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WHAT IS THE FUTURE FOR PUBLIC LAW?

Patrick Birkinshaw *

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1. INTRODUCTION

What is the future of public law within the UK? How will the way in which public law develops within the UK affect and be affected by public law initiatives elsewhere at the national, regional and global levels? This enquiry will be a new work which will go beyond the EU/ECHR legacy on our public law and will look to developments challenging the future discipline and integrity of public law. There are claims that public law as a discipline is now outdated given the degree of, and growing, public/private interdependence and compenetration; growing internationalism and internationally based regulatory techniques in trade, finance, the environment; global dependence on information technology and data sharing; privatisation; contractualisation of public service; crime prevention and anti-terrorism activity. To these we may add the growing nativism of national politics which seeks to reverse transnational regulation and which runs counter to globalisation. My belief is that these claims are easily stated, over-stated and run the risk of being simplistic.[2] Claims that public law risks becoming something of an anachronism rest on a supposition that public law is a creature solely of the nation state and is confined by national barriers. It would be correct to insist, however, that the focus must bring into relief the multi-national dimension of public law. For over forty years our public law has been increasingly influenced by multinational and overseas legal doctrines. This is not going to cease despite protectionist and isolationist politics.

The key problems that public law addresses have not been removed. The state does not disappear; it re-forms. Novel emanations of power and influence emerge in association with governmental power. Moderating that power in the public interest remains a central objective of public law and a challenge to the neutrality of law. How will the post World

[2] Some of these themes, but not necessarily their advocacy, are addressed in P.DOBNER AND M. LOUGHLIN eds *The Twilight of Constitutionalism*, C. MACAMLAIGH, C. MICHELON and N. WALKER eds *After Public Law* (2013). See also E.L.RUBIN *Beyond Camelot: Rethinking Politics and Law for the Modern State* Princeton UP (2005) and M. LOUGHLIN *Foundations of Public Law* (2010).

War II and twentieth century public law tradition have to adapt and develop in order to address the challenges and questions posed by the global context in which national public law has to operate? This context is developing at a time when there are, contrariwise, growing movements for indigenous constitutionalism, for return of national 'sovereignty', and for independence from external pressures which come in the form of globalism, liberal economics and internationalism.

The 'Leave' vote in Brexit is an indication of such sentiments as is Trump's presidential triumph. The events of the post Brexit referendum in 2016 left many overseas commentators aghast that such a momentous decision could have been taken without qualified majorities, under the influence of gross exaggeration and falsehoods and racist prejudice. The US presidential outcome simply left many commentators aghast. But there was an uncomfortable truth that in the case of Brexit, the EU through the Commission, European Central Bank and the German Chancellor had behaved in a high handed and misguided manner towards faltering member state economies and had undermined national democratic will. The shortcomings of monetary union set the EU up as an easy object of criticism and disenchantment.[3] There are those who no doubt hoped that a populist sovereignty based on a referendum would not only diminish Parliamentary sovereignty – the *people* have spoken. It would also impede the progress towards an enhanced role for law and judicial process in the UK's political constitution, a movement which is termed 'juridification'. Such a process has been developing for more than four decades. It reached its zenith in the Divisional Court and Supreme Court's rulings in the Brexit case in late 2016 and early 2017.[4]

This paper is a precursor to a study that will provide an analysis of the contemporary elements of public law and how they need to be modified and developed;

[3] J. STIGLITZ *The Euro: And its Threat to the Future of Europe* (2016).

[4] *R (Miller) et al v Secretary of State for Exiting Europe* [2016] EWHC 2768 (Admin) and [2017] UKSC 5.

what do they provide; how relevant are they to modern governance; and how is political power, whether acting through public or private vehicles such as corporations, corporeal or virtual, rendered accountable, responsive and controllable? Are layers of power beyond control? The work will examine public law in a national and international perspective. It will fasten on core themes such as changing concepts of constitutionalism and the future embodiment of the rule of law, the separation of powers and constitutional pluralism. The work will explore the changing context of state and inter-state activity and institutions of governance and regulation, governance and decision-making techniques, transparency, promotion of the public interest and the modern meaning of democratic involvement by those who encounter power configurations and the public/private interface as citizens, aliens, 'subjects' or dis/unengaged. The work will spark widespread debate at home and abroad on these emerging challenges and themes in law and governance. The work will address themes that are not addressed in existing literature by UK lawyers who have tended to focus on home-grown or EU inspired developments or global public law. It is a very ambitious project but one which the author believes has to be undertaken.

2. WHAT IS PUBLIC LAW AND WHAT DOES PUBLIC LAW DO?

We need to remind ourselves of some basic points. Public law is concerned with the exercise, non-exercise, control and accountability of, at its crudest, political power. That is the power to make decisions affecting the conditions of existence of the society or a large component of the society and decisions affecting interrelationships within society. It is public law that determines who are the members of the society. The political power in question may be exercised by politicians or by those appointed by them or those who work closely with them or even by those who act on their behalf, whether by design or default. The exercise of power relates both to elite actors within the political firmament and its outposts and their mutual relationships as well as their relationship with the members of the community over whom they exercise power.

Political power invariably resorts to legal forms for the expression of its content. One says 'invariably' but totalitarian regimes often seek a veil of secrecy and resistance to legal instruments. Such legal forms exist in what we now term constitutions, legislation and

regulations. Public law historically sets an institutional framework for legal decision-making through a royal council, an identified assembly or legislature or appointed ministers or individuals in office or by those acting on behalf of the public interest. The task of public law is to identify and give recognition to these forms and institutions and to the individuals operating within the forms and institutions. From recognition of powers public law moves to defining and interpreting the powers of the institutions and individuals setting out the extent, content and scope of their powers and privileges. The movement of power to actors in the private realm may or may not be accompanied by public law forms. There may or may not be formal delegation under legislation. Corporate law, charity law or conferral of exclusive privilege by way of monopoly may be the vehicles under which power is exercised. There is almost inescapably a body of sacred law setting out its own powers, immunities and privileges alongside/over the secular public law.

Different countries have different traditions in the manner in which public law has evolved. This subject has ample coverage in the literature.[5] Let it suffice for the present to say that in the western tradition there emerged a pre-eminence in 'law' as the official expression of power and that law was the subject of the judgments of courts in which powers could be identified, defined and challenged. In some countries power may be conferred under a formal constitution to strike down parliamentary legislation as 'unconstitutional'. In others, England is the most prominent example, this is not the case. The origins of judicial review to interpret the limitations of statutory or executive powers can be seen in English case law from the seventeenth century. The post second world war period has been fundamental in the development of constitutionalism and constitutional

[5] See T. PLUCKNETT *A Precise History of the Common Law* (1956); F.W. MAITLAND *The Constitutional History of England* (1955); J. BELL *French Constitutional Law* (1994). M. ROSENFELD and A.SAJÓ eds *The Oxford Handbook of Comparative Constitutional Law* (2013); for administrative law: J. SCHWARZE *European Administrative La*w (revised ed. 2006); N. BROWN and J. BELL *French Administrative Law* fifth edition (1998); R. C. VAN CAENEGEM *An Historical Introduction to Western Constitutional Law* (1995). Loughlin n 1 (2010); *The Max Planck Handbooks in European Public Law: Vol. 1. The Administrative State*. A. von Bogdandy, P. Huber and S. Cassese (eds) (2017).

jurisprudence in Europe. The EU's promotion of legality and legal competence through the judgments of the European Court of Justice added significantly to this tradition as well as borrowing from it.

The paramount objectives of public law comprised identifying 'official' institutions and establishing authority to make official pronouncements as law. A division is seen between 'public' bodies and 'private' bodies. In a simple sense: who is the king? What can the king do? When can the king do it? How can the king do it? Must the king act with another individual or institution? What, if any, restraints operate on the king or those acting on his behalf?

When the 'official' is identified the task is then to identify the content of the official words or actions or inactions. Unlimited power is ultimately uncontrollable power and uncontrollable power is the very antithesis of law.

Set out in these terms the tasks of public law seem relatively straightforward. However, there were accompanying difficulties complicating identification in the senses outlined above. If we focus on England as an example, when the King morphed into the 'Crown' and this latter term was used for executive government in England the challenges facing public law became legally ever more abstruse. What was the 'Crown' and what did the 'Crown' embrace? Who answered for the 'Crown'?

A further factor was the insistence on official secrecy in Britain and a lack of transparency in governance.[6] Another was judicial self constraint – a particular problem in England and the United Kingdom where there was no written constitution and until recently there was no *developed system* of public law. Principles of judicial review in England go back through the centuries it is true and the courts could make striking declarations in favour of individual liberty and property to mark out the distinction, and the security that

[6] On the Law Commission proposals for strengthening official secrecy laws see *Protection of Official Data* No 230 (2017) http://www.lawcom.gov.uk/wp-content/uploads/2017/02/cp230_protection_of_official_data.pdf

resided in the distinction, between 'meum' and tuum'. Between what is mine and what is another's. Stephen Sedley and Paul Craig have both mapped the development.[7] But judicial review of administrative action was neither systematised nor systemic. It was 'sporadic and peripheral' to use the words of Stanley de Smith.[8] Judicial review has become far more frequent and systematic. There was, additionally, no written constitution allowing review of legislation within the terms and spirit of the constitution.

Yet another feature was the pre-dominance of the political constitution and a desire to keep legal intervention to a minimum. The establishment and organisation of government were matters of royal prerogative. The reality of the political constitution was reflected across the political spectrum in other nations. In a legal culture such as the British that recognised no domestic concept of fundamental human rights,[9] that lacked a system of public law and which relied so heavily upon the royal prerogative in matters of governance, the 'political question' that was inappropriate for courts to probe and subject to judicial principle and examination was more broadly constructed than in many other comparable jurisdictions.

My career as a legal academic since 1976 has witnessed a dramatic change in this tradition outlined above. Much of my work has catalogued these changes and there is no need for rehearsal. Judicial review has become a far more flexible tool to control the

[7] S. SEDLEY *Lions Under the Throne. Essays on the History of English Public Law* (2015); P. CRAIG *UK, EU and Global Administrative Law* (2015).

[8] S.A. DE SMITH *Judicial Review of Administrative Action 3rd* ed 1973, p.3. For statistics see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/643445/civil-justice-statistics-quarterly-jan-mar-2017.pdf and for a commentary:

https://ukhumanrightsblog.com/2015/03/23/the-true-statistics-behind-judicial-reviews-success-rates/ (accessed 6 November 2017)

[9] See to the contrary M.TUGENDHAT *Liberty intact: human rights in English Law* (2017) OUP.

exercise of governmental power and abuse of authority. But judicial review has become deeply resented by government. Those with power invariably bridle at correction.

The dramatic developments we have witnessed have also included freedom of information legislation in 2000 accompanied more recently by a non statutory promotion of open data and transparency through Big Data and Open Data initiatives. The future, the Prime Minister promised in 2012, will be 'open'.[10] It seems likely to depend on non statutory facilitation to promote public/private commercial exploitation of data. Many striking developments in transparency have also occurred as a result of the influence of EU law and its predecessors EEC and EC law.

Domestic protection of human rights was introduced by the Human Rights Act 1998 which made many provisions of the ECHR effective in UK law subject to a domestic gloss. The advance in human rights protection has seen the extension of judicial inquiry into executive action even in areas falling within the rubric of national security.[11] It has advanced and covered actions in overseas countries.[12] The influence of EU law and the greater emphasis on human rights has fomented changes to domestic law that have raised questions of constitutional identity largely unknown within domestic courts until the last twenty years.[13] The courts have been vigilant to distinguish questions of individual right

[10] *Open Data: Unleashing the Potential* Cm 8353 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78946/CM8353_acc.pdf (accessed 6 November 2017).

[11] *A v Secretary of State for the Home Department* [2004] UKHL 56 and *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71.

[12] *Smith v Ministry of Defence* [2013] UKSC 41; *Mohammad et al v Ministry of Defence et al* [2017] UKSC 1; *Serdar Mohammed et al v Ministry of Defence* [2017] UKSC 2; *Belhaj et al v J. Straw et al* [2017] UKSC 3.

[13] *HS2* [2014] UKSC [2014] UKSC 3; *Pham* [2015] UKSC 19.

which are appropriate for judicial protection and wider questions of policy where the courts lack expertise such as acting 'in the interests of national security'.[14]

3. SOME QUESTIONS TO ADDRESS

What we now need to examine are not the advances made but the problems that remain through these advances. These problems constitute a remaining agenda for reform and challenge in our public law.

3.1. Brexit

First of all, the outcome of the EU referendum will have an overriding determination on the challenges that face our public law. The Brexit result is known. We do not know what Parliament – both Houses – will eventually do in the event of the leave vote. One hoped MPs acting as responsible representatives will not consent to a bill repealing the European Communities Act 1972 and coming into effect before the UK government has formally withdrawn from the EU treaties. Such action would be in breach of the treaties and international law. The government rightly rejected calls for such a measure. Parliament, as a result of the *Miller* judgment was presented with, and has assented to, legislation authorising notice under Art 50 TEU.

We simply do not know how the courts will react to a Brexit in the longer term. We know that the courts have ruled that Parliament must have a vote via legislation before Art 50 TEU may be invoked. Parliamentary sovereignty and the unique status of EU law as a source of UK law, necessitated such measure.[15] The courts will have no alternative but to accept the fact of Brexit if that comes about after treaty negotiation and legislation. But how will courts operate in a significantly altered landscape? The government has presented

[14] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

[15] Note 4 above.

its plans to repeal the European Communities Act 1972, to remove the jurisdiction of, and references to, the European Court of Justice and to transmute EU implemented laws into domestic law where possible.[16] It will involve unprecedented executive law making as laws are modified or removed. Senior judges have urged the government to provide clear guidance on how UK judges should treat CJEU judgments delivered after the UK departs from the EU where words in an EU measure are mirrored in UK legislation.[17]

We do not know whether Brexit will foment pressure for a new constitutional settlement that might include a written constitution. Nor do we know whether Brexit will lead to the break-up of the Union or whether a written constitution might be the only way of keeping the devolved Union together. Centrifugal forces may prove irresistible on a Brexit, although the appetite for independence in Scotland seems to have waned as I write. The Constitution Reform Group has published a working document on an Act of Union as a new constitutional settlement securing the long term strength of the union of the United Kingdom.[18] Even if break-up of the Union is prevented, there are likely to be the most difficult of questions concerning devolved competencies in human rights protection. What will occur in UK-Irish Republic relations? The result of the change in Parliamentary

[16] *Legislating for the United Kingdom's withdrawal from the European Union* Cm 9446 (2017)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf The bill as introduced is at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/cbill_2017-20190005_en_2.htm#pb2-l1g6 (accessed 6 November 2017).

The Withdrawal Bill faces an extraordinarily difficult passage before enactment with over 300 amendments tabled.

[17] Clause 6 states that UK courts and tribunals *may have regard* to CJEU decisions and principles in judgments after exit day 'if it considers it appropriate to do so'. Since then a 'transitional arrangement' has entered the reckoning. See Lord Neuberger 'The role of the judges in a post-referendum world' http://www.publiclawproject.org.uk/resources/265/the-role-of-the-judges-in-a-post-referendum-world (visited 3 November 2017).

[18] http://www.constitutionreformgroup.co.uk/publications/ (accessed 6 November 2017).

standing orders allowing English only stages in Parliamentary legislative procedures for legislation affecting English concerns only may prove legally and politically impossible to manage and unforeseeably divisive. The departure of Scotland, and the less likely departure of Northern Ireland, both of whom voted to remain, will leave a Parliament for England and Wales only. This in itself raises questions about the legislative and institutional supremacy of Parliament.

The decision to hold a referendum on the UK's future in the international community is a striking illustration of Parliament's diminution. It seems that the 'people' have become a component of Parliament not through representation but through direct involvement.[19] The accusation by the *Daily Mail* after the Brexit judgment that the judges who upheld Parliament's constitutional position were 'Enemies of the People' was supporting Parliament's diminution. We have to see how Parliament will react to measures brought before Parliament by the executive to achieve Brexit. The *Miller* decisions of the Divisional Court and Supreme Court have been referred to. As stated long ago, constitutionally this (ie what to do about the referendum result) is Parliament's judgement – no-one else's.[20] The Referendum Act 2015, although agreed to overwhelmingly by Parliament, placed no legal duty on Parliament to accept the outcome as binding. It is advisory and any Prime Ministerial representations on its mandatory outcome are not legally binding on Parliament. The Supreme Court affirmed this. To compare a referendum statute which has legal effects simply consider the terms of the EU Act 2011. Under its terms the government cannot agree to EU treaties etc unless the referendum condition is satisfied. This requires approval in a UK referendum. A government would be acting unlawfully if it acted without referendum approval. But even here it does not dictate that

[19] V. BOGDANOR (2012) *Oxford Jo. Of Legal Studies* 32(1), 179 'Imprisoned by a Doctrine: the Modern Defence of Parliamentary Sovereignty.'

[20] It is worthwhile recalling the views of the deeply unfashionable, sexist etc Irishman Edmund Burke on the duties of a Westminster MP as an elected representative: http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.htm (accessed 6 November 2017). l

Parliament also has to approve what the referendum decides. It is the executive that is bound in law.

3.2. Sovereignty

Without an overriding EU edifice questions of sovereignty will no longer focus on the jurisprudence of the ECJ and its rulings. But as I have written elsewhere, we are unlikely to return to a position of Parliamentary Sovereignty as understood over forty years ago.[21] Nonetheless, the Queen's speech in May 2016 proclaimed that Her Majesty's ministers will uphold Parliamentary Sovereignty and the primacy of the House of Commons – a blunt message to the Lords.[22] *Miller* reminded the government of that sovereignty. It was determined by the court not asserted by Parliament. It richly illustrates that 'twin sovereignty' of the Crown in its courts and the Crown in its Parliament.[23] Indeed, Parliament shows little sign of assertion. The courts emerged as the senior partner. How will *Miller* be used in future international developments?[24] What precedent does this 'unique' case set?

Nonetheless, I have no doubt that the courts perceive limits on what Parliament may legitimately enact in legislation and that they have the ability to shape appropriate relief when required. This is not to suggest that the UK courts are surrogate legislators. There is a difference between striking down legislation as unlawful and refusing to enforce legislation which abuses human rights or the rule of law. The position was neatly summed up by Lord Hodge in a case involving Scottish prisoners challenging a prohibition on such

[21] P.BIRKINSHAW and M. VARNEY in P.BIRKINSHAW and A. BIONDI eds *Britain Alone! The Consequences and Implications of UK Withdrawal from the European Union* (2016) ch. 1.

[22] https://www.gov.uk/government/speeches/queens-speech-2016 (accessed 6 November 2017).

[23] Lord Bridge in *X v Morgan-Grampian* [1990] 2 All ER 1 at 13.

[24] P.BIRKINSHAW (2017) *European Public Law* 'Editorial' Vol 23(2).

prisoners voting in the 2014 referendum on Scottish independence. Their challenge was unsuccessful as the exclusion involved no breach of law. In *Moohan v Lord Advocate* Lord Hodge said, with the support of four other justices, that in relation to a claim based on the common law:

"I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by the principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful." ([2014] UKSC 67 para 35)

In accepting this position, the Court of Appeal has similarly refused to rule legislation excluding certain ex pats from voting in the Brexit referendum in June 2016 unlawful under the common law. The possibility stated by Lord Hodge did not exist in *Moohan* because there was no abuse in the statute at the heart of the case. By implication, had there been an abuse a different approach would have been possible.[25]

The point at issue was repeated by Lord Neuberger writing for a unanimous court in *R (Public Law project) v Lord Chancellor* in a case dealing with restrictions in regulations on legal aid entitlement.[26]

In our system of parliamentary supremacy (*subject to arguable extreme exceptions, which I hope and expect will never have to be tested in practice*), it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so. [Para 20]

[25] *Shindler v Lord Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 paras 47 – 50 Lord Dyson.

[26] [2016] UKSC 39.

The possibility of judicial non enforcement of a primary statutory was acknowledged. This is an idea that travels back as far as *Dr Bonham's case* and Chief Justice Coke in 1610. Coke famously stated that 'in many cases' the common law will *control* acts of Parliament rendering them void. The doctrine has not been treated as orthodox in the last two and a half centuries and there has been endless debate as to what the dicta actually meant. The contemporary version does not speak of holding statutes 'void' 'in many cases' but on their non enforcement via a declaration of illegality in the event of extreme abuse of fundamental right. Parliament is not unqualifiedly sovereign. But, what will happen if a court declares provisions in a statute 'unlawful' or 'illegal' and the government chooses not to accept the declaration?

The instincts of British judges, nonetheless, are inherently conservative – that is to achieve consistent development through the application of underlying principle and not abrupt and unjustified change.[27] That is change that is not solidly grounded in legal doctrine. Their role is not one of legislators or the striking down of legislation except in an *in extremis* situation where a statutory provision or provisions would not be enforced. If we were to see a new constitutional settlement involving a written constitution this fact, that is the fact of judicial conservatism, would have to be reckoned with. It would be a significant barrier to a written constitution in the United Kingdom as exists in the USA, Germany and even France and Canada. Within a tradition of conservatism, British judges nonetheless have made striking developments in legal doctrine. This introduction provides several examples of how, over time, judicial review and judicial protection have advanced.

3.3. Further English Devolution

Further devolution of power to English urban authorities could lead to significant centres of power outside the Metropolis and together with the Greater London Authority

[27] See *Lord Sumption and the Limits of the Law* NICHOLAS BARBER, RICHARD EKINS, PAUL YOWELL eds (2016) for essays on judges, adjudication and legislation.

these centres could pose a real challenge if not to the legislative omni-competence of Parliament then to the supremacy of Parliament as a constitutional institution. Power is increasingly seeping away from Parliament. It may be difficult, impossible, for Parliament to regain its former institutional dominance.

3.4 . What is Public?

A further question, and one that initiated our inquiry, involves the identity of the public realm. This is a subject that has accompanied public law development particularly, but not exclusively, since the end of the second world war with the growing agenda of nationalisation but it took on added significance in the era of Margaret Thatcher. Her policies of privatisation, off-loading and contracting out of functions formerly in the public sector heralded a global movement towards provision of public service and even the conduct governance by the private sector. Naturally, this massive transfer of power and influence raised questions in the minds of lawyers and political scientists. If private bodies were acting as state surrogates, or even in collaboration or in consort with the state, to what extent was it appropriate to subject them to the discipline of law that was designed to hold public power accountable? To what extent have private corporations or private interests become *de facto* state bodies? What are the private parts of the state and, once identified, what accountability devices should they be subject to? Judicial review, for instance, developed analytical devices to assess whether private bodies were to be subject to judicial review.[28] Judicial review also had to assess when, if ever, powers residing in contract involving a public authority were to be subject to review.[29] In English law, contract was a part of private law and under orthodox Diceyan doctrine not appropriate for judicial review.

[28] Going back in England to *R v Panel on Takeovers and Mergers ex p Datafin* [1987] QB 815 (CA).

[29] *R v Legal Aid Board ex p Donn* [1996] 3 All ER 1; cf *Hampshire CC v Supportways Community Services Ltd* [2006] EWCA Civ 1035.

Inroads have been made into this tradition especially under the EU public procurement directives and regulation of tendering.

3.5. Freedom of Information (FOI)

Two areas raise particular problems. One of these concerns the extent of freedom of information legislation. The UK legislation (FOIA), legislation with a very wide scope, provides for almost universal coverage of public authorities. There are notable, but few, exclusions. Power is given to the secretary of state to designate private bodies and contractors as a 'public authority' subjecting them to the Act's requirements. This power has been used very sparingly and then only to cover bodies with a high level of 'officialdom' such as the Association of Chief Police Officers and the financial services ombudsman. The government has shown a marked reluctance to extend freedom of information to apply directly to private contractors or private regulators. This approach was not criticised by a Commons Committee reviewing FOIA.[30] As private bodies assume more of the powers of government and remain unelected, demand for greater transparency in the private/public interface will grow. What are the criteria to be used to assess when such an extension is justifiable? The criteria must focus on the public interest and how the public interest is best served. This question lies at the heart of the present inquiry.

There were fears that a review of the FOIA by an 'independent' commission appointed by the government would neutralise the Act and would make it less effective as a vehicle of openness. The report early in 2016 did no such thing but, to some surprise to those fretful of an evisceration, recommended worthwhile and sensible reforms.[31] While

[30] Justice Committee First Report (2011-12) HC 96 I *Post Legislative Scrutiny of the FOIA.* Bodies covered by environmental access laws have more flexible status identifying provisions: *Fish Legal* [2013] Case C-279/12 http://www.bailii.org/eu/cases/EUECJ/2013/C27912.html

[31] *Independent Commission of Freedom of Information Report* March 2016 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf (accessed 6 November 2017).

FOIA seems firmly established in our constitutional landscape, what IT developments under 'Big data' and Open data' will by-pass FOIA requirements? Could this happen in a manner that undermines FOIA? Most crucially, FOIA has become a part of 'transparency' now seen as a universal attribute of good governance. How does transparency, which at its base seeks to explain the basis of the operation of power and to expose the process of governance to scrutiny and simplification, deal with the post fact and post truth society which are seen as responsible for the Brexit vote and Trump's victory?

FOIA is a domestic statute aimed at domestic public authorities. The USFOIA acts similarly. A further question that one has to pursue is whether an international FOIA needs to be agreed in order to bring transparency to bodies whose reach is global? Who would agree to it, under what authority, what would it cover and what would it contain? Regional versions of this exist, the most famous being the law in the EU which includes environmental information and the ECHR Convention on access.[32] Brexit might suggest a step back from such wider developments.

3.6. Human Rights

A not dissimilar consideration concerning the public/private boundary applies to human rights protection. Although the Human Rights Act applies to public bodies and private bodies exercising public functions, and to that extent it goes further than the FOIA, the courts have made heavy weather of these definitions displaying a reluctance to extend state responsibility to private actors who have taken over responsibilities from public

See note 6 above on suggested official secrecy laws in the UK.

[32] See the CHR (GC) *Magyar Helsinki Bizottsag v. Hungary* [2016] ECR 975. http://www.bailii.org/eu/cases/ECHR/2016/975.html and compare with *Kennedy v Charity Commission* [2014] UKSC 20 and *Evans v Att Gen* [2015] UKSC 21. See Mowbray [2017] *European Public Law* Vol 23(4) forthcoming.

authorities as a commercial endeavour.[33] The question of horizontality, like transparency, is a major issue for the future although it is not new. 'Horizontality' here refers to the duty on private bodies to comply with human rights duties. A recent decision of the UK Supreme Court[34] confirms that in a contractual relationship between two private parties there is no space to infer state responsibilities and ECHR duties on mortgagees seeking possession orders. The case was different to those where possession orders from public sector landlords were concerned or cases where courts invoked ECHR rights to prevent tortious harm to individuals by private parties such as newspapers.[35] Courts have also interpreted relevant statutes in a manner which does impact on a private law relationship where statutory rights for a party to the agreement have been subject to the interpretation of ECHR rights. Courts have interpreted the statutes in a manner that prevents a breach of the ECHR right.[36]

The question of human rights protection is an area in which legal change is promised in the UK change which is bitterly contested. It seems unlikely that horizontality (application to 'private' bodies) will be attended to if change does take place so that the HRA is replaced by a UK Bill of Rights. Indeed, the highly criticised outline proposals [which the 2016 Queen's Speech stated would be 'brought forward' but without accompanying detail (just as the 2015 Queen's Speech reported)] of the government seem intent on restricting human rights protection. The Conservative Party manifesto of 2017 stated that a new bill of rights for the UK ('the human rights legal framework') would be returned to once the Brexit process was finalised – it will take a brave soul to predict when that might be.

[33] *YL v Birmingham City Council* [2007] UKHL 27.

[34] *McDonald* [2016] UKSC 28.

[35] *Commencing in Douglas v Hello!* [2001] QB 967 (CA).

[36] *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

Resentment has been expressed over a perceived 'loss' of control over our law and courts because of the ECHR and the Strasbourg court standing in judgment of the UK. The extraterritorial effect of the ECHR and its application through the HRA have brought serious disquiet to those who believe that the rule of law is a purely national, the popular expression of commentators is autochthonous, concern. The latter dimension illustrates vividly the way in which protection of human rights has been seen in some quarters as invading the zone of immunity reserved to the executive and those acting on behalf of the executive. Announcements in October 2016 by the UK Defence Secretary indicate that the HRA will not apply to UK armed services operating outside the jurisdiction. Judgments of the Strasbourg court had extended the scope of liability and future derogations would be sought.[37] The manifesto referred to above stated that the UK 'will remain signatories of the ECHR' for the duration of the next Parliament. Mrs May was thinking of a five-year term when she made that prediction.

3.7. Equality and Discrimination

Equality and discrimination present particular difficulties. Nationality allows widespread discrimination between individuals based on the accident of birth. The mass migration following conflict in the middle-east and parts of Africa illustrates as poignantly as possible that nationality and citizenship define one's right of entry and residence, one's right of movement. The problem is one of size of the migrating population and their lack of resources. For the wealthy few concessions can be readily made. While efforts to address discrimination have been legislated in the UK since the 1960s in relation to race, gender and a growing number of 'characteristics' probably the most pervasive and enduring discriminating features emanate from class and wealth. The two are not the same. Class is no guarantee of wealth just as wealth is no guarantee of class. But privileged birth invariably sets one on a course for life with built-in advantages in relation to education,

[37] https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations (accessed 6 November 2017). See n 12.

employment, opportunity and prospects. 'Casualisation' of labour has a pronounced effect on the socio-economically disadvantaged. Attempts in legislation to address socio-economic disadvantages have either lain fallow or have been ineffective in helping to realise greater equality. The incoming Prime Minister in July 2016 promised to set this problem at the heart of her administration following the Brexit vote. Her first major policy proposal involved a national revival of grammar schools in England,[38] a policy which had been responsible for divisive reactions, both in the past and present. Grammar schools are accused of being elitist and inegalitarian in their impact on secondary (11-18 year old) education. The best resources are diverted to a minority. A possibility for all becomes a reality for a few. The voracious appetite of Brexit to absorb the lion's share of government and Parliamentary time, and the absence of a Parliamentary majority, meant that this policy fell by the wayside after Mrs May's ill-judged call for the 2017 election.

It would be over-simplistic to suggest that the Brexit referendum result was 'out' because of a disaffected working class vote. That vote, however, had its considerable place and clearly registered the resentment of working class communities' sense of exclusion, alienation and disadvantage. This process of disengagement has been in existence since the 1970s but has been heightened by globalisation and professional elitism.

The 2017 Higher Education and Research Act provides an interesting example in this discussion. The Act purports to be a measure aimed at enhancing equality of opportunity for all in degree level education. Its proposals aim to dismantle the safeguards that constitutionally ensured independence in university management through the Privy Council and to set a framework which places political control of decision making, in the sense of making crucial decisions on policy, through the Office for Students, a non departmental public body which will replace two existing bodies (below). The Act

[38] https://consult.education.gov.uk/school-frameworks/schools-that-work-for-everyone/supporting_documents/SCHOOLS%20THAT%20WORK%20FOR%20EVERYONE%20%20FINAL.pdf (accessed 6 November 2017).

unleashes unprecedented market forces as the controlling factor in establishing or dis-establishing universities. The chief executive of the Office is appointed by the Secretary of State. Existing powers of direction by the secretary of state are replicated for the Office. It will be an 'arms length' quango. The story of quangos is a long story and to that extent nothing institutionally is strikingly innovative in the Act. We have long witnessed the use of ciphers in British governance. Quangos inevitably entail control by a minister who uses a non-ministerial public body to conceal the full extent of the exercise of his/her own power.

The premise of the Act is that the Office will be financed from fees etc from universities although the Secretary of State will make grants to the Office and may make loans. Its role is to encourage competition in higher education driving up quality and outcomes through a Teaching Excellence Framework. It will assume the regulatory powers of the existing Funding Council and the statutory powers of the Director of Fair Access to Higher Education. It will have entry and search powers under warrant. Its supplementary co-incidental powers include doing 'anything ... which appears to it to be necessary or expedient for the purpose of, or in connection with, the performance of its functions.' [Sched 1 para 15]. Such sweeping powers are often given to ministers or local authorities. The Office is the state in microcosm.

The independent Office will be charged with maintaining current protections for academic freedom and institutional independence. Elite institutions will remain largely untouched and appeared set to have authorisation to increase their student fees – although all institutions will be able to apply for such an increase. The potential voting power of the 'young vote' has forced the government to accept that since the Bill was introduced the climate for raising fees has altered significantly. Costs of living increases in fees will be dependent on the Office and government. The government can also alter retrospectively the borrowing conditions of student loans by changing (increasing) repayment thresholds and

interest rates.[39] Banks cannot do this. Poorer students are likely to enrol with newly created entrepreneurial institutions without the former guarantees of quality based on academic peer review and traditions of dedication to education. No doubt an army of consultants will be willing and paid recruits to advise on quality. A new unified research institution – UK Research and Innovation – will comprise different subject panels and will aim to reduce bureaucracy – the very thing the reforms for creating greater competition and transparency in higher education are likely to create.

Wealth, class and privilege set the parameters for our lives and how they are fulfilled. Addressing this question is one that must be tackled in legislation in a manner which is consistent with the seriousness of the task just as race, gender, disability and orientation have been.[40] Superficially, overt discrimination in protected areas is not as manifest as was once the case. Events after the Brexit vote should not allow complacency when large increases in racially motivated incidents and crimes were reported. But many of the protected areas have high proportions of members from the lower socio-economic groups. The subject brings home in a vivid manner how law reform through case law – the 'test case' strategy - is inherently limited. This is a task for Parliament and the statute book.

3.8. National Security

National security has often been referred to as the *suprema lex*. As we have witnessed greater migratory movement, security has become a global pre-occupation encompassing national, regional and international dimensions. *Salus populi* is the first *raison d'etre* of government. *Salus mundi* has understandingly been judicially

[39] https://hansard.parliament.uk/commons/2016-07-18/debates/C97C7935-F73E-4693-ACEA-9B49A67F4B2B/StudentLoansAgreement (accessed 6 November 2017).

[40] http://www.law.leeds.ac.uk/assets/files/events/Inequality-and-the-law-lecture-plenary.pdf (accessed 6 November 2017).

acknowledged by domestic judges as a primary concern.[41] The problem is: does invocation of 'national security' allow too wide a cloak to be drawn over governmental action? The exaggerated and unjustifiable use of intelligence without independent verification to justify the invasion of Iraq in 2003 has been roundly criticised by official reports, most recently the Chilcot report.[42] There is widespread and continuing suspicion of government use of secret intelligence.

Much of the work of the security and intelligence agencies is conducted under the strictest conditions of secrecy. We have had to rely upon unofficial leaks to uncover the world-wide scope of surveillance over all of us. Litigation involving terrorist suspects takes place in closed courts or tribunals with special provisions where a suspect is not allowed to see the evidence, or all of the evidence, against the suspect. The more we come to discover hitherto secret practices the more concern is expressed about the power, and absence of appropriate forms of accountability, over the services and their influence in law-making and policy formulation. Sir Stephen Sedley has even asked whether the security and intelligence services constitute an autonomous power of the state without effective constraint and control.[43] If this is correct are there any recommendations that can sensibly be made to improve oversight and accountability?

The legislative framework of surveillance carried out by UK authorities has been recast by the Investigatory Powers Act 2016, Theresa May's last major initiative as Home Secretary. Ironically, the Act's temporary legislative precursor was the subject of a legal challenge before domestic and EU courts by David Davis MP, appointed by Prime Minister May as Brexit minister, although he departed from the litigation by the time the Advocate

[41] *Secretary of State v Rehman* [2001] UKHL 47.

[42] *The Iraq Inquiry* July 2016 http://www.iraqinquiry.org.uk/the-report/ (accessed 6 November 2017).

[43] S. Sedley note 7 above chapter 9.

General of the EUECJ gave his opinion.[44] This opinion basically advised that national parliaments could enact duties of general data retention for communication providers and access powers to the retained data to authorities providing this obligation was limited to what was strictly necessary in the fight against serious crime investigation and prevention and was accompanied by necessary and strict legal safeguards of legal certainty, accessibility, foreseeability, and proportionality. The obligation would include all the safeguards outlined by the EUCJ in the *Digital Rights* case including prior independent review before access to the data by the authorities. The judgment of the ECJ was even more constraining on the national legislation both in relation to retention and access to data. The fight against terrorism cannot render '*the general and indiscriminate retention of all traffic and location data .... necessary*.' [45] In short the obligation of retention must be proportionate, within a democratic society, to the objective of fighting serious crime, which means that the serious risks engendered by the obligation, in a democratic society, must not be disproportionate to the advantages which it offers in the fight against serious crime.

Will the IP Act strike the right balance between security, surveillance and individual autonomy? Needless to say, the jurisprudence of the CJEU will not be binding in its judgments delivered post Brexit although the EU Withdrawal Bill allows UK courts and tribunals to have regard to post exit CJEU decisions and principles. Could we expect such a robust protection from our own courts?[46] The EU Withdrawal Bill follows the White Paper

[44] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson* http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-07/cp160079en.pdf (accessed 6 November 2017) from which Davis recused himself see *Secretary of State v D. Davis* [2015] EWCA Civ 1185.

[45] Case C-293/12 and C-594/12, [2016] EUECJ:C:2014:238 para 103 and paras [95], [108] and [112].

http://www.bailii.org/eu/cases/EUECJ/2016/C20315.html (accessed 6 November 2017).

[46] See note 17 above. The UK Investigatory Powers Tribunal has referred to the ECJ questions concerning the coverage of EU law and UK bulk surveillance communication data powers: *Privacy International v Secretary of*

and ensures that the EU Charter of Fundamental Rights, which was a core aspect in the ECJ case above, will not be absorbed post Brexit into UK law.

3.9. Internationalisation of Public Law

The globalisation of law and the relationship between law and foreign policy have been transformed since the Second World War with immeasurable implications for the relationship between law and politics. The aftermath of the Second World War strengthened the hand of international law. But international law is binding on states often without any means of enforcement. Its application to non-state bodies is limited. It is only 'enforceable' by means of judgments of the international court which in reality means through politically loaded procedures of the United Nations and Security Council. International law is the spiders' web through which the big insects pass without hindrance after Honoré de Balzac. Where an international judicial body does have significant power, such as the appellate body of the WTO dispute settlement system, its rulings have been compromised by acts of the US government which has also blocked the re-appointment of a judge to the tribunal because it accused him of creating, and not applying, the law.[47] Conversely, when the Independent Tribunal in the South China Sea arbitration issued a unanimous ruling against China, the decision was rejected by China but supported emphatically by the USA. The USA had not, however, ratified the relevant treaty, the UN Convention on the Law of the Sea.[48] In fact, the imposition of EU sanctions against Russia after the annexation of the Crimea and deliberate destabilisation of the Ukraine is a real

State for Foreign Affairs 30 October 2017 http://www.ipt-uk.com/judgments.asp?id=35 (visited 3 November 2017).

[47] FT 1 June 2016 'Washington threatens to undermine the WTO.'

[48] https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf (accessed 6 November 2017).

example of the 'bite' of EU foreign relations policy and one that was propelled by the UK as a member of the EU.

Some states allow for international law to be a part of domestic law, and therefore domestically enforceable, under specified circumstances. This is not the case in the UK where international law has to be 'incorporated' within domestic law before becoming enforceable. There are well recorded attempts to make international tribunals more effective in relation to war crimes – the International Criminal Court is a striking example in such crimes although signatories are withdrawing their agreement - and in trade and commercial disputes, financial regulation, environmental protection and communications regulation as well as opening up claims to individuals as litigants. International networks in a wide range of subject areas exist. But the subject of the theme introduced in this paragraph takes a different dimension.

What is interesting and important for the present discussion is the manner in which domestic courts have become increasingly involved in litigation concerning foreign policy. These matters would hitherto have been largely non-justiciable before domestic courts. They were a part of that zone of executive immunity about which we spoke earlier. As a consequence of the extension of protection of individual rights, whether under the Human Rights Act or common law development of judicial review or liability, there has been a shrinking of the spheres of executive immunity in previously inviolable areas. Inroads have been made into the immunities of act of state, both UK and foreign, state and diplomatic immunity and actions of the military and leading politicians in overseas conflict zones have been questioned in the domestic courts. These are remarkable developments in justiciability and ones which require further exploration.[49]

[49] See P.BIRKINSHAW in *Le Droit public britannique: état des lieux et perspectives* sous A. Antoine Société de législation Comparée, Collection Colloques Vol 27, p. 47.

Security, as already stated, is an international concern. A large body of scholarly work is being carried out on the global dimension of public law. International public law differs from public international law insofar as its domain involves public law systems in domestic jurisdictions, in regional systems such as the European Union and in international agreements such as the WTO. The object of inquiry is the development of principles of justice in relation to the exercise of power and regulatory frameworks, initially state, or state sanctioned, or state approved power and how principles of law and justice and their applicability beyond a nation state, and beyond state bodies, may develop. The object of concern is with non state actors, although such bodies may have state recognition. The concern is focused on their use of power and influence and how bodies and individuals may use principles developed from public law to protect their individual or collective interests. How have the principles of public law advanced justice beyond the state? Paul Craig has recently conducted an extensive review of the literature in the area of global administrative law. It constitutes an excellent introduction to this subject.[50] The political rhetoric since Brexit and the 2016 Presidential election is defiantly anti globalisation and internationalism. How will that development affect this subject?

