Public expenditure takes a wide variety of forms, not all of which are covered by the EU procurement rules. This chapter identifies the range of activities and arrangements which fall within the 2014 procurement directives, and examines how the definition of contracts which are subject to some or all of the rules has evolved over time. The Treaty on the Functioning of the European Union (the Treaty) forms the basis in primary law for EU regulation of public procurement, in particular its provisions on free movement of goods and services, freedom of establishment, and the development of the internal market. The application of these principles by the Court has formed the basis for the extension of the procurement rules into areas not explicitly covered by the text of previous directives, as discussed in the final section of this chapter. The origin and possible future developments in these principles as they relate to procurement are explored in Chapter 2.

In EU law, a ‘public contract’ is defined by who is doing the purchasing, what they are buying, and from whom they buy it. The procurement directives cover central government, sub-central government, bodies governed by public law, and associations of one or more of these authorities or bodies. They also cover public undertakings and private or semi-private entities which have been granted special or exclusive rights in the water, energy, transport, and postal sectors, where they award contracts related to these activities. The directives apply to contracts with an estimated value above monetary thresholds which are linked to those under the WTO Government Procurement Agreement. Certain types of public expenditure fall outside of the EU and WTO rules, for example the purchase of land, social welfare payments, and employment contracts. Subsidies, grants, and contracts for research and development services are also excluded in most circumstances. Separate rules apply for defence procurement and, with the coming into force of the 2014 directives, to concessions and social, health care, and other specific services. The justification for these varying levels of regulation generally lies in the

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1 As set out in Arts 26, 28, 34, 49, and 56 of the Treaty.
lack of cross-border interest which is imputed to the contracts, or the impracticality
of holding a tender competition, for example where a public authority wishes to
purchase land or hire employees.

**Definition of Public Contracts**

1.03 Public contracts are defined in Article 2(5) of the Public Sector Directive as:

contracts for pecuniary interest concluded in writing between one or more eco-
nomic operators and one or more contracting authorities and having as their object
the execution of works, the supply of products or the provision of services.

The concept of an economic operator, who forms one of the necessary parties to
a public contract, includes any natural or legal person, grouping, or public entity
which offers supplies, services, or works on the market. The inclusion of public
entities in the definition is significant in light of the Court’s case law on public-
public cooperation. This has established that while in principle contracts for pecu-
niary interest between public bodies are covered by the procurement rules, certain
defined exemptions to this rule exist where the relationship between the entities is
one of control or genuine cooperation to fulfil a common objective. These exemp-
tions are now encapsulated in the 2014 directives and are discussed at paragraphs
1.49 et seq.

1.04 The ‘market’ on which an economic operator must offer supplies, services, or works
is not defined in the directives—i.e. if a public or private entity only offers goods or
services to the contracting authority in question, it might be argued that it does
not meet the definition of an economic operator and so the award of a contract to
it would not be governed by the directives. However, the Court has placed empha-
sis on the ‘pecuniary interest’ aspect of the definition, suggesting that where this
exists the nature and activities of an economic operator will not serve to remove a
contract from the scope of the directives. In the *CoNISMa* case, which concerned
the eligibility of a research consortium to tender for a public contract, the Court
cautioned against a narrow interpretation of the concept of ‘economic operator’
and held that a continuous presence on the market was not required.\(^2\) It also held
that the concept of an economic operator could include entities which are not pri-
marily profit-making and are not structured as a business.\(^3\)

1.05 Contracting authorities means the State, regional or local authorities, bodies gov-
erned by public law, or associations formed by one or more of these authorities
or bodies. A body governed by public law is one which: (i) has legal personality;

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\(^2\) Case C-305/08 *Consorzio Nazionale Interuniversitario per le Scienze del Mare (CoNISMa) v Regione Marche* [2009] ECR I-12129, paras 42–5.

\(^3\) *CoNISMa*, paras 30–5.
Definition of Public Contracts

(ii) has been established to meet 'needs in the general interest, not having an industrial or commercial character'; and (iii) is publicly financed or controlled. The Court has held that the second condition is not met where a body carries out its activities in a competitive environment and is administered according to criteria of performance, efficiency, and cost-effectiveness. However, the fact that a body carries out some of its activities in such conditions will not be sufficient to prevent it from being classified as a body governed by public law and thus subject to the directives in respect of all of its contracts, even if there is a separate accounting system in place for those activities which are subject to competition or carried out on a profit-making basis. The proportion of activities which are carried out in a competitive or profit-making capacity is not relevant for the purposes of classification of a body governed by public law.

The third condition requires that the body is publicly financed ‘for the most part’—that is, more than 50 per cent of its total income—or that control is exercised by way of management supervision or a board more than half of whose members are public appointments. This condition may be met whether the public financing or control is direct or indirect—for example, where fees to a professional association or statutory fund are set by law, or approval from a public supervisory body is needed for certain decisions only. It is possible for an organization to cease being a body governed by public law if the public finance or control condition is no longer met, for example where a university or research body ceases to receive public funding. The reference point for making this determination is the financial year when a procurement procedure begins.

A body may also come to fall within the scope of the definition even if it did not meet all three conditions at the time of its establishment.

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6 Thus, in Case C-393/06 Ing Aigner Wasser-Wärme-Umwelt, GmbH v Fernwärme Wien GmbH [2008] ECR I-02339, a body set up to provide district heating from waste in Vienna and which enjoyed a ‘virtual monopoly’ in carrying out that activity was held to be a body governed by public law, even though it faced competition in respect of the activity to which the contract related.
10 Case C-380/98 University of Cambridge, para 44.
11 In Universale-Bau, the Court held that a body which was not established to meet needs in the general interest, but which had subsequently taken responsibility for such needs, met the condition (Case C-470/99, at para 63). The wording ‘established for the specific purpose of meeting needs in the general interest’ remains in the 2014 directives.
The Scope of Procurement under EU Law

1.07 Public contracts are divided into those having as their object: the design, execution, or realization by any means of works (‘public works contracts’); the purchase, lease, rental, or hire-purchase of products (‘public supply contracts’); and the provision of services (‘public service contracts’). The concept of realization by any means of a work corresponding to requirements specified by a contracting authority has been subject to judicial interpretation in the context of development agreements, discussed at paragraphs 1.68 et seq. The classification of contracts which contain mixed elements of works, supplies, and services is examined at paragraphs 1.13 et seq. ‘Pecuniary interest’ has also been subject to the Court’s interpretation, and may consist of payment which is limited to reimbursement of costs, or which is in the form of a waived debt or charge due to the contracting authority. It does not appear, however, to extend to payments made by third parties to the economic operator if the contracting authority does not incur any economic detriment.

1.08 The first recital to the Public Sector Directive states that public contracts are subject to the Treaty principles of free movement of goods, freedom of establishment, freedom to provide services, equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. It is an interesting formulation, inasmuch as it is limited to ‘public contracts’. The equivalent recital in Directive 2004/18/EC referred to ‘contracts concluded in the Member States on behalf of the State, regional or local authorities and other bodies governed by public law entities…’—which could include contracts without pecuniary interest or which did not relate to supplies, services, or works (for example, a contract not to do something or for the transfer of land). While the recitals are not binding in themselves, they express the intention of the legislator and may in this case signal an attempt to define the frontiers of applicability of the Treaty principles. It is not possible, however, for a directive (secondary legislation) to modify or limit the Treaty (primary law) or to curtail the Court’s ability to interpret it. Interestingly, the Public Sector Directive also defines ‘procurement’ as acquisition by means of a public contract. The term ‘procurement’ was almost entirely missing from the 2004 directives (with the exception of the recitals), whereas it appears in several places in the 2014 directives—such as the sections on ‘Principles of procurement’.

12 Case C-159/11 Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce and Others, judgment of 19 December 2012, not yet reported, para 29.
14 Case C-306/08 Commission v Kingdom of Spain (‘Valencia Development Agreements’) [2011] ECR I-04541. The Court did not address this question directly, but AG Jaaskinen considered that the absence of a ‘mutually binding relationship in the nature of an exchange of performance with a tangible economic value between the contracting authority and the economic operators executing the works or services in question’ precluded a finding that a contract for pecuniary interest existed (AG’s opinion at para 87).
15 Art 18 Public Sector Directive; and Art 36 Utilities Directive. Art 1(2) of the Public Sector Directive states that: ‘Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or
Thresholds and Valuation of Contracts

The 2014 procurement directives apply to public contracts which are valued above defined monetary thresholds. These are set with reference to the special drawing rights (SDR) under the WTO Government Procurement Agreement, with the corresponding value in euro and other European currencies being fixed every two years. Central government bodies, which are specified in Annex I of the Public Sector Directive, are subject to lower thresholds for supply and service contracts than local government or bodies governed by public law (currently €134,000 as opposed to €207,000.) Utilities have a higher threshold for supply and service contracts (currently €414,000). All categories of contracting authority and entity are subject to the same higher threshold for public works contracts (currently €5.186 million.) This higher threshold also applies in respect of concessions, whereas Title III services are subject to intermediate thresholds of €750,000 for the public sector and €1 million for utilities.

