

Modernising the EU's Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility¹

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1. Introduction

In the Single Market Act of October 2010 the European Commission announced its intention to introduce legislative proposals for “simplifying and updating” the EU’s procurement regime, including to make the award of contracts “more flexible”, as well as to enable public contracts to be better used to support other EU policies². A consultation was launched with the publication in January 2011 of the *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market*³. Following on from this, on 20 December 2011 the Commission published its proposals⁴ for two new procedural directives on public procurement, one⁵ to replace Public Sector Directive 2004/18 and one⁶ to replace Utilities Directive 2004/17, with the stated aims of “simplification” and “flexibilisation” (sic) of the rules to improve value for money⁷. At the same time, the culmination of work going back to 2004⁸, the Commission also published a proposal for a new directive to regulate the award of concessions⁹.

However, following the pattern of the previous reforms in 2004¹⁰, whilst the proposals do indeed provide for some additional flexibility, they have at the same time in many respects introduced more

¹ This article is based on S. Arrowsmith, “Understanding the purpose of the EU’s procurement directives: the limited role of the EU regime and some proposals for reform”, forthcoming in a book to be published by the Swedish Competition Authority.

² Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: *Towards a Single Market Act – For a highly competitive social market economy*, COM (2010) 608

³ (COM (2011) 15 final). Parallel with this, the Commission has undertaken an empirical evaluation of the impact and cost of EU procurement policy, which has been published in full and summary form at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_en.pdf

⁴ For a summary see R. Williams, “Commission Proposals to Modernise Procurement” (2012) 21 P.P.L.R. NA101.

⁵ Proposal for a Directive on public procurement COM (2011) 896 final.

⁶ Proposal for a Directive on procurement by entities in the water, energy, transport and postal services sectors COM (2011) 895 final.

⁷ See e.g. the Explanatory Memorandum to the Proposal for a Directive on public procurement, p.2.

⁸ See, in particular, European Commission, *Green Paper on public-private partnerships and Community law on public contracts and concessions* COM(2004) 327 final; and *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions* COM (2005) 569 final.

⁹ Proposal for a Directive on the award of concession contracts COM (2011) 897 final

¹⁰ See S. Arrowsmith, “An Assessment of the New Legislative Package on Public Procurement” (2004) 41 *Common Market Law Review* 1

rigidity and burdensome requirements for Member States¹¹. Furthermore, these and other changes proposed will result in a set of rules which is vastly more complex than the current regime that the proposals purport to simplify¹². If these proposals are adopted the resulting regime will truly be (to borrow a phrase used by Cirell and Bennett to describe the old Compulsory Competitive Tendering regime of the UK government) a “Frankenstein’s monster”¹³.

In this context, this article proposes a simple blueprint for reforming the directives to achieve real simplicity and flexibility in the shape of a single directive for all regulated contracts that is based on the Utilities Directive.

It is submitted that this approach will ensure a real simplification of the current procurement directives in the sense of reducing the complexity of the regime. It will also provide for the greater flexibility for Member States that is recognised as one of the objectives of the current reform programme. This approach will provide for slightly more flexibility for Member States than is envisaged in the Commission’s proposals, but it is submitted that this needed to provide a better balance between the directives’ objective of promoting a single market and Member States’ interests in regulating public procurement for national objectives. Fundamental to this balance is the important point, often misunderstood¹⁴, that the author has elaborated elsewhere, that it is not an objective of the directives to ensure value for money in procurement¹⁵. This remains a matter for Member States, and internal market measures adopted by the EU must take account of Member States’ interests in this area, as well as others, in accordance with the principle of proportionality. In this respect, it must be remembered that transparency rules at EU level may inhibit limit the ability of Member States to pursue value for money in accordance with their own preferences and different circumstances, such as their differing levels of corruption and differing levels of expertise of purchasing officers. The proposals made below also take into account the author’s view that, whilst a degree of transparency is certainly useful, there are also significant limits on the value of

¹¹ A few examples are a proposal to apply the full rules of the directive to almost all services by removing the current exemption from most rules that applies to Part B services; a requirement for verification of criteria which seems to apply in all cases and will impose significant and unreasonable burden on purchasers and suppliers; formal procedures before contractors can be excluded for deficient performance of previous contracts; an obligation to exclude for non-payment of taxes and social security contributions; and requirements for purchasers to divide certain contracts into lots or justify their failure to do so: see, respectively, Article 66(4), Article 55(3), Article 55(1) and Article 44 of the proposal for a new directive on public procurement.

¹² Reducing the complexity of the regime as well as the burden on participants was one element of simplicity needed that was identified by the report by Mario Monti to the President of the European Commission of 9 May 2010, “A new strategy for the Single Market – at the service of Europe’s economy and society” (http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf) which preceded the Communication *Towards a Single Market Act*, note 2 above. The concept of simplicity is used in the present article to refer simply to absence of complexity.

¹³ S. Cirell and J. Bennett in the looseleaf publication formerly called *CCT: Law and Practice*, A11 (1996 version).

¹⁴ See further S. Arrowsmith “Understanding the purpose of the EU’s procurement directives: the limited role of the EU regime and some proposals for reform” (see fn.1) and, more briefly, S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn. Sweet & Maxwell, 2005), Ch.3.