3.10. Access to Justice and the Rule of Law

Access to Justice is far from a novel theme! This was the subject of my inaugural lecture in 1991. The UK is not alone in witnessing the impact of austerity measures on access to justice. The outcome is the same everywhere: the impoverished are removed from the possibility of going to law where their interests or rights are involved. The impact in England is particularly hard in legally aided work, family law, employment and social security law and in judicial review. There have also been costs imposed on defendants in criminal litigation which call into question the basic fairness of the criminal process. What this represents is an assault on the rule of law itself. The UK Supreme Court criticised regulations as *ultra vires* which removed from legal aid entitlement those people who could

[50] See note 7 above.

not satisfy a residence test as set out in the regulations. The court found that the power exceeded those given by Parliament in legislation but declined to rule on the discriminatory nature or otherwise of the regulations.[51]

The rule of law is a value laden concept and there are many conceptions of the rule of law. We know the concept ranges in content from the most formal of offerings based on abstract equality, legal regularity and the blind eye of justice to the fullest evocations of substantive interpretations where substantive equality ultimately entails widespread re-distribution of wealth. Conversely, many of those who support a substantive content for the rule of law argue it is not the rule of law that can make the poor richer or the rich more humble.[52] Reducing injustice nonetheless will invariably have distributional implications.

Within the UK, reflecting practices elsewhere, we have witnessed a movement from procedural to substantive content in UK/EU law and UK law more generally. It would now be conspicuous not to include protection of human rights within the rule of law. This was unthinkable in conventional analyses thirty years ago. The importance of the ECHR and Court of Human Rights is an essential feature in this development. Lord Bingham in his rightly acclaimed book on *The Rule of law* (2010) lists the protection of human rights as a component of the rule of law as well as access to law. The movement to a greater substantive content for the rule of law is widely accepted. But we need to establish the limits of the rule of law and its interpretation today – both for domestic law, and the interrelationship between domestic law and extra territorial systems of law. The position of EU law and what it offers us in the UK will be affected by the Brexit vote. Quite how we shall have to wait and see.

[51] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39. See also the powerful statements in *R (UNISON) v Lord Chancellor* [2017] UKSC 51 paras 65-89.

[52] S. SEDLEY note 7 p 280.

If a majority cannot afford to go to law what does this say about equality before the law? Many years ago, and sporadically since, I worked on non judicial forms of redress which form a part of the alternative dispute resolution movement. These forms of redress are a necessity. But they cannot be a complete substitute for judicial redress. When judicial redress is denied to the majority the rule of law not only runs the risk of becoming meaningless; it will become meaningless.

It is therefore a matter of regret that for the first time since the 1950s there is in England and Wales no statutory standing body to keep the whole field of administrative justice under scrutiny. The Administrative Justice and Tribunals Council was abolished in 2013 in the cull on public bodies under the coalition government and a non-statutory advisory body, the Administrative Justice Forum, meets twice a year.[53] This is not an adequate substitute for a standing body to advise on administrative justice on a comprehensive basis.

3.11. Brexit and the Future

As I wrote at the beginning of this introduction, this analysis takes place at a time when the UK has made the most important decision in over forty years, undeniably unprecedented, in relation to the UK's relationship to the international community. I say 'unprecedented' because the referendum in 1975 was with reference to a trading community of what was about to become nine members and not a 'union' of twenty-eight. Quite what the ultimate bearing of the June 2016 decision will be on the final outcome in our relationship with the EU has to be determined. The repercussions of the Brexit referendum vote are incalculable. Complex negotiations appear quagmired. One question that will be uppermost is the following: how will our courts develop the nascent

[53] https://www.gov.uk/government/groups/administrative-justice-advisory-group (accessed 6 November 2017).

On the concerns of the Administrative Justice and Tribunals Council's demise (from the AJTCs perspective) see *Securing Fairness and Redress: Administrative Justice at Risk?* (2011).

constitutionalism that the Supreme Court has fostered in the last few years and which has its origins in earlier case law of the appellate committee of the House of Lords? The questions raised hitherto in this paper will remain and become more pressing. *Miller* is a striking example.

The decision from the plebiscite was to leave. We have no idea what this will ultimately mean for the detailed outcome and content of negotiations. What will be the relationship between the UK and EU that emerges? What will be the place of the UK in the new world order? Will there be pressure to remove the UK from a permanent seat at the UN Security Council? What will be the outcome for sovereignty? 'Sovereignty' was one of the most widely touted concepts in the Brexit campaign. I do not recall any sensible unpackaging of this term beyond 'controlling borders' and immigration and 'getting back control', meaning making our own laws and making them 'democratic' and giving Parliament sovereignty over our judges. Parliament never ceded its overall legislative sovereignty although I have spoken of a limitation above in the form of judicial non-acceptance of egregiously abusive acts against the rule of law. The UK ministers and UK elected MEPs participated in law making at the EU level. National Parliaments were given greater influence in EU law-making. In international negotiations the Crown is 'sovereign' but has always, or certainly for over 400 hundred years, lacked the power to change domestic law. The Brexit judgment *advanced* that point emphatically, although I have spelt out some reservations.[54] If the UK lacked competence to make trade treaties where the EU had acted that was because we had pooled sovereignty with our partners in these matters. I would ask for a catalogue of disadvantages that such agreements effected. None exist I would submit.

This phrase 'sovereignty' of course is not self-defining. But no-where was it explained in a manner that brought out and unpacked its real significance. No-where were

[54] Editorial (2017) *European Public Law* Vol 23 Iss 1 March 2017 and note 21.

the implications of the replacement of representative sovereignty by popular sovereignty spelt out.

How much of the existing EU provisions implemented in UK laws will remain? The EU Withdrawal Bill sets out the agenda for absorbing EU law into UK law invariably by executive law-making.[55] It seems clear the premium on EU and public lawyers is going to be huge as the unravelling, in whatever form, of future relationships is underway. The General Council of the Bar of England and Wales, the professional regulatory body for barristers, has written that in areas such as data protection UK law is likely to remain modelled on EU law because of the necessity of having 'safe harbours' for data holding and cross border data transfers.[56] The UK government has accepted this.[57] Financial regulation is likely to be based on EU law and any trade deals with the EU may well result in EU legal frameworks in environmental law, environmental information law, public procurement and competition law including state aids. Specific outcomes will be the result of 'deals' and bargaining power. One can only guess as to the timing involved. The EU Canadian trade deal seen by some Brexit supporters as a model for the UK's future with the EU has taken

[55] See Hansard paper on EU (Withdrawal Bill) *Delegated Legislation, Parliamentary Scrutiny and the EU (Withdrawal) Bill* (Sept. 2017), https://assets.contentful.com/xkbace0jm9pp/4mZb6S8t3yukaqAqKYkskC/955ff1e64ba499649e2bc72f9a942059/Taking_Back_Control_FINAL.pdf site (visited on 25 Sept. 2017).

[56] http://live.barcouncil.netxtra.net/media/472103/exec_summary_bar_council_eu_referendum_final.pdf (all visited 3 November 2017).

http://live.barcouncil.netxtra.net/media/472106/paper_i_bar_council_eu_referendum_final.pdf

http://live.barcouncil.netxtra.net/media/472109/paper_ii_bar_council_eu_referendum_final.pdf

http://live.barcouncil.netxtra.net/media/472112/paper_iii_bar_council_eu_referendum_final.pdf

[57] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The exchange_and_protection_of_personal_data.pdf (accessed 25 Sept. 2017).

over seven years to negotiate and faced resistance from several EU member Parliaments and then a regional Parliament. The US president stated in the spring of 2016 that a UK/US trade deal would have to take its place in a long queue and the UK will be given no special treatment. This position was confirmed after the referendum result. Trump has consigned it to the waste bin – for the present. Whether the widely predicted cessation and collapse of the US/EU Transnational Trade and Investment Partnership will make any difference awaits to be seen. The incoming President is hostile to trade deals although the UK hopes that he will be sympathetic to the UK.

4. CONCLUDING THOUGHTS

In introducing this paper I spoke of 'the modern meaning of democratic involvement by those who encounter power configurations'. The 2016 referendum was the outcome of a divided political party whose leader was cornered into offering a plebiscite to buy off opponents in his own party who had an ideological obsessive aversion to 'Europe' or who were fearful for their Parliamentary seats because of a populist opponent in the shape of UKIP. Many voters explained that they simply had no grasp of the issues involved. It was widely reported many voted for Brexit because they did not think it would happen. Xenophobia, widely fanned fear of foreigners in particular by the popular press,[58] simplistic populism and a wish for an erstwhile image of 'olde England' had their place without doubt among more rational reasons for voting leave. But even the latter seemed very often more precariously placed on vacuous optimism and not hard, contestable fact. The dominance of social media as a means of saturating public opinion and colouring the

[58] The Press Gazette analysed that in the last month of the campaign on Brexit more than 90 million newspapers were published with front pages favouring leave; only 30 million front pages were published with front pages favouring remain: *Financial Times* 25/26 June 2016 p. 6.

'truth' has been responsible for the prevalence of populist politics, it has been alleged.[59] The future was decided on a Prime Ministerial gamble that back-fired and a guess that was poorly informed. It has to be questioned whether this was a firm basis on which to fashion our future relationship with the rest of the world? Regrettably, the 'Remain' case was poorly – abysmally - conducted. There was a surplus of fact from 'experts' which the leave campaign successfully derided in the forum of popular opinion– what do experts know of the *real* word? – often derided successfully as fear-mongering. There was little consistent argument about the ethical principles of working together co-operatively for our common good in a joined enterprise with our partners. Two of the major protagonists for remain – the Prime Minister and the Chancellor – had long belittled the EU. What clear message would electors receive from this? It is as if the UK was the recipient of that old aphorism: 'May you live in interesting times'. Its origin, reputedly Chinese, is disputed. It was a curse. 'Those whom the Gods wish to destroy' said Enoch Powell in decrying immigration in the 1960s 'they first make mad.'

What future, one may ask, for nation-wide referenda where the outcome is unclear, the position complex and the stakes fundamental? The old constitutional conundrum: 'Who decides who decides'? has acquired fresh potency at a time of widespread populist politics and populist political leaders. The European Union was seen as a part of globalisation. Many Brexiteers had not benefited from this and felt threatened by it. The virtues of rational liberal politics devised by elites, the 'gainers' from European Union, simply had no pull for them. If the 'elites' are correct in assessing that the benefits of rational liberal politics benefit all more significantly than any alternative, how, if at all, are they going to persuade the 'losers' (the economic underprivileged) who won the Brexit vote of the

[59] C. SUNSTEIN *#republic: Divided Democracy in the Age of Social Media* (2017). Princeton UP. K. Viner 'How Technology disrupted the truth' *The Guardian* 13 July 2016. T.NICHOLS *The Death of Expertise: The Campaign Against Established Knowledge and Why it Matters* OUP 2017.

benefits of rational liberal politics?[60] How is the message of rationality to be heard and protected in the era of populist politics and simplistic assertion? This is much wider than the future of public law. A transatlantic dimension to this has been added. The ninth circuit court of appeals has reminded the presidency of constitutional limits on its powers even in national security.[61]

But the political debate and its outcome set the context for public law. Political choice and direction based on sound evidence and fact have been at the heart of public law development for the last fifty years. This is the contribution of rationality and proportionality review. These contributions are to be more important than ever in preventing a tyranny of the majority aided by global technology – technology whose

[60] M. IGNATIEF *Fire and Ashes: Success and Failure in Politics* (2013) and see Ignatief's review of Nick Clegg's *Politics: Between the Extremes* (2016) *Financial Times* 10-11 September 2016; E. LUCE *The Retreat of Western Liberalism* (2017).

[61] See *State of Washington et al v Donald J. Trump President et al* No 17 – 35105 CA Ninth Circ 9/02/2017 and the courts' suspension of Trump's Executive Order banning immigrants from seven Muslim countries entering the US. '[A]lthough courts owe considerable deference to the President's policy determinations with respect to immigration and national security, it is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action'(p.18). http://cdn.ca9.uscourts.gov/datastore/opinions/2017/02/09/17-35105.pdf (10/02/2017) (accessed 6 November 2017). For judicial orders against modified executive orders, see http://www.vox.com/2017/3/15/14940946/read-full-text-hawaii-court-order-trump-refugee-travel-ban (accessed 6 November 2017). The US Supreme Court upheld Trump's appeal to the extent that the preliminary injunctions were stayed (ceased to have effect) in relation to foreign nationals with no bona fide relationship with a 'person or entity' in the US. The hearing of the substantive issues will take place in the autumn of 2017: *Donald J. Trump et al v International Refugee Assistance Project* Nos 16-1436 (26/06/2017) https://www.supremecourt.gov/opinions/16pdf/16-1436_l6hc.pdf (accessed 6 November 2017).

For executive inspired assaults on the US Administrative Procedure Act 1946 see S. Rose-Ackerman 'A Regulatory Revolution is Underway' http://www.thehill.com/blogs/pundits-blog/the-administration/322127-a-regulatory-revolution-is-underway (accessed 6 November 2017).

executives have been zealous to protect the virtues of liberty without a commensurate sense of responsibility for the power they wield.

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EN TORNO A LA CONTROVERTIDA COMPATIBILIDAD DEL CONCEPTO DE CONCESIÓN CON LA RESPONSABILIDAD PATRIMONIAL DE LA ADMINISTRACIÓN EN CASO DE RESOLUCIÓN[1]

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[1] El presente trabajo se ha realizado en el marco del Proyecto de Investigación titulado: "El tiempo de las reformas administrativas: hacia la excelencia en la contratación pública (*Smart Procurement*) a través de compras eficaces, estratégicas y transnacionales", (Ref: DER2015-67102-C2-2-P).

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RESUMEN

El presente trabajo analiza la regulación española del deber de indemnizar al concesionario en los supuestos de extinción anticipada o resolución de la concesión, conocido como responsabilidad patrimonial de la Administración (RPA), y su compatibilidad con la exigencia comunitaria de que toda concesión, como fórmula que conlleva la atribución al concesionario del derecho a explotar la obra o servicio, debe trasladar el riesgo operacional al concesionario.

Palabras clave: Concesión, riesgo operacional, resolución, responsabilidad patrimonial de la Administración

ABSTRACT

This paper analyses the Spanish regulation of the duty to indemnify the concessionaire in the event of early termination of the concession, known as patrimonial liability of the Administration (RPA), and its compatibility with the community requirement that any concession, as a formula that entails the concessionaire's attribution of the right to exploit the work or service, must transfer the operating risk to the concessionaire.

Keywords: Concession, operating risk, termination of concessions, patrimonial liability of the Administration.

1. INTRODUCCIÓN

Por razones diversas, el recurso del sector público a técnicas de colaboración público-privada (CPP)[3], tanto para la provisión de servicios como de infraestructuras, se ha acentuado notablemente en las últimas décadas[4], al punto de considerarse como estratégico para fomentar las inversiones y reactivar la economía[5]. Las razones manejadas para justificar su utilización han sido diversas, pero destacan dos por su importancia y reiteración. De un lado, el hecho de que la CPP permita atender la demanda de servicios y obras sin afectar a las cuentas públicas, al denominado "*perímetro de endeudamiento*[6], resulta decisivo en un escenario de fuertes restricciones presupuestarias y estrictos límites al déficit público impuestos por Bruselas. De otro, se afirma que el sector privado es más eficaz[7] y eficiente que el sector público y que este puede beneficiarse de los mayores conocimientos y de los métodos de funcionamiento de aquel; la CPP sería, en este sentido,

[3] Sobre el auge de las fórmulas de CPP, VALCÁRCEL FERNÁNDEZ (2012: 442-450).

[4] Como último ejemplo, el pasado mes de julio de 2017, el Gobierno español ha anunciado la puesta en marcha de un Plan Extraordinario de Inversiones en Carreteras (PIC) mediante colaboración público-privada, dotado con 5.000 millones de euros para actuar sobre 2.000 km. de carreteras en cuatro años (2017-2021).

[5] GIMENO FELIÚ (2014b: 139); igualmente en (2014a: 1-2).

[6] GIMENO FELIÚ (2014a: 21).

[7] "*La CPP* -afirma el Comité Económico y Social Europeo- *permite beneficiarse de la eficacia del sector privado y aplicar mecanismos apropiados de repartición de riesgos entre el sector público y el privado*". Dictamen del Comité Económico y Social Europeo sobre el tema "El papel del BEI en el ámbito de la colaboración público-privada (CPP) y el impacto en la problemática del crecimiento" (2005/C 234/12), DOUE de 22 de mayo de 2005.

un buen instrumento para que el sector privado aporte su *hnow how* en el diseño, construcción y gestión de la infraestructura o servicio de que se trate[8].

Pero este tipo de fórmulas presenta también notables peligros o inconvenientes como los derivados de su mayor coste[9], necesario para hacer atractivo al sector privado la asunción de un cometido sin duda arduo, de larga duración y grandes riesgos.

De ahí que el primer y fundamental análisis que deba efectuarse antes de lanzar un contrato de CPP tenga por objeto la optimización de la relación coste-beneficio. De este modo, solo estará justificado acudir a estas técnicas cuando la realización del proyecto por el sector privado proporcione un valor añadido tal que aporte una mayor eficiencia que la que alcanzaría la Administración si lo ejecutase por sí misma; esto es, cuando el proyecto proporciona *Value for Money* (relación calidad-precio)[10].

2. CLAVES DE LA TÉCNICA CONCESIONAL

[8] MARTÍN PERROTTO y VÁZQUEZ LÓPEZ (2010: 504).

[9] BERNAL BLAY (2010: 32).

[10] VALCÁRCEL FERNÁNDEZ (2012: 457). La propia autora concluye que "*a la celebración de contratos de CPP solo debería acudirse tras un estudio pormenorizado de las circunstancias de cada proyecto que arrojase que la realización del mismo por el sector público es ineficiente porque no está en disposición de afrontarlo de la forma que se entiende necesaria. Por tal razón, el mayor coste que reportará la asunción del mismo por los particulares, está compensado por la plusvalía real que se obtiene en términos de eficacia, respecto al resto de alternativas, en la atención del cometido público perseguido. No valen, por consiguiente, respuestas globales, amplias o genéricas, sino que para decidir lo que en cada caso proceda hay que tener un amplio y profundo conocimiento de las capacidades y eficiencia del sector público o de otros métodos contractuales distintos de este tipo de mecanismos de colaboración*" (pág. 459). Asimismo, HERNANDO RYDINGS (2012: 87-88 y *passim*).

2.1. Derecho de explotación y transferencia de riesgos

Uno de los modelos de CPP más utilizados en España, sino prácticamente el único, es el concesional[11], sistema caracterizado, en palabras del Libro Verde, por dos notas principales: a) crear un vínculo directo entre el socio privado y el usuario final: aquel presta un servicio a la población "*<en lugar de> el socio público*", pero bajo su control; y b) remunerar al contratista mediante "*cánones*" abonados por los usuarios del servicio (o de la infraestructura), que se completan, en su caso, con subvenciones concedidas por los poderes públicos[12]. Se otorga, pues, el derecho de explotación de la obra o del servicio al concesionario, derecho que implica también la transferencia de la responsabilidad de la explotación, que engloba los aspectos técnicos, financieros y de gestión de la obra o servicio, y permite trasladarle todo o la mayor parte del riesgo inherente a la explotación, en la medida que su beneficio y la recuperación de la inversión dependen de la demanda y pago por los usuarios de los citados "*cánones*" (riesgo de demanda). Sin explotación no cabe hablar de concesión, tampoco de asunción del riesgo por el empresario[13]. La jurisprudencia del Tribunal de Justicia de la Unión Europea así lo ha venido subrayando en numerosas ocasiones, de modo particular para distinguir entre contratos y concesiones[14].

Debe matizarse, con todo, que la traslación de este riesgo de demanda al concesionario no exige siempre que su retribución provenga de las cantidades abonadas por

[11] Un análisis histórico-jurídico de la figura en España puede encontrarse en MENÉNDEZ GARCÍA y FERNÁNDEZ ACEVEDO (2010: *in totum*).

[12] Afirma MIGUEZ MACHO (2015: 399), que "*estas dos características son justamente las que diferenciarían las concesiones de otras modalidades de colaboración público-privada también contractual*".

[13] VILLAR ROJAS (2007: 158).

[14] Así, por ejemplo, la STJ 605/2005, de 13 de octubre, As. C-458/03, *Parking Brixen GmbH* c. *Gemeinde Brixen* y *Stadtwerke Brixen AG*, ECLI:EU:C:2005:605, apartados 39 a 41.

los usuarios. En efecto, la traslación del riesgo al concesionario no desaparece, o no lo hace por completo, por el hecho de que este no reciba el pago de los usuarios de la infraestructura o del servicio, sino de la entidad concedente, siempre que dicho pago dependa del número de usuarios de la obra o servicio en proporción suficiente como para que no quede garantizada la recuperación de las inversiones y costes de explotación. Basta, pues, con que la retribución percibida por el concesionario esté vinculada a la demanda de los usuarios[15].

Por otra parte, el peligro constatado y cierto de que estas figuras se utilicen con el propósito de eludir controles sobre los gastos públicos, Eurostat[16] aprobó la Decisión 18/2004, de 11 de febrero. Conforme a la misma, para que los activos incluidos en una asociación público-privada puedan contabilizarse fuera del balance de las Administraciones públicas es preciso que se cumplan dos condiciones acumulativas: que el socio privado se haga cargo del riesgo de construcción y que, además, asuma al menos, bien el riesgo de disponibilidad o bien el de demanda. Sin perjuicio de otros matices, se subraya, una vez más, la transferencia del riesgo como elemento clave también desde el punto de vista financiero y contable. Nótese que conforme a esta Decisión debía transferirse en todo caso el riesgo de construcción, bastando con que además se transfiriera el riesgo de demanda o el de disponibilidad (o ambos, naturalmente)[17].

[15] MIGUEZ MACHO (2015: 405); VALCÁRCEL FERNÁNDEZ (2016: 121); VILLAR ROJAS (2016: 297). La Directiva 2014/23/UE, en su considerando 18, lo admite sin ambages: "*Hay que aclarar que ciertos regímenes en los que la remuneración procede exclusivamente del poder adjudicador o la entidad adjudicadora pueden considerarse concesiones si la recuperación de las inversiones y costes que hubiera satisfecho el operador para la ejecución de las obras o la prestación de los servicios depende de la demanda o del suministro efectivos de esos bienes o servicios*".

[16] Oficina Estadística de la Unión Europea.

[17] Por lo que se refiere al riesgo de disponibilidad, concepto importante por cuanto más adelante se dirá, la Decisión citada en el texto entendió que consiste en "*no ser capaz de suministrar la cantidad contractualmente pactada o alcanzar la seguridad o niveles certificados públicamente, correspondientes a la prestación de servicios*

Por su parte, el Sistema de Cuentas Europeo, SEC-95[18], ha venido exigiendo, para que los activos vinculados a una operación de CPP puedan tener la consideración de privados y no computen como déficit y deuda públicos, que el ente público traslade todos los riesgos al privado. Sin embargo, la práctica demuestra que siempre se produce una suerte de reparto de los riesgos entre el socio privado y el público[19]. De ahí que, posteriormente, el Sistema de Cuentas Europeo revisado 2010 ("SEC-2010")[20] haya establecido que para determinar si los activos derivados de una CPP pertenecen al socio

a los usuarios finales, definidos en el contrato. También se aplica al caso en el que el socio no alcanza los estándares de calidad relativos al suministro del servicio, determinados en el contrato, y se produce un evidente fallo del servicio por su parte. La Administración no estará obligada a asumir tal riesgo si está legitimada para reducir significativamente (como una clase de deducción o penalización) sus pagos periódicos, como cualquier 'cliente normal' (consumidor) podría solicitar en un contrato comercial. Los pagos de la Administración deben depender del nivel efectivo de disponibilidad suministrada por el socio durante un concreto periodo de tiempo. La aplicación de las penalizaciones cuando el socio incumple sus obligaciones de servicio debe ser automática y también debe tener un efecto significativo sobre los ingresos/beneficios del socio, y no debe ser puramente cosmética o simbólica".

[18] Reglamento (CE) nº 2223/96 del Consejo, de 25 de junio de 1996, relativo al sistema europeo de cuentas nacionales y regionales de la Comunidad. Este Reglamento estableció un sistema de cuentas nacionales que cumplía los requisitos de la política económica, social y regional de la entonces Comunidad europea y era coherente con el entonces nuevo Sistema de Cuentas Nacionales que adoptado por la Comisión de Estadística de las Naciones Unidas en febrero de 1993 (1993 SCN) con el fin de que los resultados en todos los países miembros de las Naciones Unidas fueran internacionalmente comparables.

[19] MACHO PÉREZ y MARCO PEÑAS (2014: 447).

[20] Reglamento (UE) Nº 549/2013 del Parlamento Europeo y del Consejo de 21 de mayo de 2013, relativo al Sistema Europeo de Cuentas Nacionales y Regionales de la Unión Europea (Texto pertinente a efectos del EEE), DOUE de 26 de junio de 2013, L 174. Mediante este Reglamento se revisa el Sistema Europeo de Cuentas establecido por el citado Reglamento (CE) nº 2223/96 (SEC-95) con el fin de tener en cuenta los cambios introducidos en el 1993 SCN por el SCN 2008 aprobado por la Comisión de Estadística de las Naciones Unidas en febrero de 2009. El objetivo se cifra en aproximar las cuentas nacionales al nuevo entorno económico, los avances en la investigación metodológica y las necesidades de los usuarios con el objetivo de que los datos de la Unión Europea sean comparables con los recopilados por sus principales socios internacionales.

público o al privado es preciso averiguar quién asume "*la mayor parte de los riesgos*", no todos, por consiguiente, así como quién se espera que reciba la mayor parte de los beneficios. Entre los que deben evaluarse cita una vez más los de construcción, disponibilidad y demanda.

Por su parte, la Directiva de concesiones[21], al abordar por vez primera la regulación de las concesiones en el Derecho europeo, define tanto las de obras, como las de servicios en el artículo 5.1), letras a) y b), respectivamente. Ambos tipos concesionales se configuran como contratos a título oneroso celebrados por escrito por uno o más poderes o entidades adjudicadores con uno o más operadores económicos. Con la primera se confía la ejecución de obras y su contrapartida consiste bien en el derecho a explotar las obras únicamente, o en ese mismo derecho en conjunción con un pago [letra a)]; la segunda tiene por objeto la prestación y la gestión de servicios distintos de la ejecución de las obras contempladas en la letra a), y su contrapartida es bien el derecho a explotar los servicios únicamente, o este mismo derecho en conjunción con un pago. Así pues, las dos concesiones presentan como elemento esencial común el que la remuneración del concesionario consiste en el derecho a explotar las obras o los servicios objeto de la concesión o, en su caso, en dicho derecho acompañado de un precio[22].

Este primer elemento se completa de inmediato por el propio artículo 5.1) de la Directiva con un segundo, también esencial y derivado del anterior, que consiste en la exigencia de que toda concesión implique *"la transferencia al concesionario de un riesgo operacional en la explotación de dichas obras o servicios abarcando el riesgo de demanda*

[21] Directiva 2014/23/UE, del Parlamento Europeo y del Consejo, de 26 de febrero de 2014, relativa a la adjudicación de contratos de concesión (Texto pertinente a efectos del EEE), DOUE de 28 de marzo de 2014, L 94.

[22] BERNAL BLAY (2010: 33).

o el de suministro [al que denomina también como "riesgo de oferta"[23]], *o ambos*". El considerando 18 de la propia Directiva recoge alguna aclaración: "*La característica principal de una concesión, el derecho de explotar las obras o los servicios, implica siempre la transferencia al concesionario de un riesgo operacional de carácter económico que supone la posibilidad de que no recupere las inversiones realizadas ni cubra los costes que haya sufragado para explotar las obras o los servicios adjudicados…*"[24].

En suma, la Directiva de concesiones, tomando como punto de partida los contratos de obras y de servicios, califica de concesiones únicamente aquellos contratos en los que la forma de remuneración consiste en la explotación de las obras o los servicios (sola o acompañada de un pago), y siempre que dicha explotación conlleve la transferencia

[23] Sostiene LAZO VITORIA (2015: 428), que el precepto carece de la adecuada claridad. Nótese que no incluye referencia expresa alguna al riesgo de disponibilidad, suscitándose la duda de si el riesgo de suministro (o de oferta) equivale al riesgo de disponibilidad, o, por el contrario, se trata de dos riesgos distintos. Sobre el particular y el problema que plantearía para muchas concesiones españolas la eliminación del riesgo de disponibilidad, véase LAZO VITORIA (2015: 428-430). La misma autora, (2013: 155), ya había puesto de relieve que "*en los últimos años la remuneración del concesionario ha dejado de estar vinculada al uso de la infraestructura para basarse principal, sino exclusivamente, en su disponibilidad. En España, por ejemplo, el Plan Extraordinario de Infraestructuras del Ministerio de Fomento de 7 de abril de 2010 estableció que «para que sea financiable, el Plan está diseñado para que las entidades financieras puedan asumir los riesgos asociados a los proyectos y estos proporcionen, a su vez, una rentabilidad adecuada. Se ha optado por el riesgo de disponibilidad y no por el de demanda, ligado a la coyuntura del tráfico, y, por tanto, a los avatares del ciclo económico, porque dificultaría el acceso a los mercados financieros, añadiéndose además que «la rentabilidad del concesionario dependerá del nivel de disponibilidad de la infraestructura, lo que reforzará su compromiso con la conservación y el mantenimiento de la misma»*" (subrayado de la autora). Resuelve la duda planteada en sentido negativo, es decir, que entiende que el riesgo de suministro o de oferta no se corresponde con el riesgo de disponibilidad, VALCÁRCEL FERNÁNDEZ (2016: 122-125).

[24] La directa vinculación del riesgo operacional con la explotación ha sido destacada también por la jurisprudencia europea. Véase, por ejemplo, la STJ 540/2009, de 10 de septiembre, As. C-206/08, *Wasser- und Abwasserzweckverband Gotha und Landkreisgemeinden (WAZV Gotha)* y *Eurawasser Aufbereitungs- und Entsorgungsgesellschaft mbH*, ECLI:EU:C:2009:540, apartados 66 a 68.

del riesgo operacional al contratista, ahora concesionario[25]. Se erige, así pues, el riesgo operacional en elemento esencial de toda concesión y en criterio delimitador entre la concesión y el contrato de servicios.

En esta misma línea, la Ley de Contratos del Sector Público recientemente promulgada (LCSP)[26], asume ya desde su propio Preámbulo la exigencia de que en toda concesión "*necesariamente debe haber una transferencia del riesgo operacional de la Administración al concesionario*". La exigencia, los tipos de riesgo y su definición, así como los requisitos que deben cumplirse para que se estime que el concesionario asume dicho riesgo concesional, se incluyen en un apartado, el cuarto, añadido al artículo 14 que contiene la definición del contrato de concesión de obras[27]; apartado al que remite el artículo 15 referido a la noción de contrato de concesión de servicios, con lo que se igualan, como no podía ser de otro modo, ambos tipos concesionales en este aspecto nuclear y definitorio de las mismas. Así, la concesión, como fórmula en la que la contraprestación consiste en atribuir al concesionario el derecho a explotar la obra o servicio objeto del contrato (solo o acompañado del de percibir un precio), trasladan siempre y necesariamente el riesgo operacional de dicha explotación de la Administración al concesionario (artículos 14.1 y 15.1 del LCSP).

[25] Para la distinción entre contratos y concesiones, véase GIMENO FELIÚ (2012: 19-39).

[26] Ley de Contratos del Sector Público de 2017, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento europeo y del Consejo, 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014.

[27] El Derecho español ha considerado siempre las concesiones como un tipo más de contrato, de ahí que las diversas leyes vigentes a lo largo del siglo pasado siempre hayan regulado las concesiones de servicios públicos (como una modalidad del contrato de gestión de servicios públicos), concesiones que, por cierto, englobaban las originarias concesiones de obras públicas como consecuencia de la absorción de la obra pública dentro del concepto de servicio público; *vid.* MENÉNDEZ GARCÍA y FERNÁNDEZ ACEVEDO (2010: 99-104). Hoy la tipología de contratos del sector público está compuesta por los contratos de obras, de servicios, de suministros, de concesión de obras y de concesión de servicios (artículo 12.1 de la LCSP).

2.2. Breve consideración del concepto de riesgo operacional y sus límites en la Directiva de concesiones y en la LCSP que la transpone

La Directiva de concesiones, tras enfatizar la transferencia del riesgo como nota definitoria de la concesión, aclara en el citado artículo 5.1), que para que se considere que el concesionario asume un riesgo operacional es preciso que, en condiciones normales de funcionamiento, no esté garantizado que vaya a recuperar las inversiones realizadas ni a cubrir los costes contraídos con ocasión de la explotación de las obras o los servicios objeto de la concesión. A su vez, la parte de los riesgos transferidos al concesionario debe suponer una exposición real a las incertidumbres del mercado que implique que cualquier pérdida potencial estimada en que incurra no es meramente nominal o desdeñable. Falta de garantía de recuperación de inversiones y costes y exposición real a las incertidumbres del mercado son los criterios que deben presidir el análisis de los riesgos transferidos en cada contrato al objeto de determinar si cumple o no el requisito de implicar la transferencia al contratista de un riesgo operacional en la explotación, es decir, si cabe o no calificar el contrato de concesión con todas las implicaciones de régimen jurídico que dicha calificación conlleva.

En la misma línea, el artículo 14.4, pfo. 2º, de la LCSP para considerar que el concesionario asume un riesgo operacional pone el acento en la falta de garantía de que, en condiciones normales de funcionamiento, vaya a recuperar las inversiones realizadas ni a cubrir los costes en que haya incurrido en la explotación de las obras o servicios. "*La parte de los riesgos transferidos al concesionario* -continúa el precepto- *debe suponer una exposición real a las incertidumbres del mercado que implique que cualquier pérdida potencial estimada en que incurra el concesionario no es meramente nominal o desdeñable*".

La jurisprudencia lo había resaltado con anterioridad afirmando que el riesgo de explotación económica del servicio debe entenderse como el riesgo de exposición a las incertidumbres del mercado, que puede traducirse en el riesgo derivado de enfrentarse a la competencia de otros operadores, de que se produzca un desajuste entre la oferta y la demanda de los servicios, de la eventual insolvencia de los deudores de los precios por los

servicios prestados, de que los ingresos no cubran íntegramente los gastos de explotación o incluso en el riesgo de responsabilidad por un perjuicio causado por una irregularidad en la prestación del servicio[28].

Por su parte, la Directiva, en su considerando 20, trata de aclarar qué tipos de riesgos considera operacionales, cuáles no por ser comunes a cualquier tipo contractual, y en qué consiste el riesgo significativo. El punto de partida común a todos los supuestos lo constituye la exigencia de que el riesgo derive de factores que escapan al control de las partes. Así, "*un riesgo operacional debe entenderse como el riesgo de exposición a las incertidumbres del mercado, que puede consistir en un riesgo de demanda o en un riesgo de suministro, o bien en un riesgo de demanda y suministro*". Por riesgo de demanda entiende el que se debe a la demanda real de las obras o servicios objeto del contrato, y por riesgo de oferta, el relativo al suministro de las obras o servicios objeto del contrato, en particular el riesgo de que la prestación de los servicios no se ajuste a la demanda[29]. "*A efectos de la evaluación del riesgo operacional* -continúa diciendo la Directiva-, *puede tomarse en consideración, de manera coherente y uniforme, el valor actual neto de todas las inversiones, costes e ingresos del concesionario*"[30].

Desde un punto de vista negativo considera expresamente la Directiva, en coherencia con el mencionado requisito de que el riesgo derive de factores que escapen al control de las partes, que los riesgos vinculados a la mala gestión o a los incumplimientos

[28] STJ 130/2011, de 10 de marzo, As. C-274/09, *Privater Rettungsdienst und Krankentransport Stadler* y *Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau*, ECLI:EU:C:2011:130, apartado 37.

[29] Las definiciones de riesgo de demanda y de riesgo de suministro se recogen literalmente y sin aclaración añadida alguna en el artículo 14.4, pfo. 1º, 2º inciso, de la LCSP: "*Se entiende por riesgo de demanda el que se debe a la demanda real de las obras o servicios objeto del contrato y riesgo de suministro el relativo al suministro de las obras o servicios objeto del contrato, en particular el riesgo de que la prestación de los servicios no se ajuste a la demanda*".

[30] GIMENO FELIÚ (2014a: 5-6).

del contrato por parte del operador económico "*no son determinantes a efectos de la clasificación como concesión, ya que tales riesgos son inherentes a cualquier tipo de contrato, tanto si es un contrato público como si es una concesión*". Por esta última razón se descartan, asimismo, los riesgos asociados a situaciones de fuerza mayor, situaciones que obviamente sí escapan al control de las partes.

Así las cosas no será fácil que la transferencia del riesgo de disponibilidad, tal y como se define en el citado SEC-2010, pueda considerarse por sí solo suficiente como para entender que hay verdadera transferencia de un riesgo operacional en la explotación derivado de factores ajenos al contratista en el sentido de la Directiva de concesiones[31]. Construir, gestionar y explotar una obra o servicio con mayores o menores estándares o requisitos de calidad es algo que el contratista sí puede controlar[32], y es, a su vez, un elemento inherente a cualquier contrato público[33].

Con todo, la LCSP sí admite el riesgo de disponibilidad expresamente para las concesiones de obras. En efecto, conforme a su artículo 267.4, la retribución por la utilización de la obra puede abonarse por la Administración "*teniendo en cuenta el grado de disponibilidad ofrecido por el concesionario y/o su utilización por los usuarios*"; y para

[31] LAZO VITORIA (2015: 428-430).

[32] Afirma VALCÁRCEL FERNÁNDEZ (2016: 123), que "*la disponibilidad alude a los estándares o requisitos de la calidad en la infraestructura o de los respectivos servicios que son exigibles al concesionario de acuerdo con lo establecido en los términos del contrato. Estándares que, por tanto, se derivan del propio contrato y están relacionados con su adecuado cumplimiento. Siendo esto así, parece lógico que en la Directiva se haya entendido que los mismos no deben formar parte del riesgo operacional característico de los contratos de concesión. No en vano el cumplimiento adecuado del contrato de acuerdo con las estipulaciones contractuales es un aspecto cuyo control tiene totalmente en su mano el contratista*".

[33] MIGUEZ MACHO (2015: 403); "*de hecho* -afirma este autor-, *en cualquier contrato público, al menos en Derecho español, es posible penalizar económicamente al contratista por los incumplimientos del contrato, incluyendo las deficiencias en la calidad de las prestaciones ejecutadas, si así se prevé en los pliegos y en el propio documento contractual*".

el supuesto de que la retribución se realice "*mediante pagos por disponibilidad deberá preverse en los pliegos de cláusulas administrativas particulares la inclusión de índices de corrección automáticos por nivel de disponibilidad independientes de las posibles penalidades en que pueda incurrir el concesionario en la prestación del servicio*". Nótese que el precepto, dado el uso alternativo de las conjunciones y/o, permite excluir por completo el criterio de utilización por los usuarios lo que no se admite para las concesiones de servicios. Si bien las normas previstas para las concesiones de obras son de aplicación supletoria a las de servicios (artículo 297 de la LCSP), en estas no parece posible que la retribución del concesionario se realice únicamente bajo criterios de disponibilidad por cuanto el artículo 289 de la LCSP, al regular las contraprestaciones económicas a que tiene derecho el concesionario de servicios dispone que para hacer efectivo su derecho a la explotación del servicio una de ellas debe ser "*una retribución fijada en función de su utilización*" por los usuarios, que se percibirá directamente de estos o de la propia Administración.

Como afirma GIMENO FELIÚ, es preciso averiguar si el modo de remuneración acordado en el contrato consiste en el derecho del concesionario a explotar un servicio o una obra e implica, al propio tiempo, que asume el riesgo de explotación del referido servicio u obra en los términos expresados[34]. Y es entonces cuando surge la pregunta de en qué medida deben transferirse al concesionario los repetidos riesgos de explotación.

Ya se ha dicho que la transferencia no será normalmente absoluta pero que, en todo caso, debe ser significativa; es decir, que no es requisito imprescindible que alcance a todos los riesgos[35] pero debe tener un nivel tal que cumpla los requisitos exigidos por el artículo 5.1 de la Directiva: que la recuperación de las inversiones y costes no quede garantizada y que suponga una exposición real a las incertidumbres del mercado. Además,

[34] GIMENO FELIÚ (2014a: 7).

