

**2<sup>ND</sup> (OR, FROM A EUROPEAN POINT OF VIEW, 3<sup>RD</sup>) GENERATION  
PROCUREMENT LAW REFORM: PRINCIPLES AND UNDERLYING  
POLICIES**

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**ABSTRACT.** The present paper is aimed to identify and emphasize those principles on which current international procurement law (*i.e.* legislation related to the proceedings to award public contracts or implement infrastructural projects), has been grounded in and relies on. The analysis, based also on a deep documentary and jurisprudential review, has been focused on the European Directives (starting from those issued in the early 70s of the last century, to the Proposals currently under elaboration and which could represent the final step of the reordering started in 2004), compared with primary international instruments (*i.e.* GATT and both the 1994 and 2012 WTO GPA, UNCITRAL instruments), in order to show how their mutual influence has contributed to establish, develop and refine such principles. The above as well as the divergencies in the implementation of such principles related to primary and secondary policies have been described taking into consideration the relevant socio-political scenario and further, analyzed in the light of theories on good governance. Such instruments were developed following a tendentially common line to reach objectives (*in primis* of economic nature), guaranteed by the application of well defined principles. However, due to their different juridical nature and context in which they were approved, this happened and happens with timing, tones and proper declension as well. While between principles and objectives of economic nature there is a perfect correspondence, the respect for the first guaranteeing the achievement of the second, the relationship between principles and secondary policies appears to be more complex, since the latter could lend themselves, eluding the first and mainly the principle of transparency, area in which the most relevant differences between the analysed instruments are to be found, at least up to the recent developments.

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## INTRODUCTION

The public contracts market has always played a crucial role in economic development. With the elapsing of time, the original award system for public contracts, given the technological progress and the new or re-newed interests in pursuing the so-called secondary policies, has been enriched by more sophisticated procedures. Budgeting exigencies and the changed relationship between public and private sector have contributed to the development and increase of forms of cooperation between them for implementing infrastructural projects, context in which also the financial market is assuming a new role.

Thus, public procurement has acquired a central relevance in the debate on “good governance”, *alias* the set of rules, procedures and praxis connected to the exercise of powers and consistent with the elaboration and implementation of policies (in the *desiderata* better and more coherent), which associate the civil society to the institutions and has currently assumed a valence going beyond purely national boundaries. The partnership phenomena and the development of infrastructural projects are the real test for its concretization realized when State, civil society and private economy interact in the respect of principles such as participation, transparency and effectiveness.

As stated in the Preamble of the 2012 WTO GPA, adopted on March 30, 2012, “[...] the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties’ economies, and the functioning of the multilateral trading system”.

The present paper is aimed to identify and emphasize those principles on which current international procurement law (*i.e.* legislation related to the proceedings to award public contracts or implement infrastructural projects, depending on the *genus* of the acquisition, implied sector, circumstances and contractual type to be formalised) has been grounded in and relies on, their development and differences (if any) in their implementation.

To this end, reference has been made (also through a deep documentary and jurisprudential review) to the European Directives

issued from the beginning of the 1970s to the Proposals currently under elaboration and which could represent the final step of the reordering started in 2004 with the archetype of the 'third generation' Directives; the GATT GPA, then replaced by the WTO GPA as well as its revised text (2012); the UNCITRAL instruments, starting from the Model Law of 1993 passing, through the Model Law of 1994, to that issued in 2011, in addition to the Model Provisions on PFIP of 2003, and the accompanying Guides, included the 2012 Draft Guide to the Enactment of the UNCITRAL Model Law on Public Procurement.

The WTO GPA, the European Directives and the UNCITRAL instruments representing different techniques of harmonization (*i.e.* examples of uniform legislative law), are particularly useful in tracing such an evolutive line.

Moreover, the relevant Directives tend to form a line (even if in their own time) with the disposal of the GPA to which the European Union and its Member States are party (that opens the procurement market of third countries to the EU undertakings and *vice-versa*). The 1993 and 1994 UNCITRAL Model Laws had been elaborated taking into account the provisions of the (then) EEC Directives and mainly the provisions of the (then) GATT GPA (the Tokyo Code) in order to avoid conflicts (among provisions). Infact, the (objective) scope of application of the 1993 Model Law was limited to the award of supply and construction contracts, since services were still under negotiation in the Uruguay Round and it was held awkward to deal with them before the results of the negotiations. As far as the recipients, it is worth pointing out that the Working Group entrusted with the elaboration of the 1993 and 1994 texts especially looked to the East European countries (then in transition phase from a centralised to a market economy in order to later access to the EU), and to the countries of the African continent; instead, the Working Group entrusted in 2004 with the revision of the Model Law has taken into particular consideration the legislations of the Asian continent and of Latin America (the emergent markets). Last but not least, the opportunity to transform the GPA from plurilateral agreement to a multilateral one is still 'under discussion'.

In synthesis, the principal features of the mentioned sources of law, contextualized and framed within the political, economic and

juridical structure in which they have been issued and then amended or supplemented, are outlined. Further, the analysis is focused on the guiding principle and their concretization in some of their emblematic provisions.

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Draft Guide to the Enactment of the UNCITRAL Model Law on Public Procurement	2012 Draft Guide
European Community	EC
European Court of Justice	ECJ
European Economic Community	EEC
European Union	EU
GATT Government Procurement Agreement	GATT GPA or Tokyo Code
Guide to the Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services	(1994) Guide
Treaty establishing the European Community	TEC
Treaty on the Functioning of the European Union	TFEU
UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects	Legislative Guide on PFIP
UNCITRAL Model Law on Procurement of Goods and Construction	(1993) Model Law
UNCITRAL Model Law on Procurement of Goods, Construction and Services	(1994) Model Law
UNCITRAL Model Law on Public Procurement	(2011) Model Law
UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects	Model Provisions on PFIP
WTO Agreement on Government Procurement	(1994) or (2012) WTO GPA or GPA

## SOURCES OF LAW

### 1. PRINCIPLES OF THE (EC/EU) TREATY AND SECONDARY LAW.

#### 1.1. ...ON PUBLIC CONTRACTS.

The liberalization process of public procurement can be dated back to the 1960s, even though it acquired intensity and impetus beginning in the 1970s, with the declining of economic policies of

Keynesian origins (which gave rise to protectionist practices being public procurement intended as a stimulus to the domestic demand) and the rising of those neoliberal. Indeed, up to the 1960s, the main concern of scholars, politicians and economists connected to the trade liberalization, was the reduction of tariff barriers to trade. The interest for non-tariff barriers, arose during the 1960s and more importantly in the 1970s, especially after the oil crisis.<sup>1</sup>

The original Directives,<sup>2</sup> the so-called 'first generation', date back to the beginning of the 1970s, when the economic functionalism<sup>3</sup> was still predominant. Therefore, on the whole, they were fairly essential but brief and narrowed to the proceedings related to supplies or works; moreover, they were practically ignored since the protectionist tendencies in favour of domestic enterprises still prevailed.<sup>4</sup>

It is only from 1985, with the White Paper Completing the Internal Market<sup>5</sup> and mainly with the Single European Act of 1986, that the subject became an overriding topic, creating an intensive legislative program<sup>6</sup> which was translated into a more analytical and exhaustive discipline of the proceedings for the award of public supply and works contracts, the enlargement of the same to public service contracts, and the regulation of the strategic 'utilities' sector,<sup>7</sup> both previously excluded, more for political and economic nature than juridical reasons. The homogeneous structure as well as the particular and detailed contents of such Directives (the 'second generation'), derived from the intent to assure their effectiveness *i.e.* the immediate applicability of self-executing provisions when and if they were later adopted into national laws.

The greater incisivity of the community policy and its tension not only turned to the reaching of the non-discrimination objective, but to the harmonization of policies and procedures, led in the same years to the introduction – with Directives 89/665/EEC and 92/13/EEC<sup>8</sup> – of the judicial and administrative control for the award of public contracts.

Directives 89/665/EEC and 92/13/EEC, assumed a valency which went far beyond the subject. Infact, they gave substance to the

principle of effectiveness of judicial protection, of sincere cooperation (laid down in art. 10 of the TEC)<sup>9</sup> and of legality enucleated by the ECJ,<sup>10</sup> so as to be welcomed as the formal starting by the Community of a processual policy. It attested to, not only the reached penetration of the European law as well as the need that its uniform application was not contrasted by the diversity of the means of judicial protection provided for by national legislations, but also the development of the principle of effectiveness to be now regarded as fundamental aspect to protect individuals towards the acts of both national and Community institutions.<sup>11</sup>

If the EU (at that time EEC) was the first to undertake the comprehensive program of liberalization, in the same years the topic was subject to such a deep reflection, both at national and international level,<sup>12</sup> that it was talked about as '*global revolution*' or '*reformation*' of the sector.<sup>13</sup>

Directives 2004/17/EC and 2004/18/EC,<sup>14</sup> are the first example and the archetype of what – maintaining the above classification – can be defined as the 'third generation'. Indeed, they have concretized both the guiding lines established by the Commission in the communication of 1998<sup>15</sup> (referenced to the exigencies of simplification, updating and flexibility) and, by setting forth provisions guaranteeing and promoting social and environmental interests, the interaction of economic, social and labour policies described at the Lisbon European Council of March 2000. As far as the substantive law is concerned, the sistematization was also realized thanks to the principles established by the ECJ, as well as (through the approaching of terms) to principles already fixed in the 1994 WTO GPA, whose reform was in the meantime under discussion. As a main point, unlike the former Directives setting forth respect of the equal treatment, the cornerstone of the system become explicitly the respect of the mentioned principle joined to that of transparency. This allowed the concomitant alignment to the GPA and will imply subsequent legislative interventions.

The development of the principle of effectiveness required that the uniform application of Directives 89/665/EEC and 92/13/EEC, was assured; instead, there still were significant disparities as far as

their correct application; moreover, due to the innovations introduced for use of the electronic means of data transmission, they were clearly obsolete. In December 2007, Directive 2007/66/EC<sup>16</sup> - regarding review procedures concerning the award of public contracts - was published in order to carry on the reordering wished by the Commission since 1998. The intention is stated by the Title dedicated to the improvement of review procedures effectiveness.

The genesis of Directive 2007/66/EC, in fact, is to be found in the need to systemize and adequate the provisions of the original 89/665/EEC and 92/13/EEC, including the principles established during the years by the ECJ - although they were already transposed into national laws of the majority of the Member States - and to assure their consistency with the Directives of substantial law, in order to guarantee their effective application and a real development of the sector. The relevant EU institutions, pointed out that rapid and effective review mechanisms complying with the principles of the TEC (*i.e.* free movement of goods, freedom to provide services, freedom of establishment) and the principles derived therefrom (equality of treatment - of which the principle of non-discrimination on the basis of nationality is a specific expression - mutual recognition, proportionality and transparency), were *condicio sine qua non* for defending and guaranteeing a transparent and non-discriminatory implementation of both the 2004/17/EC and 2004/18/EC. Thus, it was considered more functional to that aim an intervention at community level, rather than by the Member States *uti singuli*.

The preliminary work shows that, from the very beginning, the Commission agreed to focus on the pre-contractual reviews instead of those following the signing of the awarded contract (which would have meant to change the nature of the Review Directives and, consequently, make inevitable totally different provisions), assuming a number of possible interventions.

After having analysed the presumable impact of the different options, it was thought to introduce, by means of a Directive, the deferring of the signing of the awarded contract, since the alternative option, *i.e.* the adoption of a communication interpreting the ECJ case-law, could not have guaranteed a uniform application as well as the arrangements for applying effective, proportionate and deterrent

sanctions in the event of infringement of this key provision for the effectiveness of pre-contractual reviews.

Essentially, Directive 2007/66/EC carries out the disposal of Art. 47 of the Charter of Fundamental Rights of the EU (particularly, its first and second subparagraphs, which state the right, of everyone whose rights and freedoms guaranteed by the law of the Union are violated, to an effective remedy before an impartial tribunal).<sup>17</sup> It is to be ascribed to the policy against corruption phenomena, reaffirmed and strengthened with the commitments taken at international level by the signing (on September 15, 2005) of the United Nations Convention against Corruption and particularly with those deriving from its Art. 9(1)(d).<sup>18</sup> But mainly, the Directive at issue, acknowledges the principles stated by the ECJ in its judgements *Alcatel* and, as necessary development, *Commission v. Austria and Stadt Halle*,<sup>19</sup> while those already transfused in Directives 89/665/EEC and 92/13/EEC, assume a more emphasized and substantial valence.

The cornerstone of the system, in harmony with Directives 2004/17/EC and 2004/18/EC, become the respect of the principle of equality of treatment together with that of transparency.

In the same years, the development of the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP), the changed international scenario and “the emergence of asymmetrical transnational threats”,<sup>20</sup> made crucial the creation of a European Defence Equipment Market (EDEM).

Instead, although the ECJ had confirmed on several occasions that Art. 296 TEC<sup>21</sup> does not introduce an automatic exemption in the field of defence,<sup>22</sup> but on the contrary “[...] it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases” and demonstrate that they “are necessary for the protection of the essential interests of its security”,<sup>23</sup> the majority of contracts related to the defence of the Member States was up to then awarded in compliance with the relevant national laws.<sup>24</sup> It made the sector characterised by the fragmentation of markets along purely national

lines, by the specific features which distinguish it from other types of public procurement and by a complex legal framework, with the results that the relevant European market was less efficient and competitive, intra-European competition was hampered, extra costs and inefficiencies were created.

In March 2003, the Commission indicated procurement law as one of the sectors in which it was necessary to intervene and, successively, on September 2004, issued a Green Paper in which, *inter alia*, outlined the improper functioning of the current legal framework. It was suggested that it could have been supplemented by a Directive which would have pursued three main objectives, *i.e.* “greater legal certainty, since it would improve classification of contracts [...]; more information at Community level on the contracts in question, and therefore, greater opening of the markets, which would allow European defence industries to participate equally in calls for tender in all the Member States; the introduction of the necessary flexibility for the award of these contracts by the creation of a body of rules suited to the specific features of such contracts”, pointing out that “such an instrument could also serve as a reference point should a Member State decide not to make use of the Article 296 TEC derogation even when it would have been entitled to do so”.<sup>25</sup>

Directive 2009/81/CE on the award of contracts, *rectius* of ‘certain’ contracts, in the fields of defence and security,<sup>26</sup> should realize the above, since it aims to the gradual establishment of a EDEM essential for strengthening the European Defence Technological and Industrial Base as well as for developing the military capabilities required to implement the ESDP.<sup>27</sup> As outlined by the Commission, it touched the core of the European Community and by its very nature a legally and potentially serious matter. Infact, the up to then excluded applicability of the relevant Directive was a means to exclude the legal instrument intended to secure respect for the basic provisions of the Treaty regarding free movement of goods and services as well as freedom of establishment.

Notwithstanding, it is also evidence of the sectorialization of the subject in antithesis with the policy adopted by the UNCITRAL in 'revising' the 1994 Model Law.

Indeed, Directives 2004/17/EC and 2004/18/EC have helped "to establish a culture of transparency and outcome-driven procurement, generating savings and improvements in the quality of procurement outcomes that far exceed the costs, for public purchasers and suppliers, of running those procedures".<sup>28</sup> However, as outlined above, they represent only the first step of a reordering *in itinere* that, has recently found new impetus. An improvement of transparency, efficiency and effectiveness of procedures is indeed highly required for the efficiency of public expenditure and economic growth in a continuously evolving (or sometimes involving) political, social and economic context. In October 2010, the Commission recognized the key role of public procurement in the Europe 2020 strategy<sup>29</sup> and in January 2011 published a Green Paper on the modernization of EU relevant policy,<sup>30</sup> launching a broad public consultation on options for legislative changes. In the meantime, on April 13, 2011, with the adoption of the Single Market Act,<sup>31</sup> the Commission included the revision of the European public procurement legislation among its twelve key priority actions to be adopted by the EU institutions before the end of 2012, and in December announced its revision, which seems to go far beyond the boundaries of a 'revision', since the original legislative package includes also a Directive on concessions (!).<sup>32</sup>

In synthesis, from the mentioned consultations, three key problems have been identified: an insufficient cost-efficiency;<sup>33</sup> missed opportunities for stakeholders to optimise the use of their resources and/or make the best purchasing choices; a national rather than EU public procurement market. Moreover, with reference to the 'utilities' sector, the finding of the evaluation showed that legislative activity to liberalise access to them has not yet been translated into sustained or effective competitive pressure.