¹⁵ See S. Arrowsmith, “The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach” (2002) 27 *European Law Review* 3.

transparency – and, in particular, of very detailed transparency rules that limit the discretion of procuring entities – as a tool for achieving the single market objectives themselves¹⁶.

The author has previously suggested a more radical reform of the directives than is proposed here, whereby procurement in Member States would be regulated only by the need to comply with the general principles of the Treaty on non-discrimination and transparency, rather than through specific transparency rules, using a new approach to enforcement and evaluation to secure adherence to the Treaty principles¹⁷. In the author's view, this remains preferable. However, it is recognised that such an approach is politically much more difficult to achieve than one which accepts the basic approach of the current directives and focuses merely on reforming their contents. Thus the present article focuses on how to achieve simplification and flexibility within the broad parameters of the existing approach to regulation.

2. The basic principle: a single directive based on the current Utilities Directive

It is submitted that the starting point for any reform should be to consolidate all three of the current substantive directives – the Public Sector Directive, Utilities Directive, and Defence and Security Directive (Directive 2009/81) – into one single directive, the contents of which would be based on the current Utilities Directive. This single directive would be applied in principle to all entities and activities covered by the current directives.

A single directive of this kind would also be entirely suitable for regulating the award of concession contracts, including services concessions that are currently excluded from the procurement directives. Thus it would not be necessary to introduce an entirely new instrument to regulate concessions, but simply to amend the current rules that apply to utilities regarding the extent and manner of their application to concessions.

It is suggested also that there should be a single set of rules on remedies¹⁸, applying to all award procedures covered by the single substantive directive.

Such a reform would improve flexibility and bring about very considerable simplification of the rules – thus effectively promoting the two main goals of the current reform programme – and also have the advantage of removing anomalies from the regime.

¹⁶ See further the works cited in notes 15 and 16 above; and, more generally, on the relationship between transparency and other procurement objectives, S. Kelman in *Procurement and Public Management* (AEI Press; 1990); S. Kelman, "Remaking Federal Procurement" (2002) 31 *Public Contract Law Journal* 581; S. Arrowsmith, J. Linarelli and D. Wallace, *Regulating Public Procurement: National and International Perspectives* (London: Kluwer Law International 2000), p.72 *et seq*;; S. Schooner, "Commercial Purchasing: the Chasm between the United States Government's Evolving Policy and Practice", Ch. 8 in S. Arrowsmith and M. Trybus (eds.), *Public Procurement: the Continuing Revolution* (London: Kluwer Law International 2002); S. Schooner, "Fear of Oversight: the Fundamental Failure of Businesslike Government" (2001) 50 *American University Law Review* 627; J. Schwartz, "Regulation and Deregulation in Public Procurement Law Reform in the United States", Chap. 8 in G. Piga and K. Thai (eds.), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (Boca Rato: PRAcademics Press 2007).

¹⁷ Arrowsmith, "The EC Procurement Directives...", note 15 above.

¹⁸ Instead of the current two directives 89/665 and 92/13.

3. Flexibility

The change proposed above would, first, achieve the *flexibility* goal of the current reform programme, specifically by giving much greater flexibility to member States for contracts currently covered by the general Public Sector Directive.

In this respect it would, first, provide for more flexibility for Member States to pursue value for money objectives in the way best suited to their own situation. This is because the current Utilities Directive does not impose such significant limitations as the other directives on the discretion in decision-making that may be given by Member States to their procuring entities and officers, and because it allows use of procurement tools that are generally prohibited for the public sector because of their perceived impact on market access.

As regards the first point, the Utilities Directive allows, in particular, a free choice over whether to use the open procedure, restricted procedure and negotiated procedure with a notice¹⁹, the last permitting a general freedom to negotiate with suppliers, subject to the principle of equal treatment²⁰. As we have noted above, negotiations can potentially help ensure value for money for various reasons; and adopting this approach for all regulated procurement would enable Member States to provide for the possibilities of negotiation for their own procuring entities in all situations in which they consider that this is useful. (It also gives Member States the possibility to remove the uncertainty that applies in the current Public Sector Directive over when negotiations are possible, which arises both from the uncertainty over when the negotiated procedure and competitive dialogue are available²¹, and the uncertainty over the extent to which negotiations are permitted in the different procedures²²). The Utilities Directive also seems to allow more useful flexibility to Member States in drawing up criteria for choosing which firms are to be invited to tender (relevant for restricted and negotiated procedures) when there are more firms meeting the qualification (“suitability”) criteria for participation than the procuring entity wishes to invite²³.

As regards the second point, unlike the Public Sector Directive, the Utilities Directive allows, in particular, the use of general notices and notices of qualification systems to advertise a

¹⁹ Utilities Directive 2004/17, Article 40.

²⁰ On this procedure see Arrowsmith, *The Law of Public and Utilities Procurement* note 13 above, chapter 16.