[35] BERNAL BLAY (2010: 258).

desde un punto de vista económico, la atribución de todos los riesgos a los concesionarios puede resultar contraproducente si se quiere que el sector privado se interese por este tipo de proyectos y que lo haga presentando ofertas aceptables desde el punto de vista del interés general. Y es que la distribución de los riesgos condiciona significativamente el funcionamiento práctico del mercado concesional[36]. En efecto, un elevado riesgo puede conllevar un encarecimiento excesivo del precio exigido por el sector privado para retribuir el riesgo asumido[37]. Y a la inversa, la asignación de un nivel de riesgo escaso puede contribuir a la realización de proyectos de poca o nula rentabilidad social, los conocidos como "elefantes blancos"[38]. Solo si el concesionario asume efectivamente una parte significativa del riesgo de la concesión, las empresas tendrán inventivos para usar o adquirir información fiable sobre la rentabilidad de la concesión, y descartarán licitar y ejecutar proyectos concesionales con valor social negativo[39].

En cualquier caso, si la transferencia de todos los riesgos no se produce tendrá lugar un reparto de los mismos entre concedente y concesionario. En el bien entendido de que dicho reparto debe suponer que el concesionario asume una parte sustancial o relevante del riesgo de explotación[40]. Así lo expresan los artículos 250.1.m) y 285.1.c) de la LCSP

[36] LAZO VITORIA (2013: 154).

[37] VÁZQUEZ DEL REY VILLANUEVA (2012: 59).

[38] Refieren GANUZA FERNÁNDEZ y GÓMEZ AVILÉS-CASCO (2005: 111), que las obras públicas innecesarias o faraónicas, lamentablemente tan frecuentes en España (aeropuertos sin pasajeros, autopistas de peaje sin vehículos que las transiten), reciben el nombre de "elefantes blancos" porque "*antiguamente, los reyes de Siam, cuando no tenían demasiado aprecio por un súbdito le regalaban un elefante blanco. Como los elefantes blancos eran sagrados en la antigua Tailandia, el regalo no se podía rechazar y el súbdito estaba obligado a alimentar al elefante blanco y permitir que el pueblo acudiese a venerarle, lo que muchas veces terminaba arruinando al presunto beneficiario del favor real*".

[39] GANUZA FERNÁNDEZ y GÓMEZ AVILÉS-CASCO (2015: 112).

[40] GÓMEZ-FERRER MORANT (2004: 1107-1108).

cuando exigen que los pliegos de cláusulas administrativas particulares hagan referencia, entre otros aspectos, a la distribución entre la Administración y el concesionario de los riesgos relevantes en función de las características del contrato, si bien en todo caso, advierten expresamente, el riesgo operacional corresponde a este último.

Cuestión más compleja es la relativa a los criterios con arreglo a los cuales realizar el referido reparto de los riesgos. No caben aquí fórmulas generales sino que habrá de realizarse caso por caso, en cada contrato, atendiendo a las peculiaridades propias de cada uno, tales como su objeto, duración e importe, la capacidad económica y financiera del concesionario y cualquier otro elemento que permita determinar que es este quien asume realmente el riesgo[41]. Sin perjuicio de recordar una directriz general en su día anticipada también por la Comisión: el reparto de los riesgos entre concedente y concesionario se realiza en cada caso en función de las respectivas aptitudes para gestionar de manera más eficaz los riesgos en cuestión[42], de modo que cada una de las partes asuma aquellos riesgos que está más preparada para atender.

En todo caso, la individualización y apropiada distribución de los riesgos concesionales presenta un componente más de naturaleza económico-técnica que estrictamente jurídica, por lo que habrá de estarse a la interpretación que efectúen instituciones tales como la citada Eurostat[43].

[41] LAZO VITORIA (2013: 153).

[42] *Vid.*, el ya citado Libro Verde sobre "La colaboración público-privada y el Derecho comunitario en materia de contratación pública y concesiones" y Comunicación Interpretativa de la Comisión sobre las concesiones en el Derecho comunitario (2000/C 121/02), DOCE de 29 de abril de 2000.

[43] VALCÁRCEL FERNÁNDEZ (2016: 128).

3. LA RESPONSABILIDAD PATRIMONIAL DE LA ADMINISTRACIÓN (RPA) EN CASOS DE RESOLUCIÓN CONCESIONAL

La concesión, como todas las fórmulas de colaboración público-privada, encuentra su sentido más evidente en la atracción de capitales privados a la tarea de abordar la provisión de infraestructuras y servicios públicos. Y bien puede afirmarse que dicha atracción es inversamente proporcional al nivel de riesgo que el proyecto quiera trasladar al concesionario, lo que implica que si se quiere captar al sector privado el diseño de la traslación de riesgos ha de hacerse con cierta mesura. En otro caso, dicho capital o no se mostrará dispuesto a "colaborar" o lo hará presentando ofertas mucho más onerosas para los intereses públicos.

En este sentido, uno de los principales atractivos del sistema concesional español ha venido estando en la regulación legal de la denominada responsabilidad patrimonial de la Administración (conocida en este ámbito por sus siglas RPA)[44]. En efecto, la RPA, esto es, la obligación de la Administración de indemnizar al concesionario por la extinción anticipada o resolución de la concesión, desempeña un papel fundamental en el reparto de riesgos y, con ello, en los incentivos de una empresa para decidir participar en la licitación de un contrato, así como en el tipo de oferta que eventualmente formule[45]. Desde otro punto de vista la RPA constituye un elemento de seguridad de primer orden para el sector privado, dado que funciona a modo de garantía de parte del negocio más allá del riesgo inherente a toda concesión, o por qué no decirlo, eliminando buena parte de dicho riesgo.

[44] Pese a la identidad terminológica, ciertamente no muy afortunada, no debe confundir esta RPA con la responsabilidad patrimonial de la Administración de carácter extracontractual, también denominada responsabilidad aquiliana, cuyo régimen jurídico habrá que buscar en las nuevas Leyes 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público y 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas.

[45] GANUZA FERNÁNDEZ y GÓMEZ AVILÉS-CASCO (2015: 113-114).

De ahí que haya merecido el calificativo de sistema legal de seguro frente a determinados riesgos[46].

La RPA no es en sí misma contraria al principio de riesgo y ventura; es su concreta configuración legal la que, si se rebasan ciertos límites, puede eliminar o disminuir enormemente el riesgo, y con ello impedir que pueda hablarse de traslación de un riesgo operacional significativo al concesionario.

Las consecuencias son conocidas por demás. Unas de régimen jurídico, pues para el Derecho europeo no sería una concesión sino un contrato, lo que determina un distinto régimen al entrar en la esfera de la Directiva de contratos públicos en lugar de la Directiva de concesiones; y otras de carácter contable, pues asumido el riesgo por el sector público la operación computa a efectos de déficit público.

Hasta finales de 2015 el Derecho español contenía un régimen de RPA ciertamente muy generoso para los concesionarios. En efecto, a la hora de regular las consecuencias de la resolución, cualquiera que fuera la causa que la motivara y con independencia de quién fuera el responsable de la misma, se imponía a la Administración la obligación de abonar al concesionario el importe de las inversiones realizadas por razón de tres elementos: expropiación de terrenos, ejecución de obras de construcción y adquisición de los bienes necesarios para la explotación de la concesión. A tal efecto, debía tenerse en cuenta su grado de amortización en función del tiempo que restara hasta el término de la concesión y lo establecido en el plan económico-financiero[47]. Esto era así con total independencia de que la resolución hubiera tenido lugar o no como consecuencia del abandono, la renuncia unilateral o el incumplimiento por el concesionario de sus obligaciones contractuales

[46] GIMENO FELIÚ (2014a: 14).

[47] Pueden verse los artículos 170.1 de la Ley de Contratos de las Administraciones Públicas de 1995 (LCAP/1995), 266.1 del Texto Refundido de la LCAP de 2000 (TRLCAP/2000), 247.1 y 264.1 de la Ley de Contratos del Sector Público de 2007 (LCSP/2007) ó 271.1 y 288.1 del Texto Refundido de la LCSP de 2011 (TRLCSP/2011).

esenciales. También en los supuestos de declaración de concurso o de declaración de insolvencia del concesionario, por ejemplo, por falta de rentabilidad de la propia concesión.

Obviamente, en los supuestos en los que la resolución del contrato tuviera lugar por causa imputable al concesionario se producía la incautación de la garantía, así como la obligación de indemnizar a la Administración por los daños y perjuicios ocasionados en lo que, en su caso, excediera del importe de la garantía incautada. Pero dicha culpabilidad no permitía imponer al concesionario la obligación de soportar las cargas de las inversiones realizadas y aún no amortizadas, las cuales debían ser abonadas a aquel por la Administración.

Por otro lado, si la causa de la resolución fuera imputable a la Administración, esta debía indemnizar además al concesionario por los daños y perjuicios que se le hubieren irrogado; esto es, la indemnización debía alcanzar no solo el daño emergente, sino también el lucro cesante. A tal efecto, los beneficios futuros dejados de percibir por el concesionario como consecuencia de la resolución se calculaban atendiendo a los resultados de explotación del último quinquenio, y a la pérdida de valor de las obras e instalaciones que no debieran revertir a la Administración, considerando su grado de amortización.

Así pues, el fracaso de la concesión y su consiguiente resolución conllevaba para el concesionario el derecho a una compensación a cargo de la Administración contratante por el importe de todas las inversiones realizadas en ejecución del proyecto (expropiaciones, obras, activos), con los límites expuestos (amortización, plazo concesional restante y plan económico-financiero). A su vez, como se permitía a los contratistas con derecho al cobro frente a la Administración la cesión de dicho derecho, la RPA era objeto de pignoración en los contratos financieros, sirviendo como garantía pública para las entidades financiadoras.

En definitiva, el nivel real de riesgo que asumía el concesionario en relación con el éxito o fracaso del proyecto era bastante limitado, pues en caso de falta de rentabilidad de la concesión, las inversiones no amortizadas quedaban sustancialmente cubiertas por la RPA. Y nótese que el citado fracaso del proyecto, en principio, no tiene por qué derivarse de una

causa imputable al concesionario, pues podría deberse, por ejemplo, a un nivel de demanda muy inferior al inicialmente previsto, por lo que no era posible la incautación de la garantía ni la indemnización a la Administración antes aludidos. Por contra, en caso de éxito del proyecto los beneficios pertenecían en todo caso al concesionario. Dicho de otro modo, aprovechamiento privado de los beneficios y socialización de las pérdidas[48].

Sin perjuicio de otro tipo de consideraciones, cabe cuestionarse si un sistema tal puede considerarse compatible o no con el Sistema de Cuentas Europeo revisado 2010 ("SEC-2010")[49] si lo que se quiere es eludir las restricciones europeas sobre el déficit y la deuda públicos. Y ello porque, como se dijo, el análisis de la distribución de riesgos es determinante a la hora de calificar los activos y pasivos concesionales como públicos o como privados, de modo que si son calificados como públicos se producirá un incremento de los niveles de déficit y deuda públicos afectando al cumplimiento de los criterios establecidos en el artículo 126 del TFUE[50] y en el artículo 135[51] de la Constitución española[52].

[48] GANUZA FERNÁNDEZ y GÓMEZ AVILÉS-CASCO (2015: 114-115).

[49] Reglamento (UE) Nº 549/2013 del Parlamento Europeo y del Consejo de 21 de mayo de 2013, relativo al Sistema Europeo de Cuentas Nacionales y Regionales de la Unión Europea (Texto pertinente a efectos del EEE), DOUE de 26 de junio de 2013, L 174. Mediante este Reglamento se revisa el Sistema Europeo de Cuentas establecido por el citado Reglamento (CE) nº 2223/96 (SEC-95) con el fin de tener en cuenta los cambios introducidos en el 1993 SCN por el SCN 2008 aprobado por la Comisión de Estadística de las Naciones Unidas en febrero de 2009. El objetivo se cifra en aproximar las cuentas nacionales al nuevo entorno económico, los avances en la investigación metodológica y las necesidades de los usuarios con el objetivo de que los datos de la Unión Europea sean comparables con los recopilados por sus principales socios internacionales.

[50] El citado artículo 126 del Tratado de Funcionamiento de la Unión Europea exige evitar los déficits públicos excesivos y atribuye a la Comisión la potestad de supervisar la evolución de la situación presupuestaria y el nivel de endeudamiento público de los Estados miembros y para, en su caso, iniciar un procedimiento que puede concluir, entre otras medidas, con la imposición de multas por el Consejo.

A tal efecto, el SEC-2010 aprobado por el Reglamento (UE) Nº 549/2013 identifica cuáles son los principales elementos de riesgo y beneficio que deben ser objeto de evaluación:

> "a) *Riesgo de construcción, que incluye los rebasamientos en los costes, la posibilidad de costes adicionales derivados de retrasos en la entrega, el incumplimiento de condiciones o códigos de construcción, y los riesgos ambientales y de otros tipos que exijan pagos a terceros.*
>
> *b) Riesgo de disponibilidad, que incluye la posibilidad de costes adicionales, como los de mantenimiento y financiación, y las sanciones soportadas porque el volumen o la calidad de los servicios no cumple las normas especificadas en el contrato.*
>
> *c) Riesgo de demanda, que incluye la posibilidad de que la demanda de los servicios sea mayor o menor de la esperada.*
>
> *d) El riesgo de valor residual y obsolescencia, que incluye el riesgo de que el activo sea inferior a su valor esperado al final del contrato y el grado en que las Administraciones públicas tienen opción a adquirir los activos.*
>
> *e) La existencia de financiación del garante o de concesión de garantías, o de cláusulas de rescisión ventajosas sobre todo en caso de rescisión a iniciativa del operador*."

[51] Precepto que, tras la reforma constitucional de 2011, exige a todas las Administraciones públicas adecuar su actuación al principio de estabilidad presupuestaria, prohíbe al Estado y a las Comunidades autónomas incurrir en un déficit estructural que supere los márgenes establecidos por la Unión Europea e impone a los Entes locales presentar equilibrio presupuestario.

[52] MACHO PÉREZ y MARCO PEÑAS (2014: 459).

En consecuencia, SEC-2010, para determinar el reparto de los riesgos y, por consiguiente, si estamos ante una verdadera concesión que, como se ha repetido, exige que haya riesgo operacional, no solo requiere examinar los riesgos de construcción, demanda y disponibilidad (riesgo que la Directiva de concesiones sustituye por el de oferta o suministro), sino también el riesgo de valor residual y obsolescencia, así como la existencia de financiación del garante o de concesión de garantías, o de cláusulas de rescisión ventajosas sobre todo en casos de rescisión a iniciativa del operador. Ello determina que, especialmente en los casos de resolución por causa imputable al concesionario, sea aconsejable limitar de algún modo la RPA, pues en otro caso podría interpretarse que se ha eliminado o reducido en exceso la transferencia de riesgos y, en consecuencia, los activos ya no estarían excluidos del perímetro de endeudamiento[53]. Limitar la RPA, sin embargo, no debe suponer que en todos los supuestos deba eliminarse; significa únicamente que la RPA no debe servir para reducir indebidamente la exposición al riesgo operacional quebrantando los principios de transparencia e igualdad de trato inherentes a toda contratación pública. No debe olvidarse que la RPA bien dimensionada constituye un instrumento válido para favorecer las inversiones privadas mediante concesiones al introducir en el sistema un elemento de seguridad[54] que elimina incertidumbres excesivas que sin duda ahuyentan aquellas inversiones y que puede servir como fuente de financiación privada del concesionario[55].

[53] MACHO PÉREZ y MARCO PEÑAS (2014: 463).

[54] GIMENO FELIÚ (2014a: 15 y 21-22).

[55] La reforma efectuada en 2015 del TRLCSP/2011 admitió expresamente la posibilidad de pignorar los derechos derivados de la resolución de un contrato de concesión de obra pública o de gestión de servicio público siempre que la pignoración lo sea en garantía de obligaciones que guarden relación con la concesión o el contrato y que exista previa autorización del órgano de contratación, publicada en el BOE o en los diarios oficiales autonómicos o provinciales (artículo 261.3 del TRLCSP/2011; recogido ahora en el artículo 273.3 de la LCSP sin más que sustituir la referencia al contrato de gestión de servicios públicos que desaparece por el contrato de concesión de servicios que le sustituye-). Al propio tiempo, la modificación alcanzó asimismo al artículo 90.1.6º de la Ley Concursal para dejar claro que la prenda de créditos futuros atribuye a su titular un privilegio especial en caso de

Justamente por ello la LCSP limita la RPA con la intención de situarla dentro del margen de los criterios del Sistema de Cuentas Europeo, SEC-2010, de modo que resulte más respetuosa con la atribución del riesgo concesional y la deuda de las concesionarias no entre en el perímetro de endeudamiento público y compute como déficit. La principal novedad radica en que cuando la resolución obedezca a causas no imputables a la Administración, incluidos los supuestos de insolvencia o concurso de acreedores, la indemnización se determinará no por el valor patrimonial de la inversión, sino por el valor de mercado de la concesión, lo que por hipótesis podría llegar a suponer incluso un importe igual o próximo a cero (artículos 280.1, pfo. 2º, y 281.2 de la LCSP)[56].

Nihil novum sub sole: se trata en realidad de una vuelta al siglo XIX, a previsiones contenidas ya en la Ley General de Caminos de Hierro de 3 de junio de 1855, norma que preveía, para el caso de resolución (a la que denomina caducidad) tanto de las concesiones de construcción, como de las de explotación de ferrocarriles, su salida a subasta (artículo 25) y la compensación al concesionario con el valor obtenido (artículo 28)[57].

Desde otro punto de vista, puede razonablemente esperarse que este nuevo régimen suponga un importante incentivo para la elaboración de cálculos más rigurosos de las inversiones necesarias en las concesiones. En efecto, el hecho de que el concesionario ya no tenga garantizada la recuperación en cualquier caso de todas sus inversiones, evitará

concurso cuando, antes de la declaración, concurran las circunstancias siguientes: a) Que los créditos nazcan de contratos o relaciones jurídicas ya existentes; b) que la prenda esté constituida en documento público o, si es prenda sin desplazamiento, se haya inscrito; c) que, en el caso de prenda de la RPA, se cumpla con el requisito de haber obtenido autorización administrativa al tiempo de la constitución de la prenda. Se reconoce, pues, la posibilidad de pignorar créditos futuros (sin necesidad de inscribir la prenda en el Registro), siempre que nazcan de relaciones jurídicas constituidas antes de la declaración de concurso [*vid.* ZAMARRO (2015: 2)].

[56] GIMENO FELIÚ (2014a: 14-15).

[57] GONZÁLEZ-DELEITO DOMÍNGUEZ (2015: 13).

o al menos dificultará, los ya referidos "elefantes blancos", así como también debería redundar en una gestión más diligente y mejor[58].

Acaso movido por este objetivo, y porque probablemente ha servido de acicate la crisis creada por ciertas autopistas de peaje cuyas concesionarias han atravesado una larga agonía[59], lo cierto es que el legislador español, sin esperar a tramitación parlamentaria del anteproyecto y aprobación de la nueva LCSP que transpone al ordenamiento español las Directivas de contratos públicos y de concesiones[60], decidió anticipar esta parte de dicho anteproyecto modificando por completo el régimen de la RPA recogido en el TRLCSP/2011, previsiones que recoge ahora la LCSP pues no han sido apenas objeto de modificación a su paso por las Cortes Generales. En consecuencia, la nueva regulación de la RPA, que se considera transposición de las Directivas[61], entró en vigor con más de dos años de antelación respecto la LCSP que acaba de promulgarse[62].

[58] GONZÁLEZ-DELEITO DOMÍNGUEZ (2015: 12). Al margen de ello, este autor denuncia que esta medida pone de manifiesto la "*evidente incapacidad del sistema para, a través de los estudios de viabilidad correspondientes, ejecutar únicamente aquellas obras públicas cuya función social y sentido económico estén debidamente acreditados*" (pág. 13).

[59] Finalmente, las autopistas de peaje quebradas y revertidas al Estado, serán objeto de explotación y posterior licitación pública por la Sociedad Estatal de Infraestructuras del Transporte Terrestre, S.M.E., S.A. (SEITTSA), de conformidad con el Convenio de gestión directa entre la Administración General del Estado y SEITTSA, publicado en el Boletín Oficial del Estado del 25 de agosto de 2017, a partir de enero de 2018, debiendo proceder a la nueva licitación a más tardar el 31 de diciembre de 2018.

[60] Aprobación largamente demorada entre otras razones por la inestabilidad política y consiguiente falta de Gobierno tras el apretado desenlace de las elecciones de diciembre de 2015 que hubieron de repetirse en junio de 2016.

[61] Así lo comunicó el Gobierno español a la Comisión europea.

[62] La entrada en vigor de la nueva LCSP tendrá lugar a los cuatro meses de su publicación en el BOE (disposición final 16ª).

Pero la mencionada modificación legal se llevó a cabo a toda prisa, aprovechando la tramitación parlamentaria de la Ley de Régimen Jurídico del Sector Público, a pesar de la poca relación que la misma guarda con la contratación pública, introduciendo en ella una nueva disposición adicional, la novena, que reformó numerosos preceptos del TRLCSP/2011 que ahora se deroga[63]. Resulta ciertamente criticable, por poco ajustado a los criterios de buena regulación proclamados por la normativa más reciente[64], que tan importante reforma legislativa se haya realizado mediante una simple enmienda presentada en el Congreso sin justificación alguna, más allá de la clásica "mejora técnica", y que, además, fuera aprobada sin apenas suscitar debate. En cualquier caso, como digo, la regulación de este concreto aspecto introducida en el TRLCSP/2011 coincide de forma prácticamente literal con la que ahora contiene la nueva LCSP.

El punto de partida de la regulación de la RPA está en la distinción básica entre las causas de resolución que se imputan a la Administración y las que no, pues dicha distinción determina un distinto régimen jurídico aplicable[65]. Nótese, a estos efectos, que la culpabilidad o no del concesionario no se tiene en consideración para determinar la RPA; se regulan dos regímenes bien diversos, uno para los supuestos de resolución por causas imputables a la Administración y otro por causas no imputables a la Administración, siendo

[63] La nueva regulación de la RPA no tiene alcance retroactivo por cuanto es aplicable únicamente a los expedientes de contratación de concesiones de obras públicas y de servicios iniciados con posterioridad a la entrada en vigor de la disposición adicional novena de la Ley de Régimen Jurídico del Sector Público que tuvo lugar a los veinte días de su publicación, es decir, el 21 de octubre de 2015. Se entiende que los expedientes de contratación han sido iniciados si se ha publicado la correspondiente convocatoria del procedimiento de adjudicación del contrato. Si se trata de un procedimiento negociado, para determinar el momento de iniciación se toma en cuenta la fecha de aprobación de los pliegos (disposición transitoria cuarta de la Ley de Régimen Jurídico del Sector Público). En consecuencia, el régimen de RPA derogado seguirá siendo de aplicación durante mucho tiempo habida cuenta de la larga duración de las concesiones.

[64] Así, artículo 128 de la citada Ley del Procedimiento Administrativo Común de las Administraciones Públicas.

[65] LOZANO CUTANDA (2015: 2).

este último de aplicación tanto si el concesionario es culpable de la resolución como si no lo es (como pudiera suceder en supuestos de insolvencia no culpable).

En consecuencia, lo primero es fijar qué causas se imputan a la Administración y cuáles no. A tal efecto, se establecen las causas que, "*en todo caso*", no se imputan a la Administración. Ello significa, por un lado, que en estos supuestos, por determinación legal, no será posible imputar la culpabilidad a la Administración bajo ninguna circunstancia; se trata de una presunción *iuris et de iure*; y, por otro, que la relación de causas no imputables a la Administración no constituye *numerus clausus*, es un simple elenco mínimo que no agota todos los supuestos posibles.

Así, no son imputables a la Administración las siguientes causas de resolución concesional[66]:

- La muerte o incapacidad sobrevenida del concesionario individual o la extinción de la personalidad jurídica de la sociedad concesionaria, sin perjuicio de la posible continuidad del contrato en los supuestos de sucesión del concesionario: fusión de empresas, escisión, aportación o transmisión de empresas o ramas de actividad de las mismas.
- La declaración de concurso o la declaración de insolvencia en cualquier otro procedimiento.
- El incumplimiento de la obligación principal de la concesión, así como el de las restantes obligaciones esenciales siempre que estas últimas hubiesen sido calificadas como tales en los pliegos o documento descriptivo, cuando concurran los dos requisitos siguientes: que las mismas respeten los límites de libertad de pactos (que estos no contravengan el interés público, el ordenamiento jurídico ni los principios de buena administración) y que figuren

[66] Artículo 280.1, pfo. 3º de la LCSP para la concesión de obras y artículo 295.1, pfo. 3º de la LCSP para la concesión de servicios, con idéntico contenido.

enumeradas de manera precisa, clara e inequívoca en los pliegos o documento descriptivo, no siendo admisibles cláusulas de tipo general.

- La ejecución hipotecaria declarada desierta o la imposibilidad de iniciar el procedimiento de ejecución hipotecaria por falta de interesados autorizados para ello en los casos en que así procediera.
- El secuestro o intervención de la concesión por un plazo superior al establecido por el órgano de contratación (que no puede exceder, incluidas las posibles prórrogas, de tres años), sin que el contratista haya garantizado la asunción completa de sus obligaciones.

Hecha esta distinción, importa subrayar que cuando se produce la resolución de una concesión, la Administración debe compensar, en todo caso, al contratista por los tres elementos que ya se han indicado: expropiaciones de terrenos, ejecución de obras y adquisición de bienes. Es esta una regla general de compensación[67], si bien ahora la LCSP cuando se refiere a la resolución por causas no imputables a la Administración ha sustituido la referencia expresa a los tres elementos mencionados que se contenía en el TRLCSP/2011 por la frase "*cualquiera de las causas posibles*". Se abre, así, la puerta a que a los elementos a tomar en consideración para el cálculo de la indemnización puedan añadirse otros, como se desprende de la enmienda 403 del GP Ciudadanos que propuso la modificación[68]. Como ejemplo de otro elemento a tomar en consideración, las enmiendas 707 y 730 del GP Socialista, que mantenían los tres referidos, añadían expresamente el canon que el pliego de cláusulas administrativas particulares hubiera exigido abonar, en su caso, a la Administración concedente por el concesionario.

[67] GANUZA FERNÁNDEZ y GÓMEZ AVILÉS-CASCO (2015: 114).

[68] En la justificación de dicha enmienda el GP mencionado afirma expresamente que el importe a abonar al concesionario en los supuestos de resolución no imputable a la Administración lo ha de ser por cualquier causa posible, "*no solo por razón de la expropiación de terrenos, ejecución de obras y adquisición de bienes que deban revertir a la Administración*".

Con todo, la diferencia fundamental radica en cómo se determina o cuantifica la indemnización, es decir, cómo se valoran tales elementos. Entre otras fórmulas posibles, el legislador español ha ideado dos, de modo que la valoración puede realizarse bien atendiendo a lo que en su momento le costaron al concesionario o bien a lo que un tercero esté dispuesto a pagar por ellos, es decir, a su valor de mercado al tiempo de la resolución.

Suele afirmarse que las cosas valen lo que alguien está dispuesto a pagar por ellas; por tanto, la concesión valdrá lo que un tercero esté dispuesto a pagar y la forma de determinarlo es poniéndola en el mercado. De ahí que cuando la resolución no es imputable a la Administración, esta cumpla con pagar por lo que recibe y por su valor en el momento en que lo recibe. Ello justifica que se establezca como cuantía a abonar al concesionario, por cualquiera de los elementos arriba mencionados, el valor obtenido de la adjudicación de la concesión en pública subasta, calculándose el tipo de licitación atendiendo a los flujos futuros de caja que se prevea obtener por la explotación de la concesión, y con un mínimo garantizado por la Administración del 50% de dicho tipo de licitación, en el caso de que el sistema de subasta fracase.

En definitiva, en caso de fracaso del proyecto, y subrayadamente en los supuestos de declaración de concurso o de insolvencia, el concesionario no será compensado por el coste invertido sino por el valor actual de la concesión, asumiendo de este modo el riesgo del proyecto, toda vez que no va a recibir más de lo que percibiría de haber continuado explotando la concesión, sin perjuicio de posibles ganancias de eficiencia que pueda aportar el nuevo titular de la explotación salido de la subasta de la concesión[69].

En cambio, cuando la causa es imputable a la Administración este valor no es suficiente pues no alcanza a cubrir el daño emergente causado al concesionario con la resolución y al que tiene derecho, sin perjuicio, como luego se dirá, del derecho también al lucro cesante. Como fórmula para calcular dicho daño emergente el legislador ha decidido

[69] GANUZA FERNÁNDEZ y GÓMEZ AVILÉS-CASCO (2015: 114).

mantener la regulación hasta ahora existente que determina la indemnización atendiendo a los gastos efectivamente realizados por el concesionario, es decir, al importe de sus inversiones; descontando naturalmente las amortizaciones, para cuya determinación se utilizará un criterio de amortización lineal de la inversión.

Descendiendo a los detalles del régimen jurídico de la RPA, cuando la concesión se resuelve por causa no imputable a la Administración, el órgano de contratación debe licitarla de nuevo para hallar su valor de mercado. A tal fin se utiliza el sistema de la subasta, que de este modo revive por sorpresa en nuestro ordenamiento tras su eliminación en 2007 (sin perjuicio, claro está, de las subastas electrónicas)[70].

El objeto de la subasta es la concesión resuelta permaneciendo inalteradas todas sus cláusulas, incluso el plazo de duración que será el que reste hasta su cumplimiento o completa extinción, esto es, hasta el momento en que se hubiera previsto su rescate. A su vez, el nuevo concesionario se subrogará en la posición del primitivo y queda incluso obligado a la realización de las actuaciones vinculadas a las subvenciones de capital percibidas por el antiguo concesionario cuando no se haya cumplido la finalidad para la que se concedió la subvención.

Toda vez que la resolución de la concesión, como la de cualquier otra modalidad contractual, da lugar a su extinción (artículo 209 de la LCSP) y que el artículo 281.3 de la LCSP se refiere expresamente al "*contrato resultante de la licitación*" y a que dicho contrato resultante tiene "*en todo caso la naturaleza de contrato de concesión*", podría afirmarse que se trata de un nuevo contrato y no de una simple continuación del anterior. Sin embargo, la concesión permanece inalterada, sin que quepa introducir en ella modificación alguna en su contenido, en los derechos y obligaciones, en el equilibrio económico y financiero que sirvió de base para su adjudicación; en definitiva, los pliegos

[70] Para una crítica de la eliminación de los términos subasta y concurso por la LCSP, véase FERNÁNDEZ ACEVEDO (2014: 26-27).

de cláusulas no se modifican. La única variación que se produce es la relativa a la persona del concesionario por lo que sería más correcto calificar jurídicamente la operación diseñada por el legislador como una novación subjetiva, o como dice LOZANO CUTANDA, "*una especie de 'subrogación sobrevenida'*"[71].

Sea como fuere, y aunque se considere que se trata de un nuevo contrato, ello no autoriza a las partes a introducir en él modificación alguna, sin perjuicio de la aplicación de las reglas generales de modificación de los contratos y del derecho al restablecimiento del equilibrio económico cuando se produzcan las circunstancias que lo habilitan.

Por otro lado, la determinación del tipo de licitación se realiza según las reglas, ciertamente complejas, previstas en el artículo 282 de la LCSP:

a) El tipo se determina en función de los flujos futuros de caja que se prevea obtener por la sociedad concesionaria, por la explotación de la concesión, en el periodo que resta desde la resolución del contrato hasta su reversión, actualizados al tipo de descuento del interés de las obligaciones del Tesoro a diez años incrementado en 300 puntos básicos.

b) Los flujos netos de caja futuros se cuantifican en la media aritmética de los flujos de caja obtenidos por la entidad durante un período de tiempo equivalente a la menor de las dos cantidades siguientes: tiempo que reste hasta la extinción del contrato o tiempo transcurrido desde su adjudicación. No se incorporará ninguna actualización de precios en función de la inflación futura estimada.

c) El valor de los flujos de caja será el que el Plan General de Contabilidad establece en el Estado de Flujos de Efectivo como Flujos de Efectivo de las Actividades de Explotación sin computar en ningún caso los pagos y cobros de intereses, los cobros de dividendos y los cobros o pagos por impuesto sobre beneficios.

[71] LOZANO CUTANDA (2015: 1).

d) Si al momento de la resolución las obras estuvieran aún en construcción, el tipo de la licitación será el 70% del importe equivalente a la inversión ejecutada. A estos efectos se entenderá por inversión ejecutada el importe que figure en las últimas cuentas anuales aprobadas incrementadas en la cantidad resultante de las certificaciones cursadas desde el cierre del ejercicio de las últimas cuentas aprobadas hasta el momento de la resolución. De dicho importe se deducirá el correspondiente a las subvenciones de capital percibidas por el beneficiario, cuya finalidad no se haya cumplido.

La convocatoria de la licitación puede realizarse antes de que tenga lugar la resolución pero siempre una vez iniciado el procedimiento administrativo para declararla. Con todo, el acto de adjudicación no puede dictarse hasta que dicho procedimiento haya concluido. Además, desde dicha conclusión hasta la apertura de las ofertas de la primera licitación no podrá transcurrir un plazo superior a tres meses.

A la licitación puede presentarse cualquier empresario que comunique previamente al órgano de contratación su voluntad de participar en la licitación para obtener la oportuna autorización administrativa que debe notificarse al interesado en el plazo máximo de 15 días (naturales). Dicha autorización tiene carácter reglado y debe otorgarse siempre que el peticionario cumpla los mismos requisitos de capacidad y solvencia exigidos en su día al concesionario.

Nada se prevé acerca del anuncio y plazos de presentación de proposiciones, por lo que serán de aplicación las normas generales dirigidas a adjudicar un contrato con un único criterio de valoración de las ofertas que será el precio, siendo de aplicación los artículos 131 y siguientes de la LCSP[72].

Si el procedimiento licitatorio tiene éxito y la concesión se adjudica, el beneficiario debe abonar a la Administración el importe de la adjudicación en el plazo de

[72] Cfr. GONZÁLEZ-DELEITO DOMÍNGUEZ (2016: 4).

dos meses desde la misma, quedando en otro caso sin efecto la adjudicación, lo que dará lugar a una nueva adjudicación al siguiente licitador por orden, si lo hubiere. Por su parte, la Administración debe abonar al primitivo concesionario el valor obtenido en la licitación en el plazo máximo de tres meses desde la adjudicación.

Si por el contrario la subasta fracasara, bien por quedar desierta o bien por no abonarse por el adjudicatario el importe de la adjudicación y no haber más licitadores, se convocará una segunda, en el plazo máximo de un mes, en la que el tipo de licitación será el 50% de la primera. Si esta segunda subasta también quedara desierta, el valor de la concesión será el tipo de esta, es decir, el 50% del tipo de licitación de la primera subasta. Este es el único valor que en todo caso tiene garantizado el concesionario.

Con todo, producido el doble fracaso de las subastas, el primitivo concesionario o los acreedores que sean titulares al menos de un 5% del pasivo exigible de la concesionaria, pueden presentar un nuevo comprador que abone al menos el citado tipo de licitación (es decir, el 50% del tipo de la primera subasta). Podrá presentarse dicho comprador en el plazo máximo de tres meses a contar desde el momento en que la segunda subasta quedó desierta.

Por supuesto, cuando la resolución del contrato tenga lugar por una causa imputable al concesionario, se le incauta la fianza y si no alcanza para cubrir todos los daños y perjuicios realmente ocasionados se le impone la obligación de indemnizar por el exceso no cubierto por la garantía incautada.

Cuando la resolución de la concesión se produce por una causa imputable a la Administración, esta debe abonar al concesionario, como se dijo, el importe de las inversiones que hubiere efectivamente realizado por razón de expropiaciones, obras y adquisición de bienes necesarios para la explotación de la obra o servicio de que se trate, atendiendo a su grado de amortización.

Además, en los supuestos de rescate y supresión de la explotación de la obra o del servicio, de imposibilidad de la explotación de la obra o del servicio como consecuencia de acuerdos adoptados por la Administración concedente con posterioridad al contrato, así como en casos de demora superior a seis meses en la entrega por el órgano de contratación

de la contraprestación, de los terrenos o de los medios auxiliares a que el órgano de contratación se obligó según el contrato, a aquella obligación se le añade el deber de indemnizar los daños y perjuicios irrogados al concesionario.

Se plantean en este punto dos cuestiones principales. La primera, si fuera de estos cuatro supuestos previstos de modo expreso, es decir, cuando la resolución del contrato se produce por otras causas también imputables a la Administración, el concesionario tiene o no derecho a la reparación de los daños y perjuicios. Y la segunda, cuáles son los criterios para determinar la cuantía de esta indemnización.

Por lo que se refiere a la primera, la regla constitucional de indemnidad frente a toda lesión consecuencia del funcionamiento de los servicios públicos que los particulares sufran en sus bienes y derechos, salvo casos de fuerza mayor (artículo 106.2 de la CE), impone la obligación de resarcir los daños y perjuicios y, por ende, la aplicación de las reglas que inmediatamente se verán. Así se prevé expresamente en los artículos 280.3 y 295.4 de la LCSP, cuando tras referir los cuatro supuestos aludidos (demora, rescate, supresión de la explotación o imposibilidad de la misma), añaden "*y en general en los casos en que la resolución del contrato se produjera por causas imputables a la Administración*".

En cuanto a la segunda, los criterios para determinar la cuantía de la indemnización son los siguientes:

1º) El lucro cesante. Los beneficios futuros que el primitivo concesionario de obras o de servicios dejará de percibir se cuantifican sobre la base de la media aritmética de los beneficios antes de impuestos obtenidos durante un período de tiempo equivalente al menor de los siguientes lapsos de tiempo: el número de años que restan hasta la terminación de la concesión o el tiempo transcurrido desde su adjudicación. Asimismo, se aplicará una tasa de descuento en base al coste de capital medio ponderado correspondiente a las últimas cuentas anuales del concesionario.

2º) El daño emergente. Para determinar su cuantía se toma en consideración la pérdida del valor de las obras e instalaciones que no hayan de revertir a la Administración, teniendo en cuenta su grado de amortización.

Esta nueva regulación ha sido objeto de crítica por suponer un drástico recorte de las garantías del concesionario que, sin justificación, altera el sistema de protección de los inversores en los supuestos de resolución de las concesiones, especialmente cuando no es imputable a la Administración pero tampoco al concesionario (insolvencias no culpables)[73]. Sin embargo, la nueva regulación, como se ha visto, no elimina la RPA sino que más bien la limita de tal modo que cuando la resolución no es imputable a la Administración el riesgo lo asuma el concesionario. Así lo exige la Directiva 2014/23/UE para que pueda hablarse de concesión y, por ende, aplicar su régimen jurídico y no el de los contratos contenido en la Directiva 2014/24/UE. Así lo requiere también el sistema europeo de cuentas SEC-2010 para que la operación no se incluya en el perímetro de deuda pública. Y lo imponen, además, los principios de eficacia y eficiencia de la contratación pública, pues la asunción del riesgo operacional resulta imprescindible para que las empresas tengan incentivos para, primero, proponer proyectos y ofertas realistas y, segundo, llevar a cabo la más diligente gestión.

En todo caso, como ha puesto de relieve el Profesor GIMENO FELIÚ[74] es indispensable que los aspectos económico-financieros de los pliegos de la licitación se ajusten a la realidad y complejidad de la prestación pues una inadecuada planificación financiera implica una mayor exposición al fracaso de la concesión lo que perjudica a la empresa concesionaria y a la propia Administración, es decir, al interés público. El diseño del pliego con prudencia y realismo es el mejor instrumento para preservar las reglas de la

[73] LOZANO CUTANDA (2015: 2 y 5).

[74] GIMENO FELIÚ (2014a: 22).

contratación pública y, añado yo, para evitar la realización de proyectos con baja o nula rentabilidad social, los denominados "elefantes blancos".

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SOCIAL ASSISTANCE BENEFITS IN FAVOUR OF IMMIGRANTS IN THE ITALIAN AND EUROPEAN LEGAL FRAMEWORK

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ABSTRACT

The essay focuses on the issue of the recognition of immigrants' entitlement to social assistance benefits. After some brief background on the treatment of aliens under the Italian Constitution and the application of the principle of equality also to non-citizens, specific attention is given to the subject of the recognition of social rights. In particular, an overview is provided of the evolution in State and regional legislation with respect to the recognition of the rights of foreign nationals to receive social assistance benefits and the numerous interventions of the Italian Constitutional Court. The problems inherent in Italian legislation, also in terms of its compatibility with EU law, have also given rise to a significant number of disputes before the ordinary courts. Despite the persistence of legislation that is discriminatory, even if motivated by the need to contain public expenditure, the courts at all levels have confirmed the inviolability of several fundamental principles.

1. THE STATUS OF ALIENS UNDER THE ITALIAN CONSTITUTION

Before analysing the question of immigrants' rights to social assistance, I would like to mention the status of aliens under the Italian Constitution.

Article 2 of the Constitution establishes that "the Republic recognises and guarantees the inviolable rights of man....". If we place the principles of the Italian Constitution in their proper historical/political context,[2] we also perceive the dimension of art. 2 and understand that it is addressed to every person regardless of the fact that he or she is a citizen or alien. Moreover, the reference made in art. 2 to the rights of man holds true not only for civil rights and liberties, but also for social rights.