The proposals have been formulated with the main objective to thoroughly modernize the existing tools and instruments simplifying their present structure, starting from the classification of the contract

types and, independently of their possible restructuring, review and simplify their current definitions as well as the concept of procurement itself. The other interventions are the simplification of the procedures;<sup>34</sup> the extension and, in the medium term, generalization of electronic communication; a drastic reduction of the administrative burden; measures to encourage access to public procurement for SMEs; improvements to the existing guarantees aimed at combating conflicts of interests, favouritism and corruption. At the same time the proposals aim to facilitate a qualitative improvement in the use of public procurement by ensuring greater consideration for social and environmental criteria such as life-cycle costs or the integration of vulnerable and disadvantaged persons, thereby helping to achieve the objectives of the Europe 2020 strategy.<sup>35</sup>

In particular, simplification and flexibilisation of the procedural regime is given by the clarification of the scope of application, newly introducing (starting from the titles of the proposed Directives), the basic concept of 'procurement'. This, in perfect alignment with the findings of the Working Group which has drawn the 2011 Model Law dedicated to public procurement and derived from the increasingly different forms of public action as well as highlighting the complexity of the procurement.

The definitions of certain key notions determining the scope of the Directives have been revised<sup>36</sup> in the light of the ECJ case-law endeavouring, at the same time, to keep continuity in the use of notions and concepts that have been developed over the years through it. In the proposal related to the 'utilities' sector the notion of special and exclusive rights has been explicitly clarified and procurement for the purpose of exploring oil and gas has been withdrawn from its scope being nowadays that sector subject to a real competition ('pressure' according to the Commission).

As far as the proceedings are concerned, Member State systems will provide, in case of procurement of supplies, works and services, two basic forms of procedures, 'open' and 'restricted' and in addition, subject to certain conditions, the 'competitive procedure with negotiation', the 'competitive dialogue' and/or the 'innovation

partnership', a new form of procedure for innovative procurement, according to which the partnership shall be structured in successive stages following the sequence of steps in the research innovation process; the contracting authority may decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases. Instead, in the proposal related to the 'utilities' sector, the system will provide three basic forms, *i.e.* 'open', 'restricted' and 'negotiated procedures with prior call for competition'; the 'innovation partnership' can be foreseen either as standard procedure or restricted to certain types of procurement.

In order to facilitate and promote e-procurement, in both the Proposals, six specific procurement techniques and tools intended for aggregated and electronic procurement have been improved and clarified: 'framework agreements', 'dynamic purchasing systems', 'electronic auctions', 'electronic catalogues', 'central purchasing bodies' and 'joint procurement'.

Further, in line with the WTO GPA, a lighter regime for sub-central contracting authorities has also been introduced. These purchasers are exempted from publishing a separate contract notice before launching the procurement procedure. They may also set certain time limits in a more flexible way by mutual agreement with participants.

The proposals, in thus revealing the same exigencies which guided the works of the Group entrusted by the UNCITRAL, provide a more flexible and user-friendly approach: time-limits for participation and submission of offers have been shortened, allowing for quicker and more streamlined procurement. The distinction between selection of tenderers and award of the contract has been made more flexible, allowing for contracting authorities to decide on the most practical sequencing by examining award criteria before selection criteria and to take into account the organisation and quality of the staff assigned to performing the contract as an award criterion.

The grounds for exclusion of candidates and tenderers have been reviewed and clarified. Contracting authorities will be entitled to exclude economic operators which have shown significant or

persistent deficiencies in executing prior contracts. The proposal related to the classical sectors provides also for the possibility of 'self-cleaning': contracting authorities may accept candidates or tenderers in spite of the existence of an exclusion ground if they have taken appropriate measures to remedy the consequences of any illicit behaviour and effectively prevent further occurrences of the misbehaviour.

The existing safeguards against unsound business practices (violating basic principles of the European Union and resulting in serious distortions of competition) seem to have been improved. The proposals set forth specific provisions on conflicts of interest either actual, potential or perceived, illicit conducts by candidates and tenderers, as well on safeguards against undue preference in favour of participants who have advised the contracting authority or have been involved in the preparation of the procedure. Indeed the fight against corruption and favouritism is reinforced also by the newly introduced Title (the IV<sup>th</sup>) on Governance. As explained in both the proposals, the evaluation has shown that not all Member States consistently and systematically monitor the implementation and functioning of the public procurement rules, compromising the efficient and uniform application of EU law. Therefore it is provided that Member States designate a single national authority in charge of monitoring, implementation and control of public procurement, which will ensure an overview of main implementation difficulties, provide immediate feedback and will be able to suggest appropriate remedies to more structural problems.

Following the 2008 European Code of Best Practices facilitating access by SMEs to Public Procurement Contracts, the envisaged improvement for SMEs and Start-ups has been assured by means of concrete measures such as the simplification of information obligations and direct payment of subcontractors; in the proposal related to the classical sectors, the opportunity to divide into lots, as well as limitation on requirements for participation have also been provided. Moreover, the obligation for Member States to provide support structures offering legal and economic advice, guidance, training and assistance in preparing and conducting procurement procedures, has been set forth.

Last, but not least, one of their most remarkable aspects is the setting forth of specific provisions (Title II, Chapter IV of both the Proposals) on modification of contracts taking up the basic solutions developed by the ECJ<sup>37</sup> and providing a pragmatic solution for dealing with unforeseen circumstances requiring an adaption of a public contract during its term. It is provided that a substantial modification of the provisions of a public contract during its term shall be considered as a new award and shall require a new procurement procedure (with consequent termination of the original awarded contract, as provided for in Art. 73 and Art. 83 of, respectively, the proposal regarding the classical sector and that regarding the 'utilities' sector). In particular, a modification of a contract during its term shall be considered substantial if it renders the contract substantially different from that initially concluded or introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer, or changes the economic balance of the contract in favour of the contractor, or extends the scope of the contract considerably to encompass supplies, services or works not initially covered.<sup>38</sup> Moreover, also the replacement of the contractual partner shall be considered a substantial modification, unless it is due to a universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, as well as in the event of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of the Directives.

However, notwithstanding the purposes of the Commission, both the Proposals have been considered not going far enough, particularly on social aspects; therefore, the ensuring of compliance with social standards at all stages of the public procurement procedure has been supported as well as the application of the lifecycle costs and the socially sustainable production process principles in order to promote sustainable development.<sup>39</sup> It is worth to underline that one of the main points of the current debate regards the recommendation to select the 'most economically advantageous

offer' as the sole award criterion (or at least to increase its use, depending on the form of procedure). Indeed, the 'lowest price' award criterion discourages and prevents innovation and the pursuit of better quality and value. Instead, the 'most economically advantageous offer' can encourage a more efficient public procurement, increasing the participation of SME's including social enterprises, combating favouritism, fraud and corruption and promoting cross-border contracts in public procurement. The European Economic Social Committee (EESC) supports the use of such criterion to "assess the sustainably most advantageous tender, in economic as well as in environmental and social terms. In this way, the award criteria can also take account of these aspects in a broad, imaginative and non-restrictive way, by means of a broader acceptance of this criterion's linkage to the subject matter of the contract and a weighted valuation in relation to the other criteria".<sup>40</sup>

Other relevant amendments have been proposed. Among them, it is relevant to outline the one providing for a joint and several liability down the sub-contracting chain (thus both for the main contractors and any intermediate subcontractor),<sup>41</sup> which has been limited to no more than three successive levels of sub-contracting,<sup>42</sup> as well as the newly introduced provisions - relating to the monitoring of contract performance - setting forth that contracting authorities may or may be required by Member States to monitor the performance of the contractor awarded the contract and, at appropriate stages during the contract term, carry out an assessment of performance using a method that is based on objective and measurable criteria, applied in a systematic, consistent and transparent way. Whether the economic operator or a subcontractor appointed by him has been found to have significant or persistent deficiencies in the performance of any substantive requirement under the contract and the economic operator has not objected to the findings or the economic operator's objection have not been validated through seeking judicial protection, the contracting authority shall communicate the fact and the necessary details of such an assessment to the supervisory and administrative authorities for the consequent, necessary actions.<sup>43</sup>

## **1.2. ... ON CONCESSIONS CONTRACTS AND PUBLIC-PRIVATE PARTNERSHIPS**

Among the contracts to be concluded with the public sector, there is the concessive model based on the partnership between public and private entities, subject of a renewed interest since the mid of the 1990s, when budgetary restrictions and the rise of the *New Public Management*, led to the development of private sector initiatives.

At community level, concessions are drawn as manifestation of the consensual activity of the public authorities. The distinctive criterion between public contracts and concessions is found in the allocation of the financial risk, criterion of a strictly economic nature responding to the logic of results in the light of efficiency, economy and effectiveness.<sup>44</sup>

Currently, the procedures for the award of these contracts are regulated by few provisions of secondary law. In the case of works concessions, there are only certain advertising obligations, sub-contracting and an obligation regarding the minimum time-limits for the receipt of applications.<sup>45</sup> The method for the selection of the private partner is left up to the contracting bodies, subject only to the respect of principles and rules resulting from the Treaty. The services concessions, whose definition lacked also in Directive 92/50/EC and was elaborated only in 2000 by the Commission,<sup>46</sup> are regulated by reference to Arts. 43 and 49 of the EC Treaty, *i.e.* to the principles of transparency, equality or treatment, proportionality and mutual recognition.

As far as the 'utilities' sector is concerned in 2000, lacking any specific rule, the Commission intervened to point out that in order to decide which rules apply, the legal personality of the grantor as well as his activity are decisive elements, outlining several possible situations. Infact, when the State or other public authority, not operating specifically in one of the four sectors governed by the 'utilities' Directive awards a concession involving an economic activity in one of these four sectors, the rules and principles of the Treaty described above apply to it (as does the work Directive),<sup>47</sup> if it is a works concession. If a public authority operating specifically in one of the four sectors governed by the 'utilities' Directive decides to grant a concession, the rules and principles of the Treaty are therefore

applicable insofar as the grantor is a public entity. Even in the case of a works concession, only the rules and principles of the Treaty are applicable, since the works Directive does not cover concessions granted by an entity operating specifically in one of the four sectors governed by Directive 93/38/EEC.<sup>48</sup> If the grantor is a private entity, it is not subject to either the rules or the principles described above.

Directive 2004/18/EC, while including the classical definition, has not drawn a specific set of provisions for concessions contracts. In the case of works concessions it has maintained the provisions related to advertisement obligations, sub-contracting and minimum time-limits for the receipt of application, but it has expressly excluded from its scope of application the services concessions, setting forth only the provision of Art. 3 stating the compliance with the principle of non-discrimination on the basis of nationality by the concessionaire.

However, because of the general change in the role of the State, moving from the direct intervention to the role of regulator and controller of the market and considering also the budget constraints confronting Member States, new contractual schemes ascribed by the community law to the Public-Private Partnership (PPP) category have been developed. PPPs have been defined as any form of cooperation between public authorities and the world of business which aims to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service, whose lowest common denominator is the transfer of responsibility to the private subject.

On April 30, 2004, in addition to Directives 2004/17/EC and 2004/18/EC, the Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions was published, since the Community rules, applicable to the choice of businesses called for cooperation with a public authority under a PPP as well as their impact on the contractual relationships governing the execution of the partnership, were accused of being insufficiently clear and lacking of homogeneity between the different Member States.

As a matter of fact, Directives 2004/17/EC and 2004/18/EC, although the introduction of the competitive dialogue (in Directive 2004/18/EC) and the reordering of concessions, seemed not to

answer to the exigencies and problems posed by a PPP due also to the different forms that it can assume. The mentioned Green Paper proposed a distinction between Purely Contractual PPPs (in which the concessive model is the one best-known and to which could be applied the competitive dialogue set forth in Directive 2004/18/EC) and Institutionalised PPPs, new organizational formula based on the establishment of mixed entities to carry out public services (e.g. for water supply services or waste collection services), but also by the private sector taking control of an existing public undertaking.

Undoubtedly, Institutionalised PPPs pose the most delicate problems, connected also to the practices found in some States allowing the mixed entities, in which the participation by the public sector involves the contracting body, to participate in a procedure for the award of a public contract or concession even when these entities are only in the course of being incorporated, or to confuse the phase of incorporating the entity and the phase of allocating the tasks, contravening in the first case to the principle of effective competition, in the second to the obligation of the contracting authorities to define the subject-matter of the contract or concession in a sufficiently clear and precise manner.

The mentioned Green Paper enucleated also the following elements as characterising PPPs allowing the reconduction of innovative instruments (such as project financing, global service or sponsorizations), to the category; more precisely, the relatively long duration of the relationship between the public and the private partner to guarantee the economic and financial stability of the project; the method of funding the project; the role of the economic operator who participates at different stages in the project (design, completion, implementation, funding), while the public partner concentrates primarily on defining the objectives to be attained (in terms of public interests), quality of services provided and pricing policy and takes responsibility for monitoring compliance with these objectives as well; and – in the end - the distribution of risks between the public and the private partner (to whom the risks, generally borne by the public sector, are transferred).

However, if the decision-making power is shared, the roles are clearly distinct: the public sector defines the purposes and monitors

the project, while the private sector finds the most effective modalities to realize such purposes. Thus, notwithstanding the division into two different sub-categories made by the Commission, the public-private partnership is a unique category including only contractual instruments, which have to comply with rules and principles resulting from the Treaty, particularly with freedom of establishment and free movement of services which specified themselves into the principles of transparency, proportionality and mutual recognition.

Further distinctions are functional to identify the discipline applicable to a particular case. With reference to the modalities of remuneration of the private subject, a partnership contract, under the form of concession, will be implemented if the undertaking is remunerated with a price preponderantly paid by the users. Another distinction attains to the typical or atypical nature of the contract, however, considered the characteristics of the partnership, the atypical and more flexible instrument, seems to be the most suitable.

In 2008, the Commission issued another interpretative communication on the application of Community Law on Public Procurement and Concessions to institutionalised PPP, because it was acknowledged that practitioners wanted clarity about the application of procurement law to the creation of public-private undertakings in connection with the award of a contract or concession.

The Commission observed that the provisions on public contracts and concessions are to be applied also when a private subject and a public entity cooperate in a mixed enterprise if the public contract or the concession is to be awarded to that mixed entity. The ECJ held that the participation even as a minority of a private undertaking in the capital of a company in which the contracting entity in question is also a participant, excludes in any event the possibility of an *in-house* relationship (to which, public procurement law does not apply) between the contracting entity and the company. Moreover the Commission explained what an IPPP is, finding it in the establishment of a new company, the capital of which is held jointly by the contracting entity and the private partner, and in the awarding of a public contract or a concession to this newly

founded public-private entity; or in the participation of a private partner in an existing publicly owned company which has obtained public contracts or concessions '*in-house*' in the past.

The Commission has given explanations not only on the award procedure, information about the project requirements, selection and award criteria and transparency requirements for the criteria, but also on specific elements of statutes and articles of association, the shareholder agreement and the public contract or concession, elements governing the contractual relationship between the contracting entity and the private partner on the one hand, and the contracting entity and the future public-private entity on the other hand. However, concessions contract while presenting specific features, continued to be only partially regulated.

In 2009, the Commission outlined the potential of a legislative initiative on concession contracts to create a supportive EU framework for PPPs<sup>49</sup> and the following consultations held in the course of 2010 (when severe budget constraints and economic difficulties in many EU Member States required a more efficient allocation of public funds), confirmed that the lack of legal certainty in the sector was causing problems, as well as the need for new legislation.

The solution identified was legislation on concession contracts based on the current provisions on public works concessions, adequately adjusted and supplemented with certain specific provisions. The Proposal for a Directive on the award of concession contracts,<sup>50</sup> currently under examination, has been drawn up in compliance with the Proposals for the Directives replacing the 2004/17/EC and 2004/18/EC, and the majority of the obligations which apply to the award of public works are extended to all services concessions. There are also a number of concrete and more precise requirements, applicable at different stages of the award process on the basis of the Treaty principles as interpreted by the ECJ. Finally, the application of secondary law is extended to the award of concession contracts in the 'utilities' sector, currently exempted.

Although this is not the seat for an exhaustive analysis, as the proposed Directive at issue would deserve, it is worth underlying that

the notion of concession contracts is clarified making reference to the defined operational risk. In fact, the right to exploit the works or services implies the transfer to the concessionaire of the substantial operational risk, which in its implementation, caused disputes. Thus, the concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. That economic risk may consist in either the risk related to the use of the works or the demand for the provision of the service; or the risk related to the availability of the infrastructure provided by the concessionaire or used for the provision of services to users. However, an amendment aimed to further clarify the notion of operational risk "*en tant que risque économique lié à l'exposition aux aléas du marché*"<sup>51</sup> is under discussion.

It is also worth underlining that the same Proposal clearly indicates the exclusion of concessions awarded by contracting entities, to an affiliate undertaking, as well as concessions awarded to a joint venture or to a contracting entity forming part of a joint venture (Art. 12), following the indications and principles resulting from the relevant ECJ case-law, before which a number of cases relating to the *in-house* providing<sup>52</sup> have been submitted.