The differentiation in thresholds reflects the historical development of both the EU and WTO regimes, with authorities outside of central government being brought within the rules at a later stage and to a more limited extent, and lower value works contracts considered to be of little cross-border interest. Some Member State governments sought a general raising of the thresholds as part of the 2014 revision, but this was resisted. It has also been argued that, given the legal uncertainty regarding the application of the Treaty principles to below-threshold contracts, it would be preferable to have lower thresholds for application of the directives, below which no obligations would arise under EU law.16 As it stands, the level at which the thresholds are set mean that roughly 20 per cent of all public expenditure on goods, services, and works is advertised in the Official Journal.17

The valuation of a contract for the purpose of determining whether the directives apply is not always straightforward. In theory, any contract exceeding the relevant threshold which has not been advertised in the Official Journal may be subject to services are intended for a public purpose.’ However, in the author’s view, the definition of public contracts is still the central point of reference for determining applicability of the directives. In particular, the use of the term ‘acquisition’ in the above definition of procurement should not be taken to overrule the Court’s case law on ‘realisation of a work by any means’. This view is supported by Recital 4 of the Public Sector Directive, which advises that ‘acquisition’ should be broadly interpreted.

17 European Commission (2012) Public Procurement Indicators 2011 gives an estimate of €425 billion for contracts published in the OJEU as opposed to general expenditure by government and utilities of €2,405 billion on goods, services, and works for the EU27 in 2011. However, the figures must be treated with caution due to the incomplete nature of information recorded in award notices and difficulties tracking overall spend. It is also the case that many authorities choose to advertise below-threshold contracts in the OJEU.
challenge either by a would-be bidder or by the Commission itself. Contracting authorities are thus obliged to exercise care when estimating the value of their expenditure or awarding contracts without a fixed price. A number of rules and principles govern the estimation of value for the purpose of applying the thresholds. Chief among these is the prohibition on subdividing contracts in order to avoid application of the directives. The estimated value of a contract must take into account the total amount payable, net of VAT, including any form of options and any renewals. If there are various operational units within the contracting authority, the estimate must be calculated based on the aggregated value of their requirements, unless they are independently responsible for their own procurement or certain categories thereof. Specific rules apply for calculating the value of service and supply contracts which are regular in nature or intended to be renewed within a given period, based on a reference period of 12 months. For service contracts without a fixed value, a reference period of 48 months applies, or the total estimated value over the full term if it is for less than 48 months.

Rules on aggregating contract values between similar procurement categories are not established in the directives. So, for example, if a contracting authority wishes to award separate contracts for paper and envelopes, or for the design and construction of a building, this is only forbidden if such divisions are intended to avoid the application of the directives and are not objectively justified. The administrative inconvenience of such arrangements will often outweigh any perceived benefits in avoiding the need to conduct an OJEU-level tender. If similar contracts are awarded to the same operator, they may be subject to scrutiny by national authorities, other operators, or the Commission itself. In 2010, the Commission brought a challenge against Germany in respect of the award by a municipality of successive contracts to the same firm of architects for a renovation project realized in three separate phases. The EU rules were not applied as the contracts were individually valued below the threshold, and the municipality argued that this was necessary for budgetary reasons. The Court found that the failure to tender was not justified as the services served a single economic and technical function. Here, as in many other areas of its procurement jurisprudence, the Court has taken a purposive approach to the application of rules and principles; the designation or administrative structure of a contract is irrelevant.

18 Art 5 Public Sector Directive; Art 16 Utilities Directives; and Art 8 Concessions Directive.
20 Art 5(11) and (14) Public Sector Directive; and Art 16(11) and (14) Utilities Directive.
21 Case C-574/10 Commission v Germany, judgment of 15 March 2012, not yet reported.
22 This was the test set out in Case C-16/98 Commission v France [2000] ECR I-08315 to determine when works contracts should be aggregated.
Mixed Contracts

Some time and attention has also been dedicated by the Court to the proper characterization of mixed contracts, both those which involve a combination of services or supplies and works, and those which contain some elements which are not covered by the procurement directives. Many service or supply contracts involve an aspect of works—for example, installation of medical equipment or parking metres. If such contracts could be characterized as works, they would be subject to the higher threshold and many more would escape from the OJEU. The Court has held that it is the main purpose of a contract which determines its classification. The 2014 directives incorporate the principles developed in case law regarding the classification of mixed contracts in order to determine which rules apply. Under Article 3 of the Public Sector Directive, for contracts which contain both fully covered services and services subject to the new lighter regime set out in Title III, the element with the highest estimated value determines the correct classification for the entire contract. The same rule applies to supply contracts which involve a service element or vice versa, but as the rules and thresholds for these contracts are the same, their classification is of little moment, unless the service is one which would be subject to Title III.

Another type of mixed contract is one which contains some elements which either fall outside of the EU procurement regime completely or are subject to the Concessions Directive. For example, a contract for legal services may include representation or document certification services which are now excluded from the scope of the Public Sector Directive. A contract to renovate an office building might include a concession arrangement for car parking or catering. The relative value of the different elements does not matter here. If the elements of the contract are ‘objectively separable’, contracting authorities are free to decide whether to award separate contracts for differently regulated elements, or to combine them.

23 See Case C-412/04 Commission v Italy [2008] ECR I-00619, paras 47–50. The Court held that the main purpose must be determined by an objective examination of the entire transaction to which the contract relates, and that the value of the various matters covered would be just one criterion among others to be taken into account in that assessment.

24 There was one exception to the identical treatment of supply and Part A service contracts under Directive 2004/18/EC. Under Art 48(2)(f), an indication of the environmental management measures which would be applied in carrying out a contract was an acceptable selection criterion—but not for supply contracts. The origin or justification for this distinction was never entirely clear and it has been removed in the 2014 directives, allowing environmental management measures to be requested at selection stage for all contracts.

25 The idea of the elements of a contract being inseparable or indivisible was developed by the Court in its judgment in Joined Cases C-145/08 and C-149/08 Club Hotel Loutraki AE and Others [2010] ECR I-04165, in which it held that the inclusion of requirements to provide certain works and services in a contract for the privatization of a casino did not bring it within the scope of the procurement directives, as the main object was the sale of shares in a public undertaking ( paras 48–63 of judgment). Recital 11 of the Public Sector Directive emphasizes that the determination
If a combined contract is awarded, the ‘red sock’ principle applies—the inclusion of an element covered by the Public Sector Directive means that it applies to the entire contract. The only exception to this principle is where a mixed contract contains a concessions element, and the value of the element subject to the Public Sector Directive in itself is below the relevant threshold.26

1.15 If a mixed contract contains separate activities subject to the Public Sector and Utilities directives, then the treatment of the mixed contract depends on the activity for which the contract is principally intended.27 If it is ‘objectively impossible’ to determine which activity this is, then the default position is to apply the strictest rules which would apply to any element.28 If a contract contains elements which are subject to the Defence and Security Directive or exempt from the procurement rules under Article 346 of the Treaty, the question of whether these elements are objectively separable again comes into play. However, the default position is reversed—if the elements are not objectively separable, then the inclusion of an element which would be subject to the Defence and Security Directive or exempt under Article 346 means that the entire contract can be tendered subject to the lightest rules which would apply to any element.29 If the elements are objectively separable, the contracting authority may still decide to award a mixed contract and to apply the lightest rules which would apply to any one element, provided this decision is justified by objective reasons and is not made for the purpose of avoiding application of stricter rules. Needless to say, the extent to which elements are objectively separable, or a decision to award a single contract is based on an objective justification, may be subject to review by national courts and the CJEU.

Contracts in the Water, Energy, Transport, and Postal Services Sectors

1.16 Contracts which are fully subject to the Utilities Directive are excluded from the scope of application of the Public Sector Directive. Each directive sets requirements both in terms of the characteristics of the organizations to which it applies (ratione personae) and the type and value of contracts covered (ratione materiae). Whereas the classification of the purchasing organization as a contracting authority is an essential prerequisite for the application of the Public Sector Directive, a

of whether elements of a contract are objectively separable must be carried out on a case-by-case basis, and that both economic and technical considerations may be relevant in this determination.

26 Art 3(4) Public Sector Directive, final paragraph. The ‘red sock’ principle is a metaphor drawn from laundry—referring to the inclusion of a single element which requires special treatment of the entire load.
27 Art 6(2) Utilities Directive.
28 Art 6(3) Utilities Directive.
broader range of entities may be subject to the Utilities Directive where they are carrying out one or more of the activities covered by it. The Court has held that the scope of application of the utilities rules is strictly circumscribed, so that contracting entities are not obliged to apply them in respect of any other activities. The list of covered activities is set out in Articles 7 to 14 of the Utilities Directive, and closely resembles the list of covered activities under Directive 2004/17/EC, with a few changes.