The relationship between arts 2 and 10(2) of the Constitution ("the legal status of aliens shall be regulated by the law in compliance with international standards and treaties") makes clear the primacy of the former over the latter, which is why the rights of aliens are already recognised and guaranteed in the Constitution. Consequently, art. 10(2) embraces all aspects concerning the status of aliens that are not already provided for in the Constitution. In addition, it establishes two important guarantees: first of all, the matter is reserved to law; second, in regulating the status of aliens, the law must conform to the provisions contained in the general international conventions and treaties that Italy is

[2] There can be no doubt that the Italian constituent assembly fits into the current of constitutionalism having its roots in the grand declarations of the late 18th century, which marked a break with the conception of the exclusiveness of law, understood, that is, as a set of rules designed to protect those who belong to the same community. It emerges clearly from the texts of both the U.S. and French constitutions that the majority of rights enshrined therein are intended to apply not only to citizens, but to all human beings. C. Corsi, *Lo stato e lo straniero* (Padua: Cedam, 2001).

signatory to[3].

If we go and read the individual rights sanctioned by the Constitution, we can observe that the vast majority of them are addressed to every individual and intended to provide guarantees to every person. However, there are certain provisions which contain a literal reference to citizens and summarise the three principal categories of citizens' rights, including the right to work, the right to enter and stay in the territory of the Republic and political rights.

As regards the right of entry for work reasons and, in general, the right to enter and stay in the territory of the Republic, it is up to the ordinary legislator to regulate the enjoyment thereof on the part of aliens. Only those who have a right to asylum enjoy a constitutional guarantee of entry and stay in the Italian territory[4].

The matter of political rights is more complex, with legal scholars being divided

[3] On the relation between arts 2 and 10(2), see A. Barbera, "Principi fondamentali: art. 2", in (G. Branca ed.) *Commentario della Costituzione,* (Bologna-Roma: 1975); P. Barile, *Il soggetto privato nella Costituzione italiana*, (Padua: Cedam, 1953), p. 51; P. Barile, *Diritti dell'uomo e libertà fondamentali*, (Bologna: il Mulino 1984), p. 32; G. D'Orazio, "Effettività dei diritti e condizione dello straniero", (1973) Diritto e società, p. 955; G. D'Orazio, *Straniero (condizione giuridica dello),* in *Enc. giur*. 1993, Roma, p.1 ff.; P. Grossi, *Introduzione ad uno studio sui diritti inviolabili nella Costituzione*, (Padova: Cedam 1972), p. 30 ff. note n. 49; E. Cannizzaro, "L'assunzione di lavoratori stranieri: aspetti costituzionali", in (G. Gaja ed.) *I lavoratori stranieri*, (Bologna: il Mulino 1984), p. 58-59; G. Biscottini, "I diritti fondamentali dello straniero", in *Studi in onore di Biondo Biondi,* II, (Milan: Giuffrè 1965), p. 335 ff.; A. Piraino, "Appunto sulla condizione giuridica degli 'stranieri' nell'ordinamento italiano", (1984), Riv. trim. dir. pubbl., p. 993-994; V. Onida "Relazione", in *I diritti fondamentali oggi*, (Padua: Cedam 1995), p. 75; A. Pace, *Problematiche delle libertà costituzionali, Lezioni, I Parte generale* (Padua: Cedam 1990), p. 146: E. Grosso, "Straniero (status costituzionale dello)", in *Digesto discipline pubblicistiche,* XV, (Turin: Utet 1999), p. 164.

[4] See art. 10 (3) of the Constitution: "Aliens who are in their own country denied the real exercise of the democratic freedoms guaranteed by the Italian constitution shall have the right to asylum under the conditions provided for by law".

between those who believe that only citizens are entitled to such rights and those who maintain that legislators can reasonably regulate their exercise also by non-citizens.

Coming to the question of social rights, it is necessary first of all to consider some essential, currently widely accepted points.

Social rights as well as civil rights and liberties are included among the fundamental rights and as such are inherent in the state form of the Italian Republic.

Secondly, there is a close link between social rights and civil rights and liberties, for which there is a reciprocal implication and only the guarantee of minimum economic and social conditions can allow an effective enjoyment of civil and political rights.

Finally, the principle of the protection of social rights has been ratified at an international level, first through the Universal Declaration of Human Rights (see arts. 22 et seq.) and later and above all with the International Labour Organization Conventions and through the International Covenant on Economic, Social and Cultural rights of 1966. On a European level, the protection of social rights is a principle enshrined in the EU Charter of Fundamental Rights, in particular in the provisions contained in Chapter IV, dedicated to solidarity, and in art. 6 TEU; it is also recognised in the European Social Charter and the European Convention on Human Rights, thanks above all to the case law developed by the Strasbourg Court.

Now it is necessary to understand the relevance of nationality when it comes to provisions on social rights.[5]

[5] *Diritti uguali per tutti?*, edited by A. Giorgis, E. Grosso, M. Losana (Milan: FrancoAngeli, 2017); G. Corso, "La disciplina dell'immigrazione tra diritti fondamentali e discrezionalità del legislatore nella giurisprudenza costituzionale", in *La condizione giuridica dello straniero nella giurisprudenza della Corte costituzionale*, (Milan: Giuffrè 2013) p. 14 ff.; W. Chiaromonte, *Lavoro e diritti sociali degli stranieri* (Turin: Giappichelli 2013); F. Biondi dal Monte, *Dai diritti sociali alla cittadinanza* (Turin: Giappichelli 2013); G. Bascherini and A. Ciervo, "I diritti sociali degli immigrati", in C. Pinelli (ed.), *Esclusione sociale. Politiche pubbliche e garanzie dei diritti,*

As to international law, there is no doubt that it applies to all men; the third paragraph of art. 2 of the Covenant on Economic, Social and Cultural Rights confirms this, mentioning that "Developing countries, with regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals". As it sets forth this exception for developing countries, it is clear that any other State must undertake to guarantee the rights under the Covenant to anyone working within its territory, not just its own nationals. In addition, the ILO conventions are intended to regulate the conditions of all workers regardless of their nationality.[6]

As for the rules enshrined in the Italian Constitution, the first thing worth noting is that in the second title of the first part[7] dedicated to "ethical and social relations" there is no reference to nationality (for example art. 32 speaks about the right of the individual to health, while art. 34 states that public education is open to all and arts 29-32 address the family).

If we read the third title of the Italian Constitution dedicated to "economic relations", it emerges that the treatment of foreign workers falls under the guarantees of arts 35, 36, 37, 38(2), 39 and 40 (right to pay, to paid vacations, to weekly rest and to a pension, freedom of trade union organisation and the right to strike): the subject to which such constitutional provisions refer is workers, without any reference to nationality. Even under ordinary legislation, if an alien who intends to enter Italy for employment purposes is

(Florence: Passigli 2012); B. Pezzini, "Una questione che interroga l'uguaglianza: i diritti sociali del non cittadino", in *Lo statuto costituzionale del non cittadino*, (Naples: Jovene 2010), p. 224 ff.

[6] C 143 *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* and C 97 *Migration for Employment Convention.*

[7] The first part of Italian Constitution is dedicated to Rights and Duties of Citizens and it is divided into four titles (Civil Rights, Ethical and Social Relations, Economic Relations and Political Rights).

subject to a complex authorisation procedure due to not having a right to entry, once he or she is accepted in the Italian territory and has obtained a permit to stay for work reasons, he or she will enjoy the same rights and be required to fulfil the same obligations as Italian workers. Both international and European law, as well as the provisions of our Constitution and those of the Consolidation Act on Immigration No. 286/1998 are clear in granting to all individuals (whether they are nationals or not) the rights linked to the status of a worker, as well as equal treatment.

Finally, as regards the right to social assistance, although the first paragraph of art. 38[8] of the Italian Constitution includes the only reference to citizens to be found in the entire third title, it should not be construed as intending to limit the subjective sphere of the recipients, because from the point of view of the constituent assembly, the term citizen implied a wider concept than worker and the aim was solely extend some guarantees to all persons rather than limiting them only to workers;[9] the Constitutional Court itself has always asserted the right of aliens to social assistance benefits. Similarly, the provisions of the third paragraph of art. 38, dealing with disabled and handicapped persons, must be understood as referring also to those who do not have Italian nationality.[10]

This is the constitutional framework within which the provision contained in art. 2(5) of the Consolidation Act on Immigration no. 286/1998 must be read. It states in fact that "aliens shall be granted treatment equal to that of citizens…in relations with the public

[8] Art. 38 (1): "All citizens unable to work and lacking the resources necessary for their livelihood are entitled to maintenance and social assistance".

[9] W. Chiaromonte, "La tutela dei diritti previdenziali", in G. Caggiano (ed.), *I percorsi giuridici per l'integrazione*, (Turin: Giappichelli, 2014), p. 493.

[10] Art. 38 (3): "Disabled and handicapped persons are entitled to education and vocational training". See Constitutional Court Decision no. 454 of 30.12.1998, confirming that alien workers living in Italy have the right to compulsory employment, which relates to one aspect of the implementation of art. 38, third paragraph, and more particularly to vocational training courses.

administration and access to public services, within the limits and in manner provided by law". This reference to law is not meant to establish entitlement, but to indicate the lawmaker's task in identifying situations that allow access to public services.

1.1. Aliens and the principle of equality

Notwithstanding the literal reference to citizens contained in art. 3 of the Constitution ("all citizens have equal social status and are equal before the law, without regard to their sex, race, language, religion, political opinions and personal or social conditions"), from its very first judgments the Constitutional Court has always confirmed that the principle of equality also applies for foreign nationals[11], when it comes to complying with inviolable rights.[12]

Although the Court has never explicitly set forth the grounds for going beyond the literal wording of art. 3, if, once again, we interpret the provision within the

[11] Legal scholars have expressed different opinions on this point; for an overview see M. Cuniberti, La cittadinanza. Libertà dell'uomo e libertà del cittadino nella Costituzione italiana (Padova: Cedam 1997). See also C. Lavagna, *Basi per uno studio delle figure giuridiche soggettive contenute nella costituzione italiana*, in *Studi economico-giuridici*, (Padua: Cedam, 1953), p. 14; L. Paladin, *Il principio costituzionale di uguaglianza*, (Milan: Giuffrè, 1965), p. 205; A. Pizzorusso, *Che cos'è l'eguaglianza?,* (Rome: Editori riuniti, 1983), p. 69; C. Esposito, *Eguaglianza e giustizia nell'art. 3 della costituzione,* in *La Costituzione italiana. Saggi*, (Padua: Cedam 1954), p. 24 note 19; C. ROSSANO, *L'eguaglianza giuridica nell'ordinamento costituzionale*, (Naples: Jovene, 1966), p. 395 ff.; G. Zagrebelsky, "Questione di legittimità costituzionale della l. 3 febbraio 1963, n. 69, istitutiva dell'ordine dei giornalisti", *Giur. cost.*, 1968, pp. 350-351; P. Stancati, "Le libertà civili del non cittadino: attitudine conformativa della legge, assetti irriducibili di garanzia, peculiarità degli apporti del parametro internazionale", in *Lo statuto costituzionale del non cittadino*, (Napoli: Jovene 2010), p. 61; A. Pace, *Dai diritti del cittadino ai diritti fondamentali dell'uomo*, (2010), Rivista dell'Associazione Italiana dei Costituzionalisti, www.associazionedeicostituzionalisti.it; F. Sorrentino, "Uguaglianza e immigrazione", in (L. Ronchetti ed.) *La Repubblica e le migrazioni*, (Milan: Giuffrè 2014), p. 118.

[12] C. Corsi, "Stranieri, diritti sociali e principio di eguaglianza nella giurisprudenza della Corte costituzionale", (2014) Federalismi, 3.

historical/political context in which it originated, it is clear that the principle of equality was meant to apply to non-citizens as well.

The principle of equality was born as a principle that concerns human beings as such, not as citizens; we need only consider art. 1 of the Declaration of the Rights of Man and of the Citizen (*les homes naissent et demeurent libres et ègaux en droits*), similar American declarations (*we hold these truths to be self evident that all men are created equal*[13]; *all men are by nature equally free and independent*[14]), and the 14th amendment to the United States Constitution, which extends *the equal protection of the laws* to all people.[15]

The preparatory drafts of the Constitution show no evidence of any intention to limit protection of the principle of equality to citizens alone and the text adopted by the 1st sub-committee began with the term "men"; the editing committee replaced it with "citizens" and the impression is that the members of the committee, when amending this article, were convinced of "carrying out a simple 'coordination' action, aimed solely at eliminating an inconsistency, a break in the continuity of the constitutional fabric".[16]

Moreover, recognising the entitlement to rights as per art. 2 of the Constitution without any further guarantee of observance of the principle of equality would imply stripping the recognition of the rights themselves of all meaning. Finally, international

[13] United States Declaration of Independence of 1776.

[14] Virginia *Bill of Rights*.

[15] The provision was interpreted for the first time in 1886 by the Supreme Court, which ruled that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens… these provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of colour, or nationality", *Wo Lee* v. *Hopkins Sheriff*, 118 U.S. 369.

[16] M. Cuniberti, La cittadinanza. Libertà dell'uomo e libertà del cittadino nella Costituzione italiana (Padova: Cedam 1997), p. 132.

legislation and the Charter of Fundamental Rights of the European Union apply the principle of equality to every human being.

Therefore, the subjective extension of the provision of art. 3 becomes clear in the sense that any rules regarding aliens must undergo an assessment of reasonableness: it would not be possible for lawmakers to discriminate their treatment arbitrarily on the grounds that no guarantee is provided to them under the constitution.

2. THE ATTEMPTS OF LAWMAKERS TO GUARANTEE SOME SOCIAL ASSISTANCE BENEFITS ONLY TO NATIONALS

In recent years, national or regional regulations have been approved which limit certain social assistance benefits only to Italian or European nationals; a regional law of Lombardy, which limited the right to free travel on public transportation to totally disabled persons who were Italian or EU nationals, is well known, as the Constitutional Court was able to express an opinion on its legitimacy (Judgment No. 432/2005). The Court, after emphasising that a provision on free transportation was based on social solidarity, reasonably assuming the conditions of difficulty of residents who, being fully disabled, had lost most or all of their earning capacity, concluded that the provision under discussion conflicted with the principle of equality laid down in art. 3 of the Fundamental Charter. In terms of implementation of the provision at stake, making a distinction on the basis of nationality introduces fully arbitrary elements into the regulatory framework, since there is no reasonable correlation between eligibility for a benefit (Italian or EU nationality) and other specific requirements (100% disability and residency).

A few years later, based on a similar interpretation, in its Decision no. 40 of 2011, the Constitutional Court declared the illegitimacy of the Friuli Venezia Giulia Regional

Law no. 6 of March 31, 2006, which excluded immigrants from the integrated system of social interventions and services.[17]

It is worth mentioning, moreover, the judgment of the Strasbourg Court[18] in *Dhahbi v Italy*,[19] issued upon the application of a Tunisian national legally residing in Italy for work, who had been refused the large family allowance, as he was not of Italian nationality[20]. In this decision the combined provisions of arts 14 and 8 of the ECHR, among other provisions, were considered as having been violated, since there were no objective and reasonable grounds to justify such an unequal treatment. The applicant had been in possession of a lawful residence and work permit in Italy and had been insured with the INPS. He paid contributions to that insurance agency in the same capacity and on the same basis as workers who were European Union nationals. He was not an alien residing in the country for a short period or in breach of the immigration legislation. Hence, he did not belong to the category of persons who, as a rule, do not contribute to the funding of public services and in relation to whom a State may have legitimate reasons for curtailing the use of resource-hungry public services such as social insurance schemes, public benefits and health care. The Court, after finding that the lack of Italian nationality was the one and only reason for denial, deemed as not convincing the arguments in favour of containing public expenditure invoked by the government or however not such as to reasonably justify the different treatment.

[17] F. Scuto, "Le Regioni e l'accesso ai servizi sociali degli stranieri regolarmente soggiornanti e dei cittadini dell'Unione", (2013) 1, Diritto, Immigrazione e Cittadinanza, 56 ff,

[18] See also *Gaygusuz v Austria*, 16 September 1996; *Koua Poirrez v France*, no. 40892/98, § 46, ECHR 2003; *Andrejeva v Latvia*, no. 55707/00 §87, ECHR 2009; *Ponomaryovi v Bulgaria*, no. 5335(05) §54, ECHR 2011.

[19] Decision no. 17120/09, § 52-53, ECHR 2014.

[20] When the application was submitted, the benefit was granted to nationals. Only in 2013 it was extended to some categories of aliens (see par. 4).

"As to the 'budgetary reasons' advanced by the Government …, the Court recognises that protection of the State's budgetary interests constitutes a legitimate aim of the distinction at issue. Nevertheless, that aim cannot by itself justify the difference in treatment complained of. It remains to be determined whether there was a reasonable relationship of proportionality between the above-mentioned legitimate aim and the means employed in the present case. The Court points out in that connection that the national authorities' refusal to grant the family allowance to the applicant was based solely on the fact that he was not a national of a European Union Member State. It is not disputed that a citizen of such a State in the same position as the applicant would receive the allowance in question. Nationality was therefore the sole criterion for the distinction complained of. However, the Court reiterates that very weighty reasons would have to be put forward before it could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention …. In these circumstances, and notwithstanding the wide margin of appreciation left to the national authorities in the field of social security, the arguments submitted by the Government are not sufficient to satisfy the Court that there was a reasonable relationship of proportionality in the instant case that would render the impugned distinction compatible with the requirements of art. 14 of the Convention".

I shall note, finally, that lawmakers have intervened only recently to modify national regulations limiting access to certain social assistance benefits strictly to Italian or European Union citizens (the large family allowance for families with at least three children,[21] the social card; see par. 4).

However, taking for granted the abstract eligibility of aliens for social benefits, the legislation governing social benefits for non-nationals and the concrete identification of

[21] However, on the basis of Directive 2004/83/EC and the Legislative Decree transposing it into Italian law, the INPS (Italian Social Security Institute) recognised that aliens having refugee status or subsidiary protection had the right to *de quo* benefits and services; see Circular no. 9 of January 22, 2010.

beneficiaries are very sensitive matters. Though an alien who is at the border of or within the State territory always enjoys basic civil rights and freedoms, social rights presume a "bond" with the community, which it is up to the lawmaker to indicate and which varies according to the social benefit at stake. As also pointed out by the Constitutional Court, lawmakers can not unreasonably, make the provision of certain services subject to the fact that the alien's residence permit shows that his or her stay is not sporadic.

It is evident that this is a very delicate task, because it is up to either State or regional lawmakers to concretely identify on what basis aliens may be entitled to enjoy certain benefits. As affirmed by the Court, choices linked to the identification of categories of beneficiaries – necessarily to be restricted to those having limited financial resources – must always in any case be made in accordance with the principle of reasonableness, so that lawmakers may introduce differentiated regimes in respect of the treatment to be given to individuals only in the presence of a regulatory "cause" which is not clearly irrational, or worse, arbitrary.[22]

3. THE IDENTIFICATION OF CATEGORIES OF BENEFICIARIES BY LAWMAKERS AND THE CASE LAW OF THE CONSTITUTIONAL COURT

While the Consolidation Act of 1998 (art. 41) provided that legal aliens who have had a residence permit for at least one year are entitled to social assistance benefits, also of an economic nature, the 2001 Finance Act drastically reduced the scope of the provision, since it established that economic benefits would be granted only to aliens having a permanent residence permit (currently an EC residence permit for long-term residents),

[22] Decision no. 308/2008.

which, as is well known, may be issued to a foreign national who has resided legally in Italy for at least five years and has disposable income that is equal to at least the amount of the yearly social allowance and suitable housing.

The economic reasons underlying this choice on the part of the lawmaker were obvious, but also immediately evident was the difference in treatment for aliens who, despite legally residing in Italy, did not have an open-ended residence permit. And it was equally evident that there would be soon a dispute before the Constitutional Court.

The Court has in fact been repeatedly asked to rule on this provision, in relation to different economic benefits. It has always ruled in favour of the applicant, and it is worth dwelling on the reasons of each decision, as they highlight different aspects of the issue.

With the first two decisions (no. 306 of 2008 and no. 11 of 2009), the Court noted an intrinsic unreasonableness of the rules making welfare benefits such as the attendance allowance and disability pension – which also presuppose an economic disadvantage – subject to a permanent residence permit that can be obtained only by a person having a sufficient income. With its subsequent decisions no. 187 of 2010 and no. 329 of 2011, respectively regarding the monthly disability allowance and attendance allowance for disabled minors, the Court pointed out an unreasonably different treatment of legal aliens who were supposed to have resided in Italy for at least five years in order to obtain the residence permit allowing them to access the benefit.[23] The Court, while stating that it was acceptable to subject the granting of certain benefits to a residence permit demonstrating a non-sporadic stay of the alien, was of the opinion that requiring a five-year minimum

[23] In stating the reasons for these judgments, the Constitutional Court also made reference to the case law of the ECtHR concerning the principle of non-discrimination in respect of social benefits, based on which a difference in treatment is discriminatory if there is no reasonable, objective justification, i.e. if the aim pursued is not legitimate or if there is a disproportion between the means employed and the objective it is desired to achieve; consequently, only on the basis of very weighty considerations could a difference in treatment founded exclusively on nationality be judged compatible with the Convention.

period of residence was discriminatory against the alien, and thus denied the latter's right to have primary needs met.[24]

Some regional lawmakers have also resorted to the requirement of having a permanent residence permit in order to limit access to certain welfare benefits. Once again the Court[25] confirmed that the distinction was an arbitrary one, since there was no reasonable correlation between the requirements for the access of non-EU citizens to the welfare benefits at stake and situations of need or disadvantage, which refer directly to the individual as such and are the basis for granting social benefits.

In fact, it is not possible to assume a priori that non-self-sufficient aliens having an EC residence permit for long-term residents – being already previously present in Italy on the basis of their over five-year residence permit – are in a greater state of need or of disadvantage than other aliens who, although also legally present in Italy, do not have a long-term permit.

Another requirement which both national[26] and regional lawmakers introduced to limit aliens' access to certain social assistance benefits was that the alien had to be legally residing in Italy or in a regional territory for a certain number of years; in some cases it was established as a requirement which applied only to aliens, while in others it affected both

[24] See also Decision no. 22 of 27/02/2015 concerning the pension for the visually impaired and Decision no. 230 of 7 October 2015, referring to the civil invalidity pension for the deaf and the communication allowance. Cf. A. Ciervo, "La sentenza n. 22/2015 della Corte costituzionale in materia di prestazioni assistenziali a favore degli stranieri extracomunitari. Cronaca di una dichiarazione di incostituzionalità", (2015) 2 Federalismi.

[25] Constitutional Court Decisions no. 4 of 18 January 2013 and no. 172 of 4 July 2013.

[26] Italian nationals and aliens alike must have legally and uninterruptedly resided in Italy for at least 10 years in order to obtain a social security allowance (an economic benefit for people over 65 who are in a state of economic hardship). See art. 20(10) of Law Decree no. 112 of 25 June 2008 converted with subsequent amendments of Law no. 133 of 6 August 2008.

nationals and non-nationals, but it is clear that it was a condition more easily met by Italian nationals, to such an extent that the regulations in question have resulted in significant constitutional litigation.

In an appeal against a Lombardy regional law requiring as a condition for the assignment of public housing that "the applicants must have resided or worked for at least five years during the period immediately preceding the date of application", the Court adopted a debatable ruling (no. 32 of 2008) which rejected the claim of unconstitutionality.[27] It deemed the allegation of a violation of art. 3 of the Constitution to be groundless, as the uninterrupted residence requirement for the grant was not unreasonable and was in line with the aims that the lawmaker intended to pursue, thus ensuring a balance between the constitutional values at stake.

In more recent decisions the orientation of the Court has appeared inconsistent.

In its Decisions no. 40/2011, no. 2/2013, no. 133/2013 and no. 172/2013 (which concerned regional laws), the Court came to the conclusion that the provisions establishing a predetermined period of residence as a requirement introduced an arbitrary distinction in the regulatory framework, since there is no reasonable correlation between the duration of residence and situations of need or disadvantage that are at the basis of the entitlement to the benefits concerned: it is not possible to presume that those who have resided in an area for only a few years are less needy than someone who has resided there for an extended period.

After these four decisions, the orientation of the Court might have seemed clear, but it adopted an apparently different argumentation in the subsequent Decision no. 222 of

[27] Cf. C. Corsi, "Il diritto all'abitazione è ancora un diritto costituzionalmente garantito anche agli stranieri*?",* (2008) 3-4 Diritto, immigrazione e cittadinanza, 141-148.

19 July 2013 concerning a Friuli Venezia Giulia law of 2011;[28] although in relation to some benefits (such as the possibility of benefiting from a regional fund set up to "contrast the phenomena of poverty and social disadvantage" or the entitlement to a study allowance) it reiterated the unreasonableness of making the benefits subject to a period of twenty-four months of residence in the region, the Court came to a different conclusion for other social benefits.

With regards to the "baby bonus" (child allowance), having noted that it was a measure intended to favour births, the Court held that "it is not openly unreasonable that lawmakers addressed precisely those social groups that are not only in the area, but have already shown over time that they plan to live there on a permanent basis, so that they can be supported on a regional level".

Concerning the provisions on rental housing, family income support, the enjoyment of goods and services, and possible tax reductions with the so-called "Family Card" or vouchers, the Court observed that "the lawmaker aimed to enhance the household's contribution to the community with measures exceeding the basic level of benefits, so it is not openly unreasonable to target efforts in favour of households that have been active and vital community members for some time" [twenty-four months]. Also in regard to subsidised housing and subsidised leases, the Court, after recalling its Decision no. 32 of 2008 (see above), pointed out that social policies of regional governments "may well consider an additional local presence beyond residence alone, provided it is kept

[28] With regional law no. 16 of 30 November 2011, introducing modifications "as to the access to social and personal benefits", the FVG Region again made many benefits subject to the requirement of having resided for at least twenty-four months in the Region and in the case of legal aliens of having resided at least five years in Italy too. As for the requirement that regarded only aliens who had resided in Italy for at least five years, the Court reiterated its discriminatory nature due to the disproportionate importance attributed to the residency requirement, also making reference to the Decisions no. 40/2011, no. 2/2013, and no. 133/2013. However, the Court has taken a different stance in relation to the requirement (which applies to all foreign nationals and Italian citizens alike) of two years of residency in the regional territory.

within not openly arbitrary nor unreasonable limits. Access to an asset of paramount importance and of long-lasting enjoyment, such as housing, on the one hand, comes at the conclusion of the process of integration of an individual into the local community and, on the other hand, may require guarantees of stability, which, in the allocation of public rental housing, serve to prevent an excessive turnover of renters from undermining administrative action and reducing its effectiveness".[29]

It is finally worth mentioning Constitutional Court Decision no. 141 of 19.5.2014 regarding the Campania regional law no. 4 of 15.3.2011, which restricted the "baby bonus" to families that had been residing in the region for at least two years; the Court rejected the claim of unconstitutionality as "the regional provision was not unreasonable, as it limited itself to encouraging the birth rate in relation to the permanent presence of the family in the area, without giving rise to additional selective criteria as to situations of need or disadvantage, which do not tolerate discriminations".

It seems evident that the Court's position when it comes to allowing lawmakers to introduce requirements for accessing social benefits linked to long-term residence in a given territory is not yet well defined: though in some cases the Court finds treatments to be discriminatory due to unreasonable requirements, in others it does not consider it unreasonable to give preferential treatment to those who have resided in the territory for a certain number of years. Actually, I do not think it is possible to detect any difference in the type of benefits such as to justify a different approach: for example, in its Decision no. 222 of 2013, the Court considered restricting access to the regional fund set up to "contrast poverty and social disadvantage" or the entitlement to a study allowance to aliens who had been residing in the regional territory for at least twenty-four months to be discriminatory.

[29]On the problems related to the extended residency requirement for access to housing, see P. Bonetti, "Il diritto all'abitazione", in G. Caggiano (ed.) *I percorsi giuridici per l'integrazione*, (Turin: Giappichelli 2014), 570 ff. See also F. Pallante, "Gli stranieri di fronte al diritto all'abitazione" in A. Giorgis, E. Grosso, M. Losana (eds) *Diritti uguali per tutti?* (Milan: FrancoAngeli, 2017); F. Dinelli, *Le appartenenze territoriali*, (Naples: Jovene 2011), p. 213; E. Olivito, *Il diritto costituzionale all'abitare*, (Naples: Jovene, 2017).

However, in the same decision the Court held that it falls within the legitimate discretion of lawmakers to make access to child or housing allowances subject to the same requirement.

4. THE PERSISTENCE OF ILLEGITIMATE PROVISIONS IN EXISTING LEGISLATION

Despite the aforementioned multiple decisions of the Court, the body of State laws still includes cases in which access to social assistance benefits is limited to those who have resided in Italy for a certain number of years or are holders of permanent residence permits.

The social security allowance for people over 65 who are in a state of economic hardship is paid only to Italian nationals and aliens who have legally and uninterruptedly resided in Italy for at least 10 years (see above note 24). Although the long-term residence requirement formally applies to everyone, it is obvious that it will be harder to meet for foreign nationals.

The 2000 Finance Act[30] provides that the maternity allowance paid by the State, as well as the maternity allowance granted by municipalities to women who do not benefit from social security benefits, may be granted only to resident women – Italian or EU citizens or women having an EC residence permit for long-term residents.

Recently, certain provisions of law which used to guarantee certain social assistance benefits only to Italian or European Union citizens were amended, thus extending access to aliens having a permanent residence permit: under the European Law of

[30] Arts. 49(8) and (12), Law no. 488 of 23 Dec. 1999. See more recently Art. 74, Legislative Decree no. 151 of 26 March 2001.

2013,[31] the large family allowance for families with at least three children[32] was extended to third-country nationals having an EC residence permit for long-term residents, as well as to family members (of European nationals) who are not nationals of a member State but had permanent residence status in Italy. Based on Directive 2004/83/EC and the legislative decree transposing it into Italian law, the INPS (Italian Social Security Institute) has recognised, however, that aliens receiving refugee status or subsidiary protection also have the right to this benefit.[33]

Even the new "social card" regulation, which in its original version guaranteed only Italian nationals,[34] now provides that both Italian and European nationals and their family members, as well as aliens having an EC residence permit for long-term residents and political refugees or beneficiaries of subsidiary protection can be entitled to this benefit (art. 1(216), Law no. 147 of 27.12.2013).

A similar approach was adopted in the 2015[35] stability law that introduced the "baby bonus", including as beneficiaries, in addition to Italian and EU citizens, aliens having a residence permit for long-term residents. In this case as well, however, the INPS has recognised that aliens receiving refugee status or subsidiary protection have the right to this benefit.[36]

[31] Art. 13, Law no. 97 of 6 August 2013.

[32] Art. 65, Law no. 448/1998.

[33] See Circular no. 9 of 22 January 2010.

[34] The social card was introduced by Law Decree no. 112 of 25 June 2008, converted into Law no. 133 of 6 August 2008 (art. 81(32)) and in its original version it was guaranteed only to Italian nationals.

[35] Law no. 190 of 23 December 2014, art. 3(125): "In order to encourage births, a monthly check for a total yearly amount of € 960 shall be paid for each child born or adopted between 1 January 2015 and 31 December 2017, starting from the month of birth or adoption".

[36] See Circular no. 93 of 8 May 2015.

Despite these amendments, which finally transposed Directive 2003/109/EC (concerning long-term residents) and Directive 2011/95/EU (concerning beneficiaries of international protection), Italian law continues to show points in conflict with the constitutional framework, the case law of the Court of Justice and the European directive on the single permit.

As for the latter, Directive 2011/98/EU "on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State" provides (art. 12) that third-country workers "shall enjoy equal treatment" with nationals of the Member State where they reside with regard to branches of social security, as defined in Regulation (EC) No 883/2004. But, as is well known, the question of the extension of the European notion of social security to social assistance benefits is controversial, since, on the one hand, the provisions of the Regulation (EC) No 883/2004 do not apply to social assistance,[37] but, on the other hand, the Regulation includes certain benefits (considered social assistance under Italian law) among the branches of social security.[38]

4.1. The case law of ordinary courts

In recent years, given this legislative and jurisprudential framework, ordinary courts have been playing an important role on the issues at stake and it is worth mentioning

[37] See art. 3(5), Reg. (EC) No 883/2004.

[38] The measures of social assistance include the benefits falling under art. 38(1) Const. ("All citizens unable to work and lacking the resources necessary for their livelihood are entitled to private and social assistance"); the social security measures include the benefits falling under art. 38(2) Const. ("Workers are entitled to adequate insurance for their needs in case of accident, illness, disability, old age, and involuntary unemployment"). See Constitutional Court Decision no. 31 of 5 February 1986.

some recent decisions which have reaffirmed the discriminatory character of the aforementioned legislative provisions.[39]

As regards the maternity allowance[40], the Court of Bergamo[41] and the Court of Reggio Calabria[42] raised a question regarding the constitutionality of art. 74 of Law no. 151/2001, where it makes the entitlement to maternity benefits subject to possession of a long-term residence permit, in violation, according to the referring courts, of both constitutional and supranational legislation (art. 14 and first additional protocol to the ECHR; art.21 of the Charter of Fundamental Rights of the European Union and art. 6 TEU). In its Ruling no. 95 of 4 May 2017, the Constitutional Court declared the question to be inadmissible, as the referring courts had not duly evaluated whether European Union legislation was directly applicable, in particular art. 12 of Directive 2011/98/EU. Indeed, as the Court had clarified on a number of occasions, the referring court must expressly specify the reasons precluding the disapplication of domestic law in conflict with EU law, and which would thus make the Court's intervention necessary.

Unlike the courts of Bergamo and Reggio Calabria, other ordinary courts, similarly in reference to the *maternity allowance*, ruled that art. 12 Dir. 2011/98/EU must be considered a Community provision directly applicable in the national legal system, given its clear, precise and unconditional content. Therefore, from the direct applicability of art. 12 and the conflict with the domestic provision (art. 74 of Legislative Decree no. 151/2001) which limits the right to a maternity allowance to aliens with a long-term residence permit,

[39] Cf. *Senza distinzioni. Quattro anni di contrasto alle discriminazioni istituzionali nel Nord Italia* edited by A. Guariso (Milano: Associazione avvocati per niente 2012).

[40] Art. 74, Law 26 March 2001, no. 151.

[41] Court of Bergamo, (ruling of 26 November 2015, available at *https://www.asgi.it/banca-dati/tribunale-di-bergamo-ordinanza-del-26-novembre-2015*).

[42] Court of Reggio Calabria (ruling of 30 March 2015, available at http://www.asgi.it/banca-dati/23375/).

it follows that the latter must necessarily be disapplied in view of the superordinate character of Community law vis-à-vis national legislation.[43] Consequently, the denials, on the part of municipal governments, of a *maternity* allowance to foreigners in possession of a residence permit for family reasons were declared *illegitimate.*[44]

As regards the so-called "baby bonus",[45] several decisions of ordinary courts have affirmed the discriminatory character of the denial of the benefit to legal aliens who have a single permit or a residence permit for family reasons, as art. 125 of Law no. 190/2014 is in contradiction with Directive 2011/98/EU, which aims to guarantee equal treatment to third-country workers with regard to branches of social security, as defined in Regulation (EC) No 883/2004. The deadline for the transposition of Directive 2011/98/EU expired in December 2013 and the provision of art. 12 (which had not been transposed by Legislative Decree 40/14[46]), **is** precise**,** clear and unconditional, so it does not call for additional measures and it can have direct effect. Furthermore, the obligation to disapply national provisions contrasting with European directives lies not only with judges, but also with public authorities and agencies, thus also with the INPS (Italian Social Security Institute), and the benefit at stake, although it is considered a form of social assistance under Italian

[43] Although the benefit at stake is a form of social assistance, it falls in the branch of social security as it concerns maternity benefits, which are mentioned by art. 3 Reg. (EC) No. 883/2004.

[44]Court of Bari, Ruling of 20.12.2016 (*http://www.asgi.it/wp-content/uploads/2016/12/ordinanza_tribunale_di_bari_maternit%C3%A0-74.pdf*). See also Court of Brescia, Ruling of 23.8.2016.

[45] Art. 1 (125), Law no. 190 of 23 December 2014: "In order to encourage births, a monthly check for a total yearly amount of € 960 shall be paid for each child born or adopted between 1 January 2015 and 31 December 2017, starting from the month of birth or adoption".

[46] Legislative Decree no. 40 of 4.3.2014, which transposed Directive 2011/98/EU, says nothing about the question of the enjoyment of social security benefits. See A. Guariso, *Direttiva 2011/98 e d.lgs. 40/2014 di recepimento*, Diritto Imm e citt., 23 ff. 1 (2015).

law, falls in one of the branches of social security as it concerns "family benefits", which are explicitly mentioned in art. 3 of Regulation (EC) No. 883/2004[47].

As the Court of Milan has ruled,[48] according to the case law of the Court of Justice, family allowances are intended as a form of help for workers with family burdens, where the burden is shared by the community (judgments of 4.7.1985, *Krombout*, C-104/84 and 19.9.2013, *Hliddal*e *Bornard* C-216/12 and C.217/12) and, moreover, the distinction between benefits included in or excluded from the branches of social security is essentially based on the elements making up each benefit, not on whether it is defined as a social security benefit by national legislation (judgment of 24.10.2013 *Caisse nationale des prestations familiales* C-177/12); consequently, the legal mechanism a Member State relies on to implement the benefit has no relevance for the purpose of qualifying the latter as social protection.

The Court of Modena also highlighted that there is no overlap between the Community and national concepts of social security; the Community concept of social security must be evaluated in light of Community legislation and case law, so that a benefit attributed to the beneficiaries irrespective of any individual and discretionary assessment of their personal needs, based on a legally defined situation associated with one of the risks listed in art. 4(1) of Regulation No. 1408/71 must be considered as social security. Therefore, the notion of social security that has developed in the Community framework – and in light of which the aforementioned art. 12 must be interpreted – should thus be

[47]See Court of Como, Ruling of 30 July 2016 (*http://www.asgi.it/banca-dati/tribunale-como-sez-ii-ordinanza-del-30-luglio-2016/*). See Brescia Court of Appeal Ruling of 30.11.2016 (*http://www.asgi.it/banca-dati/corte-dappello-brescia-sentenza-del-30-novembre-2016/*) and Court of Alessandria Ruling of 19.4.2017 (*http://www.asgi.it/banca-dati/tribunale-alessandria-ordinanza-del-19-aprile-2017/*).

[48] Court of Milan, Ruling 2 May 2017 (*http://www.asgi.it/banca-dati/tribunale-milano-ordinanza-del-2-maggio-2017/*). Cf. Court of Treviso Ruling of 29 March 2017 (*http://www.asgi.it/banca-dati/tribunale-treviso-ordinanza-del-29-marzo-2017/*).

considered to embrace the benefits defined as social assistance under Italian law.[49] That being said, the "baby bonus" is ascribable to the branches of social security as defined by Regulation (EC) No. 883/2004 and in particular to family benefits as per art. 3 (j) of said regulation;[50] consequently, Law no. 190/2014 is in conflict with art. 12 of Directive 2011/98/EU and must be disapplied.[51]

For the sake of completeness, mention should be made of a ruling issued by the Court of Milan,[52] which adopted a different interpretation: it observed first of all that the benefit is a form of assistance, since it is provided irrespective of any insurance relationship, and thus falls within the scope of art. 38(1) of the Constitution. Furthermore, art. 1(125) of Law no. 190/14 does not introduce any elements of discrimination, but rather establishes a selective criterion (namely, the requirement that the alien be in possession of a long-term residence permit) that is not unreasonable or arbitrary, also (and above all) considering that such a selection criterion is accepted at the level of European legislation: art. 11 of Directive 2003/19/EC (concerning the status of third-country nationals who are

[49]Court of Modena, Ruling of 30.9.2016 (*http://www.asgi.it/banca-dati/tribunale-modena-sez-lavoro-ordinanza-del-30-settembre-2016/*).

[50] See Brescia Court of Appeal judgment no. 444 of 30.11.2016: from an objective standpoint, the "baby bonus", "despite being a form of assistance according to a distinction made by Italian law, falls in the branch of social security as defined in the Community regulation referenced by the Directive, because it is aimed at economically protecting maternity and paternity, in a continuous manner until the child has reached three years of age, and is paid automatically and not discretionally where the established income requirements are met." (http://www.asgi.it/banca-dati/corte-dappello-brescia-sentenza-del-30-novembre-2016). See more recently Milan Court of Appeal, Judgment no. 1003 of 29 5 2017 (*http://www.asgi.it/banca-dati/corte-dappello-milano-sentenza-29-maggio-2017*).

[51] See also Court of Milan, Ruling of 12.5.2017 (*http://www.asgi.it/banca-dati/tribunale-milano-ordinanza-del-2-maggio-2017*).

[52] Court of Milan, Decision of 13.10.2016 *(http://www.cgil.lombardia.it/wp-content/uploads/2016/11/sentenza-milano-13-10-2016.pdf*).

long-term residents) envisages, under the heading of equal treatment, the possibility for Member States to limit equal treatment in respect of social assistance and social protection to essential benefits only. In the view of the Court of Milan, it is moreover evident that, based on art. 3(5) of Regulation (*EC) 883/2004*, social assistance benefits are excluded from the scope of application of the regulation itself. Finally, should the benefit in question be deemed to fall within the category of family benefits mentioned in art. 3(1) of Regulation (EC) 883/2004, on the basis of Recitals 19, 24 and 26 of Directive 2011/98/EU, Member States may be considered to have a margin of appreciation when it comes to equal treatment for foreign workers in respect of social benefits.