²¹ On negotiated procedures in this respect see Arrowsmith (ed.), S. Arrowsmith (ed.), *Introduction to EU Procurement Law*, available at www.nottingham.ac.uk, section 6.11 and on competitive dialogue; S.Arrowsmith and S.Treumer (eds.), *Competitive Dialogue in EU Procurement Law* (forthcoming; CUP), chapter 1, section 4; Arrowsmith, note 30 above, pp.632-635; S. Treumer, “The Field of Application of Competitive Dialogue” (2006) 15 P.P.L.R. 307; A. Brown, “The Impact of the New Directive on Large Infrastructure Projects: Competitive Dialogue or Better the Devil You Know?” (2004) 13 P.P.L.R. 160; M. Burnett, ‘Developing a Complexity test for the Use of Competitive Dialogue for PPP Contracts (2010) 4 E.P.P.L. (2010) 215.

²² On pre-tender negotiations in open and restricted procedures see S. Treumer “Technical Dialogue and the Principle of Equal Treatment – Dealing with Conflicts of Interest after Fabricom” (2007) 16 *Public Procurement Law Review* 99; S. Treumer, “Technical Dialogue Prior to Submission of Tenders and the Principle of Equal Treatment of Tenderers” (1999) 8 *Public Procurement Law Review* 147. On post-tender negotiations in these procedures see the works cited in note 74 above; and on post-tender negotiations in competitive dialogue Arrowsmith and Treumer (eds.), note 21, chapter 1, section 5.

²³ The main requirement is for selection to be based on objective rules and criteria, stated in Article 54. However, there are uncertainties over what this means in the context of this directive: see, in detail, S. Arrowsmith and C. Maund, “CSR in the Utilities Sector and the Implications of EC Procurement Policy: A Framework for Debate”, ch.11 in S. Arrowsmith and P. Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge: CUP, 2009) 436.

procurement, rather than requiring a notice of each specific procurement²⁴, which can reduce the costs of procurement. It also, very significantly, allows use of mandatory “qualification systems” (that is, it allows access to procurements to be restricted to those on qualification systems), provided that certain rigorous conditions are observed regarding transparency (in various aspects) of the systems²⁵. Qualification systems can be very valuable both in enhancing value for money (for example, by allowing procuring entities to work closely with its best suppliers to improve products and services) and reducing costs and delays in procurement²⁶. It should be stressed that it should be for Member States themselves to make the choice of whether or not to allow their entities use of these new flexibilities, taking account of their own circumstances.

Applying a utilities-type regime more broadly would also potentially remove other unjustified limitations that might be interpreted as applying in the extensive (and rather ambiguous) provisions of the Public Sector Directive. An example of this can be seen by referring to the explicit and exhaustive²⁷ list of evidence in Article 48(2) of that directive that may be demanded of economic operators. The concept of a closed list of permitted evidence is of limited value. However, the list may, on the other hand, make it difficult for contracting authorities to seek evidence of certain matters that are in fact relevant and appropriate for assessing technical ability to perform the contract, unless (which is not clear) Article 48(5) allowing the evaluation of “skills, efficiency, experience and reliability” for certain operations can be interpreted as overriding the need for evidence called for to fall within the explicit list. The main value of removing such provisions, as discussed below, would be its value to simplification, but it might also remove some unjustified obstacles to obtaining value for money.

We can note that the Defence and Security Directive already provides for some of the flexibility offered by the Utilities Directive, notably in the possibility it gives, like the Utilities Directive, for use of the negotiated procedure with a notice for any procurement²⁸. However, it does not provide for other important flexibilities, notably the flexible methods of advertising and the use of mandatory qualification systems. The latter, it is submitted, could be of particular value in the defence sector: they provide the best opportunity for thorough assessment of supplier capability (including on security matters) within an adequate time scale, rather than requiring this to be fitted within the timescales of each specific procurement; and they also provide a means for contracting authorities to work closely with their best suppliers to encourage development and innovation, as has happened in the utilities sector.

In addition, applying the rules of the utilities regime to procurement governed by this directive would also improve the rules on use of an open form of tendering for contracts currently covered by that directive, in the sense of a procedure that gives all interested and qualified firms a chance of winning the contract based on a tender. The open procedure that is found in the Public Sector and

²⁴ Utilities Directive Article 42.

²⁵ Utilities Directive Article 53.

²⁶ On the benefits and costs of these systems see S. Arrowsmith, *Government Procurement in the WTO* (2003, London: Kluwer Law International), pp.232-236.

²⁷ The exhaustive nature of the list was established in Case 76/81, *S.A. Transporoute et Travaux v Minister of Public Works* [1982] ECR 417 and Joined Cases 27-29/86, *S.A. Construction et Entreprises Industrielles (CEI) and others v Société Coopérative "Association Intercommunales pour les Autoroutes des Ardennes" and others ("CEI and Bellini")* [1987] ECR 3347.