The term ‘contracting entity’ refers to a contracting authority, public undertaking, or any other body (public or private) if it has been granted special or exclusive rights by a competent authority of a Member State and is awarding contracts in pursuit of the covered activities. A public authority may be subject to the Utilities Directive for some contracts and to the Public Sector Directive for others. Private sector organizations which have been granted special or exclusive rights—for example, to extract oil, gas, or coal, or to operate transport networks—may be subject to the Utilities Directive. However, where the rights in question have themselves been granted based on a transparent and objective procedure, then the grantee will not be subject to the procurement rules unless it is a contracting authority or public undertaking. There is specific EU legislation governing such rights in the oil and gas, electricity, transport, and postal services sectors.

Contracts awarded in the utilities sector are subject to a less prescriptive set of rules than that which applies to public sector contracts. Notably, contracting entities enjoy higher thresholds, greater freedom in choice of procedure and timelines, and can establish framework agreements for a period of eight years rather than four. They also have greater flexibility to award contracts to an affiliated undertaking or joint venture.

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30 Case C-393/06 Ing Aigner Wasser-Wärme-Umwelt.
31 Exploration for oil and gas has been excluded on the basis that these activities are subject to adequate competition. Exemptions in the oil and gas sectors had already been granted to the United Kingdom, Denmark, Italy, and the Netherlands by decisions of the Commission. Extraction of these fuels is still covered. Certain activities in the postal services sector, namely, financial, logistics, philatelic, and added-value electronic services, have also been excluded from the scope of Directive 2014/25/EU based on their exposure to competition.
32 Art 4(3) Utilities Directive.
34 Arts 29 and 30 of the Utilities Directive set out the conditions under which contracting entities may award contracts to affiliated undertakings and joint ventures without application of the directives.
The Scope of Procurement under EU Law

in addition to the provisions for exempted public-public cooperation outlined below. There is provision under Articles 34 and 35 of the Utilities Directive for activities to be excluded from its scope if they are directly exposed to competition on markets to which access is not restricted. This principle has led to the gradual exclusion of more activities from the scope of successive utilities directives, notably telecommunications services and financial, logistical, or added-value electronic services provided by entities active in the postal sector.

1.19 The rules on award of concessions apply both to contracting authorities and entities; however, activities in the water sector are excluded from the Concessions Directive (for reasons discussed at para 1.47 et seq), as are concessions for air transport or public passenger transport services, which are governed by separate regulations.\footnote{35 Art 10(3) Concessions Directive.} Concessions awarded by contracting entities for the pursuit of their activities in a third country are also excluded, provided these do not involve the physical use of a network or geographical area within the Union.\footnote{36 Art 10(10) Concessions Directive.} Concessions for activities which are exposed directly to competition are excluded on the same basis as applies under the Utilities Directive.\footnote{37 Art 16 Concessions Directive.} In the case of mixed concessions covering some activities in the utilities sector and some in the public sector, these exclusions are not available.\footnote{38 Art 22(3) Concessions Directive.}

### Specific Exclusions

1.20 The 2014 directives provide for a number of specific exclusions, some of which existed under previous generations of procurement directives and some of which are new. The rationale for each exclusion is normally given in the recitals. Employment contracts and contracts for the acquisition or rental of existing buildings, land, or other immovable property have always been excluded from the scope of the procurement directives. The impracticality of arranging tender competitions for such contracts is obvious, although in some cases the line may be blurred between employment and a consultancy arrangement, or between acquisition of existing buildings and a land development agreement (discussed below.) Where employment or acquisition of real property form part of a larger contract such as an outsourced service arrangement, the rules on mixed contracts will apply.

### Services of general interest

1.21 Services of general interest are subject to special treatment under the Treaty and this is reflected in the public procurement and State aid rules applicable to them. They are divided into services of general economic interest (SGEIs) and
Specific Exclusions

non-economic services of general interest, sometimes also known as social services of general interest. SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment, or universal access) by the market without public intervention.³⁹ Activities which may, depending on their organization, be classed as SGEIs include transport, postal, water, energy, telecommunications, and other services subject to a public service obligation. The 2014 directives simply state that they do not affect the freedom of Member States to decide what are SGEIs and how they should be organized and financed, in accordance with the State aid rules.⁴⁰ Non-economic services of general interest are activities that are performed without any consideration, by the State or on behalf of the State, as part of its duties in the social field, for example.⁴¹ They may include activities related to the army or police, air traffic control, compulsory social security services, education and childcare, or the operation of public hospitals. Non-economic services of general interest are explicitly excluded from the 2014 procurement directives (including the Concessions Directive)⁴²—however, this may also be seen as simply a restatement of the definition of public contracts, which requires pecuniary interest to apply.

Public communications networks

The 2004 directives contained an exemption for the award of contracts for the provision or exploitation of public telecommunications networks or services, that is, where a contracting authority itself acted as a telecommunications provider. Under the 2014 directives, the wording of this exemption has been changed to refer to ‘public communications networks’ and ‘electronic communications services’, while still applying only to contracts and concessions for the public provision or exploitation of such networks and services, as opposed to where a public body purchases services for its own use.⁴³ The exemption is justified with reference to

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³⁹ Commission Staff Working Document, Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SWD (2013) 53 final/2, p 21. The vagueness of this ‘definition’—which could extend to cover almost all public sector activity—probably reflects the discretion of Member States to decide what is an SGEI.

⁴⁰ Art 1(4) Public Sector Directive; Recital 9 Utilities Directive; and Art 4 Concessions Directive. Special rules regarding State aid apply to SGEIs: see Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02); and Commission Decision 2012/21/EU on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.


⁴² Recital 6 and Annex XIV Public Sector Directive; Art 1(6) and Annex XVII Utilities Directive; and Art 4(2) and Annex IV Concessions Directive.

⁴³ Art 8 Public Sector Directive; and Art 11 Concessions Directive. ‘Public communications network’ and ‘electronic communications service’ are defined in accordance with Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.
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the exposure of this sector to competition, as well as the desire to facilitate rapid dissemination of broadband internet services in particular.

Contracts awarded under international rules

1.23 Contracts or concessions which contracting authorities or entities are obliged to award under international procurement rules are excluded from the 2014 directives.\(^4^4\) In order to qualify for this exemption, the obligation must be set out in a legal instrument which has been notified to the Commission and the contract must be for works, supplies, or services ‘intended for the joint implementation or exploitation of a project’ by the parties to the agreement. There is a further exemption in the case of procurement financed wholly or for the most part by an international organization, where it has prescribed procurement rules. These exemptions could apply to contracts or concessions awarded on behalf of United Nations agencies, for example, or financed by the World Bank or European Investment Bank. A parallel exemption applies to contracts with defence or security aspects which are awarded under international procurement rules, which also includes agreements or arrangements for the stationing of troops.\(^4^5\)

Specific exclusions for service contracts

1.24 A motley collection of services enjoy exclusion from the directives, with justifications ranging from the obvious to the obscure. The long-standing exclusion for award of contracts by audiovisual and radio media service providers for programme material, or for contracts awarded to these organizations for broadcasting time or programme provision, is replicated in the 2014 directives.\(^4^6\) This has traditionally been justified on the grounds that such contracts involve distinct national cultural interests and thus should not be subject to cross-border competition. It has never been clear why the acquisition of printed or online media services, or the acquisition of audiovisual or radio material by authorities other than media providers, should not be subject to the same treatment or justification.

1.25 The pre-existing exclusion for arbitration and conciliation services is now accompanied by an exemption for certain legal services which are considered not to be of cross-border interest.\(^4^7\) The latter include representation before a court or tribunal, advice given in immediate contemplation of such proceedings, notary or document certification services, and trusteeship or other court-appointed or official functions performed by lawyers. In practice, it may prove difficult for contracting authorities


\(^{4^5}\) Art 17 Public Sector Directive; Art 27 Utilities Directive; and Art 10(5) Concessions Directive.

\(^{4^6}\) Art 10(b) Public Sector Directive; Art 21(i) Utilities Directive; and Art 10(8)(b) Concessions Directive.

\(^{4^7}\) Art 10(d) Public Sector Directive; Art 21(c) Utilities Directive; and Art 10(8)(d) Concessions Directive.
Specific Exclusions

to separate out these functions from more general legal services, which are subject to the lighter Title III regime. The rules on mixed contracts prescribe that the services with the greater estimated value should determine how the contract is classified; however, accurate estimation of legal costs, particularly where these include elements linked to judicial proceedings, can be challenging. Authorities may opt to err on the side of caution and treat legal services contracts or frameworks as being covered by Title III, even where they include a considerable element of excluded services.

Financial services connected to the issue, sale, purchase, or transfer of securities or other financial instruments—for example, for the issue of government bonds or public debt management—are excluded as under previous directives. This is now complemented by an exclusion for loans, regardless of their purpose, and for operations conducted with the European Financial Stability Facility and the European Stability Mechanism. While the difficulty of arranging transparent competitions for these types of financial service transactions must be acknowledged, arguably this is an area in which further cross-border competition could provide real gains both to the public purse and to the market.