As regards the large family allowance for families having at least three children[53], the Genoa Court of Appeal[54] presented a prejudicial question to the Court of Justice of the European Union to verify

"whether a benefit such as the one provided for under art. 65 of Law no. 448/1998, called 'allowance for nuclear families with at least three underage children', constitutes a family benefit within the meaning of art. 3(1)(j) of Regulation (EC) No. 883/2004. And if so, whether the principle of equal treatment enshrined in art. 12(1)(e) of Directive 2011/98/EU precludes legislation such as the Italian legislation whereby third-country workers in possession of a 'single permit to work' (having a period of validity exceeding six months) may not benefit from the aforesaid 'allowance for nuclear families with at least

[53] It may be worth pointing out that the Court of Ivrea, in a ruling handed down on 25 July 2014, had considered the refusal to grant the allowance for nuclear families with at least three underage children to a worker holding a residence permit for work purposes to be discriminatory. Making reference to the case law of the Constitutional Court and judging that raising the issue of constitutionality was not warranted, it ruled that the claimant was entitled to the allowance on the basis of a constitutionally oriented interpretation of art. 65 of Law no. 448/1998, which is moreover consistent with ECtHR case law (*Dhahbi case*).

[54] Genoa Court of Appeal, Ruling of 1 August 2016 (http://www.asgi.it/notizia/la-corte-appello-genova-rinvia-alla-corte-giustizia-merito-allassegno-nuclei-famigliari-numerosi).

three underage children' despite having three or more underage children living with them and earning incomes below the legal minimum".

With the judgement C-449/16, 21 June 2017 the Court of Justice has reaffirmed that the method by which a benefit is financed, in particular the fact that its grant is not subject to any contribution requirement, is immaterial for its classification as a social security benefit. And as regards the benefit at issue, it is granted without any individual and discretionary assessment of the claimant's personal needs, on the basis of a legally defined situation. Secondly, it consists in a sum of money paid to those recipients each year in order to meet family expenses. Therefore it is a social security benefit included among the family benefits referred to in art. 3(1)(j) of Regulation No 883/2004 and the art. 12 of Directive 2011/98/EU on a single application procedure must be interpreted as precluding national legislation under which a third-country national holding a single permit cannot receive a benefit such as the benefit for households having at least three minor children.

4.2. The illegitimacy of the latest administrative regulations

The most recent Finance Act introduced an additional child benefit *("birth bonus*"), providing that "As of 1 January 2017 an 800 euro bonus shall be awarded for the birth or adoption of a child. The bonus …. shall be paid by the INPS in a lump sum, at the request of the future mother, on completion of the seventh month of pregnancy or at the time of adoption".[55] Although the legislative provision – finally – did not impose any restrictive requirements (in terms either of citizenship or type of residence permit) on legally residing aliens, in a circular issued on 28.4.2017, the INPS specified that non-EU citizens in possession of a residence permit valid for the purpose of obtaining the "baby bonus" as per Law 190/2014 will be eligible to receive the benefit. This means that Italian or EU nationals (and their family members), aliens receiving refugee status or subsidiary

[55] Art. 1(353) of Law no. 232 of 11 December 2016.

protection, and aliens with a long-term residence permit will be entitled to the benefit. The decision of the INPS to introduce the aforesaid limitations seems truly incomprehensible given that legislation has finally been passed which does not set any requirements tied to the type of residence permit and appears to be clearly in conflict with the prevailing case law, which has on many occasions emphasised the discriminatory nature of such requirements. The circular's reference to the requirements of Law no. 190/2014, which many courts have declared to be in conflict with European law, is likewise beyond comprehension.

Similar problems are posed by the decree of the President of the Council of Ministers (issued on 17.2.2017) implementing the provision of the "stability law" for 2017,[56] which provided for a bonus to be paid for children born on or after 1 January 2016 and the payment of public and private day nursery costs, as well as the introduction of forms of in-home support for children under three years of age with severe chronic illnesses. Whereas the legislative provision does not set any limitations against foreigners, art. 1 of the decree establishes that the applicant must not only reside in Italy, but also be an Italian or EU citizen and if a non-EU citizen, the applicant must be in possession of a long-term residence permit.

A more complex issue concerns a further measure to combat poverty ("support for active inclusion"),[57] which consists in a credit card ("SIA" card) enabling the holder to purchase basic necessities and is essentially an extension of the shopping card previously introduced in 2008.[58]

[56] Art. 1(355) of Law no. 232 of 11 December 2016.

[57] See art. 1 (386) and (387)(a), Law no. 208 of 28 December 2015.

[58] See *supra* par. 4.

The ministerial decree[59] introducing this benefit restricted it to Italian or EU nationals (and their family members) and aliens with a long-term residence permit. On the one hand, aliens receiving refugee status or subsidiary protection are incomprehensibly and illegitimately excluded,[60] whilst on the other hand holders of a single residence permit continue to be excluded. As regards the latter, we again see the same problems previously illustrated in relation to compliance with principles enshrined in the Italian constitution and in the ECHR. Doubtful is instead the assumption that this benefit belongs to the categories listed in art. 3(1) of Regulation (EC) 883/2004, which does not make mention of measures to combat poverty. However, if we analyse the terms of the SIA card in greater detail, it emerges that it can be issued only on condition that the beneficiary's household includes at least one member less than 18 years old or a disabled person or a pregnant woman. This might be grounds for including the SIA card among the family benefits which, according to art. 1 (z) of R*egulation (*EC) No. 883/2004, regard "all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances".

What is striking is how administrative authorities and agencies continue to set requirements that the courts have consistently declared to be illegitimate and their perseverance in doing so also arouses some concern, as if it were a signal that the road to equality is still a very long one.

[59] Ministerial decree of 26 May 2016, as amended by the decree issued on 16.3.2017.

[60] The bizarre nature of this exclusion is conspicuously evident, all the more so given that that legislation on the shopping card also applies to aliens receiving refugee status or subsidiary protection. It should nonetheless be pointed out that although the INPS circular no. 133 of 19 July 2016 did not make any correction, the forms downloadable from the INPS website include aliens entitled to international protection among the eligible beneficiaries.

5. SOME CONCLUDING REMARKS

As has been pointed out[61], we are witnessing a sort of conflict, not so much between politics and the judiciary, but rather between politics and law and what is most striking is that all levels of government (national and regional legislators, the government, administrative authorities) have implemented policies aimed at differentiating the treatment of aliens in respect of the enjoyment of social benefits.

Economic concerns are evident and have been repeatedly voiced also in arguments of defence; I shall mention, for example, the defence of the provincial authority of Bolzano in the proceedings before the Constitutional Court on the provincial law regarding the social integration of foreign nationals, which required a minimum period of five years of uninterrupted residence in the provincial territory in order to access benefits of an economic nature. The defence underscored that the long-term residence requirement introduced a progressive mechanism, imposed by the need to save on costs to comply with State measures aimed at containing public spending, but the Court[62] reiterated that it was not relevant whether a certain requirement had been introduced due to savings needs tied to the decrease in available funds resulting from State measures to contain public spending, because the choices connected to the identification of the beneficiaries must always be made in observance of the principle of equality.[63]

In proceedings before the Court on art. 80(19), in relation to an attendance allowance and disability pension, the INPS similarly observed that art. 80(19) had introduced limits connected to public finance needs: which gave the legislation a

[61] A. Guariso, *Introduzione*, in *Senza distinzioni. Quattro anni di contrasto alle discriminazioni istituzionali nel Nord Italia* (Milano: Associazione avvocati per niente 2012).

[62] Decision no. 2 of 18 January 2013.

[63] See also Decision no. 222 of 19 July 2013.

constitutionally relevant dimension. Moreover, in proceedings related to pensions for the visually impaired, it stressed that art. 80(19), included in the 2001 Finance Act, was also clearly aimed at balancing the provision of benefits with needs connected to the limited availability of financial resources and to address, albeit implicitly, the need to ensure a balanced budget[64], but the Court did not take the arguments of the INPS into consideration either.

Finally, in its defence before the Strasbourg Court (*Dhahbi* case), the Italian government stressed that the benefit had been denied to the applicant for financial, rather than discriminatory reasons, but the Court reiterated that although States are allowed a wide margin of appreciation in deciding economic or social measures of a general character, only very weighty considerations could induce it to regard a difference in treatment exclusively based on nationality as compatible with the Convention.

It is evident that an important political game is being played out on this issue, and it also involves the model of integration[65] that it is intended to adopt and the interpretation that is given to the principle of equality. Defining the individuals who may take part in a community founded on solidarity is a complex and delicate operation, but if we lose sight of the fundamental principles of a democratic social system and create forms of "institutional discrimination", the negative impact will be felt not only by the individuals

[64] As has been pointed out (A. Ciervo, "La sentenza n. 22/2015 della Corte costituzionale in materia di prestazioni assistenziali a favore degli stranieri extracomunitari. Cronaca di una dichiarazione di incostituzionalità", (2015) 2 Federalismi), this argument, though not accepted by the Court, has proven to be an insidious one, also in view of the 2012 amendment to art. 81 of the Italian Constitution, which introduced the principle of a balanced budget. The references to "a constitutionally relevant dimension" of art. 80(19) and the need to ensure a balanced budget can be understood in this light.

[65] *Cross-Border Welfare State, Immigration, Social Security and Integration*, edited by G. Vonk (Cambridge: Intersentia 2012).

who are excluded from a network of solidarity for various reasons, but by the community as a whole.

There is no doubt that certain choices of State and regional legislators are the result of political orientations and are intended to harm and discriminate against aliens, and that although balancing the budget is a legitimate aim, it is the weakest individuals who end up being most affected by the measures to contain public expenditure. [66] The political exploitation of the migratory phenomenon on the part of those who are riding the wave of fear and mistrust of a segment of public opinion appears senseless, as it risks undermining a process of integration and consolidation of a community that goes beyond nationalities.

It should be noted that the judiciary as a whole, by contrast, has firmly reaffirmed the inviolability of several fundamental principles: it is in fact not only a matter of defending certain categories of individuals from arbitrary discrimination, but also of reaffirming the rule of law and the pillars of a democratic state. However, as has been pointed out, an improper role of cultural resistance cannot be permanently entrusted to the judiciary. The political class should again take on the promotional and emancipatory function that is supposed to characterise it.[67]

[66] The perseverance of lawmakers and administrative authorities in demanding the fulfilment of requirements that courts have declared to be illegitimate can also be explained by the fact that legal action is taken against the denial of benefits in a relatively small percentage of cases. For a foreigner, perhaps in financial difficulty, applying to a court might not always be such an obvious course to take.

[67] E. Grosso, "Introduzione", in A. Giorgis, E. Grosso, M. Losana (eds), *Diritti uguali per tutti?,* (Milan: FrancoAngeli, 2017), p. 12 ff.

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PRELIMINARY MARKET CONSULTATIONS IN INNOVATION PROCUREMENT: A PRINCIPLED APPROACH AND INCENTIVES FOR ANTICOMPETITIVE BEHAVIOURS

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1. FUNDAMENTALS OF PUBLIC MARKET CONSULTATIONS

1.1. An ancillary figure

A preliminary market consultation (PMC), whether understood as an institution or as a process, is bound up to the development of a future tender. In European Union Law, a threshold decides where tenders do or do not abide by the Directives on public procurement through the national laws enacted for their implementation. However, the unanimous doctrine from the European Court of Justice claims that every procedure must respect a well-known bunch of principles, which act both as inspiration and as boundaries. These principles encircle the whole fabric of public procurement. So, they must spread to other figures that – as preparatory or ancillary- play a role in the development of a tender or in the implementation of a contract. That is the only way for a procurement to follow the straight line without bringing from the past the seeds for a future nullification.

Directive 2014/24 on public procurement devotes Article 40 to PMC. It lodges a minute regulation, which barely picks the essence of the figure. Despite its paucity, the article quotes three principles that are mandatory for the contracting authorities when they come to designing and implementing any PMC: the principles of non-discrimination, transparency and competition.

The present paper holds that these principles have their own scope in PMCs. This can be different from the one they possess during the contracting procedures. The difference comes from three PMC's features: it is a pre-procedural, not-compulsory and not-decision-making stage. Such sum of attributes justifies to leave their over-the-minimum application in the hands of any specific contracting authority. With this insurmountable limit, purchasers have a free hand to make a general call for advice or restrict the query to a limited number of entities. They are entitled to summon or miss market operators, as well.

Last, they are to decide the extension for the consulted people of the duty to provide information, the level of confidentiality and the degree of transparency.

The notion of preliminary market consultations (PMC) roughly encompasses a multi-faceted query whereby a contracting authority asks for experts and market operators to offer their contribution in order to make up the object of the contract and to draw other features of the procedure.

To launch a PCM prior to engage in a tender seems a rational behaviour for any standard contracting entity. Therefore, this figure is by no means an oddity in the European states public procurement systems. It is neither a new born idea, nor an ignored technique before the EU regulated it in the latest Directives on public procurement. Obviously, contracting authorities have usually put in contact with all those who possessed the knowledge and expertise for helping them to draw a tender. In particular, for contractual activities which are new, technological or hard to define. Those contacts have taken different ways. Informality presided over most of the communications, ranging from personal or telephone chats to e-mail exchanges among the civil servants and the third parties involved in the consultations.

Pre-procedural contacts have never been restricted to any particular typology of contract. For obvious reasons, the more complex or innovative procurements demand a finer expert advice. But no classical category demands *per se* further support than the others. Contracting unit's previous knowledge and experience is the rule for the typical public contracts. This factor and the singularity of each procedure are the conditions for a PMC to be necessary, convenient or optional. Since every rule has its exception, the services contracts linked to innovative procurement - such as pre-commercial procurement and the association for innovation- deserve a particular treatment. Both types are the most obvious examples of PMC bound up to a procedure. It looks inconceivable to start an innovative tender without conducting a previous query (specially, for pre-commercial procedure).

Public procurement of innovation requires technical experts and specific markets difficult to gather *in-house* by a public buyer in many cases. Preliminary market consultations play the role of (an effective) instrument for the preparation of innovative procedures where the contracting authority lacks such experience or specific expertise in the subject matter of the contract.

Thus, PMC is an essential action for a public procurement of innovation to success given the complexity of the archetypical contracts. Some of the products may require completely innovative solutions; what triggers the articulation of a technical dialogue between public buyers and companies before the publication of the tender. In the field of high technology, buyers may (roughly) know their needs but not what is the best technical solution to apply. As a result, a discussion and a technical dialogue on the contract between them and the would-be suppliers shows as a cooperated attempt to sort out the mess. This enhanced debate enriches the first phase (definition of ideas), before the start of the contract awarding, always respecting the principle of equal treatment and without restricting competition[2].

However, to circumscribe the PMC to the pre-procedural phase of innovative procurement is a mistake often denied by real examples. Neither the Directive nor the three studied transposition laws prohibit that a public purchaser starts or resumes a consultation to the market during the tender. It is simply a tool in her hands. Notwithstanding, procedural PMCs have to develop with considerable more care for principles of transparency and competition. The reason lies in the fact that a PMC developed during a tender is part of this competitive process and must abide by its seminal rules. The tender ends with a sole winner and multiple losers. The ultimate goal of a consultation in this moment is to help the contracting authority to award the contract. So, it issubmitted to the same principles and to the same degree of rigour than the procurement.

[2] Guía de buenas prácticas para favorecer la contratación pública de innovación en Galicia (*Guide to good practices to promote public procurement of innovation in Galicia*), Xunta de Galicia, 2015.

1.2. Primary and secondary goals

The main goal for a contracting authority to start a -complex and laborious- PMC is to request information and guide about how to bring the contracting procedure to a successful conclusion[3]. Innovative procurement is driving PMC beyond their traditional framework. The reason is that this new category of public contracts raises singular issues, arisen out of 'fear to the new' and from the stress for updating the contract to the latest state-of-the-art in technology. In principle, contracting authorities turn to PMCs because of their inability to describe the contract object, to identify the best selection criteria or the ablest technical solutions. But it is not unusual that the PMC covers up the contracting body's helplessness about how to accurately define the public needs they are compelled to satisfy.

The expansive role achieves its apex where a public purchaser goes blind to a PMC, waiting for it to advise about the 'what' (necessities) and the 'how' ('procedure'). Graphically speaking, the completion of a successful consultation enlightens the contracting authority to come to all kind of conclusions. So, the lack of feasible solutions may move it to see inadvisable to launch a contracting procedure. If discussions in the PMC indicate that there are workable solutions already in the market, the contracting body may well opt for the 'traditional' procurement. Whether the necessary technology is not available in the market, but could be achieved with minimal adaptations and developments, the chosen option will be the innovation partnership. But if it is necessary to develop new technology, non-existent to this day or that provides new solutions or improvements, pre-

[3] GIMENO FELIU, JOSÉ-MARÍA, "La corrupción en la contratación pública", in CASTRO MORENO, ABRAHAM y OTERO GONZÁLEZ, PILAR (ed.) *Prevención y tratamiento punitivo de la corrupción en la contratación pública y privada*, Dykinson, page 26.

commercial procurement the choice must be. It follows that the market consultation is carried out regardless the type of procedure used in a possible adjudication[4].

Other secondary goals are present in PMCs, as well. They are natural outcomes linked to innovative procurement. Among them, the feedback among the industry and the contracting body. This interaction will improve the implementation of the contract as well as strengthen new industrial and commercial sectors. The sheer fact of being consulted in a PMC may easily stimulate experts and firms to channel financial and labour resources towards new or innovative products. Perhaps, the innovation is only useful to public entities. But there is a chance that it becomes a new line of market business for the firms. Last, PMC and innovative procurement foster technological, logistical and managerial development, which is in itself a relevant economic contribution for a society.

Linked to all the previous features, the European regulation this institution has been designed with the primary goal of preventing the infringement of non discrimination and competition when implementing any particular PMC[5].

[4] Preliminary procurement of innovation, Guidance for Public Authorities, PPI Platform Consortium, January, 2014, pages 9 and 15.

[5] VILLALBA PÉREZ, FRANCISCA. "El principio de eficiencia, motor de la reforma normativa de la contratación del sector público ", in VIEIRA DE ANDRADE, JÓSE CARLOS and TAVARES DA SILVA, SUZANA, *As reformas do sector público. Perspectiva ibérica no contexto pós-crise*, Imprenta da Universidade de Coimbra, 2017, p. 209.

1.3. Regulations

1.3.1. Precedents

The figure of "preliminary market consultations" is neither a novelty in EU public procurement nor in national legislations. Although the regulation of PMCs has been considered one of the main innovations of *Directive 2014/23 of the European Parliament and of the Council, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC*, regarding the preparation of public contracts, it must be acknowledged that there was some history behind.

The most accurate precedent of PMC is the 'technical dialogue', recognized in Community law by recital 8 of *Directive 2004/18 / EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works, supply and service contracts*. That recital provided that "*Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition.*".

Even before the translation to a EU Directive, the technical dialogue had been recommended by the European Commission. In its Communication of 27 November 1996 the Commission revealed that a technical dialogue between contracting authorities and private companies is advisable, given the complexity of most projects, some of which may require entirely novel solutions (point 5.23). The Communication of 11 March 1998 emphasized that technical dialogue is a procedure whereby a contracting authority initiates technical discussions with potential suppliers at the stage of the definition of requirements but before the start of the procurement procedure. Technical dialogue must always respect equal treatment and cannot restrict competition (point 10 of the Communication).

Although these regulatory precedents existed in the European context and legislators were able to establish the basic conditions for the efficient use of "technical

dialogues", the application of this instrument by EU Member States was scarce. As far as Spain is concerned it was not introduced by any law.

1.3.1. Directive 2014/24/ce and three transposition laws

As said above, Article 40 of Directive 2014/24 sets out a minimum regulation of PMC. So, it states that:

> *Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.*
>
> *For this purpose, contracting authorities may for example seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.*

Article 40 stresses several several features of public market consultations. On the first hand, it seems to circumscribe PMC to the preparatory phase and, as such, it can only be managed before launching the procedure. However, the article does not prohibit that a contracting authority goes on a query during the development of the tender. In that case, the consultation is not 'preliminary' but built-in the procedure. As such, the public procurement principles are full-operating.

On the second hand, Article 40 does not impose the duty to make a PMC before starting any tender. In other words, the Directive considers that it is an optional tool. All the decisions- design, start and management- are left at the discretion of the contracting unit .

Third, PMC plays a twofold function, preparatory of the procedure and informative to possible bidders. Concerning the public purchaser, the preliminary query is intended at providing workable information on multiple topics of the procurement. It has to decide the width of the PMC. Depending on its previous knowledge and the singularity of the contract, the experts, independent authorities and market operators should be allowed to

say a word over topics such as the necessity of the procurement, the most appropriate procedure and the selection criteria. Taking part in a PMC is presumably of the utmost importance for the third category of advisors. Market operators in a PMC are possible bidders in the subsequent tender. Their two-staged participation can be an issue for the correct implementation of non-discrimination and competition principles in the procurement. Article 41 of Directive 2014/24 deals with the twofold nature of the competing firms in the PMC and in the ulterior tender.

On the fourth hand, the relationship of advisors mentioned in Article 40 - independent authorities, experts and market operators- is exemplary . Therefore, it does not shut down the gate for other types of entities to participate in the query.

Last, the sketched treatment of this figure by the Directive leaves the field open for the national transposition laws to decide on their definition, extension and boundaries. Apart from the general role of PMCs, respect for competition, non-discrimination and transparency principles is the only limit an internal law is forbidden to overstep, as the stretched Spanish Draft shows.

One of the three categories of advisors quoted in Article 40 are the economic operators present in the market of the public procurement at stake. They may easily present a bid to the tender. The importance of a PMC for the subsequent tender may work as a catalyser for the participants to agree or coordinate their responses to the query. They would take on this behaviour with the view of rigging the tender. But the contrary situation is also possible. Those ablest consulted operators will influence the contracting authority during the preparation of the tender. This will likely make their way easier to compete for the contract.

National transposition laws have adopted this feature, but they have also added other elements.

In Spain, The Draft of the Public Contracting Law (DPCL) devotes Article 115 to preliminary market consultations. The precept, which seeks to transpose Article 40 of the Directive, was coherently included in the section devoted to "*the preparation of public*

administration contracts". It states that contracting authorities may carry out market research and consult the economic operators active therein in order to properly prepare the invitation to tender and to inform the concerned economic operators of their plans and the requirements they have to meet to submit a bid. Contracting authorities may rely on the advice of third parties, who may be experts or independent authorities, professional associations, sectoral representatives or even, exceptionally, economic operators active in the market. These actions will be given, as far as possible, on the Internet, so that all potential stakeholders can access and be able to make contributions[6].

The advice may be used by the contracting authority to plan the tender procedure and also during the tender procedure, provided that this does not have the effect of distorting competition or violating the principles of non-discrimination and transparency. Consultations cannot result in a contractual object so specific and delimited that only one of the consulted meets the technical characteristics. The results of the studies and consultations should, where appropriate, be concretized in the introduction of generic characteristics, general requirements or abstract formulas that ensure a better satisfaction of public interests, without in any case, the consultations carried out may have advantages over the award of the contract for the companies participating in the contracts.

Where the contracting authority has carried out the consultations referred to in this Article, the actions taken shall be recorded in a report. The report will quote the studies carried out and their authors, the entities consulted, the questions that have been asked and the answers to them. This report will be part of the recruitment file. In no case during the consultation process, the public purchaser may disclose to the participants the solutions proposed by the other participants, the former is the only one that knows them in its

[6] For a thorough studio of PCM in the impending Spanish Law on Public Contracts, see VALCÁRCEL FERNÁNDEZ, PATRICIA, "Las consultas preliminares del mercado como mecanismo para favorecer las "compras públicas inteligentes", forthcoming.

entirety, and it will weigh them and use them, where appropriate, when preparing the bidding process correctly.

In the United Kingdom, the Public Contracts Regulation 2015 devotes Article 40 to this figure. It copies Article 40 of Directive 2014, and adds nothing. Last, in France, Article 4 of Decree No 2016-360 of 25 March 2016 on public procurement does not add anything remarkable to Article 40 of Directive. In fact, it estates that: "*In order to prepare for the award of a public contract, the buyer may consult or carry out market studies, solicit opinions or inform economic operators of his project and requirements.*
The results of these studies and preliminary exchanges may be used by the buyer, provided that they do not distort competition and do not lead to a violation of the principles of freedom of access to public procurement, equal treatment of candidates and transparency of procedures".

1.3.3. Why a full regulation is not the best option

The acknowledged importance of PCM for the design and success of innovative procurement procedures does not justify submitting it to statutory rules from the EU Commission or national authorities. On the contrary, a rigid code would entail the failure of this tool. (First), developing a market consultation is not compulsory but a faculty for contracting authorities. Therefore, (second) each PCM should be tailored on the view of the case.

The above reasons do not mean that PCM must be inordinate and 'anarchic'. On the contrary, no contracting body should set out managing a market consultation without a sound and well-established 'table of contents'. Two sets of rules are suitable as a basis for consultations: 'soft law' from public authorities and self-regulation from the concerned contracting authority.

First, EU and national authorities are entitled to provide recommendations to those contracting entities which engage in innovative procurement. Soft law on PCM would take the form of guidelines and offer two types of contents: a code of good practices and a list of malpractices. The effectiveness depends to a large extent on the authorities' ability to lay out a workable and versatile scheme based on successful cases of innovative procurement. Two other factors are essential for the guidelines to be useful: dissemination (webpages, etc) and quick adaptation to changes in innovative procurement.

Second, any contracting authority may (and must) set a compound of requirements to rule on PCMs. This 'hard law' obliges all those who are to be consulted. Mainly, it should rein in the operators interested in taking part in innovative procurement. Since they are actual rivals in the market and would-be bidders in future tenders, the rules have to ensure that their advice is autonomous and will not coalesce into future collusive bids.

1.4. Constituent parts

1.4.1. PMC as a process

Even though it is not the core of this study, it is advisable to sketch several elements of the PMC taken as a process. In that concept, a regular PMC follows the next three steps[7]:

1. Decide the scope of consultation (*Decide what information needs to be gathered and shared and which market players to target:* 1) Initial research and needs assessment should identify area(s) of focus and specific user needs, as well as the potential innovations which might meet them . 2) Further information may be needed to develop a

[7] Guidance for public authorities on Public Procurement of Innovation, Procurement of Innovation Platform (www.innovation-procurement.org.), p. 19.

specification and choose an appropriate procurement procedure. 3) Analyse the market to determine which tiers to target (e.g. manufacturers, service providers, subcontractors, systems integrators, researchers and third sector etc.)

2. Choose format and plan (*Choose the best format for the consultation and prepare the resources and people involved*): 1) Determine how best to engage the suppliers / stakeholders identified. 2)Consider using a questionnaire or survey, written submissions, face-to-face, phone or web-based meetings, open days and supplier demonstrations. 3) Be clear on the timelines and resources needed to make it work. 4)Prepare documents to be circulated as part of the consultation, e.g. a *"prospectus"*

3. Consult and capture information *Conduct the consultation, keeping good records and ensuring equal treatment***)**: 1) Publish a *Prior Information Notice* (PIN), publicise the consultation on relevant industry or other websites, and notify suppliers directly wherever possible. 2) Keep records of all contact and be prepared to follow up with respondents. 3) Prepare a summary of the findings and implications for procurement. Be sensitive towards the confidentiality of any information provided by respondents.

Before launching a procurement process, consider what measures must be taken to avoid any distortion of competition arising from the undertakings who have been involved in preliminary market consultation. For example, the same information should be shared with other operators and adequate time allowed for preparation of tenders. Exclusion of those involved in the consultation can only be done if there is no other means to ensure equal treatment, and the operators involved must be given a chance to disprove this.

1.4.2. Formats

Consultations may comprise a plurality of manifestations and the interlocutors have a very varied nature. Moreover, the different manifestations can be used cumulatively or alternatively. Thus, they may consist of: 'Meet-the-Market event' (MTM), market

surveys, industrial fairs (it does not require any kind of organizational effort on the part of the purchasing entity), open days, publication of annual public procurement plans in official or/and commercial journals and on Internet (this option is very attractive because it does not involve a great organizational effort or an added cost); the provision of information directly through governmental websites (Public Procurement Platforms, or even if information becomes fragmented and makes transparency difficult, the contracting authority's Profile), webinars, electronic platforms, etc.

A PMC can also be carried out through a variety of methods, such as commissioning analyses or reports on the experiences of other countries, developing documents, consulting experts and scientists, or promoting discussion of public bodies with potential contractors. In addition to the consultations with potential participants, public purchasers can prepare tenders through consultations aimed at research staff, scientists, professional associations, specialized public authorities, centers of knowledge. In general, queries should spread to any person and institution that enable the contracting authorities to gain a better knowledge of the market where the contract is to be developed, provided that such actions do not distort competition and do not give rise to violations of the principles of non-discrimination and transparency.

1.4.3. Advisors

The approach to this topic in Article 40 of Directive 2014/24 and in the three national implementations seen above can be summarized in two assertions: the specific mention of three categories of subjects and the list is not *numerus clausus*.

The articles at stake refer to three types of interlocutors: experts, independent authorities and market participants. As regards as the experts, their independence vis-á-vis the economic operators competing in the market appears as an insurmountable precondition. Only those persons who do not belong or are not related to the would-be bidders in the future tender should be entitled to sign their contribution as "experts". The ones linked to the latter will take part in the query as staff or representatives of the market

participants. They can be consulted as well; but the query is subjected to all the obvious connotations of the third category.

The word "independent authorities" names all public institutions able to give support to the innovative contracting bodies. Article 40 does require they to be independent. It is unnecessary. By definition, laws ensure the independence of every public institution. Among them, the most evident ones are other innovative contracting entities that had successfully dealt with (similar) innovative procedures. But any other type of authority is admissible; for instance, regulatory agencies, scientific institutions, and even Ministries.

"Market participants" are the last quoted as advisors. The concept admits several meanings, depending on how the word 'market' be understood. If referred to any economic activity, then any firm can be consulted. The latter does not seem to be the meaning wanted by the Directive. It is more appropriate to narrow the concept in favour of firms competing in a market linked to the subsequent innovative tender. Preferably, the same one. However, this restricted option assumes that the public purchaser has a good knowledge of this market. The real situation may easily be the opposite. For instance, in the purest pre-commercial procedures, it knows the useless current means, its lacks and necessities. Perhaps it has even a pretty good idea on how to meet them. But it does ignore the technological, managerial or industrial ways for this idea to become real. In these cases, contracting authorities will take on a loose market definition. Therefore, they will probably make an overstretching call for advice.

The market operators participating in a PMC cannot be forbidden to submit their bids to the future tender. To avoid possible conflicts of interests or the infringement of the competition and non-discrimination principles, Article 41 of Directive set two rules. First, the contracting authority cannot prohibit them from bidding in the tender on the sole basis of their role in the PMC. They must be given the chance to show that their previous advice does not put them unfairly on better conditions that the other bidders. Second, if the opposite is demonstrated, the public purchaser has to expel him of the tender. Article 41 will be studied below.

Art 115 of the Spanish DPCL imposes two additional boundaries to market participants. The first one is that the operators required to give advice must be "active" in the market. That precision is reasonable since only those firms currently present in the concerned market would be capable of providing workable suggestion. Moreover, it does not prevent the authority from appealing to former market operators. They could be included in the group of experts.

The second restriction is more important. Article 115 states that market operators can be called on 'exceptional cases'. They appear to be designed as a subsidiary solution where previous consultations to experts and institutions failed. It seems to mean that, only when consultations to the independent figures have been carried out and they delivered no workable solution, the contracting body can call up actual market operators. The Spanish legislator probably set that rule as a stronghold against competition infringements during a PMC. However, it looks like a huge mistake, contrary to reason and to fact. In practice, innovative authorities appeal to market participants in PMCs as the only way to ensure the participation of workable bids in the subsequent tenders.

As said above, Article 40 of the Directive quotes an exemplary relationship of advisors (independent authorities, experts and market operators). Therefore, it does not shut the gate for other types of persons or entities to participate in the query. For example, other contracting bodies, operators that already quitted the market at stake or trade in different markets.

2. PRINCIPLES OF PUBLIC PROCUREMENT INVOLVED IN PCM: NON-DISCRIMINATION, TRANSPARENCY AND COMPETITION

1.1. Principle of non-discrimination

For the *Guidance*, the application of this principle is directly linked to the principle of competition. The new Directive states that a preliminary market consultation can be carried out provided that it does not distort any later competition. By applying the same interpretation criteria that are pervasive for the procedural phase (the tender), that statement can be understood as imposing on the contracting authority the duty of requesting the participation in the PMC to as many experts, independent authorities and operators as possible. With this meaning, the Treaty principles of transparency and non-discrimination apply to preliminary market consultations; bring with them the principle of publicity and all three reach the high standard universally accepted for public procurement[8].

Principles of equal treatment and transparency are really two facets of the principle of non-discrimination. Equal treatment requires that comparable situations are not treated differently and that different situations are not treated similarly unless such a difference or similarity in treatment can be justified objectively[9]. A contracting authority must act fairly in the course of the public procurement; all competitors must have an equal opportunity to compete for the contract. The principle of transparency requires a transparent

[8] For a thorough study on this principle's role in public procurement and its links with the other principles, see NIELSEN, RUTH, *Discrimination and equality in public procurement*, http://arbetsratt.juridicum.su.se/filer/pdf/klaw46/discrimination.procurement.pdf.

[9] See, e.g., Case C-13/63, Italy v Commission, [1963] ECR 165 at paragraph III, (4)(a); Case C-306/93, SMW Winzersekt v Land Rheinland-Pfalz, [1994] ECR I-5555 at paragraph 30

decision-making process in order to show that the purchaser is following the principle of equal treatment. Although the contracting authority remains free to define the subject of the contract in any way that meets the public's needs, including through technical specifications and award criteria promoting horizontal policies, it must do so in a way to ensure transparency in awarding the contract.

On a European Union basis, the principle of non-discrimination prohibits all unreasonable difference based on nationality, irrespective the type or level of the contract. No contracting entity may, for example, give preference to a local company simply because it is located in the municipality[10]. Similarly, the principle of equal treatment requires that all suppliers be treated equally. All suppliers involved in a procurement procedure must, for example, be given the same information at the same time.

Regarding PMCs, Article 40 of Directive, taken literally, means that an innovative contracting authority will fulfil the principle of non-discrimination during the PMC provided that it imposes on the consulted firms no unfair difference based on their nationality. Moreover, the public purchaser has to hand out all the information needed to submit a successful tender between the participants. Then, it is supposed that the principle is satisfied where all the participants in this phase belong to the same EU member state. Since Article 40 seems not to impose on contracting authorities the obligation to make '*EU wide*' invitations, no discrimination will exist whether no foreigner operator is admitted to the PMC, provided that the same-nation candidates are treated on equal terms. That circumstance would explain why the principle of publicity is not quoted in Article 40.

[10] The ECJ is crystal-clear about the universal effectiveness of the non discrimination principle in plenty of the judgements. For example, *Teleaustria-Telefonadress* (7 December 2000, C-324/98) when states that "*In that regard, it should be borne in mind that, notwithstanding the fact that, as Community law stands at present, such contracts are excluded from the scope of Directive 93/38, the contracting entities concluding them are, none the less, bound to comply with the fundamental rules of the Treaty, in general, and the principle of non-discrimination on the ground of nationality, in particular*."

The findings put forth in the previous paragraphs look as straight and indisputable as a rule of three. However, this formal and nation-wide interpretation of the non-discrimination principle is fallacious. Not only does it reduce the scope of collaborating firms and is contradictory with the sheer essence of innovative procurement (new ideas or technologies demand the best contributions). What is more significant, it would appear that the own Directive would exempt from a whole category of contracts the seminal principle of publicity, which ensures the materialization of the internal market on public procurement.

A rational and imperative rule on this significant topic is hard to find due to the lack of an objective threshold. Two ways appear as rules of thumb. The first one is to use the same threshold that Article 4 of Directive 2014/24 sets out so as to decide which procurements the Directive is applied to. The alternative solution is to figure out that every preliminary market consultation has to be published in the Official Journal of the European Union.

The first option seems to be more accurate for PMCs preparatory of innovation partnerships, since this one is a type of procurement regulated in the Directive. Regarding pre-commercial procurement, the quantitative threshold is by no means workable, as long as as the procedural documents decide it. But the nature of PCP makes the second option more suitable. After all, in a sheer PCP a great deal of elements is ignored by the contracting authority. The definition of the idea, the solution, the prototype and the costs of the project call for every feasible contribution. Since most of these cases are related to top-of-the-league technological sectors, it is inconceivable that the contracting authorities engaged in PCP decide to restrict international participation in PMCs. Since PCP is not regulated at an EU level, Commission's soft law and contracting authorities' own rules have the upper hand to choose a solution.

Both rules of thumb admit a significant number of exceptions where the principles at stake only work in abstract. The contracting body has always in its hands the power to make a universal call for advice, by publishing a notice in an official journal. But the concurrence of factors ("barriers") reduces the number of participant in the PMC. An

exemplificative relation distinguishes among legal barriers, business barriers and geographical barriers.

The archetypical legal barrier for a general entry in the PMC is the ownership of IP rights. Where only one firm owns a patented product or technology lacking any alternative and, so, it is necessary for the innovative contract to be implemented, all the operators but the patent's holder have no role in the PMC. Of course, the innovative contract may have among its goals to find a substitute for the patented product. This is generally a difficult and long lasting task. In many sectors, the presence of standard essential patents will make that goal a never ending labyrinth. And even if it is found, the patent incumbent will possibly tackle a patent war.

Business barriers relate to the corporate purpose, capacities, experience and other features which make the difference between capable or non-capable firms for the contract. The more innovative the procurement the less companies qualifies for implementing it. Principles of non-discrimination, transparency and publicity are not infringed when the Contracting authorities restrict the calls and exclude those firms alien to the contract and incapable to deliver sensible recommendations. Last, geographic or territorial barriers may dissuade certain operators whose business is mostly focused far from the contracting authority's jurisdiction.

As said above, the presence of one or more of these barriers does not ban the contracting authority to look for the widest participation in the PMC (there is no barrier on the offer side since contracting authorities enjoy unilateral power over official journals). However, they reduce the number of *de facto* participants in the PMC, and also the probable number of feasible solutions and, at the end, the effectiveness of the contract.

Anyway, the principle of non-discrimination demands that where the contracting authority sets requirements as pre-conditions to participate in a PMCs, all the firms that fulfil them must be admitted in. Those requirements must be suitable, proportionate and accept equivalent solutions to achieve the result the innovation procurement pursues.

Principle of suitability is not met where the participant does not ensure that the public purchaser will enjoy the pacific use of the product or service of the contract.

2.2. Principle of transparency

The principle of transparency derives directly from the freedoms of establishment and the provision of services (Articles 49 and 56 TFEU) and from the principles of equal treatment and non-discrimination between tenderers[11]. They all impose an obligation of transparency on the contracting body, which must guarantee - for the benefit of all potential tenderers- an adequate publicity to open up to competition the award of services and to monitor the impartiality of award procedures.

This principle is absolutely indisputable in European public procurement due to its role in the fight against corruption[12]. A transparent procedure leaves little room for discretion to the contracting body, thus reducing the incentives to bribe its members or to incur corruption[13]. Their manifestations in the contracting procedure are multiple, but they can be summarized in a single maxim: the right of the interested parties (mainly, the

[11] On the basis and contents of transparency in public procurement, see BOVIS, CHRISTOPHER, *EU Public Procurement Law*, 2nd ed. Edgar Elgar, 2012, page 220 and on.

[12] OSEI-AFOAKWA, KOFI, "How Relevant is the Principle of Transparency in Public Procurement? (March 31, 2014). *Developing Country Studies (IISTE)*, Vol. 4, No. 6. Available at SSRN: https://ssrn.com/abstract=2420311, BÉRTOK, JÁNOS, "The Role of Transparency in preventing Corruption in Public Procurement: Issues for Consideration", in *Fighting Corruption and Promoting Integrity in Public Procurement*, Chapter 9, OECD Publishing, Paris, 2005.

[13] TREPTE, PETER, "Transparency and Accountability as Tools for promoting Integrity and Preventing Corruption in Procurement: Possibilities and Limitations", OECD, Paris 2005,

bidders) to obtain certain, relevant, complete and updated information about the different phases and elements of the procedure through a plurality of means (official bulletins, contractor profiles, contracting platforms)[14].

However, the excess of transparency will allow each tenderer to monitor the behaviour of its competitors. In cases of collusion, this would discourage alleged cartel owners from bidding against the agreement for fear of retaliation. If excessive opacity favours corruption, excessive transparency paves the way for collusion. Where contracting procedures are repeated and foreseeable, as well as for homogenous and standardized products, an intelligent use of legal advertising will make it unnecessary to resort to a stable collusive structure. Sometimes it will be enough to revitalize the cartel when the call is published or the invitations to participate in the next tender are notified[15].

