations has been checked by contracting
authorities’.\textsuperscript{419} Contracts are therefore awarded to economic operators not excluded from
participating in the procurement procedure, whose tender is not considered to be
abnormally low, on the basis of award criteria listed in the directives. It may be thus seen
that, the procedure is more or less the same as that found under Directive 2004/18/EC.

(A) The Selection Stage

As with Directive 2004/18/EC, under Maltese law, contracting authorities must verify that
economic operators are not excluded from participating in the procurement process prior to
vetting the economic operators for suitability. With regards to the exclusionary rules, it has
been previously stated that the Public Sector Directive provides two exclusionary rules as
per Article 45, one being mandatory and the other granting discretion to the contracting
authority as to whether the economic operator in question should be excluded. These
exclusionary have been incorporated into Maltese law by virtue of regulation 50 of the
Public Procurement Regulations. With regards the vetting of economic operators for

\textsuperscript{417} PCRB Case No. 150 Advert No. 214/2008 – CT 2461/2006-UM1162; Tender for the Construction of the
Contracts Committee and the Public Contracts Appeals Board during 2009 196

\textsuperscript{418} Ibid. 199

\textsuperscript{419} S.L. 174.04 Public Procurement Regulations, Regulation 28
suitability, the Public Procurement Regulations and the Public Sector Directive contain the same rules and criteria. Consequently, it seems that as regards the selection stage there has also been a correct transposition of the directive into Maltese law.

(B) The Award Stage

(B)(i) The award criteria
The Public Procurement regulations list two award criteria, the most economically advantageous offer and the lowest price offered compliant with the tender specifications. The criterion of the most economically advantageous offer is akin to that of the MEAT found under the directive, however, with regards to the lowest price criterion, it is immediately evident that the wording of Maltese law is not the same as that of the directive, where the criterion is that of the lowest price only. Maltese law’s ‘lowest price offered compliant with the tender specifications’, contrasts with the EU Directive’s ‘lowest price only’ criterion. Compliance with technical specifications is clearly something that is to be evaluated at selection stage and not at award stage. The directive clearly states that the award criterion that ought to be considered is that of the lowest price only – with the use of the word ‘only’ giving a clear indication that the award is to be based solely on the price element. It seems that, under S.L. 174.04 - the Public Procurement Regulations, a selection criterion (technical compliance) was included as part of an award criterion, thereby creating a possibility that the distinction between the different stages of selection and award being blurred. As stated in Beentjes v. The Netherlands, even though it is possible for both stages to be conducted simultaneously, the selection stage and the award stage are governed by different rules. The reasons as to why the legislator felt the need to include compliance with technical specifications as part of the award criterion of the lowest price are unclear; however, the end intention seems to be the same, with the lowest priced offer being selected from amongst the technically compliant tenders. A similar interpretation was given by the CJEU in CMB Maschinenbau & Handels GmbH v. The

420 Ibid. Regulations 51, 52 and 53
421 Ibid. Regulation 28
422 Case C-31/87 Gebroeders Beentjes BV (n 336) par. 16-19
European Commission, where it was stated that the award criterion of ‘the lowest priced administratively and technically compliant tender’ should be interpreted as being the cheapest tender offer from amongst the compliant tenders. In this regards, it is humbly submitted that even though transposition is not per se incorrect, it seems to be inaccurate and hence an amendment to the law is proposed.

(B)(ii) Abnormally Low Tenders
Article 55 of Directive 2004/18/EC is transposed into Maltese law by virtue of Regulation 29 of the Public Procurement Regulations. Both provisions state that a tender which is abnormally low can only be rejected following a verification procedure with regards to the constituent elements of such tender.

(B)(iii) The Contract Award Notice
Under Directive 2004/18/EC, once the contracting authority has identified the successful tenderer, it would then inform the participants of its decisions by means of a contract award notice. The same situation exists under Maltese law. The requisite contents of this notice are listed under Schedule 10 of the Public Procurement Regulations, which as has already been stated is analogous to Annex VII A of the Directive. The duty to give reasons and certain information on request of participants also exists under Maltese law.

4.4.2 Subsidiary Legislation 174.06 - The Public Procurement of Entities Operating in Water, Energy, Transport and Postal Services Sectors Regulations

4.4.2.1 The Pre-Tendering Stage
Directive 2004/17/EC – the Utilities Directive, is transposed into Maltese law by virtue of S.L. 174.06 - the Entities Regulations. In both sets of rules, the procurement process is

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[424] Ibid. par. 116
[426] Ibid. Article 35
[428] Ibid.
kicked off with a call for competition.\textsuperscript{429} The manner by which this call for competition may be made,\textsuperscript{430} the requisite contents of the respective notices\textsuperscript{431}, as well as the definitions\textsuperscript{432} and relevant provisions\textsuperscript{433} on technical specifications, are all analogous to the corresponding provisions under Directive 2004/17/EC. Moreover, the circumstances under which the regulations deem a call for competition to be unnecessary are also the same as those under article 40 of the Directive. It may thus be safely stated that as regards the pre-tendering stage there has been a correct transposition of Directive 2004/17/EC into Maltese law.

\textbf{4.4.2.2 The Tendering Stage}

The position regarding the participants to the procurement process is also analogous to that under the directive, with, the participation of both natural and legal persons, individually or in groups, being possible.\textsuperscript{434} Similarly, the situation of participation under the different procurement procedures is identical to that under the Utilities Directive, with any economic operator being allowed to submit tenders in open procedures, and economic operators requiring an invitation to tender prior to being allowed to submit such tender in restricted and negotiated procedures.\textsuperscript{435} The form and requisites of the invitation to tender are also identical to those under Directive 2004/17/EC.\textsuperscript{436}

\textbf{4.4.2.3 The Selection and Award Stages}

\textbf{(A) The Selection Stage}

The selection stage under Maltese law is the same as that under the EU Directive, with the contracting entities being left free to specify both the selection and exclusionary criteria for the determination of a pool of suitable and eligible economic operators.\textsuperscript{437} As with the

\textsuperscript{429} Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, Laws of Malta, S.L. 174.06 (S.L. 174.06 Utilities Procurement Regulations). Regulation 40
\textsuperscript{430} S.L. 174.06 Utilities Procurement Regulations, Regulation 42
\textsuperscript{431} Ibid. Annexes XV, XIV and XIII
\textsuperscript{432} Ibid. Annex XXIII
\textsuperscript{433} Ibid. Regulations 34 and 35
\textsuperscript{434} Ibid. Regulation 11
\textsuperscript{435} Ibid. Regulation 1(2)
\textsuperscript{436} Ibid. Regulation 47
\textsuperscript{437} Ibid. Regulations 51 and 54
Utilities Directive, contracting entities may decide to include the exclusionary rules set out in regulation 50 of the Public Procurement Regulations\(^{438}\) as selection criteria.\(^{439}\) Also, if the contracting entity is one which falls within the meaning of Article 2(1) (a), and therefore a contracting authority, the inclusion of the mandatory exclusionary rules, listed under Regulation 50(4)\(^{440}\) of S.L. 174.04 – the Public Procurement Regulations; is mandatory. It should be noted that provisions setting out qualification systems\(^{441}\) and systems of mutual recognition,\(^{442}\) which help make the selection process simpler and more expedient are also found under Maltese law. Therefore, it seems that as regards the selection stage there has also been a correct transposition of the directive into Maltese law.