²⁸ Defence and Security Directive, Article 25.

the Utilities Directive was not been included at all in the Defence and Security Directive, apparently because it was considered unsuitable for defence and security procurement. However, as Heuinckx has argued²⁹, this is far from the case, in that there may at least some cases in which the number of potential tenderers is limited and the procuring entity prefers to invite all those who are capable of tendering. Further, a procuring entity might prefer to use an open procedure to encourage participation by suppliers who might fear abuse of the selection stage if a negotiated or restricted procedure were used. It seems rather surprising that the Defence and Security Directive does not explicitly include a procedure that might be useful in some cases for Member States to obtain value for money and which also is the most transparent in the directives, given the emphasis that the directives generally place on transparency as a means to achieve the objectives of the single market. An open-type procedure can be achieved by using a restricted procedure in which the procuring entity indicates in advance that it will consider all those interested who meet the suitability criteria and will not further reduce numbers by inviting only some of those to tender. However, such an approach would still differ from the open procedure of the directives in that it would in principle probably require attention of suitability prior to tendering³⁰ (unlike the open procedure which actually precludes this prior to submission of tenders), which could involve unnecessary costs. Applying the current utilities rules to procurement covered by the Defence and Security Directive would both clarify the availability of an “open” approach as well as providing access to the advantages of the open procedure itself. This would again increase flexibility in the sense of enhancing the choices available to Member States (although allowing them, of course, the flexibility to use less rigid procedures than the open procedure should they choose to do so).

The procedures of the current Utilities Directive would also give sufficient flexibility for Member States to pursue value for money in the award of concession arrangements. There is, in the author’s view, no justification to make a distinction between concessions and other arrangements from a procurement perspective. The special treatment of concessions arose for purely historical reasons and many other complex contracts, notably privately financed infrastructure contracts, present exactly the same features as concession arrangements so far as procurement issues are concerned – for example, bids by consortia, long terms for the agreement, and uncertainty over the best technical, financial and legal solutions due to the complexity of the projects. A single directive based on the utilities rules that, in particular, allows free use of the negotiated procedure, would provide entirely suitable award procedures for all concessions, eliminating the need for any separate regulatory instrument on concessions.

As well as offering obvious flexibility for Member States in pursuing their objectives of value for money in the commercial aspects of procurement, as we have just discussed above, the utilities regime may also provides greater opportunities for promoting social and environmental objectives in procurement. However, the differences between the current Public Sector and Utilities Directives in this respect are rather unclear³¹, and this is one area in which adjustment, or at least clarification, of the rules may be appropriate under any new directive. This issue is considered further in section 4.4 below.

²⁹ B. Heuinckx, “The EU Defence and Security Procurement Directive: Trick or Treat?” (2010) 19 *Public Procurement Law Review* 9.

³⁰ Although factual issues concerning suitability can be verified later.

³¹ For a detailed analysis see Arrowsmith and Maund, note 23 above.

4. Simplicity

In addition to providing greater *flexibility* for Member States, as discussed above, moving to a single directive based on the current Utilities Directive would at the same time introduce a very considerable degree of *simplification* of the current procurement regime, in the sense of making the rules easier to understand operate (both for procuring entities and for economic operators) and reducing uncertainty. Such simplification will reduce the costs of operating the rules and the costs of litigation, and allow procuring entities to devote energy and resources on obtaining value for money rather than to formal legal compliance.

Simplification will arise, first, from the fact that the rules of the Utilities Directive are less complex and detailed than those of the Public Sector Directive. For example, as we have noted above, there are no conditions that must be satisfied for using the different competitive award procedures (only for use of the negotiated procedure without a notice), and no closed list of evidence that can be demanded from economic operators. Further, the free availability of the negotiated procedure with a notice provides for the possibility of using an award procedure which, being very flexible, is also relatively simple, if Member States or (where permitted to choose the procedure) their procuring entities, prefer this. Thus the flexibility that appears to exist, for example, in holding discussions with suppliers after submission of offers, means that there is much less room for dispute over issues such as post-tender negotiations, or corrections to errors in tenders, than exists in other award procedures. It is notable that there have been very few proceedings in the Court of Justice concerning the procedural rules of the negotiated procedure with a competition under the Utilities Directive, which may be because of the simplicity and clarity of the rules (although it is acknowledged there could also be other reasons to explain this).

Secondly, simplicity will be greatly enhanced if the above proposal is accepted by the very fact of having one single set of rules for different award procedures.

This will of itself make it easier to understand and operate the procurement rules. This is important particularly in the not uncommon case of procuring entities, economic operators, and advisors entities whose activities are subject to more than one of the three - and potentially, with the adoption of a new regime on concessions, four - procurement regimes.

In addition, simplicity will be further enhanced in this respect by removing some legal uncertainties and confusion over the relationship between the provisions governing the different regimes. The rules under the different regimes currently do not always fit together in a coherent and logical manner.