Civil defence, civil protection, and danger prevention services which are provided by non-profit organizations—for example, a volunteer fire brigade or mountain rescue organization—are not covered by the directives. This can be understood based on the strong involvement of voluntary organizations in such services in many Member States and the need for continuity in service provision. However, the exemption does not extend to public contracts for ambulance services, which have been the subject of a number of cases before the European Court of Justice. Patient transport ambulance services are covered by the Title III regime for social and other specific services. The award of contracts for public passenger transport by rail or metro is governed by a separate EU regulation adopted in 2007, and so is excluded from the 2014 directives.

A final new exclusion relates to political campaign services when awarded by a political party in the context of an election campaign. In the recitals to the Public Sector Directive, we learn that political campaign and propaganda services, when delivered in the context of an election campaign, ‘are so inextricably connected to the political views of the service provider’ that the selection of that service provider cannot be made in accordance with the procurement rules. In addition to the

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48 Art 3(2) Public Sector Directive.
49 Art 10(e) and (f) Public Sector Directive; Art 21(d) and (e) Utilities Directive; and Art 10(8)(e) and (f) Concessions Directive.
50 Art 10(h) Public Sector Directive; Art 21(h) Utilities Directive; and Art 10(8)(g) Concessions Directive.
51 Art 10(i) Public Sector Directive; and Art 21(g) Utilities Directive.
52 Art 10(j) Public Sector Directive; and Art 10(8)(h) Concessions Directive.
53 Recital 29 Public Sector Directive.
importance of the service provider’s political views, the exemption might be justified based on the impracticality of conducting a procurement procedure within the short timescales which may apply after an election is called. Political parties will often fall outside of the definition of a contracting authority in any event, but in some Member States they are bodies governed by public law and so would be subject to the directives for contracts valued above the relevant thresholds.

Research and development services

1.29 Contracts for research and development (R&D) services are excluded from the scope of the directives unless the benefits of these services are reserved exclusively to the contracting authority and it also pays for them in full. The rationale here is to encourage spending on R&D which is either openly disseminated, attracts co-finance from other bodies, or both. The exemption, which also existed under the 2004 directives, has allowed for the development of ‘pre-commercial procurement’, a competitive process for the award of R&D service contracts which takes into account the State aid rules. The possibility of awarding contracts in this way was outlined in a 2007 Commission communication, and several EU funding programmes have specifically encouraged its use, including Horizon 2020. However, pre-commercial procurement can by definition only relate to the R&D phases (up to a limited volume of first production)—meaning that if public authorities wish to acquire the outcomes of the R&D on a commercial scale, they must hold a separate competition. The innovation partnership procedure, discussed in Chapter 3, aims to close this gap by allowing for the award of phased contracts which cover both R&D activities and commercial acquisition, as well as intermediate stages such as prototyping or piloting. The 2014 directives also make specific provision for intellectual property rights, which were not mentioned in earlier directives, to be addressed in technical specifications.

Defence and security

1.30 Articles 15 to 17 of the Public Sector Directive and Articles 24 to 27 of the Utilities Directive deal with procurement which involves defence or security aspects. Contracts which are subject to the Defence and Security Directive or specifically excluded from that directive are not covered by the Public Sector or Utilities Directives. Contracts may also be excluded where Member States invoke Article 346 of the Treaty due to the need to protect essential security interests, or where

54 Art 14 Public Sector Directive; and Art 32 Utilities Directive.
contracts are secret or subject to special security measures, provided the protection of these interests and objectives cannot be attained by less intrusive means.\(^5^7\)

The Defence and Security Directive aims to coordinate the award of contracts for military equipment, services, and works, and contracts which are considered ‘sensitive’—meaning they have a security purpose and involve classified information.\(^5^8\) It applies to contracting authorities and entities as defined in the Public Sector and Utilities Directives, and adopts the higher threshold for supply and service contracts applicable in the utilities sector. The basic rules on advertising, procedures, specifications, and selection and award criteria are adapted to take account of confidentiality and security of supply issues in particular. Special provisions also apply in relation to subcontracting, where contracting authorities may require that up to 30 per cent of a contract is subcontracted and impose requirements for the selection of subcontractors.\(^5^9\)

The Defence and Security Directive was intended in part to reduce reliance by Member States on the exemption available under Article 346 TFEU from the normal rules on free movement of goods and services. Article 346 provides that Member States may refuse to disclose information where this would be contrary to their essential security interests, and may take other measures necessary to protect their security connected with the production or trade in arms, munitions, and war material. Such measures cannot adversely affect the conditions of competition for products which are not intended for specifically military purposes. They also cannot extend beyond what is strictly necessary for the protection of the legitimate interests served by the exemption. The Court has interpreted and applied both of these conditions in order to limit the scope of applicability of Article 346 where contracts are for mixed civil and military purposes, or where the necessity of the measures to protect security interests is dubious.\(^6^0\)

If mixed contracts contain some elements covered by the public sector or utilities rules and some for which the Defence and Security Directive or for which Article 346 has been invoked, the least onerous rules applicable to any element will apply, provided that separate contracts cannot be awarded for objective reasons.\(^6^1\) This contrasts with the ‘red sock’ principle discussed above, which applies to mixed contracts not containing defence or security aspects. Concessions relating to defence or security are covered by the Concessions Directive; however, a number of

\(^{57}\) Art 15 Public Sector Directive; and Art 24 Utilities Directive.

\(^{58}\) ‘Contracts for the purpose of intelligence activities’ which are not defined are excluded under Art 13 Directive 2009/81/EC.

\(^{59}\) Art 21 Directive 2009/81/EC.

\(^{60}\) See Case C-337/05 Commission v Italy (‘Agusta Helicopters’) [2008] ECR I-2173; Case C-284/05 Commission v Finland [2009] ECR I-11705; and Case C-615/10 Insinööritoimisto InsTiimi Oy, not yet reported.

\(^{61}\) Art 16(2) and (3) Public Sector Directive; and Art 25(2) and (3), Art 26(2) and (3) Utilities Directive.
exemptions are available—for example, where applying the Directive would lead to the disclosure of information which would compromise essential security interests, or where the concession is awarded to another government authority. Rules on the award of mixed concessions containing some defence or security aspects are also set out.

1.34 While justifications for the exemption of defence and security contracts can always be found in the imperatives of national self-reliance and security of supply, the scope of the exemption and its effectiveness in achieving these objectives, as well as the higher costs and perhaps lower quality associated with limited competition in the defence field, deserve scrutiny. Increased costs are associated in particular with ‘offsets’—requiring all or part of a defence contract to be fulfilled using domestic companies. Offsets have been found to increase contract prices due to shorter production runs, duplicated investments, higher domestic manufacturing costs, higher sales price from the contractor in order to compensate for lost work, and licence fees.

1.35 Offsets are not permitted under EU law unless the exemption provided for in Article 346 TFEU is invoked. In July 2013, the Commission announced the ‘rapid phasing out of offsets’ as part of an effort to address distortions in the defence procurement sector. Even if there is some need for protected national defence industries within the EU, questions of transparency, corruption, and value for money in the award of defence contracts are periodically cast into sharp relief—as with the grotesque levels of spending and graft linked to defence contracts in Greece which came to light during the latest financial crisis. Efforts to reform defence procurement have been hindered by the strategic and economic importance attached to the defence industry in many European countries, although existing procurement policies may in fact jeopardize the long-term viability of these sectors.

The New Regime for Social and Other Specific Services

1.36 The distinction between priority and non-priority services (listed respectively in Annex II A and II B of Directive 2004/18/EC) has been abolished under the 2014 directives. In its place is a new lighter regime for service contracts which are deemed

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62 Art 10(6) and (7) Concessions Directive.
63 Art 21 Concessions Directive.
65 COM (2013) 542 Towards a more competitive and efficient defence and security sector.
66 Daley, S. (2014) ‘So Many Bribes, A Greek Official Can’t Recall Them All’, The New York Times, 7 February. While the alleged recipients of the bribes were Greek officials, several of the companies allegedly paying them were German—raising further questions about the ‘national self-reliance’ argument for defence exemptions.
to be of limited cross-border interest, set out in Title III of both the Public Sector and Utilities Directives. Services subject to the lighter regime are identified by their Common Procurement Vocabulary (CPV) code in Annex XIV of the Public Sector Directive and Annex XVII of the Utilities Directive. This includes most but not all of the categories formerly included in Annex II B such as health, social, educational, and cultural services; legal services to the extent they are not excluded; investigation and security services; hotel and restaurant services; and religious and other community services. It also includes certain other categories such as benefit and social security services, prison-related and rescue services (to the extent they are not excluded), services provided by certain international organizations, and postal services. Unlike the Annex II B list, it does not contain a residual category for ‘other services’—an important change. Personnel placement services and transport services other than by rail or metro are also now subject to the full rules.