It provides also for obligations relating to the selection criteria to be applied by the contracting authorities or contracting entities when awarding concessions. These rules are less restrictive than similar provisions currently applicable to public contracts. However, they restrict the selection criteria to those related to the economic, financial and technical capacity of the bidder and limit the scope of the acceptable exclusion criteria.

Unlike the Public Procurement Directives, the proposed rules do not contain a fixed catalogue of award procedures. This solution allows contracting authorities as well as contracting entities to follow more flexible procedures when awarding concessions notably reflecting national legal traditions and permitting the award process to be organised in the most efficient way. In order to ensure a fair and transparent process, a number of clear procedural safeguards are

established regarding the structure of the awarding process, the negotiations, the circulation of information and the availability of written records. A number of amendments aimed to specify and strengthen such procedural safeguards are currently under discussion. Last, but not least a specific provision (art. 42) concerning the modification of concession during their term (reflecting those introduced in the proposals related to procurement in the classical and 'utilities' sectors) has been set forth.

Presently, the debate is focused on the observation that the proposal covers all concession contracts, for both works and services, but fails to distinguish between them adequately. In particular, it has been accused of not reflecting the specific nature of concessions for services of general interest which are neither 'tenders' nor 'procurement', but a way of delegating the management of services of general interest and frequently an additional means of funding new services of general interest decided by the public authorities. The EESC has further noted that considerable doubt persists regarding the need itself for a EU Directive on the award of concession contracts, recalling the European Parliament's resolution of 25 October 2011<sup>53</sup> on modernization of public procurement in which it was considered that "any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market", pointing out that such distortions have not yet been identified. As a consequence, the EESC has called for a further and full impact assessment to be carried out before the proposals are allowed to progress, taking the view that the ECJ case-law has largely clarified the application of the Treaty principles of equal treatment, non-discrimination and transparency to the award of concession contracts.<sup>54</sup> Considering all the amendments submitted to the original text it is clear that the proposal at least needs to be clarified, simplified and reorganized.<sup>55</sup>

## **THE GATT AND WTO AGREEMENT ON GOVERNMENT PROCUREMENT**

The GATT GPA (the Tokyo Code), was negotiated between 1973 and 1979 in the frame of the GATT negotiations<sup>56</sup> during the Tokyo Round. It entered into force on January 1, 1981, and was slightly

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amended in 1987, with a Protocol entered into force on February 14, 1988.<sup>57</sup> The scope of application (both in the objective and subjective sense) was strictly delimited; the Agreement covered central government entities and procurement of goods only, in this respect reflecting the circumstance that the Tokyo Round itself was concerned only with trade in goods. Neither the negotiations for its revision took notable results; the only expansion to coverage was a slight reduction in some thresholds, establishing the basic approach that is at the core of the 1994 WTO GPA.

The awareness of the limits of the GATT system, the rise of regional trade policies as well as the re-emersion of protectionist policies, resulted in the founding of the WTO during the Uruguay Round (with the Final Act, signed at the Ministerial Meeting of April 1994) and the former Agreement (the Tokyo Code) was replaced by the WTO GPA, signed on April 15, 1994 and entered into force on January 1, 1996.<sup>58</sup>

Its coverage is more extended than that of the Tokyo Code and represents a tenfold increase; it applies to the proceedings for the award of supply, works and services contracts, summoned by 'central entities', 'sub-central-entities' and other 'entities such as utilities' (listed in Appendix III, nn. 1 - 3), with no distinction about their final use (instead, the former Agreement, was applicable only to supplies intended for being used by the central government entities thus not for commercial use, and to ancillary services if their value had not exceeded that of the supplies).

The Seattle Conference of 1999, was unsuccessful. The Agreement would have been transformed from plurilateral into a multilateral one (that would result in submitting it to the principle of global commitment according to which WTO Member States are to accept all the agreements pertaining to the organization), as held necessary for obviating the disparities between States resulting from being the WTO GPA exempted from the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) rules related to non-discrimination and for examining the possibility to conclude a new agreement involving less onerous obligations based around transparency, with a view to attracting

wider membership or, perhaps, application to all WTO members.<sup>59</sup> In synthesis, the possibility to extend the GATS rules to the proceedings for the award of services contracts.

With the Doha Declaration (issued during the 4<sup>th</sup> ministerial conference of the WTO, held in November 2001), it was reaffirmed the will to renegotiate the GPA rules related to transparency and not to limit the possibility to concede a preferential regime to national products and producers. The negotiations led to the text of December 8, 2006, but it had to wait until December 15, 2011 to have an agreement in principle, at Ministerial level, on a text “building on comprehensive negotiations conducted over a number of years and encompassing both the text and coverage of the agreement”.<sup>60</sup> It was adopted by the WTO Committee on Government Procurement on March 30, 2012. In the document drawn it is outlined that the revision has been effected “in furtherance of our common objectives to modernize the Agreement, expand access to government procurement markets, promote good governance and deter corruption, and facilitate the effective management of public resources, particularly in the present economic environment. The revision recognizes the crucial importance of government procurement as a dimension of economic activity, and its significance for international trade facilitation and development. (...)”.<sup>61</sup> In addition, a number of Future Work Programmes have been developed in order to facilitate mutual understanding of Parties’ approaches to the implementation of the revised Agreement, and to improve the administration of the Agreement itself over time,<sup>62</sup> *i.e.* the Proposed Decisions of the Committee on Adoption of Work Programmes for SMEs, on the Collection and Reporting of Statistical Data, on Sustainable Procurement, on Exclusions and Restrictions in Parties’ Annexes, on Safety Standards in International Procurement.<sup>63</sup>

The negotiations have resulted in a significant extension of the coverage of the Agreement, lowering threshold and adding new entities and sectors to the existing Parties’ Annexes. Three major Parties will provide new coverage of Build-Operate-Transfer agreements (BOTs).

The revision has been carried out with the aim to make the Agreement more user friendly. More, in the 4<sup>th</sup> recital it is stated that the procedural commitments under the GPA should be sufficiently flexible to accommodate the specific circumstances of each Party; such an opening statement has been translated in a formulation of the 2012 GPA in terms of principles more than of detailed provision, however in a way not detrimental to the respect of transparency which has been greatly considered. For example, it is worth to underlie the provision of Art. IV(4) “A procuring entity shall conduct procurement in a transparent and impartial manner that: (a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; (b) avoids conflicts of interest; and (c) prevents corrupt practices”. It finds its general frame in the 3<sup>rd</sup> recital “[...] the integrity and predictability of government procurement systems are integral to the efficient and effective management of public resources, the performance of the Parties’ economies, and the functioning of the multilateral trading system”, creating a system which allows the parties to evolve procedures consistent with their needs so long the transparency and non-discrimination provisions are adhered to and no specific provisions are broken.<sup>64</sup>

Current practices, including the role of the electronic means in the procurement process (always seeking to ensure that electronic means do not create barriers to competition), have been taken into consideration. Additional flexibility has been built in shortening time periods for procuring goods and services of a type available in the commercial market place; special and different treatment for developing countries has been more clearly specified to facilitate future accession by such countries. The 1994 GPA Parties have agreed that the new text should be used as the basis for accession negotiations even before its formal entry into force.

On the other hand, there are provisions which have been given greater certainty by detailing such as the conditions for participation in which a more extensive list of grounds for exclusion has been set forth (see Art. VIII(4)).

Further the 2012 text reflects the importance ascribed to the consideration of environmental matters in procurement and the

possibilities for Parties to integrate environmental considerations in public procurement (see Art. X(6), stating: “[f]or greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment”). This, although it does not clearly states what kinds of environmental measures can be included as conditions or evaluation criteria, in particular whether production measures (or delivery measures) can be included, matters currently debated for the elaboration of the proposed European directives on public procurement.

In the WTO circle there seems to be another impasse which could be overcome thanks to the developments related to the principle of transparency at EU level and to the mentioned decision of December 15, 2011, since the revised text of the GPA provides for the new and explicit requirement, that procurement is to be carried out in a manner that avoids conflict of interest and prevents corrupt practices (as declared by the 6<sup>th</sup> opening statement), constituting a significant innovation in the WTO Rules.<sup>65</sup> The crucial theme pertaining to public contracts has always been constituted by the guarantee and protection of transparency for itself and not as vehicle to control the execution of the undertakings related to the access to the markets,<sup>66</sup> so that in 1996 the Working Group on Transparency was established, entrusted with the task to conduct a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement.<sup>67</sup>

Notwithstanding the support and the importance given to it also from the following declarations of Doha and Cancún, the WTO General Council (of August 1, 2004) frozen its activity with the July Decision,<sup>68</sup> because of the deep and incurable divergencies particularly related to the definition of transparency and to the opportunity or not to exclude both the access to the market and the trade liberalization from the scope of the drawing text.

As far as the *a posteriori* control on the regular carrying out of the proceedings,<sup>69</sup> the 1994 GPA – on the same line of the European Directives – contains requirements of transparency and

information analogous to those operating *ex ante*.<sup>70</sup> Moreover, in order to guarantee an effective protection to economic operators, art. XX,<sup>71</sup> sets forth that the Parties shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of the Agreement arising from the context of procurements, drawing a system of protection of rights and interests of private subjects which come along with the interstate dispute settlement system.

However, the 1994 GPA – as well as the 2012 text – while setting forth the possibility to adopt interim measures or corrections to remedy the breach of the rules at issue, by means of the suspension or annulment of the award proceeding and the compensation for the loss or damages suffered, does not provide for (even though not excluding it) damages for loss of chances.<sup>72</sup> This deprives the sanction of its preventive valence because it allows the maintenance of the eventual costs resulting from the breach less than the benefit resulting from the violation of the rules.<sup>73</sup>

In the end, while it goes beyond the present analysis, it is to be taken into consideration that for intrastates disputes reference is made to rules and procedures governing their settlement in the frame of the WTO Agreement, except for the prohibition (in derogation to that Agreement and due to the plurilateral nature of the GPA), in case of disputes arisen under any of the agreement of the WTO, to suspend concessions or other obligations under the GPA (and *vice-versa*).<sup>74</sup>

## THE UNCITRAL INSTRUMENTS

### 3.1. THE UNCITRAL MODEL LAWS ON PROCUREMENT

The Model Laws and the Legal Guides enumerated under the caption of Procurement and Infrastructure Development,<sup>75</sup> were drawn by the UNCITRAL as legal instruments to regulate the commercial operations to foster economy and competition and the financing of large infrastructural projects respecting the budgetary policy. They resulted from<sup>76</sup> the project on the Legal implications of the New International Economic Order (NIEO), launched to implement the UN General Assembly Resolutions no. 3494 (XXX) of December

15 1975, 31/99 of December 15 1976, and 32/145 of December 16 1977,<sup>77</sup> with which the Commission was requested to contribute to the realization of the objectives and programmatic principles of the NIEO, stated in the Resolutions adopted at the 6<sup>th</sup> and 7<sup>th</sup> Extraordinary Sessions.<sup>78</sup>

In order to execute the mentioned Resolutions, the Commission established a Working Group and entrusted the Secretary General to find, after consulting other International Organizations being or not members of the UN system, the relevant issues to be examined. The resulting report outlined principles according to which International Law should have been drawn as an instrument of justice in international relations, intended to regulate and develop between States a fair and positive political, juridical, commercial and economic cooperation.

The principles, resulting from para. 4 of the Declaration on the establishment of a New International Economic Order and the Preamble of the Charter of Economic Rights and Duties of States as well, implied a reflection about the Commission competencies and the interpretation of its mandate.

According to a first opinion, the Commission should have taken “a broader approach to legal matters and this included the consideration of legal relationships that were of a public law character” and, thus, identify and examine “the principles of international public law that underlay the structure of international private law”, while a second more conservative perspective put pressure on the continuation within the Commission to treat pragmatically specific issues concerning the harmonization, unification and progressive development of the International Trade Law.

The Working Group entrusted with the project, adopting a compromise solution, was of the opinion that in conformity with its mandate, it would have selected specific issues related to International Trade Law (*i.e.*, according to the Schmitthoff's Report,<sup>79</sup> the body of rules governing commercial relationships of a private law nature involving different countries), relevant in the context of the NIEO and also investigating the juridical relations between States and

private enterprises. Thus, it submitted to the Commission the topics to be included in its working program, finding as fundamental and priority point, *inter alia*, the harmonization, unification and revision of the contractual provisions used in international contracts pertaining to the industrial development (such as research and innovation, technical assistance, supply and construction of large industrial works, transfer of technology, leasing and joint ventures contracts and generally industrial cooperation contracts).

At first (1981), on the basis of a study on the contractual provisions related to the supply and construction of large industrial works and of a note on the contractual provisions related to the industrial cooperation,<sup>80</sup> the Working Group focused its work on supply and construction of large industrial works contracts.

The issue related to the opportunity to deeply and organically deal with public contracts was posed when formulating the Legal Guide on Drawing up Contracts for Construction of Industrial Works (adopted on April 1988), considering that such contracts are generally concluded at the exit of tendering proceedings. The project was approved by the Commission in 1986, and the Working Group decided that its discussions should have been directed towards the preparation of a model procurement law. Such a model law would have set forth basic legal rules governing procurement which could have been supplemented with detailed rules by a state implementing it.

Then, in July 1993, the Commission enacted the Model Law on Procurement of Goods and Constructions and, being that the negotiations on services in the Uruguay Round were completed, approved the drawing of a legislative model of rules concerning also the procurement of services. Once discussed the additions and modifications to be inserted in the 1993 Model Law in order to set forth also the proceedings for the award of services contracts, in 1994 it enacted the Model Law on Procurement of Goods, Construction and Services and the accompanying Guide.

The exigency of strengthening the effectiveness of the substantive rules was clearly felt. From the preparatory works of the original text, it appears that three solutions were proposed. According

to the first one, provisions would have been drawn being an integral part of the text and consequently they would have been adopted as such; the second attributed to the same provisions a simple instrumental function, as a parameter to evaluate the sufficiency and effectiveness of the protective measures in force in a given jurisdiction. Finally, according to the third one, the Commission would have enacted the Model Law composed of the sole provisions of substantial law, enclosing a declaration pointing out the need of effective means to protect and carry on the procedures therein described as well as a recommendation, which was tailored on Arts. 1 and 2 of Directive 89/665/EEC, showing the essential elements of the review procedures.

The last proposal was rejected since a recommendation of the Commission could not have assured that States which would have issued a legislation based on the Model Law, would have also provided for the needed reviews procedures. Instead, a formula synthesizing the first two was adopted. As a result, the provisions of Chapter VI, contained only the fundamental principles of the right to review and of the procedures to carry them on (largely using the options mechanism already experimented for the rules of substantive law) and, in the same Model Law as well as in the accompanying Guide, it was clarified that they could have been used in any given jurisdiction as merely measures of equalization.

After having ascertained the favour with which the Law was received,<sup>81</sup> as well as the efficacy of the procedures drawn in guaranteeing “competition, transparency, fairness, economy and efficiency in the procurement process” (*i.e.* the objectives enumerated in the Preamble of the Model Law), the Commission pointed out the exigency of an adjustment of the Law in order to consider the developments of the electronic means of communication also in the field of public contracts, as well as the more relevant issues resulting from its practical application. In June 2004, it was agreed that the “Model Law would [have] benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in [its] use [...] as a basis for law reform”. However, it was also pointed out the necessity that “in updating the

Model Law care should be taken not to depart from the basic principles behind it and not to modify the provisions whose usefulness had been proven”, given to the Working Group a “flexible mandate to identify the issues to be addressed”.<sup>82</sup>

The proposed updating foresaw, in synthesis, the need to contemplate electronic means of acquisition such as the reverse auction, assimilable to the electronic auctions of Directive 2004/18/EC (because in the 2011 Model Law, electronic reverse auctions may also be used as a technique, similarly to framework agreements, as the final phase before the award of the contract in any method of procurement listed in the Law, as well as in the award of contracts under framework agreements), the off-the-shelf purchases, the framework agreements and, preliminarily, to verify if the letter of the Law allows the introduction of provisions setting forth the recourse to the mentioned electronic means. Issues outlined in the practice resulted in the need for reconsidering the conditions for the use of the principal method for procurement of services and some of the so-called alternative methods.

Another relevant subject concerned the rules on the review proceedings. The most meaningful questions were related to the opportunity to amend Art. 52(2) (“Right to Review”), in order to make subject to appeal also the decision of the procuring entity related to the choice of the method and to the rejection of all the offers, as well as to supplement the rules in order to assure that the review was made by an ‘independent administrative body’ on the model of Art. XX (“Challenge Procedures”), para. 6, of the 1994 WTO GPA.<sup>83</sup> In drawing up the new text, the Working Group took into consideration not only the rules and terms of the WTO GPA (both the 1994 and 2012 in the version drafted at that time), but also of Directive 2007/66/EC. Moreover, on the effected choices, weighted on the intent to draw a text complying with the contents of the UN Convention against corruption, particularly its Art. 9(1)(d). That clearly appears from the deletion of the note to Chapter VI of the 1994 Law (now Chapter VIII of the 2011 Law) which makes optional the reception of the provisions therein provided and from the Title of the Chapter itself (“Challenge proceedings”), amended to reflect the requirement of the mentioned UN Convention. The same exigency

also corresponds to the introduction of a standstill period as well as the express provision from the first article of the Chapter (Art. 64 “Right to Challenge and Appeal”), of the possibility for ‘any supplier or contractor’ not only to ‘seek review’, but also to appeal any decision taken in challenge proceedings.