An example is the treatment of competitive dialogue. As mentioned above, in 2004 this award procedure was added to the Public Sector Directive as a procedure available (like the negotiated procedures) on limited grounds, for the award of particularly complex contracts. It was not included in the Utilities Directive: this was considered unnecessary since the negotiated procedure is a very flexible procedure capable of accommodating the type of procedure provided by competitive dialogue, as well as other procedural variations, and since it is freely available the Utilities Directive already provided Member States with the possibility for using the "competitive dialogue" approach. On the other hand, competitive dialogue *has* been made available under the Defence and Security Directive despite the fact that this directive, like the Utilities Directive, allows procuring entities free

use of the negotiated procedure³². However, competitive dialogue is not freely available under the Defence and Security Directive, but may be used only for particularly complex contracts, as under the Public Sector Directive.³³ The explanation given in recital 48 of the Defence and Security Directive for the inclusion of competitive dialogue is that use of either the negotiated procedure or the restricted procedure is not feasible in certain cases where competitive dialogue applies because it is not possible to define the contract with enough precision to allow candidates to draw up their offers. This is highly questionable in the case of the negotiated procedure since the negotiations allowed by that procedure can be used to that end, if necessary – including by following the same kind of approach as with competitive dialogue within the rules of a negotiated procedure - and inconsistent with the omission of competitive dialogue from the Utilities Directive³⁴. Further, the reasoning in recital 48 of the Defence and Security Directive would, if correct, imply that certain complex contracts cannot be awarded at all under the Utilities Directive because of the absence of a feasible award procedure (restricted, open (by implication) and negotiated procedures all being categorised by the recital as unsuitable). This kind of confusion can be eliminated at a stroke by providing for a single set of procedural rules for all regulated procurement.

Another example of inconsistency and potential for confusion is found in the fact that the Defence and Security Directive contains many specific references to the possibility of taking confidentiality and security issues into account that are not found in the equivalent provisions of the Public Sector Directive or Utilities Directive³⁵, even though confidentiality in contract performance (for example, in handling of the data of medical patients) may also be relevant in the context of those directives. For example, Article 22 of the Defence and Security Directive states that the contracting authority is to specify in the contract documentation the measures and requirements necessary to ensure the security of classified contract information, and also states various contract conditions that the procuring entity may require tenderers and their subcontractors to meet to protect classified information³⁶. It is not clear why confidentiality and security concerns should not be permitted under the Public Sector Directive under its general provisions. The better view is that they are permitted to at least the same extent at all stages in the process³⁷ - but in that case it would be more logical for the directives all to be worded in the same way in these respects. In addition, the Defence and Security Directive includes certain clear *restrictions* on the way in which certain security-related matters should be dealt with, notably by defining what may be required with respect to proof of security of supply³⁸, that have no parallels in the other directives. Again, it is not clear why this matter should be dealt with expressly only in that Directive.

³² Defence and Security Directive, Art.25.

³³ Defence and Security Directive, Art.27 and also Art. 1(21) defining particularly complex contract.

³⁴ As well as with the approach sometimes adopted in practice to awarding contracts under the negotiated procedure: see section 2.2 below.

³⁵ For a full account see Heuninckx, note 29 above.

³⁶ See also, for example, Article 45(2) of the Defence and Security Directive which in permitting exclusion for criminal convictions related to the economic operator's trade or profession refers expressly to infringement of existing legislation on the export of defence and/or security equipment, an explicit reference that is absent from the corresponding provision in Art.45(2)(c) of the Public Sector Directive.

³⁷ See also Heuninckx, note 29 above. In Case C-324/93, *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd* () [1995] E.C.R. I-563, paras.44-45, indicated that ability to ensure security of the supplies delivered may be a contract award criterion, for example.

³⁸ Defence and Security Directive Article 43.

Another significant way in which a single directive could potentially enhance the simplicity of the procurement regime is by eliminating or reducing the complex rules that set the boundaries between them. This would be the case, in particular, if a single uniform regime were to be established for procurement covered by all three directives, including uniformity in the exclusions, the entities covered, the activities covered, and the thresholds for application of the directives. As regards the coverage of the Defence and Security Directive and the Public Sector Directive there is, it is submitted, very clearly no reason for a different approach to any of these matters, and the rules can be assimilated very easily. (The fact that some of the exemptions may never or rarely apply outside the field of defence and security procurement does not mean that it is necessary or desirable to confine them formally to that sphere only – if the substantive conditions for their use are met then they should be available regardless of the nature of the procurement). With regard to the Utilities Directive and the other two directives there is, again, no justification for the differences that currently apply between the three different directives as regards exclusions. However, in respect of other matters would need careful consideration, as there is room for debate over whether full uniformity of the coverage rules is feasible and desirable.

One first question here is whether the scope of procuring entities covered by the directives should be assimilated. In this respect, both the Public Sector Directive and Utilities Directive cover contracting authorities³⁹, but the Utilities Directive covers, in addition, “public undertakings” and entities (including private entities) that have special or exclusive rights to carry out one of the utility activities regulated by the directive⁴⁰. (The Defence and Security Directive applies to contracts covered by either directive that are concerned with the subject matter covered by the Defence and Security Directive). The relevance of the category “public undertakings” under the Utilities Directive has been reduced⁴¹ by the fact that “contracting authority” has been interpreted broadly to include entities that supply goods or services to a market except where these operate on a wholly commercial basis⁴² combined with the fact that entities that carry out utility activities on a commercial basis are largely exempt anyway from the directives⁴³. The main difference between the directives thus lies in the fact that the Utilities Directive covers certain private entities that have special or exclusive rights. The case for regulating these entities at all is limited and they are not generally regulated under other trade agreements on procurement, including the World Trade Organization’s Government Procurement Agreement. Although does not form part of the Commission’s 2011 proposals, an argument can thus be made that a new directive should simply limit regulation to bodies that are contracting authorities within the definition of the current directives. If that step were taken there would then (subject to the issue of thresholds discussed below) be no need for any definition of what are covered “utility” activities – contracting authorities would in principle be subject to a single set of rules for all their activities, whilst other entities would not be regulated.