As noted, higher thresholds apply in respect of Title III services (€750,000 for the public sector and €1 million for utilities). The scope of obligations above the thresholds is limited to publication of a contract notice or prior information notice, observance of the principles of transparency and equal treatment, and publication of a contract award notice. Procedures are not prescribed in the directives, but Member States may choose to do this provided they comply with the principles of transparency and equal treatment. The formulation of technical specifications for Title III services is not regulated under the 2014 directives, in contrast with the rules previously applicable to non-priority services. The intention to allow an approach to these contracts which is less economically driven, and more conducive to social value, is clear in the instructions to Member States to ensure that in their award:

contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation.

Member States are also able to restrict the use of lowest cost or lowest price for the award of Title III contracts, and to require contracting authorities to take quality and sustainability into account.\(^{67}\) The provisions represent an interesting compromise between the autonomy of contracting authorities and that of national governments, with each being given certain discretion over the award of services which are often subject to high degrees of public scrutiny and political sensitivity. As these contracts remain subject to the Remedies Directive and to the Treaty principles, the scope for protectionism is also constrained.

More controversially, Article 77 of the Public Sector Directive allows contracts for health, social, and cultural services to be reserved for competition by organizations

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\(^{67}\) Art 76(2) Public Sector Directive; and Art 91(2) Utilities Directive.
with a specific public service character. This provision was lobbied for by the UK Government in particular, where the formation of employee-led mutual enterprises is seen as a way of delivering public services, while reducing public sector employment. In order to qualify for the reservation, organizations must meet a number of conditions regarding their objectives, treatment of profits, and management or ownership structures. Contracts awarded pursuant to Article 77 have a maximum duration of three years, and organizations which have been awarded a contract for the same services by the same contracting authority within the previous three years are not eligible to avail of the reservation.

1.40 Unlike the reservation for sheltered employment programmes and workshops (discussed in Chapter 7), the conditions set out in Article 77 refer to the financial and management characteristics of an organization. This means that they cannot readily be met by any operator wishing to compete for public sector contracts let under this provision, but only those which have been established on particular terms. It thus runs contrary to the general treatment of social, environmental, and economic policy objectives in the directives—which is that they can be pursued inasmuch as they do not distort competition and the relevant requirements or criteria can be met, at least in theory, by any operator.

1.41 From a competition perspective, the use of reservations (also sometimes known as set asides) has the potential to foster monopolistic or oligopolistic market structures and can be seen as contrary to the principles of the Treaty. While an organization from another Member State which meets the requirements set out in Article 77 could technically still compete for a contract, it seems more likely that this provision will be used to award contracts to organizations which are more or less intimately related to the contracting authority in question. Unusually, Article 77 is subject to the Commission’s review within a five-year period, perhaps suggesting a degree of uneasiness about its inclusion.

**Concessions**

1.42 A service concession is an arrangement in which a private operator is given the right to exploit a service and bears the associated risk. The payment for the service often flows directly to the operator from users, for example where residents pay a private contractor appointed by their local authority for collection of waste, or customers in a hospital cafeteria pay for their meals. In other cases, there may be no immediate payment to the economic operator, for example if a company is permitted to advertise on publicly owned property. The risk borne by the operator may relate either to the demand for the service or to supply-side factors such as cost or technical aspects of delivery. A works concession is an arrangement of the same nature, but with the object of executing and exploiting a work, for example the construction of a road or bridge on which tolls will be levied. Works concessions were
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covered by Directive 2004/18/EC, but subject only to a limited set of requirements regarding advertising and procedures.

The Concessions Directive seeks to establish a harmonized regime for the award of such arrangements, and is applicable to both the public and utilities sectors. It sets a threshold of €5,186,000 for service and works concessions, below which national rules will apply. The rationale for legislation in this area arose in part from the large volume of case law relating to concessions, and the recognition that this mode of contracting is often used in areas which are of considerable cross-border interest, such as major infrastructure projects. The Concessions Directive replicates many—but not all—of the obligations found in the Public Sector and Utilities Directives relating to advertisement, time limits, specifications, selection and award criteria, notification of results, subcontracting, and modifications to contracts. Concessions valued above the threshold are also now subject to the remedies regime, including the requirement to apply a standstill period prior to award and to notify candidates and tenderers of the outcome of their applications and tenders.

The duration of concessions must be limited and stated in the contract notice or documents, unless duration forms one of the grounds on which operators are competing. If longer than five years, it must not exceed the period in which the concessionaire could be reasonably expected to recoup its investment and make a return on capital, assuming normal operating conditions. The relatively open wording of the restrictions on duration of concessions suggests that should a challenge be brought on this ground by the Commission or a private party, the Court would likely apply a proportionality test to judge whether the concession period is justified in all the circumstances. This approach has been applied by the Court in its competition law jurisprudence, leaving a relatively wide margin of discretion available to public authorities to determine contract length.

In terms of the assumption of risk by the operator which is a necessary feature of a concession, Article 5 of the Concessions Directive states:

The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve

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68 Given the discussion in paras 1.74–1.82 of the application of the Treaty principles to excluded and low-value contracts, the possibility of cross-border interest arising in concessions below this threshold should not be dismissed.
69 Art 18 and Recital 52 Concessions Directive.
70 In the London Underground decision (N-264/02), for example, a 30-year duration for contracts awarded as part of a PPP for the upgrade and maintenance of the London Underground network was found to be proportionate based on the complexities of the project, the level of investment, and time needed to reach the agreed rates of return. It remains to be seen whether a similar approach will be taken in respect of concessions.
real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.

The Commission issued a ‘fact sheet’ at the time of the adoption of the directives, stating that in its view such risks did not include those which are inherent in every contract, such as those linked to bad management, contractual default, or force majeure.\(^\text{71}\)

1.46 The concept of concessions excludes arrangements where all operators fulfilling certain conditions are entitled to perform a given task without any selectivity, such as a voucher system for accessing medical or other services. It also excludes the granting of licences or a right of way over public immovable property where these are not accompanied by an obligation to carry out the specific activity. Contracts where the operator is remunerated solely on the basis of regulated tariffs calculated to cover operating and investment costs also fall outside of the scope of the Concessions Directive.

1.47 A number of other sector- and activity-specific exemptions apply to the Concessions Directive, including the total exclusion of concessions related to the supply of drinking water and associated engineering or sewage treatment works and services. The decision to exclude water was taken following a European Citizens Initiative (ECI) calling on the European Commission to recognize a human right to water and sanitation, promote their provision as essential public services and exclude them from liberalization or the application of internal market rules.\(^\text{72}\) The ECI was organized by the European Federation of Public Services Unions and gathered some 1.8 million signatures—meaning that the Commission was obliged to take action to respond to it. This was achieved in part by way of a statement issued by Commissioner Barnier agreeing to exclude water from the scope of the Concessions Directive.\(^\text{73}\)

1.48 It is questionable whether this served the purpose advanced by supporters of the initiative. Although it formed part of their demands, exclusion from the Concessions Directive does not in itself make it any less likely that supply of water will be privatized or subject to competition. Article 2 of the Directive enshrines the principle that national, regional, and local authorities are free to decide how best to manage services and works, including through use of their own resources. If anything, excluding water from the scope of the Directive means that concessions in this

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sector will continue to be subject to less transparency and greater legal uncertainty. While concerns about privatization of water services eroding public control over this vital asset are real, the background information supporting the initiative also suggested that it reflected a specific concern about water companies from other EU Member States being involved in the management of water.74

**Public-Public Cooperation**

As explained in paragraph 1.03, contracts between public authorities are not by their nature excluded from the directives. However, the Court has carved out an exemption for contracts considered to be ‘in-house’ or otherwise falling within the concept of legitimate ‘public-public cooperation’. This includes both the award of contracts to controlled entities (Teckal companies) and shared service arrangements between public authorities, where certain conditions are met (following the Hamburg case). These conditions are designed to ensure that no private operator is given an advantage relative to its competitors by way of such arrangements. The new directives also incorporate relatively light rules for awarding contracts to public-private partnerships or through central purchasing bodies. The discussion which follows aims to elucidate the scope of these exemptions as they appear in the 2014 directives, with reference to their origins in case law.

Article 12 of the Public Sector Directive, Article 28 of the Utilities Directive, and Article 17 of the Concessions Directive contain the exemptions for different forms of public-public cooperation developed by the Court in its Teckal and Hamburg jurisprudence.75 The award of a contract to an ‘in-house’ entity will not be covered by the procurement rules, where certain conditions are met:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
(b) more than 80 per cent of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
(c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with national law.

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74 See <http://www.right2water.eu>, which sets out the background and ambitions of the initiative. Two-thirds of the signatories were from Germany, perhaps reflecting a specific concern about large French water companies winning concessions in that country.