It has meant the deletion of the list of decisions that were exempted from any review process. Under the 2011 Model Law, any decision or action by the procuring entity allegedly not in compliance with the provisions of the procurement law may be challenged by suppliers or contractors that claim to have suffered or claim that they may suffer loss or injury because of such alleged non-compliance.

The Model Law was adopted on July 1, 2011. From its analysis it results that the entrusted Working Group has gone far beyond the original intent, drawing it according to a new philosophy, rationalising and systemizing the provisions of 1994. This results from the Title itself consecrating the Law to the regulation of Public Procurement, so preannouncing the subjective scope of application of the Law and mainly what will be further clarified in the Chapter dedicated to the selection of the procurement methods, *i.e.* that the focus is on the complexity of the procurement rather than whether it is goods, construction or services that are to be procured.

The Law has been restructured through the consolidation of some provisions and principles formerly found in a number of articles of the 1994 Model Law, in order to delineate the main principles and procedures under which the system is intended to operate. It appears since the identification of how the objectives set out in the Preamble are implemented, that their effective implementation can only take effect through cohesive and coherent procedures based on the same underlying principles and where compliance with them is evaluated and, is necessary, enforced.

The same logic has informed the restructuring of Chapter I setting out the general provisions governing the entire proceedings, reorganised to show the provisions following its phases and considerably expanded as compared with its 1994 counterpart.<sup>84</sup>

The 2011 Model Law still contains a variety of procurement methods since providing States with options to choose depending on

the situations, best serve its objectives. The availability of multiple methods allows States to tailor the procedures according to each particular procurement and the needs of the procuring entity, so permitting the maximization of economy and efficiency while promoting competition.

The section on methods of procurement and their conditions for use (which, as mentioned above, are based on complexity of the subject matter rather than whether it is goods, construction or services that are to be procured)<sup>85</sup> is opened by a new Art. 27 that lists all procurement methods and techniques available. Some of them have names identical to their 1994 counterparts,<sup>86</sup> some have names not found in the 1994 Model Law, although they drew their features from its procurement methods or selection procedures.<sup>87</sup> The article refers also to newly introduced procurement techniques — electronic reverse auctions and framework agreements — whose conditions for use are included in the same Chapter II.<sup>88</sup>

The rules applicable to the selection of methods contained in the 1994 text have been substantially revised. The default procurement method remains ‘open tendering’, but a significant change from the 1994 Model Law is the approach to the selection of a method from among the alternative ones. Under the 2011 Model Law, in addition to setting out the largely distinct conditions for use of each method, two requirements that are supposed to guide the procuring entity in determining the most appropriate among those available in some situations, have been introduced *i.e.*, “to accommodate the circumstances of the procurement concerned” (Art. 27) and to “seek to maximize competition to the extent practicable” (Art. 28).

Indeed, as stated in the 2012 Draft Guide,<sup>89</sup> the 2011 Model Law has been prepared to support the harmonization of international standards in public procurement. To this end it took into account also the provisions of the GPA, the EU Directives, the UN Convention Against Corruption, the Procurement and Consultant Guidelines of the World Bank as well as the equivalent documents of other International Financial Institutions.

### 3.2. THE UNCITRAL LEGISLATIVE GUIDE AND THE UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

The New International Economic Order foresaw, *inter alia*, the analysis of the Build-Operate-Transfer (BOT) Projects, on which it began debating at the 27<sup>th</sup> session (1994), when the Commission entrusted the Secretary to draft a note, enucleating the fundamental issues to be examined. In the BOT project a concession for the development, maintenance, direction and commercial exploit of a particular project is awarded to a project consortium. The project consortium, or the undertaking established by the project consortium, commits to develop the project and make the concession operational. Unlike the traditional structure in which the contracting authority bears obligations in order to obtain the funding and guarantee in return, in BOT projects it is the project consortium to be borne (the loans are distributed in relation to the project's anticipated proceeds). The project has a minimum impact on the public funds and, moreover, the public sector benefits from the expertise of the private subject. To incentivate and guarantee the long-terms participation of private capital, a legislation assuring the recuperation of the investments and the execution of the obligations deriving from the contract is to be in force.

However, the Commission drew attention to further difficulties connected to the "procurement aspects of implementation; [...] in BOT the call for tenders might precede any design work. To the extent that there might be a lack of clear guidelines as to the basis on which to evaluate tenders or proposals that would in all likelihood contain varied solutions to a set of problems, a lengthy and therefore costly bidding process might ensue, one that would run the risk of compromising the integrity of the procurement process".<sup>90</sup> The Secretariat issued a further report to carefully examine the mentioned issues and referring on the eventual studies carried out by other international organizations and specifically by the UNIDO, in order that the work of UNCITRAL supplemented it. In 1996, after having considered the Secretariat note on the BOT projects (in which it was outlined that "the organizations that [had] done work in the area of BOT transactions [were] not working to provide comprehensive guidance to national legislators regarding BOT projects"<sup>91</sup>), the

Commission resolved to draw the Legislative Guide on PFIP (dealing with BOT projects, and its variants), adopted in 2000.<sup>92</sup> The following year it was approved the drawing of the Model legislative provisions on PFIP, submitted and enacted in 2003.

In synthesis, the principles of competition, transparency and responsibility set forth for public procurement contracts were integrated with the new techniques of financial engineering, seeing the merger of procurement and regulatory subjects.<sup>93</sup>

The intent is clear from the second paragraph of the Preamble so grounding the enactment of the Provisions “the [Government] [Parliament] of [...] considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects”, *i.e.* as specified by Recommendation 3 “[...] concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems”.

The importance of a well defined juridical frame with reference to the settlement of eventual disputes, in order to create a more hospitable climate for investors, is also pointed out in the Legislative Guide on PFIP. In particular, while for disputes relating to the selection process of the so called concessionaire, reference is made to the relevant provisions of the 1994 Model Law,<sup>94</sup> the importance of transparent and effective procedures for the PFIP is reaffirmed warning that the “legislative provisions dealing with the settlement of disputes arising in the context of these projects must take account of the diversity of relations, which may call for different dispute settlement methods depending on the type of dispute and the parties involved”.<sup>95</sup>

Infact, the mentioned operations are characterized by the long duration of the contractual relations and the plurality of the parties, also of different juridical nature, involved in the construction and operational phases of the project, to which – following its implementation – the users of the services are to be added. Thus, the disputes which could arise, not only relate to different contractual

relations, but can also involve subjects of both different juridical nature (public and/or private) and different status (economic operators and consumers) or concessionaire and (public) grantor, promoters, concessionaire and commercial partners for the implementation of the project or, in the end, concessionaire and users or clients; moreover, previously, disputes could arise between public service providers. In the end, being long-terms contractual relations, the Legislative Guide recommends – as prophylaxis – the predisposition of mechanism operating *ex ante*.<sup>96</sup>

In conclusion, if the 1994 Model Law is clearly the antecedent and the archetype for the disposal of the Model Provisions, it seems worth underlying the inverse process for the 2011 Model Law. The Model Provisions, as well as the coordinate Legislative Guide (which should be revised in order to be updated in the light of the work accomplished in the area of public procurement), have fostered the debate within the Working Group entrusted of the revision of the Model Law, symptom of the intent to develop a system.

## PRINCIPLES

### 1. PRINCIPLES AND PRIMARY POLICIES

With reference to the objectives of economic nature, the fundamental rule is that setting the free movement of goods, services and people, and more in general, the freedom of competition. At communitary level such a principle results from the Treaty, in the WTO GPA the duty to comply with (obviously borne by the Parties to the Agreement), is stated in a number of provisions, in the Model Law (as well as in the Model Provisions) its strength results from being one of the foundations of the regulations. However, such a principle would be only a meaningless predicate if there was no natural tie between it and the provisions aimed to guarantee a real and effective competition in the award proceedings. The European Commission has always held that, with reference to public contracts, the compliance with the principle of equality of treatment and a transparent system of advertising are ideal to generate competition.<sup>97</sup> However, with the elapsing of time, the transparency principle has developed.

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It meant that, while at the very beginning (with the ‘first generation’ Directives and the Tokyo Code) its function was to support the non-discrimination obligations ensuring that contrasting behaviours could be detected and monitored, it was then singled out as the basis of an equal competition to become, together with the principle of equality of treatment, the foundation of the system. The results of such a process, although with some differences in its implementation, came into evidence with the 1994 WTO GPA (see para. 3 of the Preamble), the 1993/1994 Model Laws and, within the frame of the EU, only in 2004 (see Arts. 2 and 10 of, respectively, Directive 2004/18/EU and 2004/17/EU).

In detail, though the 1993/1994 Model Laws did not contain a provision enucleating the general characters to define a proceeding as transparent (analogous to Art. XVII “Transparency” of the 1994 WTO GPA<sup>98</sup>), each provision was prepared to grant the legality of the public action, opposing dyscrasias, inefficiency and arbitrariness to promoting the public confidence in the proceedings as well as to allow economic operators to take into account costs and risks of their participation in order to submit their best offer, concretising an effective competition and the resulting benefits.

Under the 2011 text, as stated in the 2012 Draft Guide, transparency “is considered a key element of a procurement system that is designed, in part, to limit the discretion of officials, and to promote accountability for the decisions and actions taken. It is thus a critical support for integrity in procurement and for public confidence in the system, as well as a tool to facilitate the evaluation of the procurement system and individual procurement proceedings against their objectives. Transparency measures therefore feature throughout the Model Law.<sup>99</sup> These provisions can also promote traceability of the procuring entity’s decisions, a key function”.<sup>100</sup>

In the framework of the WTO, with reference to the public contracts, the cruciality of guaranteeing and protect transparency as such and not as a vehicle to control the execution of the undertakings to accede to the markets (as it is in Art. X of the GATT and was in the Tokyo Code), has been brought into evidence by the establishment of the Working Group on Transparency. However, the 1994 GPA deals

with transparency in a number of provisions<sup>101</sup> enucleating the main characters to define a proceeding as such and, in the 2012 text, it is explicitly sanctioned as one of the major founding principles (Art. IV(4)).

Finally, with reference to the Community Law, the respect for transparency, originally individuated in (and limited to) the advertising requirements, had a merely instrumental function to pursue the other principles. Afterwards, thanks also to the activity of the ECJ, it was reconsidered within the framework of the Treaty to then be ascribed among the fundamental principles, thus conferring it well other valence. Exemplificating, it is only with its judgment of 18 november 1999, Case C-275/98 (Unitron Scandinavia, ECR I-8291, para. 31), that the Court made an obligation of transparency follow the principle of non-discrimination in order to enable the contracting authority to verify that the principle has been complied with; successively, in 2000, the Commission made the obligation of transparency follow directly the Treaty, definitively ceasing to be interpreted as an obligation following the Directives. Finally, in its judgment in Telaustria (of 7 December 2000, Case C-324/98, ECR 2000, p. I-10745, paras 60 - 61), the Court ascribed the principle to the fundamental rules of the Treaty and stated that the contracting authorities/entities are bound to comply with the fundamental rules of the Treaty also in cases of contracts excluded from the scope of the Community directives in the field of public procurement.

The same remarks are valuable with regards to PPPs and concession contracts. Community secondary legislation (as well as the Model Provisions on PFIP) mainly concerns the phase of award of a contract. For the phase following selection of the private partner the principle of equality of treatment and the principle of transparency (which rule out any intervention of the public partner after selection of a private partner in so far as any such intervention might call into question the principle of equality of treatment between economic operators), are useful. The proposed Directive on concession contracts is expected to guarantee transparency, fairness and legal certainty in the award of concession contracts, and thereby contribute to improve investment opportunities by restricting the arbitrariness of contracting authorities and contracting entities' decisions on issues

as prior and post-publication, procedural safeguard, selection and award criteria (less restrictive than similar provisions currently applicable to public contracts, while restricted only to those related to the economic, financial and technical capacity of the bidder) and the deadlines imposed on tenderers. Furthermore, it is provided for a better access to justice in order to prevent or to address violations of the provisions.

Infact, the strength of the transparency principle is directly proportionate to the availability of rapid and effective means of review,<sup>102</sup> as well as to the effectiveness of the policies against the corruption phenomena. In its judgment *Telaustria*, the ECJ declared that the obligation of transparency consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the market to be opened up to competition and the impartiality of procurement procedures to be reviewed. In practice, the guarantee of a fair and impartial procedure is the necessary corollary of the duty to guarantee a transparent advertising system. The procedures drawn by Directive 2007/66/EC (as well as by Arts. 52 - 57 of the 1994 Model Law and mainly 64 - 69 of the 2011 text, and by Art. XX of the 1994 GPA and XVIII of the 2012 GPA) correspond to this aim.

As far as the effectiveness of the policies aimed to combat the corruption phenomena, it is sufficient to remember that all these instruments are linked to the observance of the obligations resulting from the UN Convention against Corruption and, in particular, of its Art. 9(1)(d). Infact, the EU (whose Treaty - Art. 29 - already commits to combat such a phenomena), signed the mentioned Convention (on September 15, 2005), while in the 2012 GPA it is stated in the Preamble. Also the Working Group entrusted with the revision of the 1994 Model Law has informed the amendments to be made in the chapter on the review proceedings, to the intent of drafting a text in line with and complying to the mentioned Convention. It has been translated in the provisions requiring that enacting States provide all rights and procedures necessary (both at first instance and in appeals) for such and effective challenge mechanism,<sup>103</sup> as well as - following in the steps of Directive 2007/66/EC - in the provision of the standstill period before the signing of the awarded contract as

well as the possibility to annul the same. Similarly, the Model Law has been designed to be consistent, so far as practicable, with the approach to challenge procedures under the GPA. As outlined before, the Directives of 2004 have helped to establish a culture of transparency while representing only the first step of a reordering *in itinere*; the proposals currently under elaboration improve the existing safeguards against unsound business practices not only setting forth specific provisions on conflicts of interest actual, potential or perceived, illicit conducts and undue preferences, but also introducing new provisions on Governance (while such a subject is not regulated in the 2011 Model Law, but addressed in the 2012 Draft Guide).<sup>104</sup> Thus, it seems that the autonomy reached by the transparency principle will be linked to the accountability in the management of public finance.

The principle of equality or treatment has been analysed under both a formal and substantial profile. According to the first one, it is translatable as equality before the law, guaranteeing to all the participants to a procurement proceeding the same rights in the application of the law. Under the substantial profile, it corresponds to the economic concept of horizontal equality and requires that identical situations are treated in the same way. This implies, for example, that the offers are to be evaluated on the basis of as much possible objective parameters (such as price or quality), or at least quantifiable. Moreover, the concept finds a specific application (and not a simple extension), in the principle of non-discrimination based on nationality, which implies that each condition founded on the nationality of the economic operator or on the local origin of the object of the contract, will give automatically rise to a different treatment, since those conditions, by definition, will discriminate between a certain class of offerors with respect to another. However, discrimination will give inevitably a place to the violation of the principle of equality of treatment, but not always a violation of the mentioned principle will give origin to discrimination.<sup>105</sup> Such a point is well illustrated by the ECJ judgment, case C-243/89 (Commission v. Denmark, 22 June 1993, ECR I-3353), in which the Court stated that “by reason of the fact that [...] invited tenders on the basis of a condition requiring the use to the greatest possible extent of Danish

materials, consumer goods, labour and equipment and the fact that negotiations with the selected consortium took place on the basis of a tender which did not comply with the tender conditions, the Kingdom of Denmark failed to fulfil its obligations under Community law and in particular infringed Articles 30, 48 and 59 of the Treaty as well as Council Directive 71/305/EEC". While the provisions providing for the use of local goods and labour introduced an unequal treatment and, at the same time, were clearly discriminatory, the fact having allowed one of the offerors to submit a variant which made the offer non-conforming to the solicitation documents was clearly a violation of the principle of equality of treatment not implying any discrimination between national and foreign offerors.

The Model Law as well as the WTO GPA, expressly provide the possibility to grant preferences to domestic suppliers or local content; in particular, the GPA provides offsets and price preference programmes, available as negotiated transitional measures to developing countries, while the Model Law other than the provision of Art. 8, sets the possibility to grant margins of preference, although it is warned that such measures should be considered exceptional given their potential impact on competition and economy in procurement and reduce confidence in the procurement process.<sup>106</sup> Currently, also in the EU frame, it is under consideration to give preference to local producers to alleviate the local impact of the economic crisis, promote sustainable development and preserve local and regional production.