(B) The Award Stage

The award stage under the Entities Regulations is in line with that under Utilities Directive. The Entities Regulations speak of two award criteria – the ‘most economically advantageous tender’ and the ‘lowest price only’.\(^{443}\) It is interesting to note that here, it is the ‘lowest price only’ criterion which is used, and not the ‘lowest price offered compliant with the tender specifications’ criterion as is the case with the Public Procurement Regulations. One should also note that the provisions regarding abnormally low tenders\(^{444}\) are also analogous to the provisions under the directive. As with the directive, once the successful tenderer is chosen, a contract award notice is sent to the participants in the process,\(^{445}\) the requisite contents of the award notice being the same as those set out in the Utilities Directive.\(^{446}\)

\(^{438}\) This Article is analogous to Article 45 of Directive 2004/18/EC
\(^{439}\) S.L. 174.06 Utilities Procurement Regulations, Regulation 54
\(^{440}\) This Article is analogous to Article 45(1) of Directive 2004/18/EC
\(^{441}\) S.L. 174.06 Utilities Procurement Regulations, Regulation 53
\(^{442}\) Ibid. Regulation 52
\(^{443}\) Ibid. Regulation 55
\(^{444}\) Ibid. Regulation 57
\(^{445}\) Ibid. Regulation 43
4.4.3 The conclusion of the Procurement Process under Maltese Law

Under Maltese law, the procurement process is also concluded at that moment in time when the contract is signed. In fact, in Case No. 221\textsuperscript{447}, the PCRB states that it is clear that the contract will only enter into force once it is signed by both parties.\textsuperscript{448} It further states that until signature takes place, the Director of Contracts may cancel the tender, provided of course that the grounds for cancellation are justified. This, together with the available procedures for reviewing the decisions of contracting authorities, will be discussed in a subsequent chapter.

4.5 Do the current developments in EU Law change anything?

4.5.1 Proposal for a Directive on Public Procurement, replacing Directive 2004/18/EC

It is immediately evident that the proposed directive is drafted in a clearer manner than the directive currently in force. The stages of the procurement process are clearly identified in separate sections, thus making the mechanics of the procedure, on the whole, much easier to understand.

4.5.1.1 The Pre-Tendering Stage

The proposed directive identifies the preparatory stage as the first stage of the procurement process. Even though reference to this stage was made in the preamble to the Directive 2004/18/EC\textsuperscript{449}, it was not \textit{per se} included in the substantive provisions. The general rule remains that the procurement process is kicked off by means of a call for competition made either by means of a contract notice or a prior information notice.\textsuperscript{450} The contents of these notices are set out in Annex VI of the proposed directive and are more or less the same as those found within Annex VII of the Public Sector Directive. The importance of technical specifications also remains, with the definition of such specifications, as set out in Annex

\textsuperscript{448} Ibid. 451
\textsuperscript{449} Directive 2004/18/EC, Recital 8
VI of Directive 2004/18/EC, being adopted by the proposed directive. Amendments have been proposed to the substantive provisions regarding technical specifications; however, no radical changes are foreseen.

4.5.1.2 The Tendering Stage

(A) The persons eligible for participation and the available procedures

In the 2011 Modernisation Green Paper, the Commission stated that the available procedures should be thoroughly examined and streamlined in order to provide improve flexibility and further enhance efficiency. In fact, it seems that the user-friendly approach adopted by the proposed directive adopts for procedures existing under Directive 2004/18/EC, has successfully streamlined these procedures. Moreover, the new procedure of Innovation Partnership was introduced. Natural and legal persons, both individually or in groups, remain eligible to participate in the procurement process.

4.5.1.3 The Selection and Award Stages

The proposed directive states that contracts are to be ‘awarded on the basis of criteria laid down, provided that, the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, and, the tender comes from a tenderer that is not excluded and who meets the selection criteria set out by the contracting authority’.

As with the directive currently in force, a clear distinction is made between the selection stage and the award stage, however, it should be noted that in cases where the open procedure is used, the contracting authorities are allowed to examine tenders before

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451 Proposal for a Directive on Public Procurement, Annex VIII
452 Ibid. Article 40
453 COM(2011) 15 final, Green Paper on the modernization of EU public procurement policy; Towards a more efficient European Procurement Market [27/01/2011]
454 Proposal for a Directive on Public Procurement, Detailed Explanation of the Proposal
455 Ibid. Article 29
456 Ibid. Article 16
457 Ibid. Article 54 (1)
verifying the fulfillment of the selection criteria.\textsuperscript{458} The possibility of altering the sequence of examination of selection and award criteria was first introduced in the Modernisation Green Paper, whereby the Commission emphasised that it was the distinction between the two sets of criteria which was important rather than the sequence by which they are examined.\textsuperscript{459} It is evident that this is a departure from current rules, which, it may be argued, renders the distinction between the two stages more flexible, hence allowing the contracting authorities to make use of the approach which they consider most practical.\textsuperscript{460} It should be noted that the compromise text adds that in such a scenario, contracting authorities are duty bound to ensure that the selection stage is conducted in a manner which is open and impartial and that no contract is awarded to a tenderer who should have been excluded or does not meet the selection criteria set out by the contracting authority.\textsuperscript{461}

\textbf{(A) The Selection Stage}

\textbf{(A)(i) The Exclusionary Rules}

As with Directive 2004/18/EC, the proposed directive, lists two exclusionary rules – one being mandatory and the other discretionary. The proposed directive has extended the grounds listed under Article 45(1) of Directive 2004/18/EC, to cases where it is the company directors or persons having the power of representation who are convicted by final judgment.\textsuperscript{462} It adds convictions regarding terrorist offences or offences linked to terrorist activities\textsuperscript{463} to the grounds for mandatory exclusion. Moreover, the mandatory exclusionary rule has been extended to economic operators who have been convicted by means of a judgment which has the force of \textit{res judicata} of not fulfilling obligations relating to payment of taxes or social security contributions\textsuperscript{464} - this ground was previously discretionary under Directive 2004/18/EC. With regards the discretionary rule, the 2011 Modernisation Green Paper had criticized the fact that it was not possible to take into

\begin{footnotesize}
458 Ibid. Article 54(3)
459 Green Paper on the modernization of EU public procurement policy (n 453)
460 Proposal for a Directive on Public Procurement, Detailed Explanation of the Proposal
462 Proposal for a Directive on Public Procurement, Article 55(1)
463 Ibid.
464 Ibid. Article 55(2)
\end{footnotesize}
account the past performance of economic operators. This was rectified by the proposed directive as it includes cases where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature with the same contracting authority as a ground for exclusion.\textsuperscript{465} Furthermore, the proposed directive also states that economic operators may be excluded in cases where; the economic operator is the subject of insolvency or winding up proceedings; the contracting authority can demonstrate that the economic operator is guilty of grave professional misconduct; or the contracting authority is aware of violations established by Union legislation in the field of social and labour law or environmental law or of certain international social and environmental law provisions.\textsuperscript{466} The compromise text then adds three further exclusionary grounds to this rule when it states that economic operators may be also be excluded in situations where; the contracting authority is able to demonstrate that the economic operator has entered into agreements, with other operators, aimed at distorting competition; the economic operator is guilty of serious misrepresentation in supplying information required for the verification of absence of grounds for exclusion or the fulfillment of selection criteria; and the economic operator has undertaken to unduly influence the decision-making of the contracting authority, to obtain information that may give it an unfair advantage in the procurement process or to negligently provide misleading information that may influence decisions on exclusion, selection or award.\textsuperscript{467} Moreover, the compromise text also states that in cases where it is aware that the economic operator is in breach of its obligations relating to taxes or social security contributions, contracting authorities have the discretion to exclude operators from participating in the procurement process, even in cases where such breach is not declared in a judicial pronouncement.\textsuperscript{468}

(A)(ii) The Selection Criteria
The selection criteria under the proposed directive remain the same as under Directive 2004/18/EC with contracting authorities being allowed to check the suitability of economic

\textsuperscript{465} Ibid. Article 55(3)
\textsuperscript{466} Ibid. Article 55(3)
\textsuperscript{468} Ibid. Article 55(2)
operators on grounds of suitability to pursue professional activity, economic and financial standing, technical and professional ability; as well as quality assurance and environmental management standards.