³⁹ Public Sector Directive Article 1(9), Utilities Directive Article 2.

⁴⁰ Utilities Directive Article 2.

⁴¹ Although not necessarily eliminated, since it covers, for example, entities subject to a dominant influence of a contracting authority which might not be subject to the type of influence necessary (in terms of financing, management supervision or appointment) for the entity to be classified as a body governed by public law and hence as a contracting authority. However, it seems that this category is likely now to be at best insignificant and its inclusion in the directive of questionable value.

⁴² On this see Arrowsmith (ed.), note 21 above, section 4.1.2.3.

⁴³ See Arrowsmith, *The Law of Public and Utilities Procurement*, note 13 above, chapter 15.

Another difference between the coverage of the current directives that would need consideration, however, is the difference between the financial thresholds for their application. For supplies and services contracts these are much lower under the Public Sector Directive than under the Utilities Directive and the Defence and Security Directive. Although some suggestions have been made for raising the thresholds under the Public Sector Directive in line with the other directives, this is probably impractical in the short to medium term given that the thresholds in the Public Sector Directive have been set in line with those of the WTO's Government Procurement Agreement, which guarantees access to certain procurements within the EU to some of the EU's trading partners, under reciprocal arrangements⁴⁴; and it, also, is not included in the Commission's current proposals. The difficulty of any upward adjustment to these thresholds is increased by the agreement on revision to the GPA – including the reciprocal coverage of the Parties - which was concluded at the end of 2011⁴⁵. Harmonising the thresholds for the Public Sector Directive and the other directives would thus effectively mean reducing the thresholds for the other directives. Such a change would be a retrograde step from the perspective of flexibility. On the other hand, if the entity coverage of the Utilities Directive were changed so that only contracting authorities were covered, lowering the thresholds for utility activities would be quite a limited step. Assuming that that step is also taken, it is submitted that, on balance, the simplicity that would result from such a change – effectively precluding the need for any rules to demarcate the coverage of the “utilities” and “other” procurement rules in terms of defining utility activities and dealing with contracts for more than one activity – would probably justify lowering the thresholds for the relevant contracts. Applying a single, simple threshold for defence and security procurement might similarly be justified by concerns for simplicity. If, however, it is preferred to maintain a higher threshold for procurement of this kind, the most simple approach would be to define the scope of this lower threshold solely by reference to the scope of the relevant GPA exclusions.

In the author's view the same thresholds should be applied also to concession contracts as to other types of regulated contracts.

5. Adjustments to the regime of the Utilities Directive

We have so far suggested that the way forward for reform is to apply a single set of rules to the procurement of contracting authorities based in principle on the rules of the current Utilities Directive. For the most part these rules provide a suitable regulatory framework as they stand at present. However, there are some aspects of these rules in which small changes or, at least,

⁴⁴ See S. Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International; 2003), and for recent developments, S. Arrowsmith and R. D. Anderson (ed.), *The WTO Regime on Government Procurement: Challenge and Reform* (CUP; 2011) *passim*. Where utilities are covered by the GPA the higher thresholds of the Utilities Directive are reflected in that agreement. The higher thresholds for the Defence and Security Directive are based on the view that the GPA does not apply to such procurement (see recital 18 to that Directive). For the relevant GPA exclusions see GPA Article XXIII.1 and relevant exclusions in the EU's Annexes which exclude the procurement of Defence Ministries apart from purchase specified in a particular list, which does not include products of an exclusively military nature nor certain dual use products.

⁴⁵ On this see R. D. Anderson, “The conclusion of the renegotiation of the WTO Agreement on Government Procurement in December 2011: what it means for the Agreement and for the world economy” (2012) 21 P.P.L.R. 83.

clarifications may be desirable as part of the reform process. The most significant are summarised briefly as follows. Some of these issues are, in fact, addressed in the Commission's proposals, but others are addressed inadequately or in a manner that is not clear, as is elaborated below. It can be noted that the Commission's current proposals for a new directive on utilities also contain a range of other reforms paralleling reforms for the public sector which, in the author's view, will increase burdens on purchasers and the complexity of the regime with little or no benefit and thus are not desirable⁴⁶. Detailed consideration of these specific proposals is beyond the scope of this article, which is focused on the author's own proposals for reform.

First, and most significantly, the rules on framework agreements and dynamic purchasing systems need reconsideration. The rules on framework agreements in the utilities sector currently lack clarity and it is questionable whether they provide an adequate legal regime for controlling the use of frameworks by utilities⁴⁷. This is particularly the case given that the placing of call-offs under framework agreements under the utilities rules appears to be wholly or largely excluded from the system of supplier remedies. This may be one area in which it is desirable to reduce rather than increase flexibility, perhaps by applying a similar regime to that of the current Public Sector Directive. This is to a large extent provided for in the Commission's current proposals⁴⁸. As regards the dynamic purchasing system concept, this has – as predicted by the present author when it was adopted⁴⁹ – hardly been used⁵⁰, and needs to be replaced by a truly dynamic system that allows procuring entities to purchase from electronic systems without the need for a new notice and call for tender for every call-off, based on offers that appear at the time of call-off on the electronic system. Neither the proposed revisions to the dynamic purchasing system concept under the proposals for a new directive⁵¹, nor proposed new rules on electronic catalogues⁵², provided for this.