The remaining fact, demonstrating the delicacy of the question, is that the selection criteria are the area in which repeatedly and icastically the ECJ (from its Judgment in *Beentijees* beyond) has been interested in, and in which Directives 2004/17/EC and 2004/18/EC, introduced some of the more incisive modifications (together with the issue concerning the criteria for the award of the public contract). It is worth mentioning that the 1994 GPA (Art. X(1)), and the Tokyo Code before it (Art. V(6)) states, as further parameter, the subordination of the right to participate in the proceeding to the efficient operation of the procurement system. The insertion of such a parameter was proposed also during the drafting of the 1994 Model Law<sup>107</sup> suggesting that the criteria to be applied should refer to the suitability

of the candidate to execute the contract to be awarded, but it was opposed that both the concepts (the subordination to the efficient operation of the procurement system and the suitability) implied subjective evaluations which would have allowed the avoidance of transparency and competition principles.<sup>108</sup> Such a consideration seems to permeate also the revised text of the GPA where the specification has been deleted (Art. IX and V(4)).

Rather, as far as the awarding criteria, it is to be outlined that - in the EU frame - only with the Directives of 2004 including the ECJ case-law, it has been pointed out that the procuring entity has to specify “the relative weight which it gives to each of the criteria chosen to determine the most economically advantageous tender”.<sup>109</sup> Currently, being under consideration the opportunity to select the ‘most economically advantageous tender’ as the sole or at least the principal award criterion in order to allow contracting authorities/entities to make the most appropriate choices in relation to their specific needs (including the consideration of strategic societal aspects, social as well as environmental criteria and, in particular, fair trade), it has been strongly pointed out the need that the award criteria selected for determining the ‘most economically advantageous’ tender should always be linked to the subject-matter of the contract and should ensure the possibility of effective competition.

To confirm the delicacy and centrality of the issue in assuring a transparent proceeding, the last remark attains to the 2011 Model Law in which an article specifically dedicated to the “Rules concerning evaluation criteria” (Art. 11), has been inserted between the general provisions. All the questions above delineated are inserted in it. Infact on one side the text rationalise and systemise the provisions contained in Arts. 27(e), 34(4), 38(m), 39 and 48(3) (setting forth the contents of the solicitation documents and the evaluation criteria) of the 1994 Model Law, on the other it includes the disposal of the Model Legislative Provision on PFIP no. 11 (“Content of the request for proposals”), lit. d), requiring that in the solicitation documents should be specified the “[...] criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight

to be accorded to each evaluation criterion; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals". However the elaborated text goes beyond, providing that in determining the successful tender, apart from the exceptions related to socio-economic criteria listed in para. 3 of the article, only selection criteria "relating to the subject matter of the procurement" will be used (Art. 11(2)).

In the 2011 Model Law, this requirement is intended to ensure objectivity, and to avoid the misuse of the procedure using other, irrelevant, criteria intended for the purpose of favouring a particular supplier or contractor or group of suppliers or contractors. The principle that evaluation criteria must relate to the subject matter of the procurement is a cornerstone to ensure best value for money and to curb abuse and assists in differentiating criteria that are to be applied under para. 2 of the article from the exceptional criteria (*i.e.* the socio-economic criteria) that may be applied only in accordance with para. 3.<sup>110</sup>

### **PRINCIPLES AND SECONDARY POLICIES**

Secondary policies are those that can affect the respect of the mentioned principles if not resulting incompatibles. Those policies are also defined pro-active because they aim to travalicate the traditional policies connected to the awarding in order to satisfy wider social objectives. The most common tend to concentrate on the protection or raising of workers rights and works conditions, on human rights (of genus and racial), on equality in employment, on SMEs and on environment.

In the communitary framework the social policies become one of the objectives of the Union, once recognized the connection between the economic component of social policies and their welfare function. The Maastricht Treaty added to Art. 2, the pursuing of "a high level of employment and of social protection"<sup>111</sup> and the Amsterdam Treaty, in Art. 136, listed a number of social objectives such as "the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with

a view to lasting high employment and the combating of exclusion”, while the following Art. 137 specified the Member States activities which will be supported by the community, between which the most important ones, connected to the topic at issue, are those regarding the working environment protection in order to protect workers’ health and safety. Moreover, because of the occupational crisis occurred in the 1990s, the Amsterdam Treaty introduced Title VIII, which deals with the Member States policies coordination in the subject matter of employment, directly connecting it to the economic policies (through Art. 126).

The Maastricht and Amsterdam Treaties, moreover, have reinforced the policies aimed to protect the environment. Infact, the first one introduced (always in Art. 2), the pursuing of a “sustainable and non-inflationary growth respecting the environment”, while the Amsterdam Treaty with its Art. 3C (Art. 6 of the consolidated version), clarifies that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Art. 3, in particular with a view to promoting sustainable development”.

The 2004 Directives, adopting the instancies aimed to assure the pursuing of the mentioned policies, other inserting the principles elaborated by the ECJ (from its judgement in Beentjies and beyond) aligned with what was stated in the 1994 GPA, and specifically with the diposal of its Art. XXIII (“Exceptions to the Agreement”), para. 2, which provides “[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour”. In this Agreement, since the very beginning, some of the signatories submitted reservations (for example, the USA have inserted a reservation in favour of minorities), in order to consent to the awarding entities to apply a social criteria in the award of the

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public contracts; at the European level, the direct pursuing of such policies has been made possible starting from the Directives of 2004.<sup>112</sup>

Setting apart the renewed interest,<sup>113</sup> as a matter of fact the pursuing of the secondary policies can introduce high elements of discrimination, in so doing, contrasting the objective of creating a single public contracts market. Areas particularly subject to manipulations are those regarding the preparation of the technical specifications, criteria of selections and the awarding of the contract or project. The adopted solution consists in the fixing of limits in function of the public contract object and to subject them to a strict respect of the advertising requirements.

The European Directives of the 1990s, the 'second generation', indirectly allowed the pursuing of such objectives as well as, following the judgment in *Beentjes*, the inclusion as conditions of execution of the public contracts, of social obligations aimed to protect some disadvantaged categories.<sup>114</sup> The possibility to take into account ecological criteria in the award of a contract has been confirmed by the ECJ for example in the case *Concordia Bus Finland*<sup>115</sup> in which it was stated that they can be taken into consideration provided that are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination. Moreover, the Court has stated that the principle of equal treatment does not preclude the taking into consideration of criteria connected with protection of the environment, solely because the contracting entity (in the case at issue, the entity's own transport undertaking) is one of the few undertakings able to satisfy those criteria.

With respect towards the transparency principle, Directives 2004/17/EC and 2004/18/EC aimed to induce the undertakings to consider the social, ethic and environmental aspects in their own business and investment policies. Infact Whereas no. 6 of Directive 2004/18/EC and Whereas no. 13 of Directive 2004/17/EC, with terminology equivalent to that of Art. XXIII (2) of the WTO GPA, provide

that: “[n]othing in this Directive should prevent the imposition or enforcement of measures necessary to protect public policy, public morality, public security, health, human and animal life or the preservation of plant life, in particular with a view to sustainable development, provided that these measures are in conformity with the Treaty”. For the sake of clarity, it is worth pointing out that in the Amended proposal for a Directive concerning the coordination of procedures for the award of public supply, service and works contracts, of May 6 2002,<sup>116</sup> the Commission accepting the introduction of the Whereas at issue, outlined that it should have been drafted in such a way to reproduce the provision set forth in Art. 30 of the Treaty (currently Art. 36 of the consolidated version of the TFEU) stating: “[t]he provisions of Articles 28 [currently Art. 34 TFEU] and 29 [currently Art. 35 TFEU] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”. As mentioned before, currently under debate is the opportunity for the award criteria to take into account economic, environmental and social aspects in a broad, imaginative and non restrictive way, by means of a broader acceptance of their linkage to the subject matter of the contract and a weighted valuation in relation to the other criteria. It is also under consideration to give preference to local producers, in particular SME’s in order to enable contracting authorities to be provided with a tool for alleviating the local impact of the economic crisis, promoting sustainable development and preserving local and regional production.

As far as the UNCITRAL instruments, these seem to have become more convergent after having followed two different lines. Indeed, the 1994 Model Law contained provisions which only indirectly protected social policy objectives,<sup>117</sup> contrary to what was already stated in the opening declarations of the Tokyo Code (with

reference to the developing countries), but mainly in art. VIII(2)<sup>118</sup> of the same (reproduced in Art. XXIII(2) of the 1994 GPA). The reasons for the omission could be found in the fact that at that time “such objectives [were] of less concern in those countries to which the Model Law [was] mainly direct or perhaps because the Model Law [did] not wish to encourage the use of procurement to pursue social goals, because of the perceived adverse effect on transparency”.<sup>119</sup> Rather, the Model Provisions, in addition to giving particular emphasis to the importance of the community participation in the project selection, annoverate among the evaluation criteria the consideration of the environmental standards, as well as the potential of the proposal in function of the social and economic development. The 2011 text, has opted for the inclusion of criteria connected to environmental or social policies while applying rigorous transparency requirements and restricting the manner in which they can be applied, considering the high implied probability of elusion of the transparency, non-discrimination and equality of treatment principles prevailing on the benefits brought by the consideration of such a policies.<sup>120</sup>

As a matter of fact, socio-economic policies are implemented through restrictions on competition for a particular procurement, and so involve exceptions to the principle of full and open competition. Moreover, their pursuit can bring additional costs to procurement and therefore their use should be carefully weighed against the costs that they may involve in both the short and long term. In particular, they may be considered to be appropriate as transitory measures, only for the purposes of granting market access to emergent suppliers, opening the national economy, such as through capacity-building, and should not be used as a form of protectionism.<sup>121</sup>

Notwithstanding the safeguard measures provided for by the Law, as the 2012 Draft Guide warns, “ the impact of such policies on the objectives of the Model Law include that, in restricting competition, they may increase the ultimate price paid; and the cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative effect on efficiency”. However “some such policies may open the procurement market to sectors that have traditionally been excluded

from procurement contracts (such as SMEs) and may increase participation and competition, though in the longer term such benefits may not persist if suppliers choose artificially to remain SMEs.<sup>122</sup>

Thus, sustainable procurement considered to include a long-term approach to procurement policy, reflected in the consideration of the full impact of procurement on society and the environment within the enacting State can be considered to a large extent as the application of best practice as envisaged in the Model Law. For this reason, sustainability is not listed as a separate objective in the Preamble, but addressed as an element of processes under the Model Law.<sup>123</sup>

### CONCLUSIONS

The EU Directives, the WTO GPAs as well as the UNCITRAL instruments, show a tendentially common development line, aimed to reach objectives (*in primis* of economic nature), guaranteed by the application of well defined principles. However, due to their different juridical nature and to the context in which they have been approved, this happened and happens with timing, tones and proper declension as well.

Infact, in the community frame, it is the Treaty itself that determines the compulsory nature of the principles of free movement of goods, freedom of establishment and freedom to provide services as well as equality of treatment (of which the principle of non-discrimination on the basis of nationality is a specific application), mutual recognition, proportionality and transparency and on a more processual level, effectiveness of the protection, loyal cooperation and legality.

On the contrary, The UNCITRAL Model Law as a 'soft-law' instrument brings into evidence that said principles are fundamentals of the provisions and thus have a guiding function in the interpretation and application of the law, while are also instruments for its integration. It exposes them in the Preamble (though, originally they were included between the provisions) and so implicitly heightens them to autonomous principles.

Infact, while at the very beginning (precisely in the second draft of the 1993 Model Law) the *incipit* borrowed the formula of the GATT GPA<sup>124</sup> stating that “[t]he (objectives) of this Law are, consistent with the efficient operation of the procurement system (...)”, it was held more convenient to not subordinate them to the reaching of the efficiency, giving all of them an ‘equal status’, in order to create a balanced system and avoid the pursuing of one of the objectives to the detriment of the other.

The regulation in a single text of the procedures for the award of supply, works and services contracts is the first and more immediate translation of that exigency of rationalization and procedural simplification to promote “transparency, integrity, fairness and public confidence in the procurement process”<sup>125</sup> and that, facilitating the access of the operators to the market, strengthens the principles of non-discrimination and free competition, achieving the best relation between economic value and social utility (best value for money) and, ultimately, the growing of the long-term economy. However, while the Model Law, enacted in the 1990s, just at the time of the ‘global reformation’ or ‘revolution’ in the area of public procurement, has at once conjugated simplification, rationalization and flexibility both in its structure and in the setting forth of its provisions, in the Community frame the same exigency has been realized, at the level of substantial law, only with Directives 2004/17/EC and 2004/18/EC and, as regards the protection, with Directive 2007/66/EC. As outlined before, the Directives of ‘first generation’, enacted at the beginning of the 1970s, under the prevailing economic functionalism and the predominium *de facto* of protectionist policies, on the whole, were essential but brief, and limited to the proceedings for the awarding of supply and works contracts. For a more analitical and exhaustive legislation, the extension of the same to services contracts and the regulation of the ‘utilities’ sector, it had to wait the ‘global revolution’, comprised between the end of the 1980s and the beginning of 1990s. Directives 89/665/EEC and 92/13/EEC, welcomed as the formal starting by the Community of a processual policy, belongs to such an arch of time, but the full reception (on the formal level) of the

principles enucleated by the ECJ occurred only with Directive 2007/66/EC.

Moreover, the issuing of Directive 2009/81/EC on the award of 'certain' contracts in the fields of defence and security, up to then – in practice – exempted from the rules of the Internal Market, while has regulated what the Commission defined as the core of the European Community and by its very nature a legally and potentially serious matter, reiterates that tendency to the sectorialization of the topic, already shown by the specific regulation of the public contracts for the 'utilities' sector. In antithesis is the UNCITRAL policy. Infact, if the 1994 text had already shown provisions potentially apt also for public contracts in the 'utilities' sector, in that of 2011 the elaboration of a text applicable regardless of the kind of procurement or sector implied continued, so that the exclusions *ratione materiae* originally set forth in Art. 1 of the 1994 Model Law have been deleted. Moreover, if the 1994 Model Law is clearly the antecedent and the archetype of the Model Provisions on PFIP, it seems worth underlying the inverse process for the 2011 text. The Model Provisions, as well as the coordinate Legislative Guide, have nurtured the debate within the Working Group entrusted of the revision of the Model Law, symptom of the intent to develop a system.

Different remarks attain to the WTO GPA, born thanks to the initiative of both the USA and the (then) EEC, which were willing to open the energy and telecommunications market, up to then excluded from the foreign competition. The Agreement corresponds to the logic which took to the Uruguay Round negotiations and the establishment of the WTO as well (*i.e.* the awareness of the limits of the GATT system), and it was the reaction to the re-emersion of regional and protectionist trade policies. The exigency of sistemising and rationalizing the regulation as well as to adapt it to the new techniques of electronic transmission of data, took to its revision. However the difficulties connected to the negotiations of an Agreement which, at least at the beginning, there would be transformed in a multilateral one, contribute to explain why the text drafted on December 8, 2006 was not entered into force and had to wait the decision of last December to be converted, with some minor amendments, into the text approved on March 30, 2012.

The guiding *ratio* for the legislations at issues is to favour the growth of the long-term economy. Determinant factors are the economy and efficiency of the system for the award of public contracts, *i.e.* the acquisition of items of the desired quality at a reasonable price and contractual provisions (economy), in a reasonable time, minimizing the administrative burdens and with reasonable costs for both the procuring entity and the economic operators (efficiency). Such a binomial is strictly connected to the affirmation of the principle of public accountability in the public sector, reportable to a more general issue of public service ethic. The relevance of the topic is streamlined considering that the concept has acquired a dimension which goes beyond the national boundaries, because the international or regional agreements aimed to regulate the subject have multiplied. To these are to be added the regulations of International Financial Institutions such as the World Bank which, in order to fund the foreseen purchases and the infrastructural project, state the conditions regulating the proceedings. Moreover, its contents have been enriched thanks to the affirmation of theories on good governance, particularly with reference to the forms of cooperation between public and private sectors for the realization of large infrastructural works and to the pursuing of the 'secondary policies', so much that the mentioned adagio of best value for money has assumed a more clear phisionomy.

While between principles and objectives of economic nature there is a perfect correspondence, because the respect for the first guaranteeing the achievement of the second, the relationship between principles and secondary policies appears to be more complex, since the latter could lend themselves, eluding the first and mainly the principle of transparency, area in which the most relevant differences between the analysed instruments are to be found, at least up to the recent developments.