(B) The Award Stage

(B)(i) The Award Criteria

The 2011 Modernisation Green suggested a reassessment of the award criteria which may be applied in the procurement process. It asked whether the criterion of the ‘lowest price only’ should be eliminated, whether the weighting of the ‘price criterion’ should be limited at law, and also whether a third award criterion in addition to the ‘lowest price’ and the MEAT should be introduced. The proposed directive states that contracts may be awarded on the basis of two award criteria only - the most economically advantageous tender and the lowest cost. The criterion of the MEAT is more or less the same as that found under the rules currently in force; however, it is evident that the criterion of the ‘lowest cost’ is different from that of the ‘lowest price only’. Whilst the ‘lowest price only’ is a criterion which is based solely on price, the ‘lowest cost’ may be assessed either on the element of price, or, on the basis of a cost-effectiveness approach, such as life-cycle costing. Contracting authorities are therefore given the possibility to consider certain costs which may be incurred over the life-time of the product, service or work. It is not clear why the Commission felt the need to introduce such an award criterion, when criteria such as lifetime costing could easily have been implemented within the framework of the MEAT criterion. In fact, in the case SIAC Construction v. County Council of the County of Mayo the contracting authority had made use of the MEAT criterion in order to award the contract on the basis of the ‘ultimate cost as determined by an expert’.

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469 Proposal for a Directive on Public Procurement, Article 56
470 Ibid. Article 61
472 Green Paper on the modernization of EU public procurement policy (n 453)
473 Proposal for a Directive on Public Procurement, Article 66
474 Ibid.
475 Ibid. Detailed Explanation of the Proposal
476 Case C-19/00 SIAC Construction (n 365)
(B)(ii) *Impediments to Award*

The proposed directive provides a new provision which prohibits contracting authorities from awarding the contract to a tenderer, who, has not provided the necessary certificates and documents, or, has made false declarations on illicit conduct or conflict of interest.\(^{477}\) This provision was however, excluded from the compromise text.

(B)(iii) *Abnormally Low Tenders*

The proposed directive also obliges contracting authorities to verify the constituent elements of a tender which appears to be abnormally low before rejecting it; however, unlike the directive currently in force, it provides guidelines as to what an abnormally low tender is.\(^{478}\) That said, the proposed directive also states that ‘where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations’.\(^{479}\) It is unclear whether in such cases [where tenders appear to be abnormally low for reasons other than those listed in the proposed directive] contracting authorities are in fact obliged to verify the constituent elements of such tenders. The proposed provision on abnormally low tenders was, however, radically amended under the compromise text, and the situation was reverted back to that found under Directive 2004/18/EC.\(^{480}\)

(C) *The Performance of the Contract*

The proposed directive includes new provisions which reflect the case-law of the CJEU whereby the modification\(^{481}\) and termination of contracts\(^{482}\) during their term is regulated.\(^{483}\) The enactment of such provisions had been suggested in the 2011 Modernisation Green Paper.

\(^{477}\) Proposal for a Directive on Public Procurement, Article 66
\(^{478}\) Ibid. Article 69
\(^{479}\) Ibid. Article 69(2)
\(^{481}\) Proposal for a Directive on Public Procurement, Article 72
\(^{482}\) Ibid. Article 73
\(^{483}\) Ibid. Detailed Explanation of the Proposal
4.5.2 Proposal for a Directive on Procurement by entities operating in the water, energy, transport and postal services sectors, replacing Directive 2004/17/EC

It is again apparent that the proposed directive is set out in a manner which is easier to understand than the directive currently in force. The stages of the procurement process are also clearly identified in separate sections in the same fashion as under the proposed directive on public procurement.

4.5.2.1 The Pre-Tendering Stage

As with the proposed directive on public procurement, the proposed directive on utilities lists the pre-tendering stage as the first stage of the procurement process. Even though reference to this stage had been made in the preamble to Directive 2004/17/EC, it had not been included in its substantive provisions. The general rule remains that the procurement process is initiated with a call for competition, with the directive expressly listing the scenarios whereby the use of a procedure without a call for competition is permitted. The manner by which a call for competition may be made remains the same; by means of a contract notice; or a periodic indicative notice, where the contracting authority publishes such notice; or a notice on the existence of a qualification system, where such a system is used. The requisites of these notices are set out in Annexes VI, X and XI of the proposed directive, with these requisites being more or less the same as those of the contract notice under Directive 2004/17/EC. Technical specifications remain an important feature of the call for competition. The definition of these specifications, as set out in Annex XXI of Directive 2004/17/EC, was adopted by the proposed directive. Amendments have been proposed to the substantive provisions regarding technical specifications; however, no radical changes are foreseen.

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484 Directive 2004/17/EC, Recital 15
486 Proposal for a Directive on the procurement of Utilities, Article 44
487 Ibid. Article 39(2)
488 Ibid. Annex VIII
489 Ibid. Article 54
4.5.2.2 The Tendering Stage

(A) The persons eligible for participation and the available procedures
As with the proposed directive on public procurement, a user-friendly approach was adopted in streamlining the available procurement procedures.\textsuperscript{490} Moreover, the procedure of Innovation Partnership was also introduced to the Utilities sector.\textsuperscript{491} Again, both natural and legal persons, individually or in groups, may participate in the procurement process.\textsuperscript{492}

4.5.2.3 The Selection and Award Stages
The stages of selection and award remain separate and distinct under the proposed directive on the procurement of utilities, however, in the same fashion as under the proposed directive on public procurement, contracting authorities will in certain situations, be allowed to examine tenders before verifying the eligibility and suitability of the tenderers.\textsuperscript{493}

(A) The Selection Stage
The identification of the rules on selection and award remain at the discretion of the contracting entity.\textsuperscript{494} The directive states that these “\textit{may include the exclusion grounds listed in Article 55 of Directive 2004/18}” and that “\textit{where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 55(1) and (2) of Directive 2004/18}”.\textsuperscript{495} It is not clear why the proposed directive makes a reference to Directive 2004/18 when this will be replaced by a new directive when the two proposals being discussed come into force, moreover, Article 55 of Directive 2004/18 speaks of abnormally low tenders and not exclusionary/selection criteria. It therefore seems that the reference to Directive 2004/18 is erroneous and that reference was intended to be made to Article 55 of the proposed directive on public procurement which will replace Directive 2004/18.

\textsuperscript{490} Ibid. Detailed Explanation of the Proposal
\textsuperscript{491} Ibid. Article 43
\textsuperscript{492} Ibid. Article 30
\textsuperscript{493} Ibid. Article 70
\textsuperscript{494} Ibid. Article 72
\textsuperscript{495} Ibid. Article 74
(B) The Award Stage

The award criteria under the proposed directive on utilities are the same as those under the proposed directive on public procurement – the MEAT and the lowest cost.\(^{496}\) The situation regarding the provisions on impediments to award\(^{497}\) and abnormally low tenders\(^{498}\) is also analogous to that under the proposed directive on public procurement, with the same amendments being proposed in the compromise text.\(^{499}\)

(C) The Performance of the Contract

This proposed directive also includes new provisions on the modification\(^{500}\) and termination\(^{501}\) of contracts during their term is regulated, reflecting CJEU judgments.

4.5.3 Maltese law in the light of these developments

When the proposed directives come into force, Maltese law will have to be amended to reflect the developments set out. At this point in time it is not clear whether there will be any radical departures from the law currently in force, most probably, the policy relating to the Maltese regime of public procurement will be reassessed.

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\(^{496}\) Ibid. Article 76
\(^{497}\) Ibid. Article 78
\(^{498}\) Ibid. Article 79
\(^{500}\) Proposal for a Directive on the procurement of Utilities, Article 82
\(^{501}\) Ibid. Article 83
CHAPTER V– THE REMEDIES AVAILABLE UNDER THE PUBLIC PROCUREMENT REGIME

The law should be applied in a manner which is both consistent and in line with its spirit. For this to be guaranteed, decisions taken by individuals vested with the power of applying the law should be made subject to review. Needless to say, the public procurement regime is no exception and thus an effective and efficient enforcement mechanism is required in order to ensure that Member States are compliant with the regime’s rules. Delsaux and Treumer point out that such enforcement is to be effected both at national and supra-national level. Having discussed the substantive provisions regulating the public procurement regime in previous chapters, an in depth discussion on the available remedies and review procedures is thus merited.