Secondly, the rules currently provide that a notice of a qualification system can be used as the means to advertise a contract instead of a contract notice or periodic indicative notice only where the potential bidders are all to be drawn from the qualification system.⁵³ There is no apparent justification for this: it simply results in less competition than might otherwise be available (although in practice a procuring entity can encourage non-registered providers that it would like to invite to register on the system before it commences the procedure). It would be useful to remove this restriction.

Thirdly, as the author has argued elsewhere, the rules on the conduct of electronic auctions in the Utilities Directive arguably need amending to allow negotiation of tenders after an auction procedure when the negotiated procedure is used: there is no reason why this possibility should be

⁴⁶ E.g. those referred to in note 11 above.

⁴⁷ See the discussion in Arrowsmith, note 14 above, pp.1062-1071.

⁴⁸ Proposal for a Directive on procurement by entities in the water, energy, transport and postal services sectors, note 6 above, Article 45.

⁴⁹ Arrowsmith, note 14 above, p.1209.

⁵⁰ See S. Arrowsmith, "Methods for purchasing on-going requirements: the system of framework agreements and dynamic purchasing systems under the EC Directives and UK procurement regulations", ch.3 in S. Arrowsmith (ed), *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement* (West, 2010/11).

⁵¹ Proposal for a Directive on procurement by entities in the water, energy, transport and postal services sectors, note 6 above, Article 46.

⁵² Proposal for a Directive on procurement by entities in the water, energy, transport and postal services sectors, note 6 above, Article 48.

⁵³ Utilities Directive Article 54(9).

allowed in negotiated procedures in general, but not when an auction is held as part of the negotiated procedure⁵⁴. The fact that this possibility is not allowed at present following an auction phase in negotiated procedures has resulted from the fact that text of the auction rules was drafted in the context of the Public Sector Directive and simply copied into the Utilities Directive without considering how the rules tie in with the other rules of the latter Directive. In practice, procuring entities will not generally wish to negotiate tenders after an auction, since auctions will generally prove more effective as tool for securing value for money without the possibility of negotiation. However, there are exceptional cases in which this may be useful, notably in the context of collaborative auctions, which research suggests are made more difficult if post-auction negotiations are prohibited⁵⁵.

Another specific issue that needs some attention is the relationship between selection and award criteria. Specifically it is necessary to address the interpretation that has sometimes been put on the case of *Lianakis* that matters considered at selection stage can never be considered when applying the award criteria. It is not proposed to revisit this here this extensively debated issue⁵⁶, other than to note the author's view⁵⁷ that any matter should be able to be considered at the award stage provided that is related to the quality of the offer, and that this can potentially include experience of tenderers' personnel *or* of the tenderer itself. Both may be crucial in assessing, in particular, the quality of professional services that is likely to be provided as compared with that of other tenderers. In the author's view, that this is possible is in fact the correct interpretation of the *current* directives and is not precluded by *Lianakis* and subsequent CJEU case law, which concerned cases in which the assessment was not on the facts directed at assessing the quality of the offer at all. However, because of the extent of confusion and the importance of the issue, some clarification along these lines is essential, either in the text or recitals of the new single directive, or in clear accompanying guidance. The Commission's proposals contain provisions to address this issue⁵⁸, but do so only to allow consideration of the quality and experience of staff, and of the firm itself; and only for services and contracts involving design of works contracts (which will create difficulties for, in particular, certain mixed contracts that include works or services).

Finally, there is some uncertainty over the possibility for promoting horizontal policies through procurement⁵⁹, and clarification, and possibly reform, of these rules is needed. It is beyond the scope of this chapter to consider this issue in any detail, and we will not here consider the most controversial issues such as whether it is appropriate to remove the restrictions that currently exist

⁵⁴ Arrowsmith, note 14 above, pp.1186-1188 and 1205-1206.

⁵⁵ See S. Arrowsmith and A. Eyo, "Electronic Auctions in the EC Procurement Directives and a Perspective from UK Law and Practice", chapter 12 in S. Arrowsmith (ed), *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement* (West, 2010/11).

⁵⁶ See, in particular, Arrowsmith (ed.), note 21 above, at 6.7.2.6; P. Lee, "Implications of the *Lianakis* decision", 2010 (2) *Public Procurement Law Review* 47; S. Treumer, "The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception?" (2009) 18 *Public Procurement Law Review* 103.

⁵⁷ Arrowsmith (ed.), note 21 above, at 6.7.2.6.

⁵⁸ Proposal for a Directive on procurement by entities in the water, energy, transport and postal services sectors, note 6 above, Article 76.