#### NOTES

1. Cf. J. FERNÁNDEZ MARTÍN, *The EC Public Procurement Rules: A Critical Analysis*, Clarendon Press Oxford, 1996, pp. v – 321, p. 6.
2. *I.e.* the Directives (all repealed) concerning the procedures for the award of public works contracts 71/305/EEC (OJ L185, 16/8/1971) and of public supply contracts 77/62/EEC (OJ L013, 15/1/1977), later amended by Directive 80/767/EEC (OJ L215, 18/8/1980).
3. *I.e.* the idea, finding its origin in the Schuman's declaration of May 9<sup>th</sup>, 1950, according to which the gradual integration of the economies was a pre-condition to the political union.
4. Cf. J. FERNÁNDEZ MARTÍN, *The EC Public Procurement Rules*, cit., p. 14 “[t]he Directives [...] stood midway between a minimalist approach and a more interventionist one. The fact that they claimed to respect national rules to the furthest extent possible is an expression of the former, whereas the detailed regulation of the qualitative selection and award criteria and the imposition of advertising obligation reflects the latter”.

5. COM(85)310, del 14/6/1985, pp. 1 – 57. Cf., paras. 80 – 87 (pp. 23 – 24), in which it was pointed out that statistics indicated a minimal application of the Directives and the need for their improvement to increase transparency further as well as to enlarge the scope to the sectors of energy, transport, water and telecommunications to be realised before 1992. The report concluded pointing out that community-wide liberalisation of public procurement in the field of public service was vital for the future of the Community economy.
6. The EU contributed to the liberalisation of public procurement also with its primary commercial partners, first adhering to the GATT GPA in 1979, subsequently to the Agreement on the European Economic Area (between, at that time, the EEC and EFTA countries, of 21/10/1991, partially renegotiated and signed in Oporto on 2/5/1992), the European agreements (concluded starting from the 1990s with the countries of eastern Europe) and, finally, in 1994 entering into the WTO GPA (cf. Council Decision 94/800/EC of 22/12/1994, in OJ L336 of 23/12/1994).
7. It belongs to this period, Directive 89/440/EEC (OJ L 210, 21/7/1989), amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts and Directive 88/295/EEC (OJ L 127, 20/5/1988), amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC. In 1992, Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, was published (OJ L 209, 24/7/1992) and, in 1993, the Directives 93/36/EEC coordinating procedures for the award of public supply contracts (OJ L 199, 9/8/1993), and 93/37/EEC concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9/8/1993), later amended by Directive 97/52/EC (OJ L 328, 28/11/1997). As far as the so-called 'utilities' sector is concerned, the first Directive date back to September 1990: it is Directive 90/531/EEC, on the procurement procedures of entities operating in the water,

energy, transport and telecommunications sectors (OJ L 297, 29/10/1990). Previously, the Recommendation 84/550/EEC concerning the first phase of opening up access to public telecommunications contracts (OJ L 298, 16/11/1984) was published, as well as Directive 86/361/EEC on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (OJ L 217, 5/8/1986). In 1993, the subject was deeply reformed by Directive 93/38/EEC (OJ L 199, 9/8/1993), later amended by Directive 98/4/EC (OJ L 101, 1/4/1998).

8. The first one on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30/12/1989), amended by Directive 92/50/EEC to be extended to the public service sector (cf. Art. 41); the second one, 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 (OJ L76, 23/3/1992).
9. Pursuant to which “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.”
10. Cf. ECJ Judgments of 15 May 1986, Case 222/84, *Margherite Jhonston v. Chief Constable of the Royal Ulster Constabulary* (ECR 1986, p. 1651, para. 18); 15 October 1987, Case 222/86, *Union Nationales des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v. Georges Heylens and others* (ECR 1987, p. 4097, paras. 14 – 16); 27 november 2001, Case C-424/99, *Commission of the European Communities v. Republic of Austria* (ECR 2001, p. I-9285, para. 45); 25 July 2002, Case C-50/00 P *Unión de Pequeños*

*Agricultores v. Council of the European Union*, (ECR 2002, p. I-667, paras. 38 - 42).

11. M.P. CHITI, L'effettività della tutela giurisdizionale tra riforme nazionali e influenza del diritto comunitario, in *Dir. proc. amm.*, 1998, 3, pp. 499 - 522, cf., in particular, pp. 505 - 507.
12. The conclusion of the WTO GPA - to which the European Union (included its 27 Member States) is a signatory - as well as the adoption of the UNCITRAL Model Laws also by a number of Eastern Europe States which, in the new geo-political context, were "preparing" their accession to the Community, date back to this period.
13. The mentioned definition was given by D. WALLACE JR., *The Changing World of National Procurement Systems: Global Reformation* (1995), 4 *Public Procurement Law Review*, 57, quoted by S. ARROWSMITH, Preface, p. ix, in S. ARROWSMITH, A. DAVIES (eds.), *Public Procurement: Global Revolution*, Kluwer Law International, 1998, pp. v - 283.
14. The first one coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; the second one on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30/4/2004), later amended by Directive 2005/51/EC amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC relating to notices (OJ L 257, 1/10/2005), complying with Regulation (EC) 1564/2005 (*ibidem*) and with reference to the thresholds, by Directive 2005/75/EC (OJ L 323, 9/12/2005), Regulations (EC) 1874/2004 (OJ L 326, 29/10/2004), 2083/2005 (OJ L 333, 20/12/2005), 1422/2007 (OJ L 317, 5/12/2007), 1177/2009 (OJ L 314, 1/12/2009) and 1251/2011 (OJ L 319, 2/12/2011); by the Directives needed following the enlargement of the Union, according to the Commission Decision 2008/963 of 9 December 2008 amending the annexes as regards their lists of contracting entities and contracting authorities (OJ L 349, 24/12/2008) and by

Directive 2009/81/EC which amended Art. 10 of Directive 2004/18/EC and inserted Art. 22bis of Directive 2004/17/EC. Currently, new Proposals replacing Directives 2004/17/EC and 2004/18/EC are under elaboration.

15. Public Procurement in the European Union, COM(98)143, of 11 march 1998. It was elaborated on the basis of the debate arisen following the publication of the Green Paper Public Procurement in the European Union: Exploring the Way Forward [COM(96)583].
16. Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, was published on the OJ L335, of 20/12/2007 (pp. 31 - 46).
17. The Chart of Fundamental Rights of the European Union, of December 7, 2000 states rights and principles to be observed in application of Community law. The text was revised (cf. OJ C-303, 14/12/2007), in order to replace that of 2000 starting from the entering into force of the Lisbon Treaty. With reference to Art. 47 "Right to an effective remedy and to a fair trial", it is to be outlined that the first subparagraph is based on Art. 13 and the second subparagraph corresponds to Art. 6(1) ECHR.
18. Which sets forth that: "[e]ach State Party shall [...] take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems [...] shall address, inter alia: [...] (d) an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed ". The same Article provides also that should be regulated "(a) [t]he public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts,

allowing potential tenderers sufficient time to prepare and submit their tenders; (b) [t]he establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) [t]he use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; [...] (e) [w]here appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements". Finally, it is also provided that "2. [e]ach State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: (a) procedures for the adoption of the national budget; (b) timely reporting on revenue and expenditure; (c) a system of accounting and auditing standards and related oversight; (d) effective and efficient systems of risk management and internal control; and (e) where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph. 3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents". In this regard, cf. also the Technical Guide to the United Nations Convention against Corruption, UNODC V.09-84395-July 2009 (pp. iii - 218), pp. 28 - 42.

19. More precisely, in *Alcatel* (ECJ Judgement, 29 October 1999, Case C-81/98, ECR 1999, p. I-767), the Court, on the basis of the combined provisions of Arts. 1 and 2(1)(b) of Directive 89/665/EEC, stated the broad interpretation to be given to "decision amenable to review" lacking limitations regarding its nature or content, and that consequently the Member States are required to ensure a review procedure whereby an award decision can be set aside and, as necessary implication, a

period of time between said decision and the signing of the contract which allows the bringing of action. The Court considered insignificant that the Directive does not state a specific period of time between the time when the decision awarding the contract is taken and the signing of the contract. As stated by Advocate General Misho, this does not prevent the Court from construing it “in a way that complies with the requirements of effectiveness” (cf. para. 63 of his Conclusions). In *Commission v. Austria* (ECJ Judgement, 24 June 2004, Case C-212/02, Judgment in OJ, C-201 of August 7, 2004, p. 3), the obligation to inform tenderers of the award decision and to assure a reasonable period to examine and eventually apply for interim measures are identified as conditions guaranteeing a complete, effective and efficient legal protection. Infact, considering the purpose of legal protection of the Review Directives (outlined since the ECJ judgment of 11 August 1995, Case C-433/93, *Commission v. Federal Republic of Germany*, ECR 1995, p. I-02303), “[s]uch protection cannot be effective if the tenderer is not able to rely on those rules against the contracting authority” (cf. paras. 20, 21 and 23). In *Stadt Halle* (ECJ Judgment, 11 January 2005, Case C-26/03, ECR 2005, p. I-1), the Court, *inter alia*, extended the legal protection also to decisions taken outside a formal award procedure and to decisions prior to a formal call for tenders, veting to the Member States to make the possibility of review subject to the fact that the public procurement procedure in question has formally reached a particular stage. It stated also that, such a possibility of review is available from the time when the contracting authority has expressed its will in a manner capable of producing legal effects (cf. para. 41).

20. As stated by Whereas no. 7 of Directive 2009/81/EC.
21. “1. The provisions of the Treaties shall not preclude the application of the following rules: (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; (b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its

security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes. 2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958 [adopted by Council Decision no. 255/58], of the products to which the provisions of paragraph 1(b) apply". As the Commission outlined in the Interpretative Communication on the application of Art. 296 of the Treaty, cit., (p. 4), it is to be pointed out that "Article 296(1)(a) TEC goes beyond defence, aiming in general at protecting information which Member States cannot disclose to anyone without undermining their essential security interests. This can also concern the public procurement of sensitive equipment, in both the defence and the security sector. In general, however, possible confidentiality needs related to the procurement process for military equipment are covered by Article 296(1)(b) TEC".

22. Cf. ECJ judgements, 26 October 1999, Case C-273/97, *A.M. Sirdar v. The Army Board and Secretary of State for Defence* (ECR 1999, p. I-7403), paras. 15 – 16; 11 January 2000, Case C-285/98, *T. Kreil v. Federal Republic of Germany* (ECR 2000, p. I-69), para. 16; 11 March 2003, Case C-186/01, *A. Dory v. Federal Republic of Germany* (ECR 2003, p. I-2479), paras. 30 – 31.
23. Cf. ECJ judgment, 16 September 1999, Case C-414/97, *Commission v. Spain* (ECR 1999, p. I - 5585), para 22.
24. Although they would have respected the rules of the Internal Market by way of Arts. 10 and 21 of, respectively, Directives 2004/18/EC and 2004/17/EC).
25. Cf. the Green Paper, cit., in particular at pp. 7 – 8 and 10 – 11.
26. Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the

fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L216, 20 August 2009, pp. 76 - 136). The Directive follows the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – European Defence, Industrial and Market issues, Towards an EU Defence Equipment Policy (COM(2003)113 final), of 11 March 2003, (pp. 1 - 21); the Green Paper, Defence procurement (COM(2004)608 final), of 23 September 2004, (pp. 1 - 12); the European Parliament resolution on the Green Paper on defence procurement (2005/2030(INI)), of 17 November 2005, published in OJ, C280E, of 18 November 2006, (pp. 463 - 467); the Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement (presented by the Commission) (COM(2006) 779 final), of 7 December 2006, (pp. 2 - 9); the Commission Staff working document, Accompanying document to the Interpretative Communication on the application of Article 296 of the Treaty in the field of defence procurement, Impact assessment summary (SEC(2006) 1555), of 7 December 2006, (pp. 1 - 4); the Communication from the Commission to the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Strategy for a Stronger and More Competitive European Defence Industry (COM(2007) 764 final), of 5 December 2007, (pp. 1 - 11).

27. Cf., Whereas no. 1 and 2 of Directive 2009/81/EC.
28. See, Proposal for a Directive of the European Parliament and of the Council on public procurement (COM(2011) 896 final, 2011/0438 (COD), (pp. 1 - 246), Explanatory Memorandum, p. 5).
29. Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth (COM(2010) 2020 final), pp. 1 - 31. Cf., also, the Proposal for a Directive on public procurement, cit., Whereas n. 2 and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal

services sectors (COM/2011/0895 final - 2011/0439 (COD), (pp. 1 - 168), Whereas n. 4.

30. Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market (COM(2011) 15 final), pp. 1 - 56.
31. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act, Twelve levers to boost growth and strengthen confidence, 'Working together to create new growth' (COM(2011) 206 final), pp. 1 - 26.
32. The revision aims to replace Directive 2004/17/EC (see the Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, cit.), as well Directive 2004/18/EC (see the Proposal for a Directive on public procurement, cit.), and (finally) includes a Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM(2011) 897 final - 2011/0437 (COD), pp. 1 - 90).
33. Current EU rules generate estimate savings of approximately Euro 420 billion p.a. but procedures may be unduly burdensome as the associated cost is around Euro 5.6 billion (cf., Commission Staff Working Paper, Executive summary of the impact assessment (SEC(2011) 1586 final, pp. 1 - 9, p. 3).
34. In particular, the Commission has proposed the possibility to increase recourse to negotiation, thus enabling the contracting authorities to purchase goods and services which are better tailored to their needs at the best price.
35. Cf., the Proposal for a Directive on public procurement, cit., e.g. Whereas nn. 39 - 44 and Arts. 61 - 67. Cf., also, the Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, cit., Whereas n. 45 - 48 and Arts. 75 and 77.
36. Such as body governed by public law, public works and service contracts, mixed contracts, moreover the traditional distinction

between so-called priority and non-priority services ('A' and 'B' services) will be abolished. However, it has been set forth a specific set of rules for procurement of social services. Cf., the Proposal for a Directive on public procurement, cit., Explanatory Memorandum, p. 8 and the Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, cit., Explanatory Memorandum, p. 8.

37. See, e.g., ECJ Judgment of 19 June 2008, Case C-454/06, Nachrichtenagentur, in ECR 2008, p. I-04401.
38. Cf., Art. 72 of the proposal on public procurement and Art. 82 of the proposal on procurement by entities operating in the water, energy, transport and postal services sectors. Instead, contract modifications shall not be considered substantial where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract (cf., Art. 72(5) of the proposal on public procurement and Art. 82(5) of the proposal on procurement by entities operating in the water, energy, transport and postal services sectors).
39. The concept of 'socially sustainable production process' has been introduced as point 22(b) of Art. 2, in the Draft Report on the proposal for a directive of the European Parliament and of the Council on public procurement, of May 3, 2012, pp. 1 - 93, pp. 26 - 27. It is defined as "a production process in which the provision of works, services and supplies complies with health and safety, social and labour law, rules and standards, in particular with regard to the principle of equal treatment at the workplace. The principle of equal treatment at the workplace refers to compliance with the applicable terms and conditions of employment, including health and safety, social and labour law, rules and standards, defined by the Union and national legislation and collective agreements, which apply where the provision of works, services and supplies takes place".

40. Cf., the Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors', the 'Proposal for a Directive of the European Parliament and of the Council on public procurement', and the 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts', in OJ 2012, C191, pp. 84 – 96, p. 90.
41. Cf., the amendment to Art. 71(3) in the Draft Report on the proposal for a directive of the European Parliament and of the Council on public procurement, of May 3, 2012, pp. 1 – 93, p. 74.
42. Cf., the proposed new para. 1(a) of art. 71 in the Draft Report, cit., p. 73.
43. Cf., Art. 73, in the Draft Report, cit., pp. 75 – 76.
44. In accordance with the reconstruction made by E. PICOZZA, *Diritto dell'economia: disciplina pubblica*, quoted in R. DIPACE, *Partenariato pubblico-privato e contratti atipici*, cit., p. 39, note 61.
45. Cf., Arts. 56 – 65 of Directive 2004/18/EC. The first Directive on public works contracts, the 71/305/EEC, merely set forth in Art. 3 "1. In the event of the authorities awarding contracts concluding a contract of the same type as that indicated in article 1(a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment, the provisions of this directive shall not apply to this so called 'concession' contract [...] 2. When the concessionaire is himself one of the authorities awarding contracts, he must apply the national procedures for the award of public works contracts adapted to the provisions of this Directive for works to be carried out by third parties. 3. When the State, a regional or local authority or one of the legal persons governed by public law specified in Annex I grants to a concessionaire other than an authority awarding contracts the right to have public works

carried out and to exploit them, the concession contract shall stipulate that such concessionaire must observe the principle of non-discrimination on grounds of nationality in respect of contracts awarded to third parties [...]”. With Directive 89/440/EEC, it was agreed (Whereas no. 11), that “[w]hereas, in view of the increasing importance of concession contracts in the public works area and of their specific nature, the rules concerning advertising should be brought within Directive 71/305/EEC”, and in fact in Art. 1(d) the definition of “public works concession” is included; it is the “[...] contract of the same type as that indicated in (a) [*i.e.* “public works contracts”] except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment”, and provisions regarding certain advertising obligations, sub-contracting and an obligation regarding the minimum time-limit for the receipt of applications, were inserted and then reiterated in Directive 93/37/EC (*cf.*, Arts. 1(d), 3, 11, 15 and 16), which set forth provisions for public contracts awarded by concessionaires being or not themselves contracting authorities.