5.1 The EU Remedies Directives

The review of decisions taken by contracting authorities and the enforcement of the substantive rules of public procurement are regulated by a set of directives known as the Remedies Directives - Directives 89/665/EEC and 92/13/EEC as amended by Directive 2007/66/EC. The primary purpose of these directives is to ensure the effective application of Directives 2004/18/EC and 2004/17/EC, by enacting an effective and efficient review mechanism.

502 John Finnis, Natural Law and Natural Rights (Calderon Law Series OUP 1980) 270-271
504 Ibid.
505 Steen Treumer, EU Public Procurement Law: An Introduction in Sue Arrowsmith (ed) (EU Asia Inter University Network for Teaching), available online at http://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf, last accessed on 27/04/2013, pg. 288
509 Directive 2007/66/EC, Recital 1
5.1.1 Directive 89/665/EEC

5.1.1.1 The Scope and Availability of Review Procedures

Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, applies to contracts falling within the scope of Directive 2004/18/EC - the Public Sector Directive.\(^{510}\) It obliges Member States to ensure the possibility that decisions taken by contracting authorities are reviewed in cases where the public procurement rules are infringed.\(^{511}\)

The directive does not specify which decisions should be subject to the possibility of review since no definition of the phrase ‘decisions taken by contracting authorities’ is given. Reference should therefore be made to the \textit{Stadt Halle Case}\(^{512}\) where the CJEU held that the phrase ‘decisions taken by contracting authorities’ ought to be afforded a wide interpretation and thus ‘any act of a contracting authority adopted in relation to a public contract within the scope of the respective directive and capable of producing legal effects constitutes a decision amenable to review regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure’.\(^{513}\) The court also stated that those ‘acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure’ should not be subject to review.\(^{514}\)

The directive provides that review procedures are to be made available, ‘at least, to persons having or having had an interest in obtaining a particular contract and who have been or risk being harmed by an alleged infringement’.\(^{515}\) The minimum time limits within which applications for review of decisions of contracting authorities are also set out.\(^{516}\) It should

\(^{510}\) Directive 89/665/EEC, Article 1(1)
\(^{511}\) Ibid.
\(^{513}\) Ibid. par. 34
\(^{514}\) Ibid. par. 35
\(^{515}\) Directive 89/665/EEC; Article 1(3)
\(^{516}\) Ibid. Article 2c
be noted that Member states may require individuals seeking review to notify the contracting authority of the infringements being alleged and of their intention to seek review. 517

5.1.1.2 The Requirements of Review Procedures

(A) The Powers which ought to be afforded to the Review Bodies

Member States must provide review bodies with the power to take interim measures, to set aside unlawful decisions, and, to award damages. 518 These powers need not be conferred upon the same body, but may be granted to separate bodies responsible for different aspects of the review procedure. 519 Moreover, it should be ensured that the decisions taken by review bodies are capable of enforcement. 520

Interim measures are measures aimed at safeguarding the parties concerned from incurring any further damages or the correction of the infringement being alleged. 521 These measures are taken by means of interlocutory proceedings and may include measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by a contracting authority. 522 Decisions on whether interim measures should be granted must not prejudice any other claim of the individual seeking review, 523 and it may be required that a review body considers all interests likely to be harmed, as well as the public interest, prior to taking its decision. 524

Review bodies should also be empowered to set aside or ensure the setting aside of any unlawful decision of a contracting authority. It should be noted that the directive specifies that it is unlawful decisions which may be set aside. The issue is thus one of legality –

517 Ibid. Article 1(4)  
518 Ibid. Article 2(1)  
519 Ibid. Article 2(2)  
520 Ibid. Article 2(8)  
521 Ibid. Article 1(a)  
522 Ibid.  
523 Ibid. Article 2(5)  
524 Ibid.
whether an action is lawful or unlawful.\textsuperscript{525} In essence, in order for a decision to be set aside, it must be one which is contrary to the rules of public procurement.

The third and final power that Member States are obliged to confer upon review bodies is that of awarding damages to persons harmed by infringement. Schebesta claims that under Directive 89/665/EEC damages are left widely unregulated and as a consequence, in the absence of community regulation, damages are to be regulated by national law.\textsuperscript{526} Treumer suggests that the directive is unclear as to whether it is any infringement of the public procurement rules that could possibly form the basis of a claim for damages or whether it is only specific infringements that could form the basis of such claims.\textsuperscript{527}

\textbf{(B) Suspension of the contract award process}

Generally speaking, review procedures need not have an automatic suspensive effect on the contract award procedures;\textsuperscript{528} nevertheless, the directive provides two instances whereby an application for review would necessitate an automatic suspension of the contract award process. The first relates to proceedings before a body of first instance which is independent of the contracting authority. In such a scenario, Member States are to ensure that the contracting authority cannot conclude the contract before the review body has made its decision either on interim measures or for review.\textsuperscript{529} The second involves situations whereby the Member States would require the person concerned to first seek review with the contracting authority. Similarly, the submission of an application for review in such a case will also result in an immediate suspension of the possibility to conclude the contract.\textsuperscript{530}

\textsuperscript{525} H.W.R. Wade and C.F. Forsyth, \textit{Administrative Law} (9\textsuperscript{th} Edition OUP 2004) 33

\textsuperscript{526} Hanna Schebesta, ‘Community Law Requirements for Remedies in the Field of Public Procurement: Damages’ [2010] 1 E.P.P.L.R. 23, 23

\textsuperscript{527} Steen Treumer, ‘Damages for breach of the EC public procurement rules – changes in European regulation and practice’ [2006] 4 P.P.L.R. 159, 164

\textsuperscript{528} Directive 89/665/EEC; Article 2(4)

\textsuperscript{529} Ibid. Article 2(3)

\textsuperscript{530} Ibid. Article 1(5)
(C) Review of Decisions of First Instance Review Bodies

The Directive also provides for the review of decisions of first instance review bodies. This is to be conducted by means of judicial review or a review by another body which is a court or tribunal within the meaning of the treaty, and independent of both the contracting authority and the first instance review body. The question may arise as to whether such second instance review procedures are also to be made available to contracting authorities.

In *Simvoulio Apokheteseon Lefkosias v. Anatheoritiki Arkhi Prosforon* the CJEU stated that the directive ‘does not require the Member States to provide, also for contracting authorities a right to seek judicial review of decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts, however, it does not prevent the Member States from providing, in their legal systems, for such a legal remedy for contracting authorities’.  

5.1.1.3 The Standstill Period

Member States must ensure that persons having or having had an interest in obtaining a particular contract or who risk being harmed by an alleged infringement, have sufficient time to seek review of contract award decisions. Timmermans and Gelders state that interested individuals must be guaranteed the possibility of obtaining a remedy *in natura* – a remedy which grants them the possibility of performing the contract. The directive thus provides for a standstill period - a period of time following the contract award decision, within which a contract cannot be concluded. This was introduced into community legislation by virtue of the 2007 amendments following the landmark judgments of *Alcatel Austria AG and others v. Bundesministerium fur Wissenschaft und Verkehr* and *Commission v. Austria*. These cases highlighted the distinction

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531 Ibid. Article 2(9)  
532 Case C-570/08 *Simvoulio Apokheteseon Lefkosias v. Anatheoritiki Arkhi Prosforon* [21/10/2010] Court of Justice of the European Union  
533 Ibid. par. 38  
534 Directive 89/665/EEC, Article 2a(1)  
536 Directive 2007/66/EC, Article 1(2)  
537 Case C-81/98 *Alcatel Austria AG and Others, Siemens AG Osterreich, Sag-Schrack Anlagentechnik AG v. Bundesministerium fur Wissenschaft und Verkehr* [28/10/1999] Court of Justice of the European Union
between the award stage and the stage whereby the contract is concluded; stating that a reasonable time period must elapse between the two to ensure that interested parties are provided with sufficient time to seek review of award decisions. The CJEU, in the aforementioned cases, further stated that, in order to ensure that the possibility of review is tangible, a contracting authority must inform tenderers of its decision prior to the conclusion of the contract. Moreover, Member States should ensure that contract award notices identify the applicable standstill period. Both these obligations were introduced into community legislation by virtue of Article 2a of Directive 89/665/EC.