75 Case C-107/98 Teckal Srl v Comune di Viano (‘Teckal’) [1999] ECR I-8121; and Case C-480/06 Commission v Germany (‘Hamburg’) [2009] ECR I-4747. The Teckal exemption was further developed by the Court in Cases C-26/03 (‘Stadt Halle’), C-340/04 (‘Carbotermoo’), C-295/05 (‘Asemfo’), C-324/07 (‘Coditel Brabant’), and Joined Cases C-182/11 and C-183/11 (‘Econord’) — among others. The Hamburg principle was applied by the Court in Case C-159/11 (‘Azienda’); Case C-386/11 (‘Piepenbrock’); and Case C-15/13 Datenlotsen Informationsysteme GmbH v Technische Universität Hamburg-Harburg (‘Datenlotsen’), not yet reported.
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the Treaties, which do not exert a decisive influence on the controlled legal person.\(^{76}\)

1.51 The purpose of each of the three aspects of the test is to limit the ‘in-house’ exemption to prevent it from being used in cases where this would lead to a distortion of competition. If an entity is independent in its decisions, operates significantly on the market, or includes private participation, the ability to award contracts or concessions to it directly would create an unfair competitive advantage. It is worth noting that the restrictions on in-house award of contracts does not interfere with the ability of public authorities to provide goods, services, or works out of their own resources. It also does not mean that award of a contract to an entity not meeting the Article 12 conditions is impossible, only that the procurement rules would apply, unless another exemption is available.

1.52 The precise percentage of activities which a controlled entity must carry out for the controlling authority or authorities had not been decided in case law. In Stadt Halle, the Court left open the possibility that 80 per cent of such activities might be sufficient to meet the test, but did not resolve the issue conclusively. This 80 per cent threshold was ultimately adopted in the 2014 directives, and is to be calculated relative to the entity’s average turnover over a period of three years prior to award of the contract. If the entity has not been established for that entire period, the 80 per cent may be calculated based on business projections or other ‘credible’ accounts of its expected activity. Chapter 8 considers the availability of remedies in cases where a company awarded an in-house contract is found not to meet the required conditions.

1.53 The level of control needed is ‘a decisive influence over both the strategic objectives and significant decisions of the controlled legal person’. Case law following Teckal established that more than one public authority may exercise the requisite control over the entity and that it may carry out the essential part of its activities for those authorities collectively.\(^{77}\) It also established that the exemption can apply where the controlled entity awards a contract to its controlling authority, or another legal person controlled by the authority awards the contract.\(^{78}\) These ‘collective’, ‘reverse’, and ‘indirect’ Teckal modalities are also included in the scope of Articles 12 and 28 (and Article 17 of the Concessions Directive). In Datenlotsen, the Court found that the ‘indirect’ Teckal mode did not include the award by a controlled entity of a contract to another body controlled by the same ‘parent’.\(^{79}\) However, this situation

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\(^{76}\) Art 12 Public Sector Directive.

\(^{77}\) Case C-340/04 Carbotermo.

\(^{78}\) Case C-295/05 Asemiño and Case C-324/07 Coditel Brabant.

\(^{79}\) Case C-15/13 Datenlotsen, paras 28–30. In that case, the requisite control did not in fact exist between the ‘parent’ and ‘daughter’ entity (the City and University), so the extension of the exemption to a ‘sister’ entity was moot.
Public-Public Cooperation

is now specifically included in the scope of the exemption set out in Article 12(2) of the Public Sector Directive.

The second form of public-public cooperation exempted from the 2014 directives relates to arrangements in which two or more authorities collaborate to achieve common objectives. This exemption was first articulated by the Court in the Hamburg case, which concerned an agreement between the City of Hamburg Sanitation Department and four local authorities in the Lower Saxony region. Each of the four authorities had agreed to provide a certain volume of waste throughput to the incineration facility built by Hamburg. Payments were made to Hamburg to cover the cost of incineration, and it assumed responsibility for providing replacement capacity in certain circumstances and representing the authorities’ interests against the private operator of the facility. A citizen concerned about the charges for waste management in the region made a complaint to the Commission, which brought the case upon learning that the arrangement between the authorities had not been subject to tender. The Advocate General in the case applied the Teckal logic and found that the arrangement did not qualify for the in-house exemption, as the control condition was not met.

The Court, however, considered that as the arrangement constituted a form of genuine cooperation between the authorities, and was not intended to circumvent the procurement rules, it could stand. The Hamburg judgment was welcomed by many who felt that the Teckal exemption had become too narrow to accommodate forms of public-public cooperation which are in place in many Member States. Nevertheless, it was not clear to what extent the Court’s judgment in Hamburg might be limited by the facts of that case. In particular, the Court emphasized that the arrangement aimed to fulfil specific obligations regarding waste treatment set out in European directives, that the facility would not have been built without the guarantee of throughput from the four authorities, and that a separate service contract was awarded by Hamburg for the operation of the facility. In subsequent cases in which this exemption has been invoked, the Court emphasized the requirement for each of the contracting authorities to be fulfilling the same public service function via the cooperation, rather than one authority procuring services from another.

Public authorities wishing to set up or avail of the services of an in-house entity or organize shared services have had cause to scrutinize the case law detailed in paragraphs 1.49 to 1.55, and may now take greater comfort in relying on their specific expression in the 2014 directives. Shared services have a particular role to play where there is a desire to realize efficiencies by availing of the capacity of other authorities. Collaborative or joint procurement—whether through a Teckal

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80 Case C-480/06 Hamburg.
81 Cases C-159/11 Azienda, C-386/11 Piepenbrock, and C-15/13 Datenlotsen.
company or otherwise—is also considered to hold the potential for significant savings, both in terms of transaction costs and economies of scale reflected in contract prices.

1.57 A further exemption to be noted in the field of public-public cooperation is that which applies where a service contract is awarded to a contracting authority or association of authorities on the basis of an exclusive right which it enjoys. For example, if national legislation obliges public authorities to use a particular body for the provision of land appraisal, insurance, or pension services. Such rights must be set out in a law, regulation, or published administrative provision which is compliant with the Treaty.82 The exemption is identical to that which appeared in Directives 2004/17/EC and 2004/18/EC.

Joint and Central Purchasing Arrangements

1.58 The potential is often touted for aggregated public sector demand to contribute to better-integrated markets and to generate economies of scale. Articles 37 and 38 of the Public Sector Directive address the possibilities for using central purchasing bodies and conducting occasional joint procurement with other public authorities. Article 39 aims to encourage joint procurement between authorities in different Member States, by removing national restrictions and setting principles for the allocation of liability and determining the applicable law. In practice, the barriers to joint procurement taking place across borders are often cultural and political as much as legal. Even at national level, the administrative challenges associated with joint or centralized procurement are formidable. However, it is possible that increased use of electronic tendering will facilitate more joint procurement taking place both within and across national borders, in particular where a shared language or similar public service structures apply.

1.59 While the procurement rules apply to contracts awarded jointly by two or more authorities, Article 37(4) contains an explicit exemption for the award of contracts for the provision of central purchasing and ancillary services to a central purchasing body. As such bodies are defined only by the fact that they carry out central purchasing and ancillary activities on a permanent basis, this would appear to be an easier approach to the Hamburg-type situation, if one contracting authority can simply be designated as a central purchasing body and then award contracts on behalf of other authorities. Notably, there is no requirement that central purchasing bodies provide services only to the public sector or that they do not carry out a range of other activities. Central purchasing bodies must themselves be contracting authorities; however, the directives will not apply to contracts awarded to

82 Art 11 Public Sector Directive; and Art 22 Utilities Directive.
any entity providing central purchasing services, provided such contracts do not involve pecuniary interest. This appears to sanction arrangements whereby a private operator could provide central purchasing services to contracting authorities and recoup its costs by way of charges to suppliers included on its frameworks, for example.

The 2014 directives recognize two distinct modi operandi for central purchasing bodies. They may either act as wholesale purchasers, buying goods, services, or works on behalf of other authorities or entities; or they may establish contracts, frameworks, or dynamic purchasing systems which are then used by authorities or entities to make purchases. Where the first method is used, the central purchasing body will be legally liable for compliance with the procurement rules, whereas in the second case it is only liable for those aspects of the procedure which it conducts itself. The directives also affirm the importance of central purchasing bodies by allowing Member States to render their use mandatory for certain contracts, and by requiring an earlier transition to fully electronic procurement on the part of central purchasing bodies.

Given the expanding scope of applicability of the procurement rules, as well as the expanding menu of procedures and new obligations and opportunities created under the 2014 directives, the role for dedicated and expert central purchasing bodies may grow. Central purchasing arrangements may be more or less formal or permanent, and a variety of different approaches can be observed across the Member States. Ireland, for example, has since 2013 entrusted a number of public sector purchase categories to a newly established Office for Government Procurement, with the explicit motive of making financial savings due to economies of scale. Lithuania’s Central Project Management Agency, set up in 2003, has gradually taken over responsibility for a wide range of public sector purchases. It is not only in smaller, centralized Member States that central purchasing bodies play a significant role: in Germany, France, the UK, and Italy, central purchasing bodies are also active and used by many national and sub-national contracting authorities.