Even if there is no competition problem, absolute transparency procedure after procedure makes possible tacit collusion between tenderers. Protecting confidentiality for competitive reasons acquires greater relevance in the new contractual modalities based on the generation of ideas and technologies; In particular, pre-commercial procurement.

[14] ARROWSMITH, SUE (ed. & author), EU Public Procurement Law: an Introduction, pp. 80 and 131. https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf.

[15] SÁNCHEZ GRAELLS, "GC gets it totally wrong and pushes once more for excessive price transparency in public procurement (T-667/11)", *How to crack a nut*, 29 January 2015, http://www.howtocrackanut.com/blog/2015/01/gc-gets-it-totally-wrong-and-pushes.html, "The difficult balance between transparency and competition in publicprocurement: Some recent trends in the case law of the European Courts and a look at the new Directives", *University of Leicester School of Law Research Paper* No. 13-11.

The principle of transparency does necessarily possess in PMC all the strength that it has in regular public procurement. Even though PMC has been regulated by Directive 2014/24PMC, it is a pre-procedural phase. This entails that the innovative contracting authority has the upper hand to increase or reduce the scope of the principle. Such level of definition grants the purchaser a considerable power of definition over the boundaries of the confidentiality principle. That is, over the extension of the disclosure-data obligation imposed on it and on the bidders.

As a preliminary conclusion, transparency and confidentiality do not work in the same way in a PMC as in a tender. Variations respond to differences of nature and on the kind of relationships established within each phase. During a PMC, there exists only a relationship between each consulted operator and the innovative contracting authority. It is a mutual collaborative link, since both give feedback to one another for the subsequent tender. On the contrary, there is no link among the consulted operators.

During a contracting procedure two types of relationships exist. The first one links the contracting body with each bidder. It is a procedural and hierarchical direct connexion, since the latter participates in a tender decided by the former and is bound up to her decision. The second link connects the bidders. It is an indirect relationship based on competition and mutual exclusion. They do not share anything, because the selection of one means the exclusion of the others. Transparency, transmission of information and limited confidentiality play a role during the tender. They tend to ensure that the procedure is presided over by legal certainty, non-discrimination, protection of fair competition and lack of conflicts of interest. All in all, their implementation allows the contracting authority to guarantee that the selected bidder is the one who deserves the contract and that the other bidders can check it by revising the documents.

Since in PMC there is neither competition nor any link among the operators (and would-be bidders) nor will any of them be selected and the rest excluded, those ones are not entitled to demand information disclosure in the terms of the Directive. The contracting body can decide act in that way, but can also restrict the access to information with the goal of protecting the collaboration with one operator.

2.3. Principle of competition

This is the moment to get back to one of the most important features of PMC: its non-competitive nature. In this phase, the firms are not rivals among each other. They do not fight to death to convince the public purchaser on the quality of their recommendations. In fact, they have no particular relationship among them. Each one has an individual link with the contracting authority. This one channels up all the singular proposals to blend them in its own formula.

Despite competition among firms is postponed to the tender, the participants may fall in anticompetitive behaviours during the PMC. Collusion or abuse of dominant position will exist since the very moment of their birth during the PMC and will deserve a sanction in this moment if the practices are considered restrictions by object. Their effects cannot take place ever or will delay until the awarding of the contract. But the effects do not count to decide on the existence of the infraction; only on the amount of the fine.

Preliminary market consultation gives the operators the chance to compete or to cartelise. Several elements may decide them in one or the other way. Some will depend on the PMC design; the others on the firms' behaviour. There is a precondition for collusion to success in this phase: that the ring possesses more and better information than the contracting authority over relevant elements of the tender or the procurement. When the asymmetry of information exists and is relevant, the cartel can proceed.

2.3.1. Information asymmetries

All in all, PMCs main potentiality is to balance the different degree of information in hands of the innovative public purchaser and the consulted entities (experts, operators in the market, other contracting authorities) for the sake of the first one.

Such differences are the essence of PMC, which becomes useless whether the contracting authority has already picked up enough data to start the innovative tender. These differences are also an essential factor to account for how dependent the purchaser is

on the data provided by the advisors and how defenceless could it feel in case that they take on a coordinated strategic behaviour and engage in any kind of collusion[16]. A first conclusion is that every PMC process have to set clear-cut rules to impede or thwart that the operators participating in the query agree or coordinate their positions in the PMC with a view to rig the tender. A good start could be to replace the 'meet-to-the-market' sessions by other formulas that hinder communication among firms.

On another level, since not all the participants possess the same level of information and knowledge of a market, no contracting authority should be obliged to stretch the call for advice more than reasonable. Most of times, a general publicity of a future PMC is desirable and convenient for the success of the query. However, no allegation of discrimination is to be admitted where the contracting body have reasons to restrict the number or features of the consulted entities. Hence, the authority can choose between two degrees of dissemination: 1) 'carpet bombing', (general publicity of the PMC: official journals, consultation days, open-door meetings); 2) or 'selected bombing' (by calling a limited number of specialists through e.g., singular mailing or face-to-face meetings).

2.3.2. Incentives for competing in PMC

Last years, public opinions in many countries have been puzzled by the multiplication of collusion cases in public procurement. The spree owes more to a renewed action of some Competition authorities than to a sudden 'collusive fever' affecting bidders. Actually, traditional public contracting is a mature sector in terms of Antitrust law. Public

[16] See NEUPANE, ARJUN *et al*, "Anticorruption Capabilities of Public e-Procurement Technologies : Principal-Agent Theory", en *Public affairs and Administration : Concepts, Methodologies, Tools and Applications, Information Resources Management Association, USA,* IGI Global, 2015, page 2120 and on.

works, supply, services and concessions have always been infested with anticompetitive agreements.

In this point, such as in so many others, innovative procurement differs from the above mentioned figures. The sheer nature of the innovative contracts and the position of the parties in the tender should foster rivalry and discourage cartelisation. However, the same features could give rise to more successive, long-lasting and dangerous collusive schemes.

FEATURES FOSTERING COMPETITION IN INNOVATIVE PROCUREMENT	
Contracting authority	Monopsony
	Unilateral design of the whole process (preliminary market consultation, pre-commercial phases, tender…)

Bidders	Rivals in private markets
	Subjected to the tender rules
	Winner-take-all awarding system
	Exclusive/advantageous use of the new solutions in private markets

On the one hand, innovative procurement implies either the search for a non-existent technology (pre-commercial), for a new good or service or for a variation of an actual one (innovation partnership). The innovative contracting authority wishes a new product because the existent one does not meet his requirements. That is, the new and the existent products are not substitutes. Therefore, they do not belong to the same market. Which means that the innovative purchaser enjoys the monopsony over the new (product & geographic) markets. Theoretically, monopsonistic power strengthens and (tends to) immunize its holder against the bidders' aggressive and anti-competitive behaviours.

On the other hand, innovative procurement disposes of several tools to lure bidders into a competitive battle for the contract and to counter their temptation to engage in collusive agreements (which means to rig the tender and decide the winner of the contract). Three may be quoted: the submission to self-drawn procedural rules; the *winner-take-all* outcome; the advantageous position in private markets.

Public procurement rules have been set out by EU and national laws. Both codes entrust the contracting authorities with the power/obligation to unilaterally draw the rules for any singular tender. Competition for the market is at the core of this system. One of its goals is to ensure a competitive process where the contract must be awarded to the operator which offers the best bid. These features are common to every type of contracts. What singularizes innovative procurement, particularly pre-commercial procurement, is the wide degree of freedom the contracting authorities enjoys to design the rules. To the point that pre-commercial procurement is atypical; that is, it lacks specific regulation in a law. Therefore, a contracting authority may be particularly stringent on the requirements to impede bid rigging from infecting a procedure. For example, by banning or restricting joint bids, or strictly enforcing the exclusion grounds set in Article 57 of the Directive.

The *winner-take-all* doctrine is a basic property of public procurement. It means that the contractor rapes all the fruits of the contract, since his rivals either were excluded or ranked below in the contest (winner-take-all the contract). Innovative procurement adds a new factor. Since the innovative contract amounts to the market, the contractor acquires not only the monopsony on the contract but monopsonizes the market, as well (*winner-take-all the market*). That situation will last until the market enriched with other substitutable products or services.

Last, the fact of winning an innovative public contract is likely to generate important positive side effects for the other's contractor business. Pre-commercial procurement offers the purest example, for both parties share in the output. Innovation partnership favours the awardee in many ways; such as to take advantage of the know-how needed to implement the contract or to develop a new business line.

These three collusion-deterrent factors have their own place during the innovative procurement procedure. But they should play a key role in the PMC, too. The PMC preparatory documents must state that the whole process has been designed with a view to preventing cartelization, fostering future candidates to fight for the contract and pointing out that the public contract may be profitable for the other contractor's business.

2.3.3. Incentives for colluding in PMC

Notwithstanding, the sheer features of innovative procedures can encourage some firms to make up a cartel with the purpose of improving their chances to win the contract. Some elements favour cartelisation, such as the vagueness of the procedures and the object of the contracts. In particular, the development of a PCM can help operators to decide whether to engage in collusive practices. On this point, the collusive firms' anti-competitive behaviours and the types of collusion do not substantially differ from the ones in other categories of public contracts.

INCENTIVES AND OBSTACLES TO COLLUDE IN PMC	
INCENTIVES	**OBSTACLES**
Restricted call for advice.	General call for advice.
Limited invitation to participate in the queries.	Maximum dissemination of actions on the web
Selection of the advisors in a tiny geographic scope.	Selection of advisor in a wide geographic scope

Bilateral or multilateral physical meetings with all potential operators.	Separate meetings or interviews with potential operators. Public consultation process similar to that of normative projects.
Consultation to organizations and business associations.	Avoiding or lessening the consultation to organizations and business associations
INCENTIVES	**OBSTACLES**
Small number of advisors shows an oligopolistic market	Large number of operators/advisors.
A sole operator/advisor monopolised the market	Large number of operators/advisors
One prevalent operator/advisor leads a certain number of satellite-competitors bound up to follow his opinions.	Independent operators

Important presence of groups of firms among the consulted	Independent operators
Operators/advisors share the market or engage in tacit collusion	Independent operators

Roughly, two main reasons account for that some consulted operators may be tempted to cartelise at such early stage and rig the following innovative tender. First, the setting out of collusion-fostering selection criteria on the part of the contracting authority; second, the anticompetitive practices of the operators/advisors.

Risk for competition from the PCM design

In case that the PCM requirements set out by a public purchaser are too narrow, only a reduced number of firms will attend it, what would probably favour (some of) them to agree or coordinate their answers. This side effect would arise as well from an open but restricted call for advice as from a singled-out invitation to a limited number of operators. The collusive outcome is likely to worsen when all the consultants trade in the same geographic market and the contracting authority impedes or dissuades outsiders to take part.

The width of the admittance to meetings works in a counter-intuitive way. The many firms joined in the same meeting as advisors the more dangerous for competition. Bilateral gatherings are strongly recommended. They ensure the secret of proposals to certain extent. On the contrary, multilateral physical meetings allow the participants to know about all the others' positions, reckon the chances of success and assess the

convenience of bidding on a competitive basis or join to other firms in a cartel for the future tender. In short, general gatherings serve as substitutes of information exchange.

Last, the inclusion of business associations among the consulted is also able to channel up cartelisation. Their tasks include making an easier contact and reconciling the interest of their members, which will likely make up a significant number of the consulted operators in a lot of cases. Industrial fairs are a second source of risk. A great number of them are managed – directly or indirectly- by operators and associations. An easy way to win over the contracting authority is to forge a fair or similar meeting where the public purchaser is 'encircled' by the cartel.

Risk for competition from the consulted firms

The above factors require the active engagement of the consulted firms to engender a danger for competition. However, the firms may produce the same result by taking advantage of market flaws. Two sets of market defects must be described here. First, the oligopolistic or monopolistic market structure may easily end in [tacit or open] collusion or in [collective or individual] abuse of dominant position. Second, the lack of autonomy of the consulted firms qualifies as the first point to collusion.

The first movement of the contracting authority to ensure a fair PMC and a future competitive tender is to know about the operators. To be more precise, the authority should get information about possible links among several of the participants. Independent operators are supposed to compete by the same market until the best of them expels of dwarfs the others. It is difficult to say the same regarding firms that belong to the same group.

In case those links exist, the purchaser has free hands to dispose the information from non-independent operators at will. This attitude does not infringe the principles of non-discrimination, competition and transparency. Two reasons support this finding. First, as stated above, the PMC is a pre-procedural phase, whereby the participants in a PMC neither compete nor are obliged to interact at all. Second, the contracting authority must be free to reject or take advantage of the information in the best way for the tender success.

Since no rigged tender is fruitful, the suspicion that the information has been fixed may well drive it to set it apart. This attitude does not infringe the above mentioned principles, since the firm(s) whose contributions have been unattended are not forbidden to participate in the tender on equal terms with the others.

2.3.4. Incentives for an autonomous competition in PMC

During the planning and implementation of a PMC, the contracting authority may lessen the chances of collusion by enlarging the number of consulted firms and by widening their geographic scope. Those selected act within PMC as independently as they must do in the future tender. Therefore, general meetings as well as the participation of business associations have to be avoided or reduced as much as possible.

When the public purchaser foresees that the risk of collusion arises either out of market flaws or the firms' behaviour, the first responses have to foster the participation of a large number of independent operators.

2.3.5. Position of the Spanish Competition Authority

In the Report on the Draft of Public Sector Contracts Law, the National Commission of Markets and Competition (CNMC, in Spanish) made an insightful study on the PMC concerns for competition[17]. As was written above, the Draft regulates in its art. 115 the possibility of conducting market research and consulting with economic operators in order to prepare the tender correctly and to inform operators about their plans and the requirements they will require to attend the procedure.

[17] IPN/CNMC/010/15, October, 16th, 2015.

The CNMC claims that the positive aspects of a better knowledge of the market derived from the queries to operators do not hide the problems from the perspective of competition. They may lead to a considerable risk of being caught by the contracting authority and may lead to an infringement of the principles of equal access to tenders, non-discrimination and non-distortion of competition.

The CNMC recommended that a number of corrective measures be introduced: 1) bilateral or multilateral physical meetings with all potential operators should be avoided given the risk of colluding between them; 2) no query with specific operators. They should be limited them only to independent experts or authorities; 3) queries with professional organizations and business associations should be avoided; 4) the introduction of a public consultation process in which these preliminary consultations are carried out, similar to that in normative projects; and 4) maximum dissemination of actions on the web so that all potential stakeholders have access and possibility of making contributions.

3. PRIOR INVOLVEMENT OF TENDERERS IN A PMC

3.1. Fabricom and article 41 of directive 2014/24

Article 41 of Directive 2014/24 deals with the issue put by a "*candidate or tenderer or an undertaking related to a candidate or tenderer (that) has advised the contracting authority, whether in the context of Article 40 or not, or has otherwise been involved in the preparation of the procurement procedure (...).* The ulterior participation of that firm in the tender for which preparation it had been working is a challenge for the principles of non-discrimination and competition actual effectiveness.

Article 41 is the normative development of a clear-cut doctrine enacted by the Court of Justice in *Fabricom*[18]. The case judged a Belgian normative that stated that any person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services was not allowed to participate in or to submit a tender for a public contract for those works, supplies or services where that person was not permitted to prove that, in the circumstances of the case, the experience which he had acquired was not capable of distorting competition[19].

The defendant (Belgian State) stated that all tenderers must have equality of opportunity when formulating their tenders. On the contrary, a person who had participated in certain preparatory works may be at an advantage when formulating his tender on account of the information concerning the public contract in question which he has received when carrying out that work. Furthermore, that person may be in a situation which may give rise to a conflict of interests in the sense that, he may, without even intending to do so, where he himself is a tenderer for the public contract in question, influence the conditions of the contract in a manner favourable to himself. Such a situation would be capable of distorting competition between tenderers.

The judgement claimed that a rule such as that at issue in the main proceedings does not afford a person who has carried out certain preparatory work any possibility to demonstrate that in his particular case the problems referred to in paragraphs 29 and 30 of the judgment do not arise. Such a rule goes beyond what is necessary to attain the objective of equal treatment for all tenderers. Indeed, the application of that rule may have the consequence that persons who have carried out certain preparatory works are precluded

[18] Judgment of the Court (Second Chamber) of 3 March 2005, *Fabricom S.A. v Belgian State*, Cases C-21/03 and C-34/03 Fabricom.

[19] DE KONINCK, CONSTANT & FLAMEY, PETER (ed.), *European Public Procurement law, Part II Remedies*, Kluwer Law International, page 301 and 0n.

from the award procedure even though their participation in the procedure entails no risk whatsoever for competition between tenderers[20].

> "*Article 3(2) thereof, Directive 93/36 and, more particularly, Article 5(7) thereof, Directive 93/37 and, more particularly, Article 6(6) thereof, and also Directive 93/38 and, more particularly, Article 4(2) thereof, preclude a rule(...) whereby a person who has been instructed to carry out research, experiments, studies or development in connection with public works, supplies or services is not permitted to apply to participate in or to submit a tender for those works, supplies or services and where that person is not given the opportunity to prove that, in the circumstances of the case, the experience which he has acquired was not capable of distorting competition*".

3.2. Direct and indirect participation in a previous PMC

Proprio modo, the scheme set out by the Directive rules only where an economic operator intervenes in the preparatory phase and afterwards takes part in the subsequent tender. This general statement demands a further explanation, related both the kind of participant and the type of participation.

First at all, Article 41 sets a wide circle of operators bound to the special rule of compatibility. It mentions the "*candidate or tenderer or an undertaking related to a candidate or tenderer*". Therefore, not only are the bidders at risk of been excluded, but also the firms linked with them that contributed to develop the preparatory phase, working for the contracting authority as managers, consultants and advisors. The Article is not precise about the nature of the bonds between the tenderer and the related undertaking. This inconclusiveness should be understood as encompassing both corporative and business

[20] The ECJ builds these findings on this particular cause of exclusion on the basis of the principle of equal treatment, ARROWSMITH, SUE, "EC Regime on Public Procurement", in THAI V. KHI (ed.) *International Handbook on Public Procurement*,

relationships. The intensity of the link is open to interpretation, as well. The chaining is indisputable in case that the third undertaking and the tenderer belong to the same corporate group; even more where the latter is or acts as group head. In case that firm and bidder have just a business relationship, the closeness sketched by Article 41 should be assessed on a case-by-case basis.

3.3. Scope and limits of the exclusion

The ECJ doctrine set two rules. First, the person or firm concerned is given a sort of right of defence, to show that her participation does not affects competition during the procurement. Second, exclusion is a measure of last resort, only implementable when the other reasons fail.

3.3.1. Accommodation and investigation

Since the Directive (a) allowed the advisors to bid and (b) placed the exclusion as the ultimate solution, it had to sketch (1rd) how to guarantee the effectiveness of non discrimination and competition principles within the tender (accommodation) and (2th) how to know about the (un)lawfulness of the bidder's behaviour back during the pre-procedural phase (investigation). Both weights have been loaded on the back of contracting entities. The first and foremost consequence of such *onus* means that any exclusion lacking both previous steps is illegal and may bring about the nullity of the procedure.

First, in order to 'accommodate' the bid at stake in a non-discriminatory and pro-competitive tender, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer. Article 41 leaves in its hands selecting the solutions. But it imposes two, which must be set out in national laws and implemented in all cases. Literally, such measures shall include (1) communication to the other candidates and tenderers of the relevant information exchanged

in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure (2) and the setting of adequate time limits for the receipt of tenders. Since principle of competition is directly concerned, the above communication must be well grounded and describe the reasons for the admission decision. Therefore, tender documents should give the other tenderers the chance to reply the communication, to state their opposition to the admission or to provide reasons for the advisor to be expelled.

Second, where the information gathered drives the authority to put into question the participation of one advisor in the tender on the basis of non discrimination and competition principles, it shall lead an investigation (since automatic exclusion is forbidden).

3.3.2. Right of defence and right to appeal

Article 41 focuses on the the advisor-bidder rights: prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition[21]. Arguments from other bidders must be asked for and assessed. Even data garnered from entities outside the tender should be requested or admitted. The sheer fact of putting the aim towards the advisor-bidder does not breach principle of non discrimination, as *Fabricom* expressly put[22].

[21] The difference among formal and material investigation criteria and the preference for the second ones is analysed by SÁNCHEZ GRAELLS, ALBERT, *Prior involvement of candidates or tenderers under Reg. 41 Public Contracts Regulations 2015*, http://www.howtocrackanut.com/blog/2015/04/prior-involvement-of-candidates-or.html.

[22] *Fabricom*, 28 and 31.

In applying the first rationale, Article 41 of Directive requires the contracting authority to act *ex officio* to check the behaviour of the candidate. The contracting body is to request information from all the participants. The bidder at stake is the main interested in claiming his lawful behaviour during the PMC phase. The right of defence calls for his active implication. Prior to any exclusion, he shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition.

The other bidders have a legitimate say on the matter, as well. The reason is that one of them may have incurred in a conflict of interest, different from the one laid down in Article 24 of Directive. And this one is likely to become the awardee. So, the contracting authority is bound to communicate to the other candidates or tenderers the relevant information exchanged (in the context of or) resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders.

The capability of the last measure to ensure transparency and, above all, to heal the appearance of confusion between the intervention in the PMC and in the tender has been overestimated. It is right that the knowledge of the formal documents may give a hint about the degree of a bidder's influence in the PMC and on his participation in the wording of the procedural documents. But these data are not enough to rule out a breach in the principles of equal treatment and competition. The influence of the bidder at stake goes far away the mere draft of those documents. It also encompasses his relationships with officials, experts and other staff; gathering of information about the contracting authority's 'philosophy' when assessing the quality of the bids. Summarizing, the knowledge of the documents showing the participation in the PMC is just a linear way to make an assessment. It does not allow the viewers to hustle the meanders.

The third interested party in the investigation is the same contracting authority's, whose concern does not go behind the bidders'. The situation that gave place to the investigation may easily come from misbehaviours on the part of some officials, such as conflicts of interests or corruption. Inquiries can also shed light on other illegal behaviours

of the bidders, such as unlawful concerts, collusion in multiple forms and even the infringement of other laws, admitted or tolerated by the public procurement official. All these situations are easier in innovative procurement than in the most classic contracts. In many cases, contracting authorities will be at the expense of the consultants during the PMC. They will (help to) draw the entirety or a substantial part of the procurement. A future bidder can easily 'hide' some clues helpful in the future tender. The contracting authority is not limited by the requests of the participants. On the contrary, he is entitled to decide and implement his own measures, since Article 41 clearly require contracting authorities to take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

The measures taken shall be documented in the individual report required by Article 84.1.e) of Directive 2014/24 ("*conflicts of interests detected and subsequent measures taken*").

3.4. Exclusion

3.4.1. Nature

Only when both actions had been applied unsuccessfully and there are no other means to ensure his compliance with the principle of equal treatment the candidate or tenderer concerned shall be thrown out of the procedure. The sack of the bidder looks like an abnormal type of exclusion ground. On the first hand, it supposes the expulsion of one participant during the procedure, on the basis of his own irregular behaviour. But, on the second hand, Article 57 of Directive 2014/24 sets a *numerus clausus* relationship of exclusion grounds, among which the above mentioned did not find its place. Moreover, Article 41, unlike Article 57, limits its future sanctions to the sacking of the same tender, but it does not include the prohibition for the bidder to participate in future tenders.

3.4.2. Grounds

Breach of principles

Article 41 builds the argument for the exclusion on the principle of non-discrimination and competition. Actually, the second one encompasses both. The participation in a tender of a firm that previously took part in a PMC will infringe the second principle in case that - by virtue of her behaviour during the preliminary market consultation- is "*capable of distorting competition*". That expression must be understood as tantamount to thwarting competition in the market as well as competition for the market. That is, the participant will be excluded where his former intervention in the PMC privileges him in the tender regarding the other bidders (for instance, through a biased design of the procedure); and also where it had colluded in the PMC phase to rig the tender. In both cases, the goal is the same: to unlawfully win the contract.

Behaviours capable to distort the competition (for the market) principle range from provision of fake data to deception in the setting of the principal features of the tender (price, duration, object of the contract, etc). All actions were implemented by a former advisor and current bidder during the PMC phase and are ready to work within the awarding process. These actions are means to rig or manipulate the tender. Their primary goal is to attain that the contract be awarded to him or to another bidder.

Anticompetitive behaviours

The participation of an economic operator in the preliminary phase of a contracting procedure can be used as a vehicle for a bidder to breach Competition law (Articles 101 or 102 TFEU) during the tender. Several anticompetitive practices stand out during the phase of preliminary consultations:

- Designing the tender in such a way that only the rogue (consultant) or some of his buddies will meet the requirements to be awarded the future contract.
- Advising the contracting authority either to achieve the above goal or the exclusion of a rival bidder.

- Contributing to boycott a tender (by the means of proposing the setting-out of requisites that are irrational or make impossible for other economic operators to bid).

It should be noted that these behaviours (and others alike) would break antitrust law irrespective their degree of compliance with Article 41 of Directive 2014/24/CE. Thus, a competition authority is entitled to judge them where finding out evidences of Articles 101 or 102 infringement. A decision imposing penalties on the basis of anticompetitive behaviours will run alone, regardless the contracting authority had reckoned that the conducts at stake are consistent with Article 41 requirements, then developed the tender and endorsed its outcome.

However, since the principle of competition is one and the same for the two authorities, feedback should be the rule, not the exception. Collaboration is not mutual but just one-way.The contracting body must warn the competition authority where it suspects that a possible breach of Article 41 may infringe Competition law, as well.

In August, 2016, the Competition Authority of Hungary (GVH) imposed fines on five suppliers of medical suture products for rigging their bids regarding the tenders issued by four hospitals[23]. Collusion among the suppliers was not restricted to concertation on specific tenderers. Their behaviour concealed a tacit agreement whereby the incumbent suppliers influenced hospitals to 'over´specify' their needs for the impending tenders. The anticompetitive agreement was implemented within the preparation of tenders. Each supplier (also a would-be bidder) contributed to the definition of the technical specifications and advised the hospitals to set product specifications requirements which were unimportant for the intended use but could identify the product of a given supplier. "Over-specified product requirements were seldom attacked either formally or informally,

[23] GVH, *Braun Medical, Chimax, Johnson&Johnson, Staplecare, SurgiCare, Variomedic*, Vj-79/2013, 4 August 2016.

ensuring that a kind of pre-set tender result would prevail. Maverick competitors taking active steps against such tender announcements were allegedly reprimanded or were sanctioned with refusal to deal by hospitals[24].

3.4.3. Procedural highlights

A decisive feature for the accurate application of Article 41 lies in the standard of unlawfulness. That means the level of influence that the sheer fact of participating in the preparatory phase would have to enhance the chances for a firm to win the contract in breach of principles of equal treatment and competition. Although it is in the end a case-by-case question, several clues can be provided to help contracting authorities to decide.

The first is the hard core restrictive admission option. The special incompatibility provided for in Article 41 would apply if there is *the slightest indication* that participation may lead to restrictions on attendance or involve privileged treatment and, in the end, violate the principles applicable to public procurement. In other words, compatibility would only be admitted in case that it could be completely ruled out that the participation would restrict competition in the tender or to place the company in a position of competitive advantage over the other tendering companies[25].

This position formally shelters competition and vetoes any chance of taking advantage of the previous intervention in the preparatory phase. Therefore, it appears to foster participation and ensure the rights of the other bidders. However, a mechanic

[24] ZOLTAN MAROSI, BALÁZS CSÉPAI, "The Hungarian Competition Authority fines five suppliers of medical suture products for bid rigging and exempts one of them under the leniency provisions (*Braun Medical, Chimax, Johnson&Johnson, Staplecare, SurgiCare, Variomedic*)" e-Competitions, Nº 82634, January 2017

[25] Decision 395/2015, Tribunal Administrativo de Recursos Contractuales de la Junta de Andalucía, , Sevilla, 20 de noviembre de 2015.

application of that position might infringe Article 41 prohibition of automatic ban to the participant at stake.

A second option is for the contracting authority to make a decision dependent on the evidences put forth by the bidders when revising the documents of the former's prior participation. In that case, the contracting authority restraints itself and does no research on its own. The statement of compatibility will depend of the contributions of the participants. This result makes the position insufficient. Article 41 calls for contracting authorities to engage in all the actions useful to investigate the compatibility. They are not sheer recipients of information. They are entitled and obliged to act.

Therefore, the most accurate way to implement Article 41 is to join a treble investigation plus a case-by-case perspective. First, the contracting authority must take all the measures to ease the 'beleaguered participant', the other bidders and the authority itself to investigate. Second, on the basis of the evidences, the contracting body decides the case.

Whether the automatic exclusion of the participant in a PMC is unfair and counterproductive (it will deter firms to take part in that phase), the solution given away by Article 41 Directive 2014/24 shows a decisive flaw: it relies on the contracting authority to decide on the firm's independence. Although it seems the obvious way – the independence is disputed within a tender, so the purchaser, which is the judge of the tender, is the competent to sort out the problem-, the solution forgets that a standard contracting authority may well lack the means, the time and the will to deep in the question. Moreover, a careful reading of Article 41 shows a rebuttable presumption of lawfulness. The bidder at stake has to bring in the evidences supporting her innocence. The contracting authority must assess them and can evaluate other materials that come to it.

So, it is dubious that many authorities start up proper investigations. The likeliest is that they fulfil the right to be heard and except in cases of evident violations of competition during the PMC, the purchaser takes the allegations of the firm and the limited evidences at its disposal, and decides that 'the show must go on'…, with the suspected firm on board.

4. CONCLUSIONS

Assessing the potencial importance of PMC for innovative procurement requires to apply a minimal insight. Since the innovative contracting authority has to figure out almost everything about the future contract, it looks essential to gather ideas from experts, experiences from specialised organisations and solutions by private market operators. Hence, PMC is not only a good idea, it seems necessary for ensuring a successeful tender. However, the preliminary market consultations pattern, such as has been drawn by Directive 2014/24 is not problem-free. Three issues are analysed in this study: (1) too much confidence in the principles quoted in Article 40; (2) risks of collusion [corruption and conflicts of interests] among the participants within the consultation procedure; (3) huge difficulties for asserting the competition principle in the tender following a PMC.

Regarding the first point, the Spanish, British and French laws show that national rules have not worried very much to develop the Directive. Such paucity stresses the role of principles of non discrimination, transparency and competition. It is crystal-clear that these principles inspire the whole fabric of EU public procurement and that their influence must leak to all preparatory phases. The issue is to set the boundaries of their effectiveness in PMC. As explained in detail above, they should not be used here with the same degree of stringence that is normal within tenders. The reason is that preliminary market consultation is pre-procedural, not-compulsory and not-decisive for chosing the awardee.

These three essential features favour that collusion may prey in PMC easier than in the core of public procurement. Dangers comes from the private operators willing to give advice, since they are hypothetical future bidders. Chances of collusion depend on the participants behaviour as much as on the consultation format. Put simply, the making of the PMC is up to contracting authorities, who must be very careful to impide coalitions among the participants. To do so, they should avoid those formulas entailing group rallies (“meet-to-meet”) and choose one-to-one meetings. It is foreseeable that most authorities, focused on administrative and organizational concerns, neglect the definition of consultations that

meet the minimal pro-competitive standards. In those cases, tenders can easily be born rigged or biased.

To prevent tenders from being manipulated and also to meet the prohibition of authomatic exclusion, the Directive laid down a two-pronged mechanism for qualifiying the accurability of the former advisor and current bidder. The contracting authority must first gather information and convey it to the co-bidders. Second, it will carry out a contradictory procedure to expel him as ultimate remedy. On paper, this solution looks respectful and effective. As a matter of fact, the functioning of the whole scheme sketched by Article 41 depends on the willingness and capacities of each authority. That the risk of collusion is a hypothetical and expendable side effect for most of them must be taken por granted. Such vacuum should be filled (1st) with rules or soft law that ensured a minimum consistence and legal certainty and (2nd) with the support of sectoral organisations, such as the competition authorities.

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COMPETITION AND SECTORAL REGULATION IN DUTCH AND ENGLISH HEALTHCARE: FACTORS SHAPING THE COMPETITION FOCUS OF THE NEW HEALTHCARE REGULATORS AND THEIR RELATIONSHIP WITH THE COMPETITION AUTHORITIES

Mary GUY[1]

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[1] Lecturer in Law, Lancaster University. This article is based on research conducted during my PhD at UEA and developed in M. GUY, *Competition Policy in Healthcare Systems – A Comparative Study of the Netherlands and England*, Intersentia, Cambridge, forthcoming 2018. I am grateful in particular to Professor Wolf Sauter (Tilburg), Centre for Competition Policy (CCP) research seminars (UEA), Professor John Murphy (Lancaster), Dr Yseult Marique (Essex/Speyer) and the Comparative Public Law and European Legal Identity British Academy Rising Star Engagement Award workshops (September 2016 – March 2017) for feedback on earlier drafts.

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ABSTRACT

This article considers comparable and near contemporaneous competition reforms in modernising Dutch and English healthcare: specifically, the development of sectoral regulators – the Dutch Healthcare Authority in 2006 and NHS Improvement as a result of the Health and Social Care Act 2012 reforms - with a competition focus and a defined relationship with the competition authorities. Despite distinctions between the Dutch health insurance system and the taxation-funded National Health Service in England, there are sufficient common aspects evident in competition policy development and the functional equivalence of the new sectoral regulators to make this comparative analysis beneficial for those interested in competition policy and healthcare modernisation.

The aim of this article is to examine two factors shaping the competition focus of the sectoral regulators and their relationship with the competition authorities: the regulators' focus on patients and evolving ministerial oversight of healthcare modernisation. These factors are significant because they reveal not only tensions in equating patients and consumers, but also counterintuitive developments in the two countries. Taken together, these factors help explain why implementation of competition reforms in Dutch and English healthcare has proven difficult, so provide a better understanding for subsequent developments in both countries, or for other countries considering similar reforms.

Key words: NHS, the Netherlands, competition, healthcare, regulation

1. INTRODUCTION

Both the Netherlands and England have recently experimented with developing competition as a means to modernise their healthcare systems and meet ongoing challenges such as rising costs and increasing innovation. This need for healthcare system modernisation is emerging regardless of healthcare system type: the Netherlands represents an example of an insurance-based system, while English[2] healthcare comprises the taxation-funded National Health Service (NHS) which provides the majority of healthcare on the one hand, and the smaller, supplementary private healthcare market[3] underpinned by private medical insurance and self-paying patients on the other.

This distinction between insurance-based and taxation-funded[4] healthcare system models has implications for the development of competition reforms. In Dutch healthcare these include the introduction of mandatory private health insurance in 2006 and the liberalisation of some hospital service prices. In England there have been successive competition-based reforms of the NHS, inter alia to expand private sector delivery of NHS services and promote patient choice, culminating recently in the Health and Social Care Act 2012 (HSCA 2012). Unsurprisingly, this distinction was also evident in the extent to which the Netherlands and England were inspired by "managed competition" – in essence, a

[2] The reference to England is explicit in light of divergent management of, and approaches to, the National Health Service (NHS) across the United Kingdom.

[3] Which is UK-wide in its scope.

[4] Reference is made throughout the article to "insurance-based" and "taxation-funded" healthcare system models in preference to "Bismarck" and "Beveridge" models. This is due in part to the narrow focus of the article on competition regulation, where a key factor is how solidarity is handled, as distinct from wider features of these designations, and also to an apparent ambivalence about the ongoing use of these designations. See further on healthcare system typologies, T. K. HERVEY and J.V. MCHALE, *European Union Health Law – Themes and Implications*, Cambridge University Press, Cambridge, 2015. "EU internal health law: the systemic focus", pages 211-226.

purchasing strategy to obtain maximum value for consumers using rules for competition[5] – a model developed by the US health economist Alain Enthoven. Whereas the Dutch healthcare reforms of 2006 have been considered a "living model of managed competition",[6] the approach to competition in the English NHS has been more piecemeal, encompassing not only Enthoven's recommendation of separating purchasing and providing functions,[7] but also the conflation of these - ultimately in the Clinical Commissioning Groups introduced by the HSCA 2012.

Despite the differences between the Dutch and English healthcare systems, common elements can be found in their development of competition reflecting the experience of opening other sectors up to competition. Most notably, both countries' reforms included the establishment of sectoral regulators – the Dutch Healthcare Authority[8] and NHS Improvement.[9] These are independent agencies with a twofold competition remit: to develop scope for competition sometimes in connection with the Ministers for Health, and to work with the competition authorities to police anticompetitive behaviour, typically by reference to general competition law (the provisions governing anticompetitive agreements and abuse of dominance at national and EU levels).[10] This twofold remit –

[5] A. C. ENTHOVEN, *The History and Principles of Managed Competition*, in *Health Affairs*, 1993, 24.

[6] A. C. ENTHOVEN, *A Living Model of Managed Competition: A Conversation with Dutch Health Minister Ab Klink*, in *Health Affairs*, 2008, 196.

[7] A. C. ENTHOVEN, *Reflections on the management of the National Health Service – An American looks at incentives to efficiency in health services management in the UK*, *The Nuffield Trust*, 4 October 1985.

[8] *Nederlandse Zorgautoriteit* (NZa).

[9] Formerly known as Monitor.

[10] Treaty on the Functioning of the European Union (TFEU), Articles 101 and 102, transposed by Articles 6 and 24, Dutch Competition Act 1998 (*Mededingingswet*, Mw) and Sections 2 and 18 Competition Act 1998 (CA 98) (also known as the Chapter I and Chapter II prohibitions) in the UK.

which situates the healthcare regulators between government and competition authority - has proved problematic in light of the idea that there may still remain unresolved tensions between a universalist model of health service emphasizing the principles of equal access and equal treatment of patients, and a market-driven model emphasizing efficiency, innovation, and patient choice.[11]

The experience of other sectors has also been instrumental in developing the sectoral regulators for healthcare. This finds reflection, for example, in the Dutch Healthcare Authority initially being granted a competence to investigate significant market power,[12] a concept developed in the context of EU telecommunications regulation. This competence was intended to complement the power of the Authority for Consumers and Markets[13] to investigate abuse of dominance, but an absence of such cases has been attributed to the blurred distinction between the two competences.[14] In England, NHS Improvement shares "concurrent powers" – effectively an equal competence – with the Competition and Markets Authority to apply general competition law[15] by analogy with sectoral regulators such as Ofgem in the energy sector.

This article starts from the premise that this template – of looking to other sectors - for developing sectoral regulators in healthcare was too simple. A comparative methodology is used to explore other common factors instrumental in shaping the competition focus of the new healthcare regulators and their relationship with the

[11] T. PROSSER, *The Limits of Competition Law*, Oxford University Press, Oxford, 2005, 9.

[12] Originally under Articles 47-49 Wmg.

[13] *Autoriteit Consument en Markt* (ACM).

[14] W. SAUTER, *The balance between competition law and regulation in Dutch healthcare markets*, in *TILEC Discussion Pap*er, 2014, DP 2014-041.

[15] Section 72 HSCA 2012.

competition authorities. In so doing, it is submitted that a better insight is gained into why "healthcare" may be distinguished from other sectors, and that there may yet be further considerations emerging in light of significant differences between Dutch and English healthcare.

The primary purpose of this article is to explore two factors shaping the regulators' competition focus and specifically their relationship with the competition authorities.

Firstly, the healthcare regulators' apparent focus on patients – as distinct from, for example, healthcare providers - as defined in statute. This highlights that new directions for regulator legitimacy evident in the Netherlands[16] may also hold for England.

Secondly, the wider evolution of ministerial oversight and expansion of the competition authorities' roles in healthcare. This reveals the emergence of counterintuitive developments in the two countries, which is underscored in England by wider HSCA 2012 reforms which reduce ministerial oversight and create NHS England as the body responsible for day-to-day management of the NHS.[17]

These factors have received at best limited attention thus far, so the present article builds on previous considerations of general frameworks for competition, wider perceptions of declining government intervention and increasing regulatory oversight[18] and significant changes to the constitutional framework by the HSCA 2012 reforms.[19]

[16] W. SAUTER, *Is the general consumer interest a source of legitimacy for healthcare regulation? An analysis of the Dutch experience*, in *European Journal of Consumer Law*, 2009, 419-434.

[17] Section 9 HSCA 2012. NHS England was initially known as "the NHS Commissioning Board".

[18] T. PROSSER, *Regulation and Legitimacy*, in J. JOWELL - D. OLIVER (eds.), *The Changing Constitution*, 7th edition, Oxford University Press, Oxford, 2011. Chapter 12.

[19] A.C.L. DAVIES, *This Time, It's For Real*, in *Moderm Law Review*, 2013, 564.

The unique contribution made by this article is to provide a comparative perspective on these two factors in order to move beyond the view that common features link "healthcare" as a sector with, for example, energy or telecoms, and to articulate that the specificities of individual healthcare systems – even within the broader insurance-based / taxation-funded system typologies – may need to find expression within the competition function of the healthcare regulators and particularly their relationship with the competition authorities.