The CJEU in its case law did not delineate the minimum duration of the standstill period, however, the aforementioned Article 2a states that this has to be ‘at least 10 calendar days with effect from the day following the date on which the contract award decision is sent if fax or electronic means are used, or, if other means of communication are used, at least 15 calendar days with effect from the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision’.

It should be noted that the directive also lists three circumstances under which a derogation from the standstill period may apply. In cases where prior advertising in the Official Journal of the EU is not required, where the only tenderer concerned is the winning tenderer, and, where the contract is based on a framework agreement or a dynamic purchasing system, Member States may provide that the standstill period does not apply.

538 Case C-212/02 Commission of the European Communities v. Republic of Austria [24/06/2004] Court of Justice of the European Union
539 Glenn Fletcher, ‘Plans for implementing the Alcatel Ruling in the United Kingdom’ [2005] 5 P.P.L.R. NA140, NA140
540 Christopher Brennan, ‘Information requirements and review procedures – are the United Kingdom’s standstill provisions adequate?’ [2007] 6 P.P.L.R. NA176, NA178
541 Case C-212/02 Commission v. Austria (n 538) par. 23
542 Ibid. par. 21
543 Directive 89/665/EEC, Article 2a(2)
545 Directive 89/665/EEC; Article 2a(2)
546 Ibid. Article 2b
5.1.1.4 The notion of Ineffectiveness of Contract

The notion of ineffectiveness of contract was introduced to the EU public procurement regime by virtue of Directive 2007/66/EC 547 with the primary objective of curbing illegal direct awards and breaches of the standstill period. 548 Henty highlights this notion as the most prominent change brought about by the Amendment Directive. 549

Member States must ensure that review bodies consider a contract ineffective in three scenarios; where a contract was awarded without there being the necessary advertising within the Official Journal of the EU; 550 where there was an infringement of the provisions regarding the standstill period or those regulating the automatic suspension of the procedure for the award of a contract, provided that this infringement results in the person concerned not being able to pursue a pre-contractual remedy; 551 and where Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system. 552 The directive also provides exceptions to these grounds, particularly to the first 553 and third 554 ground. Member States may also provide that a contract is not to be considered ineffective, even though it falls within the aforelisted grounds, if the review body finds that the contract should be maintained on the basis of overriding reasons relating to the general interest. 555 In this case the Member State should provide for alternative penalties. 556

The directive does not define the consequences of ineffectiveness; however it states that national law may provide for the retroactive cancellation of all obligations related to the contract or for the cancellation of future obligations coupled with the application of

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547 Directive 2007/66/EC, Article 1(2)
550 Directive 89/665/EEC, Article 2d(1)(a)
551 Ibid. Article 2d(1)(b)
552 Ibid. Article 2d(1)(c)
553 Ibid. Article 2d(4)
554 Ibid. Article 2d(5)
555 Ibid. Article 2d(3)
556 Ibid.
alternative penalties.\textsuperscript{557} It should be noted that the directive also sets out the minimum time limits which should be allowed for an application for review under this provision.\textsuperscript{558}

5.1.1.5 \textit{Alternative Penalties}

The directive speaks of two types of alternative penalties, the imposition of fines on the contracting authority; and the shortening of the duration of the contract.\textsuperscript{559} These penalties must be effective, proportionate and dissuasive.\textsuperscript{560} The directive lists three scenarios whereby Member States should provide for alternative penalties; the first is where national laws provide that it is only future obligations which are subject to cancellation\textsuperscript{561}; the second speaks of situations whereby contracts are not cancelled due to overriding reasons;\textsuperscript{562} and thirdly in cases where the acts of a contracting authority infringe the provisions regulating the standstill period or those regarding the automatic suspension of the contract award procedure, which are not caught under the second ground of ineffectiveness.\textsuperscript{563} It should be noted that the directive specifies that the award of damages does not constitute an alternative penalty.\textsuperscript{564}

5.1.1.6 \textit{The Corrective Mechanism – A Supra-national Enforcement Mechanism}

The directive also provides a supra-national enforcement procedure which is more commonly known as the corrective mechanism. Golding and Henty suggest that this mechanism facilitates rapid action on the part of the Commission, in cases where individuals seeking review have failed to find an effective remedy before the national courts.\textsuperscript{565} The directive states that this procedure may be availed of prior to the conclusion of the contract in cases where a serious breach of EU law has been committed during the contract award procedure.\textsuperscript{566} The Commission must first notify the Member State of the reasons which have led it to conclude that a serious breach of community law has taken

\textsuperscript{557} Ibid. Article 2d(2)
\textsuperscript{558} Ibid. Article 2f
\textsuperscript{559} Ibid. Article 2e(2)
\textsuperscript{560} Sophie Charveron, ‘New remedies for public procurement’ [2010] 21 5 Construction Law (Journal) 29, 31
\textsuperscript{561} Directive 89/665/EEC, Article 2d(2)
\textsuperscript{562} Ibid. Article 2d(3)
\textsuperscript{563} Ibid. Article 2e(1)
\textsuperscript{564} Ibid. Article 2e(2)
\textsuperscript{565} Golding and Henty, ‘The new Remedies Directive of the EC: standstill and ineffectiveness’ (n 548) 153
\textsuperscript{566} Directive 89/665/EEC, Article 3(1)
place and it must request the said state to correct such breach.\textsuperscript{567} The Member State must then reply within 21 calendar days, either confirming that the infringement has been rectified; or giving a reasoned submission on why no correction has been made.\textsuperscript{568} It may also notify the Commission that the contract award procedure has been suspended,\textsuperscript{569} in such a case, the contracting authority must notify the Commission when the suspension is lifted or when another contract award procedure is initiated, with such notice requiring either a declaration that the infringement has been corrected or a reasoned submission as to why no correction was made.\textsuperscript{570} Golding and Henty further state that even though, in theory, this mechanism provides a quick reaction to serious breaches of the public procurement regulations, the Commission has tended to use Article 226 of the treaty instead.\textsuperscript{571}

5.1.2 Directive 92/13/EEC

Directives 92/13/EEC and 89/665/EC are quite similar with both directives having the aim of establishing a procedure which leads to Member States providing interested parties with the possibility of reviewing the decisions of contracting authorities which infringe the public procurement rules.\textsuperscript{572} As its title implies, Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, applies to contracts falling within the scope of the Utilities Sector Directive - Directive 2004/17/EC.\textsuperscript{573}

Review bodies are also afforded the same powers as under Directive 89/665/EEC, that of taking interim measures, the setting aside of unlawful decisions, and the awarding of damages; that said, they are also granted the power to take other measures, such as, making an order for the payment of a sum of money in cases where an infringement has not been

\textsuperscript{567} Ibid. Article 3(2)
\textsuperscript{568} Ibid. Article 3(3)(a) and (b)
\textsuperscript{569} Ibid. Article 3(3)
\textsuperscript{570} Ibid. Article 3(5)
\textsuperscript{571} Golding and Henty, ‘The new Remedies Directive of the EC: standstill and ineffectiveness’ (n 548) 153
\textsuperscript{572} Directive 92/13/EEC; Article 1
\textsuperscript{573} Ibid. Article 1(1)
corrected or prevented. Again, these powers need not be conferred upon the same body but may be granted to separate bodies responsible for different aspects of the review procedure.