Evidence regarding the short- and long-term impact of central purchasing on cost and other procurement outcomes is relatively sparse. In theory, savings should accrue both in terms of transaction costs and by leveraging government spending power to achieve economies of scale. However, central purchasing may also have negative outcomes in terms of efficiency of transactions (where the size of contracts or frameworks makes them more difficult to award and manage in a cost-effective

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83 Recital 70 Public Sector Directive; and Recital 79 Utilities Directive.
84 Recital 69, Arts 2(14) and 37 Public Sector Directive; and Recital 78, Arts 2(10) and 55 Utilities Directive. Central purchasing arrangements are not mentioned in the Concessions Directive; however, central purchasing bodies would be subject to the rules on award of concessions if they are contracting authorities or entities.
85 Arts 37(1) and 90(2) Public Sector Directive; and Arts 55(1) and 106(2) Utilities Directive.
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manner), fitness for purpose of the acquired solutions, and longer-term effects on competition and market structure.\textsuperscript{86} The role which these and other factors have in influencing value for money in procurement are discussed in Chapter 6.

Public-Private Partnerships and Land Development Agreements

Public-private partnerships

1.63 Public-private partnerships (PPPs) take a wide variety of forms across the EU Member States. A large proportion of PPPs will now be covered by the Concessions Directive if they are valued above €5,186,000. According to the Commission, over 60 per cent of all PPPs in Europe can be qualified as concessions, with 6,169 concessions advertised in the Spanish national Official Journal between 2006 and 2010, 817 in Italy in 2008 alone, and approximately 10,000 operating in France.\textsuperscript{87} Concessions appear to be less common at the higher value end of the PPP market, which is dominated by authority-pays projects. The UK leads the European market for award of such PPPs, followed by Italy and France.\textsuperscript{88} The decline in availability of private and public finance led to a sharp drop in both the number and value of PPPs reaching financial close between 2007 and 2012, with 2013 levels still remaining well below their 2007 peak. However, the available data does not fully capture the range of partnerships entered into between the public and private sectors, being focused on the larger end of the market.

1.64 For PPPs which are not classified as concessions, the Public Sector or Utilities Directives will apply if the activities to be carried out under the PPP are covered. In a 2008 Communication, the Commission acknowledged the impracticality of carrying out a ‘double tendering’ procedure where a PPP takes an institutional form—for example, if a jointly owned company is set up. In this case, it is sufficient to have a competition at the outset to choose the private partner, and not necessary to tender for each subsequent contract awarded to the venture, provided the contracts fall within the advertised scope of the arrangement.\textsuperscript{89} Alternatively,

\textsuperscript{86} For an overview of situations in which centralized purchasing may lead to cost reductions—and those in which it does not—see Albano, G. and Sparro, M. (2010) ‘Flexible Strategies for Centralized Public Procurement’ 1(2) Review of Economics and Institutions.


\textsuperscript{88} European PPP Expertise Centre (2014) Market Update: Review of the European PPP Market in 2013. The data relates to larger value PPPs (> €10 million) across 14 European countries reporting PPP activity. In 2013, 80 such projects reached financial close, valued at €16.3 billion, and over 90 per cent of these were authority-pays.

\textsuperscript{89} COM (2007) 6661 Commission interpretative communication on the application of Community law on public procurement and concessions to Institutionalised Public-Private Partnerships (IPPPs), 5 February 2008.
if no competition is held to establish the joint venture, any contracts awarded to it which fall within the scope of the directives must be subject to competition (which is likely to be less practical once the public authority has committed itself to the arrangement). In its judgment in the *Acoset* case, the Court endorsed this pragmatic approach to the establishment and operation of PPPs. It held that contracts could be directly awarded to an institutional PPP provided that the private partner was selected in an open and transparent procedure in which criteria specific to the service in question were applied.\(^{90}\)

Curiously, the scope to award contracts via a joint venture or PPP may now be broader than the scope to award contracts to an in-house entity or via a shared service arrangement, if the latter arrangements do not meet the specific conditions set out in Article 12 of the Public Sector Directive. For example, if a public authority wished to award a contract to another public entity to which it was linked, but did not control, there is no clear basis for setting up an ‘institutional public-public partnership’ which would allow for the award of multiple contracts to such an entity. Arguably, this could be done on the same basis as set out in the Commission’s 2008 Communication and approved by the Court in *Acoset*—however, the wording of Article 12 appears to preclude the direct award of a covered contract to another public body on terms other than those set out. The Court may yet have cause to revisit the scope of the *Teckal* and *Hamburg* exemptions if this asymmetry is considered pernicious.

The Court again analysed the application of the procurement rules to joint ventures in a case concerning a Finnish municipal authority which established a company with a private operator for the purpose, *inter alia*, of providing occupational health and welfare services to its own staff. The Court found that the authority was not entitled to award a contract for those services to the joint venture company without a competition.\(^{91}\) The city had intended to conduct a tender competition after a transitional period during which it entrusted the services directly to the company. However, it had not in the first place conducted a competition in order to choose the private partner involved, and the nature of the entity set up precluded application of the *Teckal* exemption.

It should be noted that some joint ventures will be covered by the new provision in the 2014 directives allowing contracts for certain health, social, and cultural

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\(^{90}\) Case C-196/08 *Acoset SpA v Conferenza Sindaci e Presidenza Prov Reg ATO Idrico Ragusa* [2009] ECR I-09913. It should be noted that the contract in question was treated as a services concession by the Court.

\(^{91}\) Case C-215/09 *Mehilainen Oy v Oulun Kaupunki* [2010] ECR I-13749. The Court distinguished the earlier case of *Club Hotel Loutraki*, in which a Greek authority sold the majority of its shares in a casino to a private company which then assumed its management for a fee and undertook refurbishment work, on the grounds that in that case the public contract elements of the deal were objectively inseparable from the non-covered elements, whereas in *Mehilainen* there was evidence that the elements were separable.
The Scope of Procurement under EU Law

services to be reserved for competition by public service organizations. Such organizations are defined with reference to their objectives, treatment of profits, and employee-led or participatory ownership or management structures. An organization can only benefit from this reservation if it has not been awarded a contract for the services concerned by the same contracting authority within the past three years, and contracts awarded under this provision cannot exceed three years. The provision was lobbied for by the United Kingdom in particular, where the creation and award of contracts to public service mutuals is a preferred means of reducing public sector employment.

Land development agreements

Land development agreements may be considered either public contracts or concessions, or they may fall outside of the procurement rules altogether. Article 13 of the Public Sector Directive deals with civil engineering, building works, and associated service contracts subsidised by public funds. As in the 2004 directives, if the level of public subsidy is 50 per cent or less, the procurement rules do not apply to the award of contract by the private partner. A grant of planning permission also does not, in itself, constitute a public contract. However, it may be combined with other elements, such as an undertaking on the part of the developer to execute works on the site in question or elsewhere, which do constitute a public contract or concession. The Court’s case law indicates that where a work corresponding to the requirements of a public authority is realized, even if the public authority has not specified or paid for it directly, this may be sufficient to attract application of the directives.

In La Scala, the Court ruled that the fact that a public authority did not specify a particular work or choose the contractor did not prevent a public contract from arising. In Auroux, this approach was extended to a development agreement, raising the spectre that grants of planning permission might also attract application of the rules where these are linked to conditions regarding the nature of development. However, in the Müller case, the Court ruled that the sale of land to a private undertaking which had, in the opinion of the town council, submitted the best plans for development of that land, did not constitute a public contract. In that case, the contract in question contained no provisions on the future use of the land and there was no direct economic benefit to the authority. The Commission subsequently dropped a challenge to a development agreement where it could not

92 Art 77 Public Sector Directive; and Art 94 Utilities Directive.
93 Art 13 Public Sector Directive.
94 Case C-399/98.
95 Case C-220/05 Jean Auroux and Others v Commune de Roanne [2007] ECR I-00385.
97 Case C-451/08 Helmut Müller, Opinion of AG Mengozzi, at para 11.
be shown that any contract for the actual execution of works existed. The requirement of a contract in writing existing for the works in question was also emphasized by Advocate General Mazak and the Court in the Libert case, which concerned a requirement to provide social housing under a Flemish planning decree.

In Commission v Netherlands, the municipality of Eindhoven had entered into a cooperation agreement with a private developer for the construction of a community centre and commercial and residential developments on a site belonging to the city. The council had decided in 2002 that the arrangement was not a contract for pecuniary interest and therefore not subject to the procurement rules. However, the contract with the developer was not finally signed until 2007. The Commission argued that there had been a substantial amendment of the terms of the agreement during this time and after the coming into effect of Directive 2004/18/EC, under which the municipality would have had to hold a tender competition.