46. *Cf.*, the Commission Interpretative Communication on Concessions under Community Law (OJ C121, of 29/4/2000, pp. 2 – 13), which defined the ‘service concession’ as the contract with which the operator bears the risk involved in operating the service in question obtaining a significant part of revenue from the user, particularly by charging fees in any form.
47. Reference is to Directive 93/37/EEC, in force at the time of the Communication.
48. *Cf.*, the Interpretative Communication of April 29, 2000 *cit.*, p. 10. *Cf.*, now, Art. 18 “Works and service concessions”, of Directive 2004/17/EC. Among the numerous documents related to the subject, *cf.*, the Green Paper on Services of General Interest, of 21.5.2003 (COM(2003) 270 final., pp. 1 – 63); the Green Paper on public-private partnerships and Community Law on public contracts and concessions, of 30.4.2004 (COM(2004) 327 final, pp. 1 – 22); the

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, White paper on services of general interest, (COM/2004/0374 final, pp. 1 – 28).; the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions, of 15.11.2005 (COM(2005) 569 final, pp. 1 – 11); the Opinion of the Committee of the Regions on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions, of 12 October 2006, (2007/C 51/05, OJ C51, of 6 March 2007, pp. 27 – 30); the Commission interpretative communication on the application of Community law on Public Procurement and Concessions to institutionalized PPP (IPPP), (2008/C 91/02, OJ C91, of 12 April 2008, pp. 4 – 9).

49. Cf., the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mobilising private and public investment for recovery and long term structural change: developing public private partnerships (COM(2009)615 final, pp. 1 – 15).
50. Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM(2011) 897 final - 2011/0437 (COD), pp. 1 - 90).
51. Cf., the Project de Rapport sur la proposition de directive du Parlement européen net du Conseil sur l'attribution de contrats de concession, dated July 5th, 2012, pp. 1 - 192, p. 45.
52. Cf., ECJ Judgments of November 2005, Case C-29/04, Commission v. Austria (ECR 2005, p. I-9705); Arnhem; Teckal, Arge Gewässerschutz; Stadt Halle; 13 October 2005, Case C-458/03, Parking Brixen (ECR 2005, p. I-8585); 27 October 2005, Case C-187/04 Commission v. Italian Republic (OJ

11.2.2006, C-36, pp. 11 - 12); 6 April 2006, Case C-410/04 ANAV v. Comune di Bari (ECR 2006, p. I-3303); 11 May 2006, Case C-340/04, Carbotermo (ECR 2006, p. I-4137); 19 April 2007, Case C-295/05 Asemfo ( ECR 2007, p. I-2999); 17 July 2008, Case C-371/05, Commission v. Italy (ECR 2008, p. I-110).

53. Cf., 2011/2048(INI).
54. As it was made clear by the ECJ, these principles apply to the award of concession concerning all types of services with a cross-border interest including services of general economic interest. Cf., the Project de Rapport, cit., pp. 91 - 92.
55. Cf., e.g., the amendments and reorganization proposed with reference to the definitions of concession contracts themselves, to the exclusions applicable to concessions awarded by contracting entities (Art. 10), concessions awarded to an affiliated undertaking (Art. 11) and with reference to the relations between public authorities (Art. 15) on terms like 'similar control'. See, also, the amendment aimed to the introduction of a new art. 38 *bis* regarding the awarding criteria which "*rappel de l'importance du role de la négociation lors de l'attribution de concession; pas de modification arbitraire des critères d'attribution au cours de la procédure; définition des critères d'attribution; possibilité de hiérarchisation des critères en fonction du choix du concédant*". See the Projet de Rapport, cit., p. 148.
56. The General Agreement on Tariffs and Trade (GATT) originally negotiated in 1947, was established as multilateral institutions to facilitate the regulation of the international economy against the re-emerging of the protectionist policies of the 1930s. It was originally conceived as component of a new specialised agency of the United Nations (the International Trade Organization), to support the Bretton Woods institutions (World Bank and International Monetary Fund), but such an idea was not carried out - rather in the 1980s the crisis of the GATT system was clear - until January 1995 when, in the frame of the Uruguay Round negotiations, the World Trade Organization was founded.

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57. The original signatories to the Tokyo Round Code, which built upon extensive preparatory work undertaken in the Organization for Economic Cooperation and Development (OECD), were: Austria, Canada; the then European Community and its then six Member States (Belgium, France, West Germany, Italy, Luxembourg and the Netherlands); Finland; Hong Kong; China; Japan; Norway; Singapore; Switzerland; and the United States. Subsequently, the Code also became applicable to Greece, Portugal and Spain upon their accession to the European Community, and Israel joined the Agreement in 1983. Cf., S. Arrowsmith, *The WTO Regime on Government Procurement* (pp. 3 – 58), pp. 14 – 15, in S. Arrowsmith, R.D. Anderson (Eds.) *The WTO Regime on Government Procurement*, Cambridge University Press, 2011, pp. v – 858.
58. Crucial for the starting and the outcomes of the negotiations was the initiative of both the USA and the EC, which were willing to open the energy and telecommunications market, up to then excluded from the foreign competition. Such an initiative resulted in a Memorandum of Understanding (effective for two years), to which the 1994 Agreement on public procurement has been inspired. Up to-day, Parties to the Agreement are, in addition to the EU and its Member States, Armenia (from September 15, 2011), Aruba, Canada, Korea, Japan, Hong Kong, Iceland, Israel, Liechtenstein, Norway, Singapore, Switzerland, United States e dal 15 luglio 2009 Taipei, whilst Albania, China, Georgia, Jordan, The Kyrgyz Republic, Moldova, Oman, Panama and Ukraine are negotiating their accession.
59. Cf., H. GORDON, S. RIMMER, S. ARROWSMITH, *The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO*, (pp. 27 – 55), p. 32, in S. ARROWSMITH, A. DAVIES (Eds.), *Public Procurement: Global Revolution*, Kluwer Law International, pp. v – 283.
60. Cf., GPA/112 of December 16, 2011, para. 1. The text of the Agreement of December 11, 2006 is included in GPA/W/297 (cf., also GPA/W/313 (of 16/12/2010) and GPA/W/313/Corr.1 (of 13/1/2011)).

61. Moreover, is outlined the intention to “encourage and facilitate accession to the Agreement by WTO Members that are not yet Parties to it, noting that developing and least developed country Members can benefit from the improved transitional measures in the revised Agreement”.
62. Cf., GPA/112 and GPA/W/315 for the complete list of the Decisions. All the documens were subject to final verification and legal review.
63. Annexes 5, 6, 7, 8 and 9 to the Decision, in GPA/112, para. 4, litt. e), f) g), h), and i).
64. Cf., S. ARROWSMITH, *The revised Agreement on Government Procurement: changes to the procedural rules and other transparency provisions*, pp. 285 - 336, p. 294, in S. ARROWSMITH, R.D. ANDERSON (Eds.) *The WTO Regime on Government Procurement*, cit.
65. Cf., *The Foreword* by P. LAMY in S. ARROWSMITH, R.D. ANDERSON (Eds.) *The WTO Regime on Government Procurement*, cit., p. xxvii.
66. As is in the case of Art. X of the GATT, imposing and requiring information on broad publication and due process requirements on the administration of measures in the area of trade in goods in order to verify if they are in compliance.
67. During the Singapore Ministerial Conference, with the Declaration of December 13 (paras. 21 and 22). The Working Group on Transparency in Government Procurement began its work in 1997 by examining the transparency related provisions in existing international instruments and National practices. It then developed and carried out a study on twelve issues (so-called ‘items on the Chairman’s Checklist of Issues’) relating to a potential agreement on transparency in government procurement, on the following four broad subject-areas: (i) the definition of government procurement and the scope and coverage of a potential agreement; (ii) the substantive elements of a potential agreement on transparency in government procurement, including various aspects of access to general

and specific procurement-related information and procedural matters; (iii) compliance mechanisms of a potential agreement; and (iv) issues relating to developing countries, including the role of special and differential treatment as well as technical assistance and capacity building.

68. The Doha Ministerial Declaration, adopted on November 14 2001, states (para. 26) “[r]ecognizing the case for a multilateral agreement on transparency in government procurement and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations. These negotiations will build on the progress made in the Working Group on Transparency in Government Procurement by that time and take into account participant’s development priorities, especially those of least-developed country participants. Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers [...]”. The Cancún Ministerial Statement adopted on September 14 2003, states (paras. 4 – 6) “[w]e therefore instruct our officials to continue working on outstanding issues with a renewed sense of urgency and purpose and taking fully into account all the views we have expressed in this Conference. We ask the Chairman of the General Council [...] to convene a meeting of the General Council at Senior Officials level no later than 15 december 2003 to take the action necessary at that stage to enable us to move towards a successful and timely conclusion of the negotiations. We shall continue to exercise close personal supervision of this process. We will bring with us into this new phase all the valuable work that as been done at this Conference. In those areas where we have reached a high level of convergence on texts, we undertake to maintain this convergence while working for an acceptable overall outcome. Notwithstanding this setback, we reaffirm all our Doha Declarations and Decisions and recommit ourselves to working to implement them fully and faithfully”. The “July Decision” of the General Council, adopted on August 1 2004 states (para. 1,

lit. g) “[r]elationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round”.

69. Cf., e.g., Art. XVIII “Information and Review as Regards Obligations of Entities”, which provides for the publication of the records of the proceeding in which are to be included a number of informations about the conduct of the proceeding as well as the obligation of the procuring entity to communicate to the excluded supplier the reasons for the rejection of its application to qualify and why it was not selected, as well as to the unsuccessful tenderer the information and the reasons for the rejection of its tender and the characteristics and the relative advantages of the selected one. Cf., now Art. XVII “Disclosure of Information”, para. 1, “Provision of Information to Parties” of the 2012 text, setting forth “[o]n request of any other Party, a Party shall provide promptly any information necessary to determine whether a procurement was conducted fairly, impartially and in accordance with this Agreement, including information on the characteristics and relative advantages of the successful tender. In cases where release of the information would prejudice competition in future tenders, the Party that receives that information shall not disclose it to any supplier, except after consulting with, and obtaining the agreement of, the Party that provided the information”.
70. Of the provisions of substantial law, cf., e.g., Arts. IX, para. 1 and 5, X, XII, paras. 1, 2 and 3 litt. c), XIII, XIV, paras. 3 and 4, XV, paras. 1 and 2, XVII e XIX, para. 1 and now Arts. VI, VII, paras. 1,3, 4, IX, para. 3, 13 and 15, XII, para. 2, XIII, paras. 1 and 2, XV, XVI, XVII and XVIII, para. 2 of the 2012 text.
71. Art. XX “Challenge Procedures”, cf., also Art. XVIII “Domestic Review Procedures” of the 2012 text.

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72. Cf., Art. XX “Challenge Procedures” and, in particular, para. 7, lit. c). Same content for Art. XVIII “Domestic Review Procedures for Supplier Challenges”, para. 7, lit. b) of the 2012 text.
73. As outlined by SALVADORI, quoted by P. PICONE, A. LIGUSTRO, *Diritto dell’organizzazione mondiale del commercio*, CEDAM, 2002, pp. v – 676.
74. So called cross retaliation, cf., Art. XXII “Consultations and Dispute Settlement”, para. 7, of the 1994 WTO GPA, as well as Art. XX “Consultations and Dispute Settlement”, para. 3 of the 2012 text.
75. *I.e.* the UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works (1988), the UNCITRAL Legal Guide on International Countertrade Transactions (1992), the UNCITRAL Model Law on Procurement of Goods and Construction and the accompanying Guide to Enactment of UNCITRAL Model Law on Procurement of Goods and Construction (1993), the UNCITRAL Model Law on Procurement of Goods, Construction and Services and the accompanying Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) and the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003).
76. In the original “List of subject matters for possible inclusion in the future work programme” (A/33/17, (pp. 11 – 45), p. 23, in UNCITRAL Yearbook 1978, Vol. IX, A/CN.9/SER.A/1978), only public tenders were mentioned, but such a topic was not inserted between the Legal implications of the New International Economic Order. Infact, it was mentioned (no. xii) in Point I “Issues related to international trade law”, lit. c), “Work directed to the unification of international contracts”, whilst the “Legal implications of the New International Economic Order” were lit. a) of Point II “Issues arising from a possible reordering of international economic relations”.
77. The General Assembly Resolution 3494 (XXX) of 15 December 1975, (pp. 7 – 8), point no. 8 “[c]alls upon the United Nations

Commission on International Trade Law to take account of the resolutions of the sixth and seventh special sessions of the General Assembly that laid down the foundations of the New International Economic Order, bearing in mind the need for the United Nations organs to participate in the implementation of those resolutions”, in UNCITRAL Yearbook 1976, Vol. VII, A/CN.9/SER.A/1976. Cf., also, the General Assembly Resolutions 31/98, 31/99 and 31/100 of 15 December 1976, (pp. 7 - 10), pp. 8 - 9, point no. 7, in UNCITRAL, Yearbook 1977, Vol. VIII, A/CN.9/SER.A/1977, and the General Assembly Resolution 32/145 and General Assembly decision 32/438 of 16 December 1977, in UNCITRAL Yearbook 1978, cit., (pp. 8 - 9), point no. 6.

78. The Sixth Extraordinary Session (April 9 - May 2, 1974), held in order to study raw materials and development problems, closed with the adoption by consensus of Resolution no. 3201 “Declaration on the establishment of a New International Economic Order and” 3202 (S-VI) “Action Plan”. The Seventh Extraordinary Session of the General Assembly (September 1 - 16, 1975), closed with the adoption by consensus of Resolution no. 3362 (S-VII) on “Development and international economic cooperation”. Further, on December 12, 1974 the Charter of Economic Rights and Duties of States was adopted by the General Assembly (Ordinary Session) with Resolution no. 3281 (XXIX). Cf., GIULIANO M., *La cooperazione degli Stati e il commercio internazionale*, Milano, Giuffrè ed., 1978 (pp. iii - 322), pp. 177 - 178.
79. Cf., UNCITRAL Historical Documents, United Nations General Assembly - Twenty-first Session, Document A/6396 and Add. 1 and 2, pp. 1 - 53. E.g. cf., pp. 24 - 25, paras. 225 - 234 on the establishment of a United Nations Commission on International Trade Law and on its functions.
80. Cf., A/CN.9/WG.V/WP.4 and Add. 1 to 8, (pp. 100 - 188), in UNCITRAL Yearbook 1981, followed by the Study II on clauses related to contracts for the supply and construction of large industrial works (A/CN.9/WG.V/WP.7 and Add. 1 - 6), submitted to the 3<sup>rd</sup> session of the Working Group on the New

International Economic Order of July 1982, and cf., A/CN.9/WG.V/WP.5, pp. 189 - 190, in UNCITRAL Yearbook 1981, cit.

81. Legislations based on the 1993 and 1994 Model Laws, were enacted by Afghanistan (2006); Albania (1995), Armenia (2005), Azerbaijani (1997), Bangladesh, Croatia (1998), Estonia (1997), Gambia, Georgia (1999), Ghana, Guyana, Kazakhstan (1997 entered into force in 1998), Kenya, Kyrgyzstan, Lettonia (1996, entered into force in 1997), Lithuania (1996), Madagascar, Malawi (2003), Mauritius, Mongolia (2000), Nepal, Nigeria (2007), Polonia (1994), Republic of Moldova, Romania, Repubblica Ceca (1994, entered into force on 1995), Rwanda, Slovakia (1993, entered into force in 1994), Uganda, United Republic of Tanzania, Uzbekistan, Ungheria (1995) and Zambia.
82. Cf., A/59/17, (pp. 1 - 52), pp. 26 - 27, paras. 79 - 82.
83. Which sets forth “[c]hallenges shall be heard by a court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment. A review body which is not a court shall either be subject to judicial review or shall have procedures which provide that: (a) participants can be heard before an opinion is given or a decision is reached; (b) participants can be represented and accompanied; (c) participants shall have access to all proceedings; (d) proceedings can take place in public; (e) opinions or decisions are given in writing with a statement describing the basis for the opinions or decisions; (f) witnesses can be presented; (g) documents are disclosed to the review body”.
84. It has been realized consolidating the principles previously stated in procedural articles (e.g., clarifications and modifications of solicitation documents, language of tenders, tender securities and acceptance of the successful submission and entry into force of the procurement contract) and of provisions (i.e. Arts. 11 “Rules concerning evaluation criteria

and procedures”, 14 “Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions”, 16 “Clarification of qualification information and of submissions” and 24 “Confidentiality”), sometimes resulting in provisions completely new, not found in the 1994 text (*i.e.* Arts. 6 “Information on possible forthcoming procurement”, 12 “Rules concerning estimation of the value of procurement”, 20 “Rejection of abnormally low submissions” and 26 “Code of conduct”).