Directive 92/13/EEC also provides for the automatic suspension of the contract award procedure in the same circumstances as those listed under Directive 89/665/EEC, as well as for the review of decisions of first instance review bodies. The provisions regulating the standstill period, ineffectiveness, alternative penalties and the supra-national corrective mechanism are also identical to the corresponding provisions under Directive 89/665/EEC.

5.2 The Maltese Regulations regulating Remedies in the Sphere of Public Procurement

The Public Procurement Regulations, particularly regulations 7, 21, 34, 83, 84 and 85, transpose the Remedies Directives into Maltese law. These rules are also mutatis mutandis applicable to the Utilities Regulations by virtue of its regulation 68. It should be noted that these rules have been recently amended following a request by the European Commission in the light of its findings that the rules previously in force did not constitute a correct transposition of the Remedies Directives.

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574 Ibid. Article 2(1)
575 Ibid. Article 2(2)
576 Ibid. Article 2(3a)
577 Ibid. Article 2(9)
578 Ibid. Article 2b and 2c
579 Ibid. Article 2d
580 Ibid. Article 2e
581 Ibid. Article 8
582 It should be noted that the judicial review of administrative actions under Maltese Law is generally regulated by Article 469A of the COCP, however, the Regulations regulating remedies in the sphere of public procurement are to be considered as a lex specialis and hence the applicable rules.
583 Public Procurement Regulations, Laws of Malta, S.L. 174.04 (S.L. 174.04 Public Procurement Regulations)
584 Public Procurement of Entities Operating in the Water, Energy, Transport and Postal Services Sectors Regulations, Laws of Malta, S.L. 174.06 (S.L. 174.06 Utilities Procurement Regulations)
5.2.1 The Review Bodies set up under Maltese Law – Their powers and competences
The Maltese Regulations provide for two review bodies, the department of contracts\textsuperscript{587} and the Public Contracts Review Board, more commonly known as the PCRB.\textsuperscript{588}

5.2.1.1 The Department of Contracts
The Department of Contracts, a government department falling under the portfolio of the Ministry of Finance, is the body empowered to provide pre-contractual remedies to interested parties in cases where the respective contract has a value less than €120,000.\textsuperscript{589} It is the Director of Contracts himself who is responsible for the provision of these remedies; however, he may delegate this responsibility to any other official within the department.\textsuperscript{590} The Director is empowered to; take interim measures, including measures to suspend or to ensure the suspension of the award procedure; to set aside or ensure the setting aside of decisions taken unlawfully; take other measures aimed at correcting the alleged infringement or preventing the causation of further damages; and to refund the costs incurred by any tenderer in acquiring the tender documents in the case of cancellation or to ensure that such person obtains these documents free of charge if the tender is going to be reissued.\textsuperscript{591}

5.2.1.2 The Public Contracts Review Board (PCRB)
The Public Contracts review board is a review body set up by law ‘to hear and determine complaints submitted by any person having or having had an interest in obtaining a particular public contract’.\textsuperscript{592} It is responsible for addressing; pre-contractual concerns raised by interested parties in relation to all public contracts whose value exceeds €120,000; complaints where the estimated value of the contract exceeds €12,000 in cases where the contract is issued by an authority listed under schedule 1; complaints relating to a contract award decision or the cancellation of a contract, raised by the parties concerned;

\textsuperscript{587} S.L. 174.04 Public Procurement Regulations, Regulation 7
\textsuperscript{588} Ibid. Regulation 34
\textsuperscript{589} Ibid. Regulation 7(1)
\textsuperscript{590} Ibid.
\textsuperscript{591} Ibid. Regulation 7(2)
\textsuperscript{592} Ibid. Regulation 34(2)
and complaints relating to public service concession contracts. In the event that a complaint or appeal is submitted, the award process is to be completely suspended.

The PCRB is granted the power to take interim measures, set aside or ensure the setting aside of unlawful decisions, and to award damages to persons harmed by infringement. Moreover, it has the power to consider a contract ineffective in the circumstances prescribed by the law, consequently, the PCRB may declare a contract to be null from the date of its decision. Moreover, the Review Board also has the power to impose alternative penalties on contracting authorities, in the form of fines or the shortening of the duration of the contract.

The decisions of the PCRB must be issued in writing and must state the reasons which justify its decision. If the decision of the PCRB is not appealed within the time limits set out, the board’s decision will be considered final and would constitute an executive title enforceable in terms of Article 273 of the COCP.

5.2.2 Appeals from decisions of first instance review bodies

The Regulations also ensure the possibility that decisions of first instance review bodies are subject to review.

Persons who feel aggrieved by the decisions of the Director of Contracts may appeal, on a point of law, to the Court of Appeal sitting in its Superior Jurisdiction. Pending the

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593 Ibid. Regulation 85(1)
594 Ibid. Regulations 21 and 84(1)
595 Ibid. Regulation 85(2)
596 Ibid. Regulation 85(3)(a)
597 Ibid. Regulation 85(3)(b)
598 Ibid. Regulation 85(3)(c)
599 Ibid. Regulation 85(4)
600 Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta
601 S.L. 174.04 Public Procurement Regulations, Regulation 85(8)
602 Ibid. Regulation 7(3)(a)
decision of the court, the process of the call for tenders is to be suspended.\textsuperscript{603} Time limits ensuring that the case is heard within a reasonable time are set out within the law.\textsuperscript{604}

With regards to decisions given by the PCRB, persons not satisfied with such decisions may also file an appeal with the Court of Appeal sitting in its Superior Jurisdiction requesting that it overturn the review body’s decision.\textsuperscript{605} Such was the case in \textit{UNEC Ltd vs. Director of Contracts et al.}\textsuperscript{606} and \textit{Design Solutions Ltd vs. Director of Contracts et al.}\textsuperscript{607} where the court overturned the PCRB’s decision. As with appeals from decisions of the director of contracts, the process of the call for tenders is to be suspended until the court gives its decision.\textsuperscript{608} This was not the case prior to the 2013 amendments whereby a reference to the Court of Appeal did not delay the director of contracts or the head of the contracting authority from implementing the decision of the PCRB. The regulations again set out time limits to ensure that cases are heard within a reasonable time.\textsuperscript{609}

A right of appeal is also granted to the department of contracts and the respective contracting authority; however this right is limited to decisions regarding the award of damages and the ineffectiveness of contract.\textsuperscript{610}

It should also be noted that prior to the 2013 amendments, appeals were to be filed before the Court of Appeal in its Inferior Jurisdiction and not the Court of Appeal (Superior Jurisdiction).

\textbf{5.3 Is Maltese Law in line with the Remedies Directive?}

As aforesaid, not all contracts fall within the remit of the EU Remedies Directives. In fact, this set of directives only applies to contracts falling within the scope of the Public Sector

\textsuperscript{603} Ibid. Regulation 7(3)(d)
\textsuperscript{604} Ibid. Regulation 7(3)(c) & (d)
\textsuperscript{605} Ibid. Regulation 85(5)(a)
\textsuperscript{606} Appell Civili Numru 5/2012 \textit{United Equipment Company (UNEC) Ltd. vs. Id-Direttur tal-Kuntratti, u Il-Korporazzjoni Enemalta ghal kull interess li jista’ ikolilha} [10/07/2012] Qorti ta’ l-Appel
\textsuperscript{608} S.L. 174.04 Public Procurement Regulations, Regulation 85(5) (d)
\textsuperscript{609} Ibid. Regulation 85(5)(c) & (d)
\textsuperscript{610} Ibid. Regulation 85(5) (e)
Directive and the Utilities Directive. In this regard, Maltese law has gone beyond community legislation and provided for the review of the actions of contracting authorities even in cases where the contract in question has a value falling below the thresholds.