This examination is timely in view of the current potential for change in both countries. The constitution of a new government in the Netherlands following the general election in March 2017 raises questions about whether the refocusing of competition will happen in the way originally envisaged by legislative proposals in the 2015-16 parliamentary session. These involved the transfer of the majority of the Dutch Healthcare Authority's competition functions to the Authority for Consumers and Markets.[20] In England, the House of Lords has recently called for a Department of Health consultation to review the HSCA 2012 reforms,[21] and there is a growing recognition of the limited role for competition in the development of new integrated care models in the NHS[22] outlined by the

[20] Kamerstukken II, 2015-16, 34 445, Wijziging van de Wet marktordening gezondheidszorg en enkele andere wetten in verband met aanpassingen van de tarief- en prestatieregulering en het markttoezicht op het terrein van de gezondheidszorg. (Second Chamber documentation, Parliamentary Session 2015-16, 34 445, Amendments to the Dutch Healthcare Market Regulation Act 2006 (Wmg) and other laws to apply tariff regulation and market regulation in healthcare).

[21] HOUSE OF LORDS SELECT COMMITTEE ON THE LONG-TERM SUSTAINABILITY OF THE NHS. Report of Session 2016-17, *The Long-term Sustainability of the NHS and Adult Social Care*, 5 April 2017. Recommendation 4 (Paragraph 101).

[22] Evident in the Competition and Markets Authority's recent comments in connection with the Central Manchester University Hospitals / University Hospital of South Manchester merger inquiry. Final Report. 3 August 2017.

NHS Five Year Forward View in 2014 and the current development of Sustainability and Transformation Partnerships.

The article develops as follows. Section II outlines the comparative approach underpinning the present discussions by considering in overview differences and similarities in the development of competition and how it functions in Dutch and English healthcare. Section III examines the regulators' apparent focus on patients as defined by the concept of the "general consumer interest" in the Netherlands and in light of the distinctions drawn between NHS patients and private patients in England. Section IV considers the evolving role of Ministerial oversight and the expanding role of the competition authorities in both countries. Section V concludes.

2. COMPARATIVE ANALYSIS OF COMPETITION AND SECTORAL REGULATION IN DUTCH AND ENGLISH HEALTHCARE

The distinction between the Netherlands as representing an insurance-based healthcare system and England as a taxation-funded healthcare system has implications for the development of competition. In essence, it is considered that, in a supply-driven, tax-based system, governments are likely to determine the precise levels of benefits, whereas governments that rely on a health insurance scheme are more likely to leave some room for demand-driven competition with regard to the benefits that the insured persons are entitled to (for instance, based on supplementary insurance).[23] Thus competition *within* the English NHS is restricted: the ability of NHS patients to exercise choice of provider is limited, for

[23] L. HANCHER - W. SAUTER, *EU Competition and Internal Market Law in the Health Care Sector*, Oxford University Press, Oxford, 2012, 232-3.

example, to certain elective care services.[24] In the Netherlands, there has been a greater focus on competition *in* the market as Dutch patients can choose their health insurer and, depending on the type of policy selected (and cost paid), have a lesser or greater choice of healthcare provider. It may also be possible to speak of competition *in* the market in England insofar as patients move *between* the NHS and private healthcare sector for treatment. However, the competition reforms of the HSCA 2012 focus primarily on the NHS, not the private healthcare market.

Nevertheless, despite this significant distinction in the scope for developing competition in Dutch and English healthcare, there are similarities which influence the regulator role and competition focus. This section first sets out the context of competition in Dutch and English healthcare which inevitably emphasizes difference, before outlining two significant underlying similarities and considering the framework within which the regulators operate which is arguably defined by the applicability of competition law.

A) Competition in Dutch healthcare

The Dutch system of mandatory private health insurance is underpinned by interaction between patients, healthcare providers and health insurers forming a "healthcare triangle"[25] and associated markets, with purchasing markets comprising the purchase of healthcare provision by both insurers and consumers (patients).

[24] Rather, the focus is on competition *for* the market (procurement activity), which is beyond the scope of this article. See further, OFFICE OF HEALTH ECONOMICS (OHE), *Competition and the English NHS*. January 2012.

[25] See SAUTER (2009), supra n. 16.

In essence, the framework established by the Dutch Health Insurance Act 2006[26] requires all adults living and working in the Netherlands to take out a basic package of health insurance, and this underpins the development of a competitive health insurance market. From this, it was intended that competition will filter through to healthcare provision markets as insurers try to gain competitive advantage by securing the best deal possible from healthcare providers, and that consultants would be put under pressure to provide high quality competitive services by provider combinations such as hospitals.[27] Within this system, patients provide an impetus for competition by exercising choice of health insurer and depending upon the type of policy chosen – "reimbursement", "combination" or "benefits in kind" – will have a greater or lesser choice of healthcare provider.

B) Competition in English healthcare

In order to understand the HSCA 2012 (and wider NHS competition) reforms, it is essential to be aware of the paradoxical scope for both distinction and cooperation between the English NHS and private healthcare sector. This includes the possibility for an individual to move between the two (insofar as they are eligible for NHS treatment), and be classified as either an "NHS patient" or a "private patient", subject to Department of Health and latterly NHS England rules.[28]

[26] *Zorgverzekeringswet* (Zvw).

[27] W. SAUTER, *Experiences from the Netherlands: The Application of Competition Rules in Health Care*, in J. VAN DE GRONDEN, E.SZYSZCZAK, U. NEERGAARD, M. KRAJEWSKI (eds.), *Health Care and EU Law*, TMC Asser Press, The Hague, 2011. Chapter 11.

[28] DEPARTMENT OF HEALTH, *Guidance on NHS patients who wish to pay for additional private care*, 23 March 2009. NHS COMMISSIONING BOARD (now NHS ENGLAND), *Commissioning Policy: Defining the boundaries between NHS and Private Healthcare*. April 2013. Ref: NHSCB/CP/12.

Market-based reforms of the English NHS began with the separation of purchasing and providing functions by the "NHS internal market" in 1991.[29] Since then, it has been possible to conceptualise the interactions between the NHS and private healthcare sector as comprising four categories thus:[30]

1.	2.	3.	4.
Public Purchaser and Public Provider	Public Purchaser and Public Provider	Public Purchaser and Public Provider	Public Purchaser and Public Provider

Figure 1: Relationship between the NHS and private healthcare sector incorporating the purchaser/provider separation.

In essence, categories 1 and 2 comprise the NHS and treatment of NHS patients by NHS providers[31] (category 1) or private/voluntary sector providers of NHS services, such

[29] Elaborated by the White Paper, "Working for Patients" and introduced by the National Health Service and Community Care Act 1990.

[30] These have also been used to delineate the private healthcare market and discuss the applicability of competition law. See, respectively, OFFICE OF FAIR TRADING (OFT), *Private Healthcare Market Study*, December 2011, OFT1396 at page13, and O. ODUDU, *Competition Law and the National Health Service* in *Competition Bulletin: Competition Law Views from Blackstone Chambers*, 8 October 2012.

[31] Secondary care providers (typically hospitals and ambulance services) within the NHS have operated as "NHS Trusts" since 1990 or as "NHS Foundation Trusts" since 2003. Although successive government policy was for NHS Trusts to achieve greater financial autonomy and Foundation Trust status between approximately 2004 and 2014, the introduction of the NHS Five Year Forward View and new integrated care models suggests that alternative conceptions are emerging, such as Accountable Care Organisations. These may include primary care providers such as GPs. These have had an independent status so might be considered to belong in category 2 as much as category 1.

as Independent Sector Treatment Centres – private clinics dedicated to treating NHS patients (category 2). Correspondingly, categories 3 and 4 relate to the private healthcare sector and treatment of private patients by private providers – for example, private patient units within NHS hospitals (category 3) or private hospitals (category 4).

Following the introduction of the NHS Five Year Forward View in 2014 there has been an emphasis on integrated models of care as well as an emerging focus on localism evident in the development of Sustainability and Transformation Partnerships.[32] These have been hailed by the CEO of NHS England as marking the end of the separation of purchasing and providing functions.[33] However, the underlying distinction between the NHS and private sector remains pertinent with regard to discussions of competition, particularly as the nature of these markets differs.

The development of market-based reforms led to the NHS being described as a "quasi-market": a concept which can share various common features with "standard" markets (such as competition and the use of financial incentives),[34] but can also be distinguished on both the demand and supply side.[35] Thus purchasers typically comprise the state via agents (NHS Commissioners), rather than patients using their own resources, while providers may include both not-for-profit as well as for-profit organisations. As there

[32] See NHS ENGLAND, *Local Partnerships to Improve Health and Care - Sustainability and Transformation Partnerships (STPs) and Accountable Care Organisations (ACOs)*, https://www.england.nhs.uk/systemchange/

[33] R. THOMAS, D. WEST, *STPs will end the purchaser-provider split, says Stevens*, in *Health Service Journal*, 27 February 2017.

[34] J. LE GRAND, *Quasi Markets: The Answer to Market Failure in Health Care?*, in P. DAY, D.M. FOX, R. MAXWELL and E. SCRIVENS (eds.), *The State, Politics and Health: Essays for Rudolf Klein*, Blackwell, Oxford, 1996, Chapter 3.

[35] W. BARTLETT and J. LE GRAND, *The Theory of Quasi-Markets* in J. LE GRAND - W. BARTLETT (eds.), *Quasi-Markets and Social Policy*, Macmillan, London, 1993, Chapter 2.

is evidence in 2017 of ongoing governmental commitment[36] to maintaining the NHS as a service based on clinical need, not the ability to pay, the designation of the NHS as a "quasi-market" remains apt since the HSCA 2012 reforms do not change this underlying characteristic.

In contrast, the private healthcare market is more akin to standard markets in light of the greater scope for provider entry and exit and as "self-pay" patients use their own resources.

A failure to engage with, or even recognise this distinction between the NHS and private healthcare market has arguably characterised the HSCA 2012 reforms and offers some explanation of why their implementation is both controversial and difficult. This is considered further in light of the regulator's focus on patients in Section III below.

C) Points of similarity underpinning competition in Dutch and English healthcare

As noted previously, the significant distinction between insurance-based and taxation-funded healthcare system models has implications for the scope for developing competition. Nevertheless, there are at least two significant similarities underpinning the development of competition policy and application of competition law within Dutch and English healthcare.

Firstly, both countries are (currently) EU Member States. At a fundamental level, this common heritage reveals the significance of solidarity – defined in limited terms for the purposes of the present discussion as universal access to necessary healthcare - as an

[36] DEPARTMENT OF HEALTH, *The Government's Mandate to NHS England for 2017-2018*, March 2017. Para 1.1.

organising principle for both Dutch and English healthcare demonstrates this. Solidarity represents the "ideational point" upon which EU Member State healthcare systems converge,[37] regardless of where they fit within the wider typologies of insurance-based / taxation-funded healthcare system. It also marks a contrast with healthcare in the United States, where competition is considered to be more developed because efficiency concerns have been prioritised over equity.[38]

In terms of the legal framework, EU membership is also notable for highlighting an absence of EU-level harmonisation in healthcare (as distinct from other sectors such as telecommunications or energy), and the consideration that healthcare system organisation is a Member State competence.[39] While this suggests that individual Member States have some freedom to experiment with market-based reforms,[40] this may be constrained by reforms such as public-private interactions (inadvertently) triggering application of general competition law.[41] This highlights that the EU competition law framework provides a broad basis upon which comparative analysis in this area can build.

[37] T. K. HERVEY, *Public Health Services and EU Law*, Chapter 7 in M. CREMONA (ed.), *Market Integration and Public Services in the European Union* Oxford University Press, Oxford, 2011. Page 186.

[38] M. GAYNOR, *Competition in Hospital Services*, OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No.2 on Competition and Regulation, DAF/COMP/WP2(2012)3 06 Feb 2012.

[39] Article 168(7) Treaty on the Functioning of the European Union.

[40] A. ANDREANGELI, *Healthcare Services, the EU Single Market and Beyond: Meeting Local Needs in an Open Economy – How Much Market or How Little Market?* Legal Issues of Economic Integration, 2016, 145-172.

[41] For further discussion, see T. PROSSER, *EU competition law and public services* in E. MOSSIALOS, G. PERMANAND, R. BAETEN, T. HERVEY (eds), *Health Systems Governance in Europe: The Role of European Union Law and Policy*, Cambridge University Press, Cambridge, 2010.

This EU competition law framework comprises two broad distinctions: between healthcare providers and purchasers, and between healthcare delivered in line with the principle of universal access and healthcare which may be considered supplementary to this. [42] In very general terms, healthcare providers have been deemed subject to competition law,[43] while purchasing activities in the context of delivering universal access to healthcare have been considered exempt.[44] These distinctions are reflected in the development of competition policy within Dutch and English healthcare.[45] In essence, Dutch competition law is applicable to healthcare providers and health insurers,[46] while in England, the Competition and Markets Authority has drawn a distinction between private providers working in the private healthcare market (category 4) and in the NHS (category 2) in its guidance on competition law.[47]

Secondly, as noted in the motivation for this analysis, a fundamental feature of the development of competition policy in both countries has been the influence of the experience of liberalising other sectors.

This might be interpreted in terms of similarities between healthcare and other sectors such as energy. If so, such comparison is arguably tenuous: distinctions are quickly

[42] See further J. W. VAN DE GRONDEN and C. S. RUSU, *EU competition law and policy and health systems*, in T.K. HERVEY, C.A. YOUNG and L.E.BISHOP (eds.), *Research Handbook on EU Health Law and Policy.* Edward Elgar, Cheltenham, 2017, Chapter 11.

[43] Case C-475-99, *Ambulanz Glöckner* [2001] ECR I-8089.

[44] Case C-205/03, *FENIN* [2006] ECR I-6295.

[45] This is developed further and examined in detail in GUY (2018), supra n. 1.

[46] J. VAN DE GRONDEN and E. SZYSZCZAK, *Introducing Competition Principles into Health Care Through EU Law and Policy: A Case Study of the Netherlands*, in *Medical Law Review*, 2014, 238.

[47] CMA, '60-second summary – Private medical practitioners: information on competition law', 3 December 2015.

revealed by the complexity of healthcare provision, which relates not only to the variety of providers and services, but also the difficulty of measuring quality (relative to technical standards applied in other markets) and the tension between competition and integrated healthcare provision.[48] Unsurprisingly, caution has been urged with drawing comparisons with other sectors as these are better suited to identifying issues in need of resolution, rather than suggesting the appropriateness of a "model" of utility regulation.[49]

However, a more pertinent comparison emerges with the sense of a wider cultural shift in the premise that sectoral regulation is a temporary feature within an overarching direction of travel towards a competitive marketplace overseen exclusively by a competition authority. This is evidenced, inter alia, in criticism by competition lawyers of the regulator's role, and in the suggestion at the outset of the 2006 reforms by Edith Schippers, now Minister for Health, Wellbeing and Sport, that the Dutch Healthcare Authority's competition function would ultimately be subsumed into the Authority for Consumers and Markets.[50] This wider cultural comparison is both reminiscent of the purpose of UK sectoral regulation being to "hold the fort" pending the arrival of competition,[51] and finds reflection in the Netherlands by the balancing of "competition where possible, regulation where necessary" in the context of the development of market

[48] A. DIXON, T. HARRISON, C. MUNDLE, *Economic regulation in healthcare – what can we learn from other regulators?* The King's Fund, November 2011.

[49] L. STIRTON, *Back to the Future? Lessons on the Pro-Competitive Regulation of Health Servic,* in *Medical Law Review*, 2014, 180.

[50] As discussed by S. VAN DER HEUL and F. CORNELISSEN, *Markttoezicht in de gezondheidszorg na wijziging Wmg (Market regulation in healthcare following Dutch Healthcare (Market Regulation) Act 2006 (Wmg) amendments)*, Markt & Mededinging, 2016, 175.

[51] S. LITTLECHILD, *Regulation of British Telecommunications' Profitability*, Department of Trade and Industry, London, 1984. Para 4.11.

regulation within the 2006 reforms.[52] Interestingly, the actual experience of other sectors – where regulation has proved a more permanent feature than originally envisaged – appears to have been overlooked in designing the competition focus of the healthcare regulators. Rather, at first glance, this temporary characteristic of sectoral regulation appears borne out in the Netherlands, where the majority of the Dutch Healthcare Authority's competition powers have recently been transferred in practice to the Authority for Consumers and Markets. However, this does not resolve more fundamental questions about *ex ante* and *ex post* intervention: it is simply in the hands of a single agency when to act and what tools to use.

It is acknowledged that this comparative analysis is shaped by factors over and above substantive law. However, a comparative law approach is fundamental to understanding the derivation of Dutch and English healthcare competition policy ultimately from EU competition law and the scope for divergent approaches to this – a concept termed "Euro-national competition rules for healthcare".[53]

D) Framing the discussion: the applicability of competition law as a starting-point for defining the framework within which the sectoral regulators operate

The foregoing overview of similarities and differences between the development of competition in Dutch and English healthcare provides a helpful starting-point for understanding the framework within which the sectoral regulators (and competition

[52] Kamerstukken II, 2004-05, 30 186, 3 "Regels inzake marktordening, doelmatigheid en beheerste kostenontwikkeling op het gebied van de gezondheidszorg (Wet marktordening gezondheidszorg)", Nr.3 Memorie van Toelichting. (Second Chamber documentation, Parliamentary Session 2005-06, 30 186, 3 (Explanatory Memorandum) "Rules governing market organisation, efficiency and managed cost development in healthcare (Dutch Healthcare (Market Regulation) Act 2006 (Wmg)").

[53] VAN DE GRONDEN and SZYSZCZAK (2014) supra n. 46.

authorities) work, which in turn helps to shape the competition focus of the sectoral regulators and their relationship with the competition authorities.

This framework is determined primarily by the applicability of competition law[54] and may lead to two general inferences which can be tested in light of the further factors considered in this article, namely the regulators' apparent focus on patients and the evolving role of ministerial oversight and expanding role of the competition authority.

One inference is that where competition law is applicable, we may expect to see greater intervention by the competition authority and a reduced role for the regulator and limited ministerial oversight.

Conversely, a second inference arises where the applicability of competition law is in question, so we may expect to see less competition authority intervention and a greater role for regulator and ministerial oversight.

As regards the underlying applicability of competition law, interesting and potentially significant distinctions between the Dutch and English systems are already in evidence.

In the Netherlands, there is greater scope for competition within its insurance-based model and in principle the applicability of competition law to both healthcare providers and purchasers is relatively uncontroversial. The relationship between the Authority for Consumers and Markets and the Dutch Healthcare Authority appeared initially predicated on a "separate powers" model. Thus the Authority for Consumers and Markets had exclusive competence to apply competition law, but the Dutch Healthcare Authority's competition powers – intervention regarding significant market power and the drafting of terms of healthcare and tariff-related agreements – were intended primarily as

[54] A separate framework emerges in connection with merger control and the assessment of hospital mergers. This is considered in GUY (2018), supra n. 1.

complementary to this. While the current transfer of the significant market power competence removes this sense of separation, it is still evident in the Dutch Healthcare Authority retaining its aforementioned drafting competence. Furthermore, a separation remains evident in whether *ex ante* or *ex post* intervention is desirable – that is, whether the Authority for Consumers and Markets will use its new significant market power competence or take action in connection with the prohibition on abuse of dominance.

In England, there is less scope for competition within the NHS taxation-funded model and the applicability of competition law vis-à-vis the NHS (but not the private healthcare sector) remains unclear, even controversial.[55] The choice of a "concurrent powers" model for NHS Improvement or the Competition and Markets Authority to have equal competence in applying competition law to cases involving "the provision of healthcare services" under section 72 HSCA 2012 is therefore curious. It suggests that NHS Improvement and the Competition and Markets Authority have equal oversight of the NHS and private healthcare sectors, something which is certainly not borne out in practice. Although the White Paper preceding the HSCA 2012 clearly articulated ambitious proposals for the Competition and Markets Authority to have oversight of the NHS, these were ultimately diminished by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) reforms[56] of the wider concurrency regime and specifically the Competition Act 1998 (Concurrency) Regulations 2014, which reserve cases concerning "matters relating to the provision of health care services for the purposes of the NHS in England" to NHS Improvement.[57] This effectively enshrines the situation which existed prior to the HSCA

[55] See, for example, D. SINCLAIR, *'Undertakings' in competition law at the public-private interface – an unhealthy situation*, European Competition Law Review, 2014, 167-171. O. ODUDU, *Are State-owned healthcare providers undertakings subject to competition law?*, in *European Competition Law Review*, 2011, 231-241.

[56] See the House of Lords debates - Enterprise and Regulatory Reform Bill, HL Deb, 12 December 2012, Col GC362.

[57] Competition Act 1998 (Concurrency) Regulations 2014, SI 2014/536, Regulations 5 and 8.

2012 reforms, whereby the Competition and Markets Authority's predecessors (the Office of Fair Trading and the Competition Commission) had oversight of the private healthcare sector (categories 3 and 4), and the Department of Health oversaw the NHS (categories 1 and 2). This represents a variation on a "separate powers" model, where the Competition and Markets Authority applies general competition law to providers in the private healthcare sector, and NHS Improvement applies a "NHS-specific" regime (the Choice and Competition condition of the NHS Provider Licence[58] and the Regulation 10 prohibition on anticompetitive behaviour of the National Health Service (Procurement, Patient Choice and Competition) Regulations (No.2) 2013)[59] within the context of the NHS "quasi-market".

In light of the aforementioned inferences, the foregoing suggests, as might be expected, the role of the competition authority regarding the application of competition law has assumed greater significance in the Netherlands, but not in England, where the regulator and sector-specific regime appears to play a larger role in connection with the NHS, not only relative to the competition authority, but also in terms of extending its remit beyond its competition focus.

However, two further factors play a role in shaping the competition focus of the regulators and their relationship with the competition authorities, namely, the regulators' focus on patients and the evolving role of ministerial oversight in connection with the competition reforms. These are now considered.

[58] MONITOR, *The New NHS Provider Licence*, 14 February 2013. *Annex: NHS Provider Licence Standard Conditions.*

[59] SI 2013/500.

3. THE REGULATORS' FOCUS

Both the Dutch Healthcare Authority and NHS Improvement have a distinct focus articulated in statute which appears directed towards patients as distinct from, for example, healthcare providers or purchasers operating within their respective markets. This focus has been considered both a source of legitimacy[60] and grounds for concern about possible contradiction of competition law standards.[61]

In view of the foregoing discussion of the development of competition and applicability of competition law, it might be anticipated that the Dutch Healthcare Authority's focus may be more market-oriented and focused on the interests of policyholders, while NHS Improvement's focus may perhaps be directed towards patient interests.

A) The Netherlands

From its inception, the Dutch Healthcare Authority has had a duty to promote the "general consumer interest" under Article 3(4) Dutch Healthcare (Market Regulation) Act 2006.[62] The Dutch Healthcare Authority has interpreted the "general consumer interest" as encompassing the public values of accessibility, affordability and quality, and these have been elaborated further in different ways. For example, "affordability" has both micro and macro dimensions, relating respectively to affordable basic insurance and a lack of

[60] See SAUTER (2009), supra n. 16.

[61] A. SÁNCHEZ GRAELLS, *New rules for health care procurement in the UK: a critical assessment from the perspective of EU economic law*, in *Public Procurement Law Review*, 2015, 16.

[62] *Wet marktordening gezondheidszorg* (Wmg) 2006.

reduction in purchasing power or dramatic increase in public spending.[63] "Accessibility" distinguishes physical and financial aspects,[64] and the Dutch Healthcare Authority has elaborated this as meaning access to the right care within a reasonable distance and period of time, based on norms regarding waiting time for non-emergency care and that ability to pay is no barrier to receiving medical care, respectively. "Quality" in connection with the Dutch Healthcare Authority[65] relates to the proper functioning of markets. It has been suggested that tension may arise with trade-offs emerging between the individual values[66] of accessibility, affordability and quality. Nevertheless, the interplay between accessibility, affordability and quality has provided a framework for Dutch Healthcare Authority assessment of significant market power and its contract intervention competences.[67] It appears that the Authority for Consumers and Markets would similarly need to have regard to the "general consumer interest" with the transfer of the significant market power competence.[68] Nevertheless, with the wider refocusing of competition in Dutch healthcare, for example regarding the assessment of hospital mergers, the Authority for Consumers and

[63] NZA, *Visiedocument: (In) het belang van de consument* ('Vision Document: (In) the general consumer interest') (November 2007). Section 2.1.

[64] Ibid.

[65] As distinct from, for example, the Dutch quality regulator (the IGZ).

[66] See SAUTER (2009), supra n. 16.

[67] Also seen in Dutch Healthcare Authority Opinions within merger assessment between 2006 and 2015.

[68] Kamerstukken II, 2015-16, 34 445, 3 - Wijziging van de Wet marktordening gezondheidszorg en enkele andere wetten in verband met aanpassingen van de tarief- en prestatieregulering en het markttoezicht op het terrein van de gezondheidszorg. Nr. 3 Memorie van Toelichting. (Second Chamber documentation, Parliamentary Session 2015-16, 34 445, 3 - Amendments to the Wmg and other laws to apply tariff regulation and market regulation in healthcare, Document No.3, Explanatory Memorandum). Page 40.

Markets has called for further clarification of what it terms "public interests"[69] – which appear to comprise accessibility, affordability and quality – in connection with the competition rules.

This definition of the "general consumer interest" in terms of public values suggests an interesting tension between a market focus on the one hand, and a focus on patients on the other which is considered further below.

B) England

Under section 62(1) HSCA 2012, NHS Improvement has a main general duty to "protect and promote the interests of people who use health care services by promoting provision of healthcare services which (a) is economic, efficient and effective, and (b) maintains or improves the quality of the services." The terminology of "people who use healthcare services" appears somewhat unwieldy as "healthcare services" appear to extend beyond the NHS.[70] Prima facie, this suggests that the general duty is owed to all patients in England, whether accessing NHS and/or private healthcare services. So this may include instances where a patient receives a hip replacement operation in an NHS hospital (as an NHS patient), but for reasons of personal convenience may seek follow-up physiotherapy with a private provider[71] (as a private patient).

[69] See ACM, *Position Paper Autoriteit Consument en Markt Rondetafelgesprek "Kwaliteit loont"* ('ACM Position Paper on the "Quality Pays" roundtable discussion'). 17 April 2015.

[70] Section 64(3) HSCA 2012 defines "healthcare services" as "[…] all forms of health care provided for individuals, whether relating to physical or mental health […]; and […] it does not matter if a health care service is also an adult social care service".

[71] See Department of Health guidance supra n. 28, example cited at page 10.

However, with regard to competition in the NHS, section 62(3) HSCA 2012 qualifies this general duty thus:

"[NHS Improvement] must exercise its functions with a view to preventing anti-competitive behaviour in the provision of healthcare services for the purposes of the NHS which is against the interests of people who use such services".

This clearly directs NHS Improvement's general duty towards NHS patients (as "people who use such services"), which is consistent with its practice of focusing on the NHS, not the private healthcare sector. As "provision of healthcare services for the purposes of the NHS" (whether by NHS or private providers) represents an area (categories 1 and 2) where the extent of the *applicability* of general competition law is questionable, this is also consistent with the existence of the aforementioned separate regime for the NHS "quasi-market".

The regulators' focus on patients entails two further considerations – regarding a coherent narrative underpinning competition reforms and recognising dual identities of patients – which are now examined.

C) A coherent narrative?

Overall, the Dutch Healthcare Authority's focus on the "general consumer interest" has been interpreted as relating to a general body of consumers and long-term interests, thus ensuring the effective working of the market mechanism.[72] This is logical as the competition reforms in Dutch healthcare comprise a consistent market narrative (at least relative to the English reforms), underpinned inter alia by the suggestion above that the

[72] Thus has been related to the market failure rationale for regulation. See SAUTER (2009), supra n. 16.

Authority for Consumers and Markets will have similar regard to the "general consumer interest".

In contrast, it is difficult to see such coherence emerging within NHS Improvement's focus on "people who use healthcare services" which appears both to reference the interaction *between* NHS and private healthcare provision, and yet in practice to mean "NHS patients" as s.62(3) HSCA 2012 explicitly references the NHS. This can be explained in part by the refocusing of competition in the face of significant criticism during the enactment of the HSCA 2012[73] – and expressed in the obligation to prevent anticompetitive behaviour, not promote competition (in contrast to other sectoral regulators).

D) "Dual identity" - patients/policyholders, patients/taxpayers

A common point between the regulators' focus, despite functioning within very different systems, is the apparent missed opportunity to engage explicitly with the "dual identity" of patients.

In the Netherlands this comprises a tension between policyholders (consumers of health insurance) and patients.[74] The regulator's focus may vary according to whether it is considering the health insurance market (thus insurance policyholders as "consumers") or the healthcare provision market (thus patients as "consumers") – it being recalled that

[73] NHS Future Forum, 'Choice and Competition – Delivering Real Choice. A report from the NHS Future Forum', June 2011.

[74] See SAUTER (2009), supra n. 16.

competition was intended to develop from the health insurance market to the healthcare provision market.[75]

This sense of a dual identity is illustrated by a rejection of a controversial legislative proposal which precipitated a near collapse of the Dutch Liberal/Labour coalition government in December 2014.[76] The legislative proposal included a recommendation to amend Article 13 Dutch Health Insurance Act 2006[77] which mitigates the limited choice of providers available to patients with cheaper "benefits in kind" policies.[78] On the one hand, amending this provision may have led to lower premia, a benefit to insured parties and in keeping with the apparent overall aim of competition in Dutch healthcare of reducing costs. However, on the other hand, precluding choice of provider may have negative impacts on a patient's health outcomes. Thus potential curtailment of "free choice of provider" not only proved decisive in the voting down of the legislative proposal, but also remains a sensitive issue.[79] This example from 2014 suggests

[75] See SAUTER (2011), supra n. 27.

[76] EUOBSERVER, *Dutch PM misses EU summit to save coalition*, 18 December 2014. <https://euobserver.com/news/126994>.

[77] Contained in a legislative proposal mainly concerned with a prohibition of integration of healthcare providers and health insurers. Kamerstukken II, 2011-12, 33 362, 2 – Wijziging van de Wet marktordening gezondheidszorg en enkele andere wetten, teneinde te voorkomen dat zorgverzekeraars zelf zorg verlenen of zorg laten aanbieden door zorgaanbieders waarin zij zelf zeggenschap hebben. Nr. 2 Voorstel van wet. (Second Chamber documentation, Parliamentary Session 2011-12. 33 362, 2 – Amendments to the Wmg and other laws to prohibit health insurers from providing healthcare themselves, or allowing care to be delivered by providers in which they have a controlling interest. Document No. 2, Legislative Proposal).

[78] By requiring insurers to offer some degree of compensation if a patient chooses (subsequent) treatment with a provider who has no contract with the insurance company.

[79] See, for example, discussion of a recent case in which this issue arose. "Twijfel over echt vrije artsenkeuze" ("Questions about real free choice of provider"), Commentaar, Het Financiële Dagblad, 5 Januari 2017. Furthermore, financial advisor websites include explanations of the "free choice of provider". The VvAA, the

that there can well be a tension – or at least a lack of alignment – in the dual identity between "patient interests" on the one hand, which benefit from maintaining the "free choice of provider", and "policyholder" interests on the other, which would benefit from cheaper premia. With the current refocusing of competition within a wider modernisation of Dutch healthcare, the Minister for Health, Wellbeing and Sport has referenced the interests of both "patients" and "policyholders",[80] which arguably suggests an awareness of the scope for dual identity.

In England, this "dual identity" comprises patients and taxpayers. While NHS Improvement has not explicitly recognised this, the Chief Executive of NHS England has previously articulated the organisation's motivation as being to "think like a patient, act like a taxpayer". [81] In view of NHS Improvement's commitment to the NHS as a taxation-funded service free at the point of delivery[82] and its close partnership with NHS England, the failure to couch its general duty in terms of "patients and taxpayers" in the HSCA 2012 appears overlooked, even remiss, for at least three reasons.

Firstly, competition within the English NHS predominantly comprises competition *for* the market, thus commissioning activity linked with securing value for money for taxpayers, as distinct from competition *in* the market, linked with consumer choice.

largest network of legal and financial support for members of the medical profession in the Netherlands, also supported a campaign following the development of the right to a "free choice of provider" - https://www.vvaa.nl/levensloop/vrije-artsenkeuze/manifest

[80] E. SCHIPPERS, 'Kwaliteit loont' ('Quality Pays'), Letter from the Minister for Health, Wellbeing and Sport to the Chairman of the Second Chamber, 6 February 2015.

[81] SIMON STEVENS (CEO of NHS England) speech, 1 April 2014.

[82] MONITOR, *Monitor's Strategy 2014-17 – Helping to redesign healthcare provision in England*.

Secondly, there is arguably a tension between the respective identities of "patient" and "taxpayer". Thus taxpayers' interests may best be served by a continued commitment in practical terms to an NHS which remains free at the point of use and ensures continuity of care. However, individual patients may also value a continued ability to move between the NHS and private healthcare sectors to receive treatment as needed – which suggests a scenario closer to that experienced in other sectors than the limited patient choice policies which offer a choice of NHS or private provider, for example, for a first outpatient appointment regarding elective care.[83]

Thirdly, the concept of a "dual identity" is found in economic regulation in other sectors yet, curiously, has not influenced the design of NHS Improvement. It can be considered that there is sufficient precedent in the dual duty of the UK communications regulator (Ofcom) to consumers and citizens[84] to have justified NHS Improvement adopting a similar "dual identity" approach.[85]

However, the lack of explicit reference to taxpayers may be explained by at least two factors.

[83] Enshrined by Regulation 12, National Health Service (Procurement, Patient Choice and Competition) Regulations (No.2) 2013 (SI 2013 No.500) and Regulations 47-49, National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 (SI 2012 No.2996). The "right" of NHS patients to exercise choice is also referenced in The NHS Constitution (July 2015), "Patients and the Public – your rights and NHS pledges to you", page 9.

[84] Section 3(1) Communications Act 2003. Discussed in T. PROSSER, *Regulation and Social Solidarity*, in *Journal of Law and Society*, 2006, 364.

[85] This comparison with other sectoral regulators is perhaps more logical than other agencies, which may routinely refer to "patients and taxpayers" in relation to the NHS. See, for example, Public Accounts Committee Sixtieth Report, "Achievement of Foundation Trust Status by NHS Hospital Trusts", 7 December 2011.

Firstly, the refocusing of competition within the implementation of the HSCA 2012 included an emphasis on competition on quality, rather than price competition. This may prompt an inference that competition on quality is something patients may be responsive to (in light of information asymmetry between patients and providers), whereas taxpayers may favour competition on price insofar as this can achieve value for money.

Secondly, the taxpayers' and patients' interests may align to such a degree that the distinction becomes superfluous. It has been suggested that, in public service delivery, the preferences of a state's citizens as taxpayers are unlikely to differ significantly from their preferences as users.[86] So a good public service may be simultaneously responsive to users' needs and accountable to taxpayers. However, interests may differ with regard to geographical distribution such that taxpayers in one part of the country subsidize public service users in another[87] – an example being the "postcode lottery" allocation of drugs.

A third consideration may be that as NHS Improvement's role is to operate alongside the Competition and Markets Authority in policing anticompetitive behaviour (evident in the existence of concurrent powers), their respective focus of the two agencies may reflect each other.

Overall, the regulators' explicit focus – whether on the "general consumer interest" or "patients' interests" – can be conceptualised as a means of incorporating public interests within competition-based tests as these may otherwise receive, or be perceived to receive, less attention – something that may raise concerns from a political perspective. Thus, from a strict competition perspective, there is an inference that it is possible to regard not only quality, but also arguably other consumer values of access, affordability and

[86] See J. LE GRAND, *The Other Invisible Hand – Delivering Public Services through Choice and Competition*, Princeton University Press, Woodstock, 2007. 12.

[87] Ibid.

choice, as dimensions of efficiency.[88] However, the current intention for the Authority for Consumers and Markets to focus on the "general consumer interest" in the context of significant market power investigations suggests its ongoing importance in this regard.[89]

However, concerns about a perceived lack of alignment between NHS Improvement's general duty to prevent anticompetitive behaviour which is against the interests of NHS patients under s.62(3) HSCA 2012 and the standards of general competition law[90] are perhaps less persuasive in view of the NHS' "quasi-market" status. Admittedly the wording of s.62(3) HSCA 2012 almost suggests that a distinction can be drawn between "good" anticompetitive behaviour which may well be in patients' interests, and "bad" anticompetitive behaviour which is contrary to patients' interests, although such characterisations can be considered problematic due to their subjective nature and the potential for differing classification between short and longer-term effects or between individual and collective assessment. However, this inference between "good" and "bad" anticompetitive behaviour can simply be read as another way of delineating the scope for intervention, which is consistent with the refocusing of competition within the NHS arising out of the enactment of the HSCA 2012 and arguably an appropriate approach for a "quasi-market".

[88] W. SAUTER, *The Impact of EU Competition Law on National Healthcare Systems*, European Law Review, 2013, 457.

[89] This appears to mark a contrast with the reformed merger control, where the need to pay attention to "public interests" is suggested to be the exception, rather than the rule. Kamerstukken II, 2015-16, 34 445, 3 – "Wijziging van de Wet marktordening gezondheidszorg en enkele andere wetten in verband met aanpassingen van de tarief- en prestatieregulering en het markttoezicht op het terrein van de gezondheidszorg", Nr. 3 Memorie van Toelichting. (Second Chamber documentation, Parliamentary Session 2015-16, 34 445, 3 - Amendments to the Wmg and other laws to apply tariff regulation and market regulation in healthcare (Explanatory Memorandum)). Page 23.

[90] For a critical view, see SÁNCHEZ GRAELLS (2015), supra n. 61.

Ultimately, it may be considered that questions of "dual identity" are also shaped by the evolving role of ministerial oversight and the competition authorities' expanding roles. These are now considered.

4. THE EVOLVING ROLE OF MINISTERIAL OVERSIGHT AND EXPANDING ROLE OF THE COMPETITION AUTHORITY

In both the Netherlands and England, the competition focus of the sectoral regulator and its relationship with the competition authority has developed alongside evolving ministerial oversight of healthcare reforms in the light of varying degrees of competition reforms in both countries.

In general terms, the evolving role of ministerial oversight and expanding role of the competition authority can be conceptualised as a simple continuum which has as its starting point "the provision of a public health service [as] the quintessential public service"[91] overseen by government and its end point a market-based system overseen exclusively by the competition authority. This is influenced by the narrative of the purpose of (UK) sectoral regulation being to "hold the fort" pending the arrival of competition,[92] and the implication that regulation is inherently second best[93] within such a system.

[91] PROSSER (2005), supra n. 11, p.7.

[92] LITTLECHILD (1984), supra n. 51.

The apparent intended direction of travel towards a competitive marketplace suggests that, in terms of oversight, it would be logical to expect a reduction in ministerial responsibility and an expansion in the competition authority's role in connection with the relative certainty surrounding the applicability of competition law (and inferences outlined in Section II). Indeed, this offers a framework to consider the reforms in the Netherlands and England, where counter-intuitive developments appear to be emerging.[94]

A) The Netherlands

The greater scope for developing competition and the lesser controversy surrounding the applicability of competition law in Dutch healthcare suggests that reduced ministerial oversight and an expanded Authority for Consumers and Markets role could be anticipated. The latter may be true in view of the transfer of the Dutch Healthcare Authority's significant market power competence, as this is intended to refocus the application of competition powers with regard to the healthcare sector.[95] However, as regards the former, it is to be noted that other aspects of competition – such as determining which hospital service prices may be opened up to competition rather than remaining subject to a government tariff – will remain with the Dutch Healthcare Authority and the Minister. Furthermore, ministerial oversight arguably appears to be assuming a different dynamic vis-à-vis the Authority for Consumers and Markets, rather than diminishing per se.

[93] See PROSSER (2006), supra n. 84.

[94] This is considered further in GUY (2018), supra n. 1.

[95] E. SCHIPPERS, "Kabinetsreactie rapport commissie Borstlap en evaluatie Wmg en NZa".("Cabinet response to the Borstlap and AEF reports", Letter from the Minister for Health, Wellbeing and Sport to the Chairman of the First Chamber), 2 April 2015.

This is because the Minister for Health, Wellbeing and Sport will retain powers to issue policy rules as the "responsible Minister" [96] (it being noted that the Authority for Consumers and Markets is overseen ultimately by the Minister for Economic Affairs), apparently in keeping with shared regulation in other sectors. The Authority for Consumers and Markets' response has been (appropriately) to define its scope for intervention in terms of the applicability of competition law,[97] acknowledging that the existing substantive law may be insufficient to achieve governmental ambitions regarding competition in healthcare.

B) England

In light of the lesser scope for developing competition within the English NHS (as distinct from the private healthcare sector), it might be considered that Ministerial oversight may remain the same (if not increase) and, correspondingly, the role of the Competition and Markets Authority would diminish. However, an interesting combination of circumstances has emerged to question such an interpretation.

On the one hand, the wider HSCA 2012 reforms included the establishment of NHS England as an independent body with responsibility for setting strategic policy direction for the NHS in England. This reduced the scope for intervention by the Secretary of State for Health in apparent achievement of a long-standing ambition to "de-politicise" the NHS.[98] Although curiously little attempt was made to align NHS England's ambitions

[96] See SCHIPPERS (2015), supra n. 80.