The Court dismissed the Commission’s action on the basis that: (i) the applicable law is ‘the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether it is necessary for a prior call for competition to be issued’; and (ii) the changes in the financial make-up of the contract, including the question of whether the municipality would purchase the works from the developer, did not constitute substantial modifications to the contract. Arguably, the more precise rules on modifications to contracts set out in the 2014 directives would lead to a different finding—they are discussed in Chapter 5.

The approach taken by the Court in the case suggested that land development agreements, which by their nature often take considerable time to conclude and require multiple decisions to be taken by public authorities, may be treated with some leniency in applying the procurement rules. In comparison with the approach taken to joint ventures in particular, the Court was willing to allow for a greater degree of flexibility in the scope of the agreement without finding the need for a new competition. It is also notable that the Court did not review Eindhoven’s decision against the general Treaty principles of transparency and equal treatment, despite the Commission’s invocation of Article 2 of Directive 2004/18/EC, which embodies these principles. No advertisement of the development opportunity had taken place.

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98 IP/08/867 Public procurement: Commission closes infringement case against Germany concerning an urban development project in Flensburg, 5 June 2008.
99 Joined Cases C-197/11 and C-203/11 Eric Libert and Others v Gouvernement flamande, not yet reported.
100 At which time the relevant procurement rules were those of Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ 1993 L 199, p 54).
101 Case C-576/10 Commission v Kingdom of the Netherlands, not yet reported, paras 45, 53, and 61.
However, two factors caution against a broad reliance on the Court’s approach to development agreements in Commission v Netherlands. The first is that the relevant decision by the municipality pre-dated the 2004 directives. The second is that the Court’s unquestioning use of the date on which the initial decision on procedure was taken to determine the applicable law is open to abuse. For example, contracting authorities may take decisions regarding the award of concessions in advance of the Concessions Directive coming into force. If such decisions are followed by long delays or substantial changes to the scope of the contract prior to award, they may well be challenged. Evidence of bad faith or intention to avoid the application of the directives could undermine attempts to rely on a decision which pre-dates the coming into effect of the new rules.

Cross-Border Interest and the Frontiers of EU Public Procurement Law

As is evident from the discussion so far in this chapter, the scope of applicability of the procurement rules has been subject to both judicial and legislative evolution. At times, the Court can be seen as attempting to tame the Commission’s wilder single market fantasies, while still marshalling reluctant Member States to apply the principles behind the directives. This approach was particularly evident in a number of judgments in the 2006 to 2011 period relating to non-priority services. However, it was the Court’s case law—in particular on the question of whether contracts not covered by the directives were of ‘certain cross-border interest’ and thus subject to the Treaty principles—which created a particularly difficult situation for practitioners and others wishing to determine the precise scope of the rules prior to 2014.

Beginning with Unitron and Telaustria, the Court ruled that certain positive obligations applied in respect of service concessions and other excluded or partially excluded contracts, based on the application of the Treaty principles of non-discrimination and transparency. This line of cases reflects the Court’s general approach of offering a purposive interpretation of EU directives and the Treaty, in order to give effect to their broader meaning. The basic problem of the

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cross-border interest jurisprudence was that the Court endorsed a test which involved submitting contracts to EU level advertisement and competition (either hypothetically or actually) in order to determine whether certain cross-border interest existed—thus begging the very question which most of these cases aimed to resolve. It was then left up to individual authorities and national courts to apply this impractical test. The Court found that cross-border interest could arise not only in contracts excluded from the full scope of the directives due to their nature (service concessions, non-priority service contracts), but also for those excluded due to their low value.  

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The application of the Treaty principles to non-priority service contracts based on certain cross-border interest created a legal puzzle, as the presumed lack of cross-border interest in non-priority services was the basis for their classification as such under the 2004 directives and their predecessors.  

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The scope of obligations arising from the Treaty principles was not limited to advertisement, but included rules relating to fair procedures and equal treatment. With its rulings in Parking Brixen, SECAP, and Wall AG, the Court left open the possibility that contracting authorities might be obliged to apply even to excluded contracts the rules relating to in-house arrangements, treatment of abnormally low tenders, and modifications to contracts. Based on these developments, some legal scholars identified a convergence between the rules applicable under the directives and those implied from Treaty principles.  

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Unsurprisingly, Member States were not satisfied with this state of affairs and sought retrenchment of the positive obligations applicable to such contracts. In 2006, Germany, supported by six other Member States and the European Parliament, brought an application for the annulment of the Commission’s Interpretative Communication on the Community law applicable to contracts not or not fully subject to the directives,  

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which purported to set out the obligations arising from the Court’s case law. The saga of the 2006 Interpretative Communication encapsulates the three-way tug-of-war between the Commission, Court, and Member States to establish the limits of the EU procurement rules. The Commission formulated it with a view to ‘clarifying’ the extent to which low-value contracts, service concessions, and other forms of contract not explicitly covered by the 2004 directives were subject to certain procedural rules—for example, a duty to advertise—based on its interpretation of the Court’s case law.


105 A fact acknowledged by the Court in its judgment in Case C-507/03 An Post, para 25.


The Interpretative Communication emphasizes that certain contracts, despite falling outside the scope of the directives due to their value or subject-matter, are nonetheless subject to the general Treaty principles of transparency and equal treatment. In practice, this means that such contracts must be advertised and procedures followed to ensure the possibility of access for non-domestic operators and to avoid any form of direct or indirect discrimination. The scope of obligations outlined relate to publicity for contracts, procedures for selection, and award, setting appropriate time limits and the availability of legal remedies. The Interpretative Communication indicates that the degree of advertising and procedural guarantees required must be determined on a case-by-case basis—hardly a recipe for legal certainty and a difficult ground on which to formulate clear national rules.

While it provides guidelines on the type of advertising and procedures which might be deemed sufficient for excluded or partly excluded contracts where these are of certain cross-border interest, the Interpretative Communication does not address the question of how cross-border interest is to be identified. In SECAP, a judgment which came after the Interpretative Communication was issued, but prior to the determination of Germany’s challenge to it, the Court stated that it would be permissible for local or national legislation to lay down objective criteria to determine if cross-border interest arose for a particular contract. These criteria would need to have regard not only to the value of the contract, but also to its technical characteristics and location—the Court indicated that even low-value contracts may be of cross-border interest where they are carried out in a conurbation which straddles national borders, for example.108

In its lengthy ruling dismissing Germany’s challenge to the Interpretative Communication, the General Court reviewed the content against previous jurisprudence and found that it did not create any new legal obligations. Accordingly, the application for annulment was found to be inadmissible. Subsequently, there were some signs of a retrenchment in the Court’s application of Treaty principles to non-priority service contracts. In Irish Translation Services, the Court held that failing to attribute weightings to award criteria in advance for a non-priority service contract did not constitute a breach of the equal treatment principle; however, altering the weighting after an initial review of tenders did constitute such a breach.109 In Strong Segurança, the Court rejected the application of Article 47(2) of Directive 2004/18/EC (allowing reliance on the financial and technical capacity of other entities at selection stage) to a non-priority service contract, stating that such a broad approach to the principle of equal treatment risked rendering the distinction between priority and non-priority services entirely ineffective.110

108 Joined Cases C-147/06 and C148/06 SECAP, para 31.
110 Case C-95/10 Strong Segurança, para 42.
The implications of this evolving case law for the treatment of contracts which are below-threshold or otherwise excluded under the 2014 directives is difficult to gauge. While some national rules already explicitly apply the Treaty principles in respect of such contracts, this is uneven and often reflects pre-existing national practices as much as the utterances of the Court and Commission.\textsuperscript{111} A 2013 analysis of legislation and case law in three Member States found that while soft law such as the Interpretative Communication had little discernible impact on national legislation or practices, the Court’s interpretation of the Treaty principles in respect of excluded or partially excluded contracts was increasingly being applied by national courts.\textsuperscript{112} In respect of certain principles such as proportionality, national courts may even have gone further than the CJEU in their review of procurement decisions—this is discussed further in Chapter 2.

There is no reason to believe that the adoption of the 2014 directives has brought to an end the evolution in the case law of the Court arising from the fundamental Treaty freedoms and principles. For example, does the exclusion of water services from the scope of the Concessions Directive mean that the Court would hesitate to apply the requirements of transparency and equal treatment as developed in its previous case law to water concessions? Probably not. While the recitals to the 2014 directives express the intention to delimit the scope of their applicability, as noted in paragraph 1.08, it is not possible to exclude the application of the Treaty principles, as these constitute the primary law of the Union. There is also the possibility of further developments in the list of principles which are held to be applicable in the context of public procurement—for example, where environmental protection, social inclusion, or fundamental rights protected by the EU Charter are at stake. The next chapter considers the role which the fundamental freedoms and principles have played in regulating public contracts to date, and the potential for such future permutations.

\textsuperscript{111} For analysis and comparison of the position in eight Member States, see Caranta, R. and Dragos, D. (eds) (2012) \textit{Outside the EU Procurement Directives—Inside the Treaty?} (Copenhagen: DJØF.).