The procedures for review are made available to ‘any tenderer or candidate concerned, or any person, having or having had an interest or who has been harmed or risks being harmed by an alleged infringement or by any decision taken including a proposed award in obtaining a contract or a cancellation of a call for tender’611 in line with the Remedies Directives. Moreover, parties who are not satisfied with the decision of such first instance review bodies have a right to seek review with the Court of Appeal sitting in its Superior Jurisdiction.612 Notwithstanding the fact that the Remedies Directives do not require Member States to cater for a right of appeal to the department of contracts or the respective contracting authority, Maltese law grants them a limited right of appeal. As was confirmed by the CJEU in the Simvoulio Apokhetefseon Lefkosias case,613 the provision of such a right to the contracting authority/entity is still in line with the spirit of the Remedies Directives and thus constitutes a correct transposition of the said rules.

The powers conferred upon review bodies are also in conformity with the provisions of the Remedies Directives with such bodies being afforded the power to take interim measures, to award damages and to set aside unlawful decisions.614 Moreover, it is also possible for the PCRB to impose alternative penalties615 and to render a contract ineffective.616

Maltese law provides that where a complaint or appeal is submitted, the award process is to be completely suspended.617 Thus, the Remedies Directives’ provisions regarding the automatic suspension of the contract award procedure are also correctly transposed.

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611 Ibid. Regulation 84(1)  
612 Ibid. Regulations 7(3)(d) and 85(5) (d)  
613 Case C-570/08 Simvoulio Apokhetefseon Lefkosias (n 532) par. 38  
614 S.L. 174.04 Public Procurement Regulations, Regulation 85(2)  
615 Ibid. Regulations 85(3)(b) & (c)  
616 Ibid. Regulation 85(3)(a)  
617 Ibid. Regulations 21 and 84(1)
The standstill period discussed under Community law was also transposed into the Maltese regulations with contracting authorities being barred from awarding a contract during the period within which appeals may be filed.618 This allows interested parties sufficient time to seek review prior to the contract being awarded.

One may state that certain provisions of the Maltese regulations tend to go beyond what is stated within the community rules. The fact that both the economic operator and the contracting authority (albeit in a limited manner), are granted a right to appeal the decisions of review bodies shows that the Maltese legislator has successfully created a system which does not favour either. Moreover, the suspension of the contract award procedure throughout review proceedings ensures that individuals interested in being awarded a particular contract are granted a right of review which is both genuine and effective. In this light, it may thus be stated that the EU Remedies Directives have been correctly transposed into Maltese law.

5.4 What about Concession Contracts? Would the rules regulating remedies be applicable?

Directive 89/665/EEC states that it applies to those contracts regulated by the Public Sector Directive.619 Directive 2004/18/EC regulates, albeit in a limited manner620, public works concessions but excludes service concession contracts.621 Therefore, Directive 89/665/EEC is applicable to public works concession contracts but not to service concession contracts. Directive 92/13/EEC, states that it is applicable to those contracts which are regulated by the Utilities Directive.622 Since Directive 17/2004/EC expressly excludes both works and service concessions from its scope,623 it follows that Directive 92/13/EEC is not applicable to both public works and public services concession contracts.

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618 Ibid. Regulation 21(2)
619 Directive 89/665/EEC, Article 1
620 Directive 2004/18/EC only regulates the publication requirements for the award of work concession contracts by virtue of a special set of rules under Title III. It should be stated that the award procedure for such contracts is not regulated.
621 Directive 2004/18/EC, Article 17
622 Directive 92/13/EEC, Article 1
623 Directive 2004/17/EC, Article 18
Under Maltese law, the Public Procurement Regulations provide that public works concessions are regulated.\textsuperscript{624} Therefore the situation with regards to such contracts is analogous to that under the EU Directives with remedies being available in cases where the contract in question is a public works concession. With regards to service concession contracts, the Maltese regulations state that these contracts are excluded from their scope,\textsuperscript{625} however, contracting authorities may subject their decisions (where the contract in question is a public service concession) to review.\textsuperscript{626} Therefore, with regards to service concessions, the regulations on remedies are not applicable unless the contracting authority itself decides to render its decisions subject to review. The Utilities regulation excludes both public works concessions and public service concessions from its scope.\textsuperscript{627} Therefore, the situation with regards to concession contracts under the Utilities Regulations is the same as that under EU law.

It can therefore be stated that as regards remedies where the contract in question is a concession contract, Maltese law is also in line with the EU Directives.

\begin{flushright}
\textsuperscript{624} S.L. 174.04 Public Procurement Regulations, Regulations 3, 70 and 71 \\
\textsuperscript{625} Ibid. Regulation 17(2) \\
\textsuperscript{626} Ibid. Regulations 17(2) and 34(4) \\
\textsuperscript{627} Ibid. Regulation 18
\end{flushright}
CONCLUSION

Having critically analysed the various aspects of the public procurement regime, both at EU and national level, a discussion highlighting the conclusions drawn therefrom is merited.

Public Procurement: What does the future hold?

The importance of a well-oiled system governing public procurement cannot be emphasised enough. It has been aforesaid that public procurement is a fundamental aspect of the economy as well as an important tool in the promotion of innovation\textsuperscript{628} and the attainment of secondary and non-commercial goals\textsuperscript{629}. The fact that it is a matter of primary public policy importance\textsuperscript{630} was further emphasised within the Europe 2020 strategy\textsuperscript{631} where the public procurement regime was defined as being central in the attainment of the Union’s targets of smart, sustainable and inclusive growth. This, coupled with the regime’s pervasive nature, consolidates public procurement’s position as a ‘cornerstone of the EU internal market’.\textsuperscript{632} Therefore, it can be stated that public procurement will definitely retain its standing as one of the most important regimes under EU law.

\textsuperscript{628} Leif Hommen and Max Rolfstam, ‘Public Procurement and Innovation: Towards a Taxonomy’ [2009] 9 1 Journal of Public Procurement 17, 17
\textsuperscript{629} Teresa Medina-Arnaiz, ‘Integrating Gender Equality in Public Procurement: The Spanish Case’ [2010] 10 4 Journal of Public Procurement 541, 541
\textsuperscript{630} European Commission and Internal Market Services, ‘ EU Public Procurement Legislation: Delivering Results (Summary of Evaluation Reports)’ available online at \url{http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf}, last accessed on 27/04/2013, pg. 6
The Principles of Public Procurement

(A) The General Principles of the Treaty

The Public Procurement Directives distinguish between contracts falling within their scope and contracts which do not.633 Nevertheless, as reiterated by the CJEU in its case law, the fundamental principles of the treaty are applicable across the board and therefore to all public procurement conducted within the EU Member States. As aforestated, contracting authorities have an obligation to respect the four fundamental freedoms as well as the principles deriving therefrom.634 Even though this line of thought has been confirmed by the Commission in an interpretative communication635 and also repeatedly by the CJEU, the contracting authorities’ obligation to abide by the fundamental principles of the treaty even in cases where the contract in question falls outside the scope of the directives has not yet been properly codified under EU Law. It is proposed that this should be rectified.

(B) The Principles Inherent to the Public Procurement Directives

(B)(i) The principles of Transparency, Objectivity, Equal treatment and Non-discrimination

It has been aforestated that contracting bodies have a duty to ‘treat economic operators equally and non-discriminatorily’636 throughout the whole procurement process637 and that the principles of transparency and objectivity arise as corollaries to the said obligation. The public procurement regime will only function properly if these interrelated yet distinct principles are correctly applied. In fact, one may go as far as to state that these principles uphold the whole public procurement regime.

633 Christopher Bovis, EU Public Procurement Law (Elgar European Law 2007) 70-72
634 Rhodri Williams, ‘Contracts awarded outside the scope of the public procurement directives’ [2007] J P.P.L.R. NA1, NA1
635 Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006], C179/2
638 Case C-448/01 EVN AG, Wienstrom GmbH v. Republik Österreich [04/03/2003] Court of Justice of the European Union, par. 92
(B)(ii) The principle of Confidentiality

The Public Procurement Directives uphold the principle of confidentiality; however, neither specifies the information which ought to be covered by this principle. Even though both the case law of the CJEU and authors such as Brown state that it is only commercially sensitive information which ought to be safeguarded, the directives remain silent. It is humbly submitted that this issue should be clarified with the directives identifying the categories of information covered by the principle of confidentiality.