[97] ACM, "Spreekpunten Henk Don bij rondetafelgesprek 'kwaliteit loont' in de Tweede Kamer op 17 april 2015". ("Points for discussion by Henk Don at the "Quality Pays" round table discussion in the Second Chamber 17 April 2015").

[98] N. TIMMINS, *'Teflon' Jeremy Hunt and the de-politicisation of the NHS*, in *The King's Fund Blog*, 22 February 2017. However the idea of, and desire for, the day-to-day running of the English NHS to be removed from Ministerial control is arguably not new and has been endorsed by both Labour and Conservative governments. Points of divergence emerge in connection with *how*, as opposed to *whether*, this might be achieved. Thus

with NHS Improvement's competition remit in the drafting of the HSCA 2012, the combining of the two agencies is increasingly called for.[99]

A further instance of the reduction in intervention by the Secretary of State for Health is evident in the decision to enshrine as secondary legislation previous policy guidance. This has been termed the "juridification" of matters of public policy,[100] specifically, encouraging private sector delivery of NHS services. In consequence, NHS and private providers have standing to challenge, inter alia, the awarding of contracts or the referral of NHS patients and ask NHS Improvement for a determination under the National Health Service (Procurement, Patient Choice and Competition) Regulations (No.2) 2013. Although few cases have emerged thus far, while such provision exists, it offers an alternative recourse to the public procurement rules[101] or general competition law (insofar as this is applicable). Overall, it might be considered that there has indeed been a reduction in Ministerial oversight of the English NHS, however counterintuitive this may be with regard to the competition reforms.

On the other hand, the role of the Competition and Markets Authority has, paradoxically, been both restricted and expanded by the HSCA 2012 reforms. The original ambition of the White Paper preceding the HSCA 2012 was for the Competition and

previous Secretaries of State for Health have revealed differing views about the establishment of NHS England and the associated restriction of the role of politicians. See the discussions in N. TIMMINS, E. DAVIES, *Glaziers and Window Breakers – Secretaries of State for Health in their own words*. The Health Foundation, London, 2015, 160-164.

[99] For example, by a House of Lords Select Committee. See supra n. 21.

[100] For an excellent discussion, see DAVIES (2013) supra n. 19.

[101] S. SMITH, D. OWENS, E. HEARD, *New procurement legislation for English healthcare bodies – the National Health Service (Procurement, Patient Choice and Competition) Regulations (No.2) 2013*, in *Public Procurement Law Review*, 2013, 109.

Markets Authority to have oversight of the NHS inter alia by sharing concurrent powers with NHS Improvement with regard to applying competition law. The aforementioned changes brought by the Competition Act 1998 (Concurrency) Regulations 2014 have effectively reflected the pre-HSCA 2012 situation insofar as NHS Improvement has sole oversight of the NHS in practical terms. Overall, this would seem to suggest a restriction of the Competition and Markets Authority's oversight of the NHS.

However, it is important to note that the 2014 Concurrency Regulations restrictions apply only to the concurrent powers under section 72 HSCA 2012 in relation to competition law. There are at least two further ways in which Competition and Markets Authority oversight of the NHS might be considered to have expanded.

Firstly, section 73 HSCA 2012 provides for the Competition and Markets Authority and NHS Improvement to share concurrent powers relating to market investigations under Part 4 Enterprise Act 2002 (EA02). Although this provision has yet to be tested, by analogy with general Competition and Markets Authority guidance, it would appear that *either* the Competition and Markets Authority *or* NHS Improvement could carry out a market study to establish whether the NHS (quasi-) market[102] (presumably defined as categories 1 and 2 to distinguish it from the private healthcare market of categories 3 and 4) is working well. If not, *either* the Competition and Markets Authority *or* NHS Improvement could make a reference to the Competition and Markets Authority Board for a market investigation, an in-depth examination of whether there is an "adverse effect on competition".[103] While this division of effort may seem less contentious than applying competition law, it could still lead to the imposition of requirements on NHS or private providers delivering NHS services. Therefore having explicit Competition and

[102] Presumably defined as categories 1 and 2 to distinguish it from the private healthcare market of categories 3 and 4.

[103] CMA, *Market Studies and Market Investigations: Supplemental Guidance on the CMA's approach*, January 2014 (revised July 2017), CMA 3.

Markets Authority intervention in such a "market developing" role vis-à-vis the English NHS may nevertheless prove extremely controversial, so it is questionable whether this power will be used, particularly in light of recent movements away from a competition-based system towards integrated care models.

Secondly, in a further contrast to the explicit restriction of Competition and Markets Authority competence regarding the application of competition law, a lesser-noted, but nevertheless potentially significant expansion of its oversight function is evident in other competition-related aspects of NHS provision. Thus the Competition and Markets Authority serves as a review body in cases where NHS Improvement proposes to include or modify a special condition in the NHS Provider Licence but this is rejected by the applicant or licence holder,[104] and where consultations yield objections to the National Tariff Payment System agreed by NHS England and NHS Improvement.[105] While the former intervention power is new, the latter was originally the preserve of the Department of Health, suggesting perhaps as much evidence of receding ministerial oversight as expansion of Competition and Markets Authority functions. However, what emerges from the foregoing is a complicated picture in which the relationship between NHS Improvement and the Competition and Markets Authority is not only dependent upon it sharing concurrent powers with regard to competition law under s.72 HSCA 2012, although a distinction is drawn between these and the separate roles under HSCA 2012 and the importance of maintaining the importance of the Competition and Markets Authority's impartiality and fairness in carrying out those functions.[106]

[104] Health and Social Care Act 2012, s. 101.

[105] Health and Social Care Act 2012, s. 120(1)(b).

[106] CMA and NHS IMPROVEMENT, *Memorandum of Understanding between the Competition and Markets Authority and NHS Improvement*, 1 April 2016. Paragraph 7.

A further example of Competition and Markets Authority expansion vis-à-vis the English NHS is evident in connection with merger assessment, which has proved the most active area of competition in terms of the number of cases subsequent to the HSCA 2012 reforms.[107]

Overall, there has been a clear, even substantial, receding of ministerial oversight of the NHS "quasi-market" with the creation of NHS England and NHS Improvement on the one hand, and the allocation of Competition and Markets Authority review functions on the other. The receding of ministerial oversight is thus indeed accompanied by an expansion of Competition and Markets Authority functions vis-à-vis the NHS "quasi-market". While this would be consistent with the desire to move from healthcare provision overseen by government to a market-based system overseen by the competition authority, it is arguably counterintuitive in light of the nature of the NHS "quasi-market" and the political sensitivity surrounding this, which has arguably formed the basis for amending concurrent powers in respect of applying competition law under s.72 HSCA 2012. In light of the questionable extent of applicability of competition law to the English NHS, this might be considered a "belt and braces" approach to circumventing explicit Competition and Markets Authority intervention regarding the NHS.

What emerges from the foregoing is that the intuition of a correlation between ministerial and competition authority oversight relative to scope for competition is not borne out in practice based on the experiences of the Netherlands and England thus far.

5. CONCLUDING REMARKS

[107] Section 79 HSCA 2012 provides that mergers involving NHS Foundation Trusts (typically hospitals) are subject to the general merger control regime of the Enterprise Act 2002. This is examined further in GUY (2018), supra n. 1.

This article started from the premise that the experience of other sectors as a starting-point for developing sectoral regulation in healthcare, and particularly the relationship between the Dutch Healthcare Authority and Authority for Consumers and Markets in the Netherlands and NHS Improvement and the Competition and Markets Authority in England, provided a template which was too simple. This premise has been explored by means of a comparative analysis examining two specific factors, namely the regulators' focus on patients and the evolving role of ministerial oversight.

Although the development of competition in both Dutch and English healthcare has been influenced by Enthoven's model of "managed competition", the varying extent to which competition is possible within an insurance-based model and a taxation-funded model arguably outweighs this. Consequently, it does not necessarily follow, for example, that transferring the regulator's competition powers to the competition authority would be a logical step[108] in both countries. Conversely, there may not necessarily exist a need for a strict separation of competition authority and regulator oversight where there is a single, unified "healthcare" sector as opposed to the distinctive interaction between the NHS "quasi-market" and the smaller supplementary private healthcare market. A general finding of this article is that such distinctions alone could justify a departure from regulatory models used in other sectors.

Indeed, the differing nature of markets in Dutch and English healthcare go some way to explaining the difficulties surrounding the development of coherent narratives regarding the regulators' focus on patients, as opposed to either purchasers of health insurance or taxpayers, or to NHS Commissioners in the English context. This demonstrates that parallels between "patients-as-consumers" and consumers of other services are at best limited. For example, there is a need to consider whether oversight values could or should differ depending on whether the focus is patients (as a proxy for consumers) or purchasers of healthcare or taxpayers, so a future development of this should

[108] Previously argued for in the English context by A. SÁNCHEZ GRAELLS, *Monitor and the Competition and Markets Authority*, University of Leicester School of Law Research Paper, 2014, No. 14-32.

acknowledge dual identities. While it is acknowledged that NHS procurement activity is fragmented, a more consistent narrative for competition reforms in English healthcare nevertheless emerges if "the NHS", or "NHS patients" as a collective group, is regarded as a consumer of private healthcare services.

Furthermore, the evolving landscape of ministerial oversight and the expanding role of the competition authorities beyond the application of competition law is arguably distinctive in healthcare in both countries. Indeed, what we are seeing is counterintuitive, with explicit ministerial oversight apparently greater in Dutch healthcare and seemingly minimal, even non-existent with regard to the English NHS.

Finally, the framework established by EU law for developing competition in Member State healthcare systems is undoubtedly expansive: Member States have significant flexibility in deciding the degree and extent of market reforms.[109] Thus far, the Dutch and English reforms have attempted to build on this framework by using the experience of other sectors to create regulatory relationships and tools. This has proved an insufficient basis and needs further elaboration in light, inter alia, of the factors analysed in this article.

[109] ANDREANGELI (2016) supra n. 40.

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A QUALITATIVE STEP FROM E-COMMUNICATION TO E-PROCUREMENT: THE ESTONIAN E-PROCUREMENT MODEL

Mari Ann SIMOVART[1] - Marina BORODINA[2]

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4. CONCLUSIONS

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1. INTRODUCTION

In recent years, the topic of electronic public procurement has been in the centre of attention, mostly in the light of the duty to transfer to fully electronic procurement procedures introduced under the 2014 public procurement directives.[3] While the inherent positive notions accompanying such transfer are evident,[4] the potential for such benefits and purposes usually credited to electronic mode of procurement have been subject to some critical approach as well.[5] Clearly, resorting to electronic communication, publication and record keeping cannot be avoided in this day and age in most areas of life, including the field of public procurement.

However, as several Member States are still reported to show insufficient progress in this area,[6] estimation of the possibilities as well as the challenges associated with different systems of e-procurement is an equally logical step. The Estonian model of e-procurement might hopefully serve as one of possible examples.

[3] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Art 34; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Art 22, 90; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, Art 40, 73, 106.

[4] See, e.g. R. Birkerstaff. E-procurement under the new EU procurement Directives. Public Procurement Law Review 2014, 3, pp 134 – 147; V. Eiro. E-Procurement: the Portugese experience. Public Procurement Law Review 2016, 1, NA1 – NA16.

[5] P. Ferk. Can the Implementation of Full E-Procurement into Real Life Addrress the Real Challenges of EU Public Procurement? European Procurement & Public-Private Partnership Law Review (EPPPL) 4, 2016, pp 327 – 339, *passim*.

[6] Ferk 2016, p 329.

Estonia has been moving towards a fully electronic public procurement environment already since the year 2001, with **92 %** of procurement procedures conducted electronically in 2016.[7] Following is a short overview of Estonian electronic procurement system, with attention to some legal issues that have been associated with e-procurement.

We submit that while single steps in electronic communication in public procurement do not constitute a jump to a new level, the fully electronic procurement as required pursuant to the 2014 directives can be associated with the added quality expected to support the strive for more cross-border competition, transparency and non-discrimination. Further, resorting to *e-procurement* as a system itself is a way of supporting innovation that can be viewed as a "cornerstone"[8] of EU public procurement policy.

2. BACKGROUND AND RECENT DEVELOPMENTS

2.1. Time-line of developing e-procurement in Estonia

A web-based electronic public procurement register of Estonia commenced in April 2001, at that time merely facilitating electronic submission and publication of contract notices. In 2009, the function of sharing electronic procurement documents was added to the register. For instance, the new function provided the public access to contract documents – contracting authorities (entities) could now publish contract documents on the register's web site instead of sending them to tenderers via e-mail.

In 2011, an innovative e-Procurement environment was launched. The environment consists of two parts: the e-Procurement Register (hereinafter "the ePR" or

[7] Rahandusministeerium. 2016. aasta riigihangete kokkuvõte . Avaldatud 17.03.2017. Available (05.12.2017), https://www.rahandusministeerium.ee/et/system/files_force/document_files/riigihankemaastiku_esmane_kokkuvote_2016_1.pdf?download=1 ,, lk 1.

[8] L. Butler. Innovation in Public Procurement: towards the "Innovation Union". In: F. Lichere, R. Caranta & S. Treumer (Eds.) Modernising Public Procurement: the New Directive. Djof Publishing 2014, p 337.

"the Register"[9]) and an information portal of public procurement[10]. The database for processing public procurement data, the Register currently performs the following functions: publication of contract notices and forwarding them to the Publications Office of the EU; provision of information on results of complaints procedures; electronic processing of public procurement procedures, gathering of statistical data and publishing any other procurement related information.[11] The Register thus provides the workspace for conducting an actual fully electronic procurement, i.e. submission of tenders and performance of all the steps within a procurement procedure electronically.. The information portal on the other hand gathers all the relevant public procurement related information.

In 2013, the law made e-procurement (including e-submission) partially mandatory in Estonia, requiring all contracting authorities (entities) to accept electronic submission of offers or electronic requests to participate in the procurement in at least 50% of all the procurement procedures planned for acquiring supplies, works and/or services in a fiscal year.[12] This requirement applied to any and all public (utilities) procurement procedures that were subject to the duty of publication, including procurement procedures for contracts below the national thresholds that were conducted as "simplified procedures".[13] The Ministry of Finance (the body liable for overseeing the field of public

[9] Available (05.12.2017) https://riigihanked.riik.ee/register

[10] Available (05.12.2017) https://www.rahandusministeerium.ee/et/riigihangete-poliitika

[11] Riigihangete seadus (RHS) RT I, 01.07.2017, 1, in force since September 1, 2017, hereinafter RHS, § 181 lg 1, § 183 - 184.

[12] Riigihangete seadus (RHS 2007) RT I 2007, 15, 76 ... RT I, 25.10.2016, 20, § 55 lg 7.

[13] At the time, the duty to publish a contract notice in the ePR generally began from the estimated value of 10 000 euros for a supply or service contract and 30 000 euros for a works contract. – RHS 2007 § 15 lg 3, § 18^2. The current Act on Public Procurement (RHS § 125 lg 1) subjects contracting authorities to publish a contract notice if

procurement in Estonia) performedregular and systematic supervision over contracting authorities following the 50% e-procurement duty.[14]

This partially mandatory e-procurement practice seems to have been rather successful as by 2016, electronic procurement procedures made up slightly over 90 % of all published public (utilities) procurement procedures,[15] in comparison to 80 % of e-procurements in 2015.[16]

With the view to the above figures, transfer to 100 % electronic procurement is not expected to pose considerable difficulties. In fact, many contracting authorities in Estonia have been in the habit of practicing 100 % electronic procurement for years already. The entirely electronic procurement practice has been credited with leading to a reduction of costs related to conducting procurements for both contracting authorities (entities) and tenderers; a reduction of administrative and labour costs as well as an increase in the quality

the value of the procurement equals or exceeds that of a threshold for a "simplified procedure" (§ 14 lg 1): 30 000 euros in the case of supplies or services, 60 000 euros for works and certain concessions. .

[14] Rahandusministeerium. 2015. aasta riigihangete plaanilise järelevalve kokkuvõte. Struktuursed probleemid riigihanke-eeskirjade kohaldamisel. Mai 2016. Available (06.12.2016) https://www.rahandusministeerium.ee/system/files_force/document_files/2015_plaaniline_jv_31.05.2016.pdf?download=1 , lk 29

[15] Rahandusministeerium. 2016. aasta riigihangete kokkuvõte. , lk 1.

[16] Rahandusministeerium. 2015.a riigihankemaastiku kokkuvõte. Poliitika kujundamine, nõustamis- ja koolitustegevus, riiklik ja haldusjärelevalve, riigihangete register ja statistiline ülevaade. September 2016. Available (05.12.2017): https://www.rahandusministeerium.ee/et/system/files_force/document_files/riigihankemaastikukokkuvote2015_4.pdf?download=1 , lk 32-33.

of conducting procurement procedures that in turn can lessen the number of complaints and court cases.[17]

The new Act on Public Procurement, in force since September 1, 2017, raised the part of mandatory electronic procurement: at least 70% of all procurement procedures published in the Register by any one contracting authority (entity) must now be conducted electronically, including electronic publication of contract documents, submission of requests, tenders or explanations.[18] Any electronic means employed in a procurement procedure are subject to strict technical criteria in order to allow unrestricted and nondiscriminatory access of tenderers as well as interoperability with generally used IT products.[19]

From October 18, 2018, public procurement is to be 100 % electronic as a rule. [20] Exceptions apply for technical (e.g. due to specific file formats or sizes), physical (e.g. samples must be enclosed to tenders) or security reasons or in the case of negotiations or dialogue that form a part of a particular award procedure - these do not have to take place in the electronic format.[21] Any exchange of information related to a public procurement must

[17] Rahandusministeerium. 2015. aasta riigihangete plaanilise järelevalve kokkuvõte, lk 27; Seletuskiri riigihangete seaduse eelnõu juurde, lk 7.

[18] RHS § 220 lg 1. As a rule, this concerns procurements from the estimated value of 30 000 euros for a supply or service contract and 60 000 euros for a works contract. – RHS § 14 lg 1 p 2 - 3, § 125 lg 1.

[19] Following RHS § 45 lg 8, criteria as to electronic means of communications in public procurement are introduced by the ministerial decree: Riigihalduse ministri määrus. Nõuded elektroonilisei teabevahetuse seadmele. Vastu võetud 09.08.2017 nr 61. RT I, 15.08.2017, 3

[20] RHS § 45 lg 1, § 238 lg 3.

[21] RHS § 45 lg 2 p 1 – 5.

take place electronically,[22] except for information concerning unsubstantial elements of a procurement procedure that can be communicated orally, provided that the content of such information is sufficiently documented. Some parts of a procurement procedure – namely contract documents, tenders or requests – are always regarded as substantial elements of the procedure that can never be subject to an oral exchange of information.[23]

With the view to the above transition period and the actually already high percentage of e-procurements, transfer to a 100 % electronic procurement is not expected to pose considerable difficulties.

2.2. Characteristics of the Estonian e-Procurement Register.

The Estonian electronic Procurement Register is a centralised national platform designated for mandatory use in procurement procedures conducted by all contracting authorities and entities. The central platform solution is one of the globally established good practice examples, even though it is not very common in the EU.[24] (On the other hand, it is probably the only reasonable solution for a tiny nation such as Estonia.) While the current ePR was introduced in 2011, a new version of the ePR is currently in the final stages of development. Parts of the new platform opened for use in September 2107, the entire new platform to be launch in two parts by 2018 and 2019.[25] The main improvements of the new ePR are to include faster and more automatic options for both tenderers and contracting authorities (entities), better search options, more flexibility in the sequence and conduction of steps of a procurement procedure as well as certain innovative tools featuring

[22] RHS § 45 lg 1, § 238 lg 3.

[23] RHS § 45 lg 5.

[24] Ferk 2016, p 335.

[25] https://www.rahandusministeerium.ee/et/eesmargidtegevused/riigihangete-poliitika/riigihangete-register/registrite-arendamine

the changes brought about by the 2014 directives.[26] The new version is expected to provide more efficiency and lower the costs of conducting or participating in a public (utilities) procurement. As a main change needed, users of the current Register referred to the need to be able to separate different parts of the same procurement and the possibility to change the sequence or time-line of such parts.[27]

The ePR is financed and developed by the state and is free for use by any contracting authority or entity when conducting public or utilities procurement procedures. As such, it can be classified as a mandatory one-platform solution supported by a government office.

As an exception to the mandatory use of the ePR, contracting authorities (entities) can either develop their own individual platforms for conducting electronic auctions, dynamic purchasing systems or electronic catalogues or use such platforms as offered on the market[28] - a possibility that has found some use in the practice.[29]

In the ePR, contracting authorities (entities) can prepare public procurement procedures, draft notices and contract documents (information) to be published in the ePR, to choose members (officials) for the contracting authority's team in that particular procurement, keep lists of tenderers, correspond with tenderers, incl. to respond to any requests for information by tenderers or send any other procurement related notices to the tenderers. Tenders are accepted, opened and evaluated within the e-environment, requests

[26] Rahandusministeerium, 2016 .aaasta riigihangete kokkuvõte, lk 9.

[27] Täieliku e-hangete võimekuse loomine. Eelanalüüs. AS Datel 2016. Available https://www.rahandusministeerium.ee/sites/default/files/Riigihangete_poliitika/register/rhr_eelanaluus_1.0.pdf (05.12.2017) lk 9 - 10.

[28] Seletuskiri riigihangete seaduse eelnõu juurde, lk 58.

[29] E.g. https://www.mercell.com/en/67127880/leading-e-tender-system-and-tender-offer-provider.aspx

for additional explanations can be sent to tenderers (e.g. in the case of mistakes discovered in a tender if these can legally be made good), requests for information can be sent to other registries to cross-check the information submitted by tenderers - e.g. to check on tax debts of tenderers, to verify the rights of an agent to represent a tenderer, to look at an annual report of a company etc.

Any potential tenderer on the other hand, has access to all published contract notices, contract documents and the contracting authorities' replies to any requests for information or clarification. A tenderer also has an option to order a specific information packages from the electronic environment. When interested in a particular procurement, a tenderer must register with the contracting authority in order to be able to submit questions or to draft, electronically sign and submit a tender. Via the ePR, tenderers will receive notifications of decisions made in the course of the procurement procedure.[30]

Thus, the ePR fulfils all the requirements established under the Directive 2014/24[31] as for the scope of a full e-procurement, namely that it must cover all activities in the pre-award phase of public procurement: publication of notices, access to tender documents, submission of tenders and the award of contracts.[32] Also, it corresponds to the requirement that potential tenderers must have *unrestricted and free direct access* to documents – a criteria that has been interpreted to mean accessibility through internet as opposed to sending the documents via e-mail.[33]

[30] Seletuskiri riigihangete seaduse eelnõu juurde, lk 10.

[31] Preambula p 52, Art 22.

[32] See also S. Arrowsmith. The Law of Public and Utilities Procurement: Regulation in the EU and UK. Sweet and Maxwell 2014, p. 639; Birkerstaff 2014, p 138 - 139; Eiro 2016, p NA8; Ferk 2016, p 330.

[33] Bickerstaff 2014, p. 144.

In the end of a procedure, the ePR offers the option to automatically submit the public contract to the successful tenderer for signing and to transfer the contract data into the report following the signing.[34] In this stage of procurement, it is however not mandatory under the Directive 2014/24[35] or the law to use electronic means of communication to carry out electronic processing of tenders or use electronic evaluation or automatic processing. Similarly, electronic communication is not mandatory during the phase of negotiations or dialogue where applicable, or in the post-award (contract performance) phase.[36]

2.3. Comprehensive e-procurement environment

While resorting to e-procurement is expected to simplify the conduct of award procedures, to reduce the impact on environment through cutting costs on paper and transportation, and to achieve a better price-quality ratio (different numbers have been published on the EU level, referring to a 5-20 % reduction of costs[37]), it is vital that e-procurement should mean more than a simple change from paper-based to electronic communication systems. Only as such can an e-procurement system enhance the efficiency

[34] E-hanke läbiviimine riigihangete registris. Abimaterjal hankijale. Koostatud 31.08.2017. Available (06.12.2017): http://rhskoolitused.publicon.ee/userfiles/E-hange%20RHRis_abimaterjal%20hankijale_II%20poolaasta.pdf, lk 4, 7.

[35] Directive 2014/24 preambula p 52, Art 22.

[36] Also: Arrowsmith 2014, pp. 639 - 640.

[37] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Strategy For E-Procurement, COM/2012/0179 final - http://eur-lex.europa.eu/legal-content/ET/ALL/?uri=CELEX:52012DC0179 , p 2.

of public procurement in general and benefit the functioning of public procurement markets as a whole.[38]

Perhaps it is namely the comprehensive nature of the whole electronic procurement environment that has been the crucial factor in the hitherto development of the Estonian electronic prourement system. Besides the electronic Procurement Register for conducting (fully) electronic award procedures, the same web page contains the electronic register of complaints[39] as well as access to user help and the information portal.

The electronic register of complaints provides references to all complaints submitted to the Complaints Board (the review body in public procurement matters[40]) and the decisions made in these matters. Submission of complaints is however not conducted within the ePR. In the course of preparing the latest update to the electronic procurement enviroment, the possibility of integrating the Complaints Board cases more closely with the ePR has been discussed but has not been decided as of present.[41]

The presence of user help facilitates direct and immediate assistance in case of facing any problems with the ePR. Equally vital are trainings organized by the Ministry of Finance, regularly offered to both contracting authorities and entities.[42] As a part of user

[38] Green Paper on expanding the use of e-Procurement in the EU, European Commission, Brussels, COM(2010) 571 final, p 2-3. Available (05.12.2017): http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010DC0571 .

[39] Vaidlustuste register - https://riigihanked.riik.ee/register/RegisterVaidlustusedOtsing.html (16.04.2017)

[40] RHS § 117 lg 4; Riigihangete vaidlustuskomisjoni põhimäärus. Rahandusministri määrus. RTL 2007, 34, 599 … RT I, 15.09.2015, 12

[41] Täieliku e-hangete võimekuse loomine 2016, lk 96.

[42] http://rhskoolitused.publicon.ee/kasutajatoe-koolitus/

preparation, the ePR provides a training environment[43] that offers video instructions for conducting different actions in the register and allows trying out various scenarios (different award procedures) in the role of either a tenderer or a contracting authority. Both parties can thus exercise their skills or acquire an experience similar to that of the other side, possibly helping to avoid some of the problems that might happen in the course of actual award procedures.

The information portal focuses on all things related to public procurement and contains information on pertaining legal regulation on both EU and national level, references to court cases and summary of case law of both the CJEU and Estonian Supreme Court, research conducted on the request or by the Ministry of Finance as well as recommendations by the Ministry, information on trainings and seminars, FAQ, news etc.[44]

We submit that collecting a comprehensive body of procurement-related information in one information portal can be a part of boosting user-friendliness and thus supporting to the popularity of e-procurement solutions.

[43] E-riigihangete koolituskeskkond on leitav aadressil: https://rhrkoolitus.fin.ee/lr1?rhrLocale=et_EE

[44] https://www.rahandusministeerium.ee/et/riigihangete-poliitika

3. LEGAL CHALLENGES AND POSSIBILITIES ATTRIBUTED TO ELECTRONIC PROCUREMENT

3.1 Does the e-procurement system support the primary goals of the EU public procurement policy?

The importance of transferring to electronic public procurement has been emphasised by the European Commission since 2010.[45] I.a., e-procurement is expected to assist in advancing the primary goals of the EU public procurement law – competition, transparency and non-discrimination. Presumably, any e-procurement system should be launched with these primary values in mind.

Technical functions of the Estonian ePR are created with the view to increasing transparency and accountability: in order to participate in an e-procurement procedure, all users – including tenderers and well as contracting authorities' agents - must authenticate themselves. Authentication of Estonian citizens or e-residents[46] takes place via the ID card while foreign users are identified with the help of a specifically created username and password.

All steps made in the ePR are logged and as such, can later be verified. For instance, members of the Complaints Board can verify if and when a challenged decision was delivered to tenderers. When a complaint about a procurement procedure is on-going in the Complaints' Board, members of the Board are vested with special rights with regard to that particular procurement procedure. These rights differ from those of the public or the tenderers: for instance, differently from the tenderers, the Complaints Board members have

[45] Euroopa Digitaalne tegevuskava. Euroopa Komisjoni teatis. Brüssel 26.08.2010 KOM (2010) 245, lk 33-34. Arvutivõrgus (05.12.2017): http://eur-lex.europa.eu/legal-content/ET/TXT/PDF/?uri=CELEX:52010DC0245R(01)&from=ET

[46] Information about the Estonian e-residency program can be found here - https://e-resident.gov.ee/ (05.12.2017)

access to the content and price of the tenders.[47] On the other hand, these rights are specificly tied to the on-going case and cease with regard to the concerned procedure once the Complaints Board makes the decision in the particular matter. [48]

In the course of proceeding with a claim, the Complaints Board can routinely access any document or information that exists within the challenged procurement procedure in the ePR and is relevant for the on-going review. As a result, the actual burden of submitting proof in public procurement cases is significantly reduced, both reducing the emerging paper trail and making the review proceedings more efficient. Evidence must only be submitted if it is not available in the Register and not accessible via other public records.[49] For instance, a tenderer naturally still has to submit proof of damages as well as evidence of the value of the tender not being abnormally low.

Tenders are submitted through safe HTTPS channels and saved in the ePR. In addition, persons authorised by the Ministry of Finance guarantee safe keeping of tenders. Authorized persons representing the contracting authority have access to the tenders only after the tender submission deadline. Security related to submitting tenders is naturally critical for creating trust and thus increasing competition.[50]

A challenge referred to by Ferk concerns the need to establish national e-procurement systems in such a way that instead of straying away from the primary objectives of the EU public procurement policy and serving the interests of local purchasing, the systems would in fact increase cross-border procurement. Without such

[47] RHS § 181 lg 6, Riigihangete registri põhimäärus RT I, 01.09.2017, 13 § 21 lg 1 p 8.

[48] Täieliku e-hangete võimekuse loomine 2016, lk 20.

[49] RHS § 190 lg 7.

[50] More information with regard to the security protocol of the updated ePR can be found here - Täieliku e-hangete võimekuse loomine 2016, lk 12-15, 16.

increase, the e-procurement reform cannot be considered to fulfil its objectives.[51] For instance, an overly restrictive approach to e-procurement could simply be present in the way of technical solutions not available to nationals of other states.

The Directive 2014/24 art 22 (1) second sentence addresses this concern as follows: *The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure*. An example of a discriminatory requirement fulfillment of what is not generally possible would be the request to sign a tender electronically with a digital signature. While digital signing via the national ID-card is a routine practice in Estonia in private as well as business affairs,[52] it would not be possible without an Estonian ID-card. Therefore, this requirement is never applied towards foreign companies.

While the share of public contracts awarded to tenderers from other Member States in public and utilities procurements in Estonia in 2015 is not a particulaly high 2.6 % of the total number of awarded contracts or ca 7,3% in terms of total contract values, [53] the share of cross-border procurement cannot be criticized too much either. It must be taken into account that this share is based on all the conducted procurement procedures of which

[51] Ferk 2016, pp 327 – 328, 332 -333.

[52] Information and assistance on application of digital signing is available here (06.12.2017): http://www.id.ee/?lang=en&id=

[53] Rahandusministeerium. 2015.a riigihankemaastiku kokkuvõte, lk 49. In the EU, the share of direct cross-border activities was indicated as 1,3% in 2012, in terms of total contract value the share was 3,5% in 2012. – Z. Kutlina-Dimitrov, C. Lakatos. Determinants of direct cross-border public procurement in EU member states. Trade. Issue 2 – July 2014.

Available (06.12.2017) http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152700.pdf , p 5.

only 17,3% are for contracts above the EU threshold[54] – those are the contracts that presumably have any cross-border interest and that the EU public procurement rules of cross-border competition is aimed at.[55]

In 2015, tenderers from other Member States participated significantly more in e-procurement procedures (63 %) than in other, not electronic procedures (37 %).[56] In general, the average number of tenderers in e-procurement procedures is higher (3,7) than that in award procedures not conducted electronically (2,6).[57] That can be attributed to the fact that through a central ePR platform, information simply reaches potential tenderers better.[58] The above seems to be in harmony with the global experience where transparency and added participation of tenderers have been noted,[59] and the overall high indicators describing procurement "performance" in Estonia in 2016.[60] In view of the above, the Estonian model of e-procurement cannot be heading in the wrong direction.

[54] Rahandusministeerium. 2015.a riigihankemaastiku kokkuvõte, lk 48.

[55] Furthermore, the number includes a fair amount of so-called "simplified" award procedures for public contract with a relatively minor financial value – see footnote 13 above.

[56] Rahandusministeerium. 2015.a riigihankemaastiku kokkuvõte lk 47.

[57] Rahandusministeerium. 2016. aasta riigihangete kokkuvõte, lk 1.

[58] *Id*, lk 1.

[59] Ferk 2016, p 331.

[60] Single Market Scoreboard. Performance per Policy Area. Public Procurement (Reporting Period. 01/2016 – 12/2016). Available: http://ec.europa.eu/internal_market/scoreboard/_docs/2017/public-procurement/2017-scoreboard-public-procurement_en.pdf , p 3 - 4.

3.2. Does the e-procurement system support secondary EU public procurement policy goals?

Besides the primary objectives, electronic procurement can as well benefit the secondary policy goals, e.g. green and socially responsible procurement as well as boost innovation.[61] With regard to secondary objectices, an interesting feature of the new e-procurement environment to be launched in Estonia in 2018 is a function offering default green public procurement criteria as grounds for exclusion, selection and award.[62] Developed to facilitate the inclusion of green requirements in public contract documents, the default green public procurement criteria were drafted by the Ministry of Environment based on criteria offered by the European Commission for certain groups of products or services.[63] It should be mentioned that currently, green public procurement can generally be described as rather underexploited in Estonia. The default inclusion of suitable green procurement criteria can perhaps bring about some increase of such practice.

Another policy goal emphasised in the 2014 directives is the purpose of better engagement of SMEs in public procurement. The question of suitability of electronic procurement systems for an efficient SME participation has been subject to some conflicting arguments.[64] We submit that *per se*, the presence of e-procurement cannot be said to have negatively influenced SME tenderers in Estonia as in 2016, 87% of all public contracts were awarded to SMEs. (As referred to above, 92% of all procurement was e-procurement.) However, an e-procurement might in fact create obstacles for SME participation in certain instances, e.g. when the e-platforms are not user-friendly enough,

[61] *Id*, p 329.

[62] Täieliku e-hangete võimekuse loomine 2916, lk 50-51.

[63] http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm (05.12.2017).

[64] See, e.g., R. Birkerstaff 2014, p 136; P. Ferk, p 332.

e.g. no assistance or training is available or when multiple platforms are creating confusion as to the potentially available award procedures.

Identified as a "cornerstone" of EU policy, the importance of pursuing innovation in general for EU public procurement law should not be underestimated but has not yet gained the deserved recognition in public procurement systems.[65] When developing and launching an improved electronic public procurement system (an updated platform), the process itself be regarded as a form of direct procurement of innovation: all the end users (contracting authorities as well as tenderers) can directly or indirectly benefit from that innovation. In addition, any state or office that is engaged in establishing or ordering a state of the art e-procurement system can serve as a catalyst that actively promotes and introduces innovative electronic systems, creating an example possibly to be followed.[66]

3.3. Does the e-procurement system support the objective of effective review proceedings?

Even though in general, e-procurement systems have not been shown to cause special circumstances or specific obstacles with regard to review procedures in public procurement, an issue can be brought to attention that concerns electronic procurement in particular. A procedural issue related to e-procurement concerns calculating the moment when a limitation period for review starts to run when the review concerns a contract document. Here, the national legislator might face the question, if the limitation period should be calculated to start to run exactly from the moment of *publishing* the concerned contract document that contains an allegedly unlawful (e.g. discriminatory) term as is referred to in the Remedies Directives[67], or from the moment when that document was

[65] L. Butler 2014, p 337, 343, 346.

[66] On innovation taxonomy, incl. direct and catalytic procurement, see L. Butler 2014, p 348-349.

[67] Art 2c of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public

actually accessed by the person initiating the review procedure, provided that the period remains in harmony with the 10-day period prescribed by the Remedies Directives.

In public procurement matters, Member States may establish limitation periods for review procedures, exact length as well as starting point of which are as a rule, subject to the procedural autonomy of Member States.[68] However, the Remedies Directives as well as the case law of the CJEU provide some guidelines in this respect. In view of the principle of effectiveness, for instance, *the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law*.[69] According to the EU public procurement law, a limitation period may not start until the concerned party *knows or ought to know* of the alleged breach of procurement law.[70]

When the contracting authority publishes contract documents in the electronic public procurement register, such actual or presumed knowledge can be determined in two ways. First, one can presume that the time of limitation starts to run at the moment the contract documents are published. Second, one can start counting the time from the moment it can be established that a particular concerned party actually downloaded these documents or registered to participate in a particular procurement procedure.

works contracts; Art 2c of Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

[68] S-J. Otto. The Starting Point of Limitation Periods for Remedies in Public Procurement Procedures. Annotation on the Judgements of the European Court of Justice of 28 January 214 in Case C-161/13, Idrodinamica Spurgo Velox and Others v Acquedotto Pugliese SpA. 9 European Procurement & Public Private Partnership law Review 209, 2014, pp 209.

[69] Uniplex (UK) Ltd v NHS Business Services Authority C-406/08, ECLI:EU:C:2010:45, para 40.

[70] S.-J. Otto 2014, p 211 – 212.

In the first case, the length of the limitation period ends earlier, making the option of contesting the contract documents (e.g. based on discriminatory award conditions) somewhat shorter. However this option provides the concerned parties with somewhat more legal certainty, as after a certain date all the concerned parties can be sure that review of contract award conditions is no longer possible, as a rule. (An exception could be a situation where the concerned clause is so ambiguous as to allow different interpretation. In such cases, it is possible that, having relied on one possible version of interpreting the clause, a concerned party later learns of a different interpretation given to the clause by the contracting authority. Even when a limitation period for requesting review of the clause has already ended, the complaint should be accepted by the review body when the delay was caused by a mistake or difference in understanding in good-faith by the complainant.) The first alternative can be criticized over failing to provide adequate protection to the rights of interested parties as well as over the essential purpose of providing effective review options in public procurement matters. As such, the harmony of the solution with the remedies directives is questionable. Making the deadline depend on the date of publishing the contract documents can also put a disproportional burden upon the concerned parties, particularly in the case of complex award procedures.[71]

In the second case, the opposite is true: tenderers' rights can be said to receive somewhat more protection, while the legal certainty is a little reduced.

Until now, the case law of the Estonian Complaints Board has favoured the second option: as a rule, the Board established the exact moment when the particular tenderer learned or had to learn that certain terms of contract documents violated its rights on a case-by-case basis. Often, either the moment of downloading the contract documents or

[71] Seletuskiri riigihangete seaduse eelnõu juurde, lk 128.

registering with the particular procurement was considered to be the moment of learning that these documents violated the tenderer's rights.[72]

However, the new Act on Public Procurement now provides a new, "compromise" version, tying the limiation period for review of contract documents to the term for submitting tenders. Depending on the value of the contract, a complaint must be submitted no later than two or five work days prior to the deadline of submitting tenders for "simplified" (under national threshold) or ordinary procedures and not after the deadline of submitting tenders in procedures with shortened tender submission deadline.[73] The explanatory letter accompanying the draft for the new Act refers to the fact that published contract documents can mostly be freely accessed without logging in into the ePR, making it futile to connect the time limit for submitting complaints to the fact of the interested party actually learning about the alleged breach. Taking into account that under the new regulation, the limitation period for submitting a complaint on a contract document in a cross-border procurement is always at least ten days from the moment of publishing the documents, the regulation must be considered to be in harmony with the Remedies Directives.

4. CONCLUSIONS

In the case of Estonia, a centralised e-procurement platform has served well to have brought the share of electronic procurement to 92% by 2016 and hopefully facilitate a smooth transfer to a 100% e-procurement very soon. The percentage of public contracts awarded to tenderers of other Member States as well as the relatively larger average number of participants in e-procurements can be seen as a positive indicator of the benefits

[72] This is established for instance in the following cases of the Complaints Board: Vaidlustuskomisjoni otsus 08.07 2016 nr 153-16/174535 p 7-8; Vaidlustuskomisjoni otsus 13.05 2016 nr 99-16/172874 p 4-5; Vaidlustuskomisjoni otsus 10.02.2016 nr 23-16/ 170047 p 5; Vaidlustuskomisjoni otsus 11.04.2014 nr 82-14 /150647 p 5; Vaidlustuskomisjoni otsus 11.07.2014 nr 161 /152349 p 4.2-4-3.

[73] RHS § 189 lg 2 p 1 - 3.

attributable to the Estonian ePR. One of the reasons for the success of the Estonian e-procurement system can be the comprehensive nature of the whole electronic procurement environment: in addition to the procurement register, the same webpage contains the register of the review decisions, a training site and an information portal. As a next step, further modernisation of the public procurement review system and introduction of additional e-review functions should be considered.