85. As stated in the 2012 Draft Guide (para 57, p. 273) “this decision was based on several grounds. First, services and other procurement methods are procedurally similar, if not identical: the main difference is the extent to which the skills and experience of individuals providing the subject matter of the procurement can be taken into account. UNCITRAL considered that these issues are important not just in services procurement, but also in mixed contracts and goods and construction (accordingly, under article 11 of the 2011 Model Law, they can be included in the evaluation criteria in any procurement). Secondly, many traditional goods contracts now take the form of services – such as IT contracts in which the hardware is leased, rather than purchased, and it would make little sense to allow procurement decisions to be potentially distorted by considerations of which method might offer the most flexibility. In addition, UNCITRAL expressly stated that the Model Law should reflect the fact that policies and practices evolve over time, and has therefore crafted its provisions in a flexible manner, balancing the needs of borrowers, ongoing developments in procurement methods and capacity development. As a result, subject to their conditions for use, all procurement methods are available for all procurement”.
86. Namely, ‘restricted tendering’, ‘request for quotations’, ‘two-stage tendering’, ‘competitive negotiations’ and ‘single-source procurement’.
87. *I.e.*, ‘open tendering’ is equivalent to ‘tendering proceedings’ in Chapter III of the 1994 Model Law; ‘request for proposals

without negotiation' draws its features on the selection procedure described in Art. 42 of the 1994 text; 'request for proposals with dialogue' combines the features of Arts. 43 ('selection procedures with simultaneous negotiations' for procurement of services) and 48 ('request for proposals') of the 1994 Model Law; and 'request for proposals with consecutive negotiations' draws its features from the 'selection procedure' described in Art. 44 of the 1994 Model Law.

88. See. Arts. 31 and 32 of the 2011 text.
89. Cf., the 2012 Draft Guide, para.16, p. 5.
90. Cf., A/50/17, (pp. 3 – 56), pp. 50 – 51, paras. 394 – 400, in UNCITRAL Yearbook 1995, cit.
91. Cf., A/CN.9/424, (pp. 1 – 17), paras. 88 – 89. The UNIDO Guidelines on Infrastructure Development through Build-Operate-Transfer (BOT) Projects, were published in 1996. In comparison with the UNCITRAL work, "it appears that the UNIDO text focuses on accomplishing the transactions, while the UNCITRAL focus is on guidance to governments on drafting laws concerning concessions and private finance of public projects", cf., J. LINARELLI, Private Participation in Public Infrastructure: Some Strategic Issues, (pp. 259 – 274), pp. 272 – 273, in S. ARROWSMITH, A. DAVIES, Public Procurement, cit.
92. The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, was enacted on June 29, 2000 (at the 33<sup>rd</sup> session) and the "desirability and feasibility of preparing a model law or model legislative provisions on selected issues covered by the Legislative Guide" was postponed to the 34<sup>th</sup> session. Cf., A/55/17, (pp. 1 – 126), p. 87, in UNCITRAL Yearbook Vol. XXXI. A Colloquium on Privately Financed Infrastructure: Legal Framework and Technical Assistance (held in Vienna, from the 2<sup>nd</sup> to the 4<sup>th</sup> of July 2001), was organised with the participation of the Public-Private Infrastructure Advisory Facility and a number of international organizations, which recognized that the "Legislative Guide was a valuable product to assist domestic legislators in establishing a legislative framework favourable to privately financed

infrastructure projects and that efforts should be made to ensure its wide dissemination. It was recognized that the Guide could serve well not only as an instrument for drafting new legislation but also as a checklist to establish the adequacy and effectiveness of legislation already in force” and outlined the necessity to give “more concrete guidance in the form of model legislative provisions or even in the form of a model law dealing with specific issues”; cf., A/CN.9/488, (pp. 1 – 6), e cf., also, A/CN.9/521, (pp. 3 – 79), submitted at the 36<sup>th</sup> session of the Commission (June – July 2003).

93. Cf., LINARELLI, J. *Private Participation in Public Infrastructure: Some Strategic Issues*, cit., p. 260, in which it is quoted the definition given by J.J. LAFFONT e J. TIROLE in *A theory of incentives in Procurement and Regulations*, Cambridge, MA and London: MIT Press, 1993, pp. 8 – 10, to show the composite nature of “concession-type arrangements”, i.e. “[w]e [...] refer to procurement when the firm supplies a good to the government and to regulation when it supplies a good to consumers on behalf of the government.”
94. Cf., Model Provision no. 27, Legislative Recommendation no. 39, and Chapter III “Selection of the concessionaire”, paras. 127 – 131 of the Legislative Guide.
95. Cf., Legislative Guide, Chapter VI “Settlement of disputes”, para. 2.
96. Cf., Model Provisions 49 - 51, Legislative Recommendations 69 - 71, and Chapter VI “Settlement of disputes”, paras. 2 - 45 of the Legislative Guide; Model Provisions 10 - 11, Legislative Recommendations 10 - 11, and Chapter I “General legislative and institutional framework”, paras. 51 – 53, of the Legislative Guide which outlines that “[d]isputes may arise between competing concessionaires (for example, two operators of cellular telephony systems) or between concessionaires providing services in different segments of the same infrastructure sector. Such disputes may involve allegations of unfair trade practices (for example, price dumping), uncompetitive practices inconsistent with the country’s

infrastructure policy [...] or violation of specific duties of public service providers [...]. In many countries, legislative provisions have been found necessary in order to establish an appropriate framework for the settlement of these disputes. [...]"

97. Cf., the ECJ judgments, 16 December 1975, Joined Cases 40-48, 50, 54, 56, 111, 113 e 114/73 *Cooperative vereniging Suiker Unie UA & Ors v. Commissione* (ECR 1975, p. 1663), and the Commission Decision of 5 February 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.572 and 32.571 - Building and construction industry in the Netherlands) in OJ L92, of April 7 1992, pp. 1 – 30.
98. Precisely, Art. XVII “Transparency” of the WTO GPA sets forth the conditions under which the Parties to the Agreement can examine tenders submitted by offerors from countries not parties to the WTO GPA, and thus enucleates the fundamental characters to define a proceeding as transparent.
99. They include requirements such as: all legal texts regulating procurement should be made promptly and publicly available (Art. 5), non-discriminatory methods of communication (Art. 7), the determination of evaluation criteria at the outset of the procurement and their publication in the solicitation documents (Art. 11), the wide publication of invitations to participate and all conditions of participation (e.g. in Arts. 39, 45, 47, 48, 49), in an appropriate language (Art. 13), the publication of the deadline for presentation of submissions (Art. 14), the disclosure to all participants of significant further information provided during the procurement to any one participant (Art. 15), the public notice of any cancellation of the procurement, the regulated manner of entry into force of the procurement contract, including a “standstill” period (Art. 22), and the publication of contract award notices (Art. 23). Further, certain information regarding the conduct of a particular procurement must be made publicly available *ex post facto*, and participants are entitled to further information, all of which must be included in a record of the procurement (Art. 25).

100. For example, a divergence from the rules may be apparent from examining the records of meetings, further underscoring the benefits of electronic data maintenance in procurement.
101. Cf., e.g. Arts. VI “Technical Specifications”, para. 4; VII “Tendering Procedures”, para. 2; X “Selection Procedures”, para. 1; XV “Limited Tendering”, para. 1; as well as the Preamble. With reference to the 2012 text, cf., Arts. X “Technical Specifications and Tender Documentation”, para. 5; XIII “Limited Tendering”, para. 1; as well as the Preamble, and mainly Art. IV “General Principles”, para 1, dedicated to the “Non-Discrimination”.
102. G. WESTRING, G. JADOUN, *Public Procurement: Manual for Central and Eastern Europe*, ITCILO, 1996 (pp. 1 – 302), p. 6, define a proceeding as transparent when “characterised by clear rules and by means to verify that those rules were followed”.
103. At the same time, the Model Law seeks to decrease the need for challenges through its procedures for each procurement process. For example, Art. 15 provides a mechanism for clarifying and modifying the solicitation documents, so as to reduce the likelihood of challenges to the terms and conditions set out in those documents; the clarification mechanism in Art. 16 is designed to reduce the likelihood of challenges to decisions on qualifications, responsiveness and on the evaluation of submissions. See the Draft Guide, para. 1(4), p. 238.
104. Cf., the 2012 Draft Guide, e.g., pp. 17 – 23.
105. Cf., P. TREPTE, *Public Procurement in the EU*, Oxford University Press, pp. vii – 681, p. 13 ss., with specific regard to the Community legislation; however, the remarks are valid also with reference to the WTO GPA and the Model Law.
106. Cf., the 2012 Draft Guide, commentary to Art. 11, para. 10, p. 71.
107. Cf., A/CN.9/331, cit., pp. 122 - 123, paras. 45 – 54.
108. Cf., A/CN.9/343, cit., p. 271.

109. Cf., ECJ judgments, Beentjes, cit., paras. 19 e 26; 25 April 1996, Case C-87/94, Commission v. Belgium (ECR 1996, p. I-2043), paras. 88 – 89; Siac Construction Ltd, cit., second and third paragraph of the decision.
110. See the 2012 Draft Guide, commentary to Art. 11, paras. 4 – 8 “Para. 2 sets out an illustrative list of evaluation criteria. [...] The procuring entity can apply evaluation criteria even if they do not fall under the broad categories listed in para. 2 as long as the evaluation criteria meet the requirement set out in para. 1 of the article – they must relate to the subject matter of the procurement. [...] Depending on the circumstances of the given procurement, evaluation criteria may vary from the very straightforward, such as price and closely related criteria (“near-price criteria”, for example, quantities, warranty period or time of delivery) to very complex (including socio-economic considerations, such as characteristics of the subject matter of the procurement that relate to environmental protection). Accordingly, the Model Law enables the procuring entity to select the successful submission on the basis of the criteria that the procuring entity considers appropriate in the context of the procurement concerned. Paras. 2(a)-(c) provide illustrations for such criteria [...]. A special group of evaluation criteria comprise those set out in para. 3. Through them the enacting State pursues its socio-economic policies [...] Para. 3 encompasses two situations: when the procurement regulations or other provisions of law of the enacting State provide for the discretionary power to consider the relevant criteria and when such sources require the procuring entity to do so. These criteria are of general application and are unlikely to be permitted as evaluation criteria under para. 2 in that they will ordinarily not relate to the subject matter of the procurement. [...] By contrast, the environmental requirements for the production of the subject-matter of the procurement relates to that subject-matter, and can therefore be included as an evaluation criterion under para. 2: no authorization under the procurement regulations or other laws is required. [...] The socio-economic criteria are therefore listed separately from the criteria set out in para. 2. They will be less objective and more discretionary than

those referred to in para. 2 [...]. For these reasons, these criteria should be treated as exceptional, as recognized by the requirement that their application be subject to a distinct requirement – that they must be authorized or required for application under the procurement regulations or other provisions of law of the enacting State.

111. The numbering corresponds to that of the Treaty Establishing the European Community as it appears in the Consolidated versions of the Treaty of the European Union and of the Treaty Establishing the European Community, OJ C321E of 29 December 2006.
112. A number of Whereas and articles of the Directives 2004/17/EC, 2004/18/EC and 2009/81/EC reflect what stated above. Cf., e.g. Whereas no. 6, 28 e 33 of Directive 2004/18/EC, Whereas no. 13, 39 and 44 of the Directive 2004/17/EC and Whereas no. 35, 46 and 66 of the Directive 2009/81/EC. Cf., also Arts. 19, 26 and 27 of Directive 2004/18/EC as well as the corresponding Arts. 28, 38 and 39 of the Directive 2004/17/EC and Arts. 14 and 24 of the Directive 2009/81/EC.
113. Cf., P. TREPTE, *Public Procurement in the EU*, cit., p. 71, “[w]hilst this may be due largely to the tensions created by the global market place and the need to bilance free access with protection against unfair trade practices, it has also been suggested [...] that pursuit of such policies by way of procurement is a means of compensating for the limited effectiveness of and avoiding the procedural requirements of other regulatory mechanisms. That is possibly at the heart of the compability debate. Where direct policies fail, it is submitted that indirect means of enforcement by way of procurement regulations may be inappropriate and certainly extremely difficult, if not impossible, to incorporate into otherwise objective procurement rules without significant modification”. Cf., Whereas no. 46 of Directive 2004/18/EC, Whereas no. 55 of the Directive 2004/17/EC and Whereas no. 69 of the Directive 2009/81/EC.

114. At Community level, such aspects had been included in the Green Paper of 1996 (cf., COM(96)583, cit., Capitolo 5).
115. ECJ judgment, 17 September 2002, Case C-513/99, *Concordia Bus Finland*, cit., and 4 December 2003, Case C-448/01, (ECR 2003, p. I-14527), *EVN AG, Wienstrom GmbH, v. Republik Österreich*.
116. COM(2002) 236), (pp. 1 - 52), p. 3, in OJ C203E, of 27 August 2002, pp. 210 - 240.
117. These issues could be addressed in the Guide to be enacted in the near future. It is worth to point out that in the first draft of the 1990s Model Law, among the information to be included in the solicitation documents there were: "References to this law, to the procurement regulations and to all other laws and regulations of (this state) directly pertinent to the tendering proceedings (and references to tax, social security, safety, environmental protection, health and labour laws and regulations of (this state) pertinent to the performance of the procurement contract)", reproducing, though partially, Art. "VIII. Exceptions to the Agreement", of the GATT GPA, Art. "XXIII. Exceptions to the Agreement", of the 1994 GPA (on which see the following note). Cf. A/CN.9/WG.V/WP.24, cit., p. 145, Art. 18, lett. s).
118. Cf., the third opening declaration of the GATT GPA "[r]ecognizing that in order to achieve their economic and social objectives to implement programmes and policies of economic development aimed at raising the standard of living of their people, taking into account their balance-of-payment position, developing countries may need to adopt agreed differential measures" ("declaration" omitted in the 1994 GPA), and Art. VIII of the GATT GPA, entirely reproduced in Art. XXIII of the 1994 GPA: "Exceptions to the Agreement", para. 2: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from

imposing or enforcing measures necessary to protect public morals, order or safety, human, animal or plant life or health, intellectual property, or relating to the products (or services) of handicapped persons, of philanthropic institutions or of a prison labour”. Same contents are included in Art. III “Security and General Exceptions”, para. 2, of the 2012 text.

119. Cf., S. ARROWSMITH, *National or International Perspectives on the regulation of Public Procurement: Harmony or Conflict?*, (pp. 3 – 26), p. 18, in *Public Procurement: Global Revolution*, cit.
120. Infact “it may offer benefits including the improvement of the quality of the end product, as local people have a motivation to see that adequate standards are achieved and that work is completed on time, the potential for on-site disputes can be reduced, and bureocracy may also be reduced through the use of less formal procedures. There are also other potential benefits, including the provision of local employment using labour-intensive technologies, the utilization of local know-how and materials, the encouragement of local businesses and the improvement of municipal accountability, which may form part of enacting States’ social goals. Community participations has been observed to work successfully in local small-scale construction projects (such as the installation of septic tanks in rural communities), in the distribution of basic foodstuffs, and the provision of health services (e.g. to mothers and infants)”. Cf., A/CN.9/WG.I/WP.32, cit., p. 15, paras. 62 – 63.
121. Cf., the 2012 Draft Guide, no. 25, p. 8.
122. Cf., the 2012 Draft Guide, no. 35, p. 10.
123. Cf., the 2012 Draft Guide, no. 43, p. 12.
124. Reproduced in the 1994 GPA, but now deleted in the 2012 text. Cf., Art. “V. Tendering Procedures”, of the GATT GPA, para. 2, lit. a) “[a]ny conditions for participation in tendering procedures shall be published in adequate time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures”, and para. 5 “Notice of proposed

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procurement and tenders documentation” “[t]o ensure optimum, effective international competition under selective tendering procedures, entities shall, for each proposed procurement, invite tenders from the maximum number of domestic and foreign suppliers, consistent with the efficient operation of the procurement system [...]”, as well as lit. a) of Art. VIII “Qualification of suppliers”, and para. 1 of Art. X “Selection procedures” of the 1994 GPA.

125. Cf., the objectives/principles set forth in the Preamble of the Model Law, valid also with reference to the European Directive and the GPA.

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