⁵⁹ On the rules in the utilities sector specifically see Arrowsmith and Maund, note 23, above. The points made here are relevant for all the current directives, however.

on horizontal policies going beyond the way that the contracts is performed⁶⁰ (for example, requirements that a supplier's business as a whole should meet particular ethical or environmental standards, or limiting access to certain types of business, such as Small and Medium-sized Enterprises). However, there are three points that certainly need clarification to bring coherence into the current rules and remove uncertainty.

One is the question of whether award criteria, contract conditions or other mechanisms for implementing horizontal policies can cover methods of production of supplies. There is some confusion on this point, since the European Commission suggests in its formal guidance that to do so is unlawful as a general principle⁶¹. However, it also gives as examples of permitted criteria measures that appear to concern production, notably criteria relating to "green" energy and the possibility of using such measures is also supported by the case law⁶². It needs clarifying that such measures are permitted in principle. Not least this is because to rule them out precludes any environmental policies that take account of the impacts of the whole life-cycle of a product and require procuring entities to focus on only some elements of environmental impact – an approach that is not only arbitrary but could be counter-productive when there are significant impacts at the production stage. The 2011 proposals of the Commission in fact provide for this, by expressly allowing consideration of environmental costs of production⁶³.

Secondly, whilst contract conditions may clearly cover matters related to the workforce on the contract – for example, by requiring employment on the contract of long-term unemployed persons or those with disabilities - the Commission has suggested that it is not possible to use *award criteria* relating to these matters, except where tenders are otherwise equal⁶⁴. Again, it is suggested that this is incorrect in light of the case law of the CJEU⁶⁵ and it is also unjustified given that award criteria can offer a more efficient method of policy implementation in some cases than contract conditions⁶⁶. There is need for clarification of the rules to this effect.

Finally, it is widely considered that – at least under the Public Sector Directive⁶⁷ - economic operators cannot be excluded from a contract because of inability to perform contract conditions

⁶⁰ On the distinction between these and other policies see generally S. Arrowsmith, "Horizontal Policies in Public Procurement: a Taxonomy" (2010) 10 *Journal of Public Procurement* 149, and for an analysis of the distinction in EU procurement law S. Arrowsmith, "Application of the EC Treaty and Directives to Horizontal Policies: a Critical Review", ch.4 in Arrowsmith and Kunzlik (eds), note 23 above.

⁶¹ European Commission, *Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement* COM(2001)566 final, p.10.

⁶² For discussion see, in particular, P. Kunzlik, "The Procurement of "Green" Energy", ch.9 in S. Arrowsmith and P. Kunzlik (eds), note 23 above.

⁶³ Proposal for a Directive on procurement by entities in the water, energy, transport and postal services sectors, note 6 above, Article 77(1)(a).

⁶⁴ European Commission, *Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement* COM(2001)566 final, pp.14-15.

⁶⁵ Case C-225/98, *Commission v France* [2000] ECR I-7445 (*Nord Pas de Calais*), which the Commission in its Communication, above, interprets as allowing such considerations as award criteria only where other aspects of tenders are equal. However, this was not mentioned by the Court; nor is it easy to see how such a limit could be read into the directives.

⁶⁶ For a summary of costs and benefits of different approaches see Arrowsmith, note 60 above.

⁶⁷ On whether this is also applicable for the utilities rules see Arrowsmith and Maund, note 23 above.

relating to workforce matters, on the basis that the former do not concern “technical” capability⁶⁸. This is unjustified since it places horizontal concerns on a lower level than commercial concerns without any good reason for doing so. Further, the distinction between different kinds of contract conditions for the purpose of determining technical capacity creates uncertainty since it is not clear into which category (technical or non-technical) some conditions, such as those relating to delivery and disposal of a product, fall. This matter also needs addressing.

6. Conclusion

This article has set out a simple proposal for reforming the EU procurement directives as an alternative to the approach currently proposed by the European Commission. In this respect, it has been suggested that the EU should regulate procurement through a single directive that sets out a single set of procedural constraints for all regulated procurement. This directive should take as its starting point the procedural rules currently found in the Utilities Directive although perhaps with some modifications, in particular as regards the rules on framework agreements, dynamic purchasing systems, and electronic auctions. Such an approach will afford the flexibility necessary for Member State to promote their own procurement policies, including value for money, in an appropriate way - in particular, it will allow Member States to authorise use of procedures involving negotiation, allow them to take account of the significant benefits of qualification systems, and facilitate cost-effective approaches to advertising contracts. Further, and of much importance, the approach advocated will greatly reduce the complexities and uncertainties that apply under the current regulatory regime. This will result both from the greater simplicity of the content of the utilities rules as compared with the rules that apply under the other directives, and from the very existence of a single regime, which, inter alia, will eliminate the need to operate under multiple regimes and to determine the boundaries between them. Thus this approach will promote both the flexibility and simplification objective of the current reform agenda whilst at the same, it is submitted, providing a suitable framework of rules for promoting the single market in public procurement in Europe.

⁶⁸ Based on Case 31/87, *Gebroeders Beentjes BV v Netherlands ("Beentjes")* [1988] ECR 4635. For elaboration on this point see S. Arrowsmith, “Application of the EC Treaty and Directives to Horizontal Policies: a Critical Review”, ch.4 in Arrowsmith and Kunzlik (eds), note 23 above, at 8.1.4.