The Applicable Law: - Too many Directives?

As previously discussed, public procurement is regulated by a number of directives each governing different aspects of the regime. Even though each directive clearly defines its scope, having such a complex system scattered throughout various legal instruments could be problematic. Arrowsmith suggests the adoption of ‘a single directive for all regulated contracts’ in order to ensure ‘a real simplification...in the sense of reducing the complexity of the regime’. It is humbly suggested that Arrowsmith’s proposal on consolidation is taken up by legislators in order to render the legal framework clearer and hence easier to understand.

The Proposed Directives

(A) The aims of the proposed directives

The proposed directives aim to simplify and enhance the flexibility of the public procurement regime. It is immediately evident that the proposed directives are drafted in a clearer manner than those currently in force with the stages of the procurement process.

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639 Case T-111/07 Agrofert Holding a.s. v. European Commission[07/07/2010] Court of Justice of the European Union, par. 69
640 Brown Adrian, ‘Protection of confidential information in procurement cases before national review bodies: Varec vs. Belgian State (C-450/06)’ [2008] 4 P.P.L.R. NA119, NA123
642 Ibid.
643 Rhodri Williams, ‘Commission proposals to modernise public procurement’ [2013] 3 P.P.L.R. NA101, NA101
being clearly identified in separate sections. This makes the mechanics of the procedure, on the whole, much easier to understand. Moreover, the introduction of new procedures such as the Innovation Partnership procedure proves the Commission’s commitment in the promotion of innovation in line with the goals set out in the Europe 2020 strategy.644

(B) Substituting the ‘lowest price only’ criterion with that of the ‘lowest cost’

The proposed directives substitute the award criterion of the ‘lowest price only’ with that of the ‘lowest cost’.645 It is evident that these criteria differ. Whilst the ‘lowest price only’ criterion is based solely on price, the ‘lowest cost’ may be assessed either on the element of price, or, on the basis of a cost-effectiveness approach, such as life-cycle costing.646 It is not clear why the Commission felt the need to introduce such an award criterion, when it could have been easily implemented within the framework of the MEAT criterion. This appears to be especially true when one considers that in the SIAC Construction case647 the contracting authority had made use of the MEAT criterion in order to award the contract on the basis of the ‘ultimate cost as determined by an expert’.

The transposition of the Public Procurement Directives into Maltese law

(A) The Scope and Application of the Law

As aforesaid, the Maltese regulations regulate all contracts covered by the EU Public Procurement Directives. It must be said, however, that the Maltese Public Procurement Regulations, unlike the EU Directive, also regulate contracts falling below the threshold value. Moreover, under S.L. 174.04 the award procedure of public works concession contracts is also regulated.648 Keeping in mind that the EU Directive is a minimum

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645 Proposal for a Directive on Public Procurement, Article 66
646 Ibid.
647 Case C-19/00 SIAC Construction v. County Council of the County of Mayo [18/10/2001] Court of Justice of the European Union
648 Directive 2004/18/EC regulates public works concessions in a limited manner. It is only the publication requirements for the award such contracts which is regulated. The award procedure for such contracts is not regulated by the directive.
harmonization directive, it may be stated that as regards the scope, the Maltese legislator has transposed Directive 2004/18/EC and Directive 2004/17/EC correctly.

(B) The Principles of Public Procurement
As aforesaid, the principles of public procurement as reflected under the EU Directives are also manifested within the Maltese Regulations. As regards the application of the principles of transparency, equal treatment and non-discrimination, Maltese law does not merely rely on the application of the basic principles of community law as expounded by the treaty, but renders these principles applicable to all instances of public procurement irrespective of the value of the contract. Moreover, as is particularly evident with the ‘separate packages in tender offer’ procedure, there are certain instances where Maltese law seems to have gone beyond what is stated in the directives in order to safeguard these principles. It can thus be stated that the principles of public procurement have been correctly transposed into Maltese Law.

(C) The cheapest technically compliant offer vs. the lowest price only
The ‘lowest price offered compliant with the tender specifications’, as put forward by S.L. 174.04 contrasts with the EU Directive’s ‘lowest price only’ criterion. By making use of the word ‘only’ the directive makes it clear that the award is to be based solely on the price element. It seems that, under S.L. 174.04 - the Public Procurement Regulations, a selection criterion (technical compliance) was included as part of an award criterion, thereby blurring the distinction between the selection and award stages. As a consequence, the criterion of the ‘lowest price offered compliant with the tender specifications’ is not in line with the case law of the CJEU which clearly states that even though it is possible for the selection and award stages to be conducted simultaneously, both stages should be governed by different rules. That said, the end intention seems to be the same, with the lowest priced offer being selected from amongst the technically compliant tenders. Nevertheless, it is humbly submitted that an amendment is necessary in this regard.

(D) The ‘Separate Package in tender offer’ procedure
As previously discussed, the separate package in tender offer procedure was incorporated into Maltese law in order to ensure a better technical evaluation of the tenders submitted. Since each package is opened individually and compliance assessed after the opening of each package, this procedure ensures that no offer is given any unfair advantage. If applied correctly it is probably the most transparent and objective procedure under the Maltese regime. That said, its main disadvantage is that it is cumbersome due to the fact that economic operators can file appeals following each and every evaluation stage. This procedure is not found under the EU Directives; however, since the Public Procurement Directives are minimum harmonization directives, the separate package in tender offer procedure does not create any problems with regards to transposition.

(E) The Available Remedies

(E)(i) Remedies for below threshold contracts and Second instance review for both parties
With regards to remedies, Maltese law has gone beyond the remit of the EU Directives and provided for the review of the actions of contracting authorities even in cases where the contract in question has a value falling below the thresholds set out. Moreover, both the economic operator and the contracting authority (albeit in a limited manner), have a right to seek review of decisions made by first instance review bodies with the Court of Appeal sitting in its Superior Jurisdiction.\(^{650}\) The Remedies Directives do not require Member States to cater for a right of appeal to the contracting authority, therefore this is another instance where Maltese law has gone beyond what is stated within the directives.

(E) (ii) The Suspension of the Contract Award Procedure during Review Proceedings
The Maltese regulations governing remedies provide that the contract award procedure is to be suspended throughout review proceedings. This applies both for first instance and second instance review proceedings. Even though the main aim of such suspension is ensuring that individuals interested in being awarded a particular contract are granted a genuine and effective right of review, it is felt that the suspension of the award procedure

\(^{650}\) Public Procurement Regulations, Laws of Malta, S.L. 174.04, Regulations 7(3)(d) and 85(5) (d)
during second instance review is unnecessary. Court proceedings require time and thus the suspension of the award proceedings at second instance could result in an undue delay in the award of public contracts which in turn could inconvenience the taxpayer. Since suspension of the contract award procedure during second instance review is not necessitated by the directives, the author is of the opinion that the law should be amended in this regard. Economic operators who still feel aggrieved after first instance review would still have a right to seek compensation in the form of a claim for damages.

**Is transposition correct?**

It seems that the transposition of the EU public procurement regime into Maltese Law is correct. As explained, there are of course some minor issues which ought to be remedied but on the whole transposition seems to be correct. Since the directives regulating the public procurement regime are minimum harmonisation directives, the instances where the Maltese legislator has gone beyond what is stated within the directives do not pose any problems of transposition. Once the proposed directives come into force, Maltese law will have to be amended in order to be brought in line with the developments set out. It is humbly suggested that since no major rethink of the Maltese regime is required, this should be taken as an opportunity to clarify the issues discussed, simplify, and further develop the Maltese regime of public procurement.
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UNIVERSITY OF MALTA
FACULTY OF LAWS

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NAME AND SURNAME: Gerd Sapiano

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