

# ACCESS TO THE MARKET AND THE TRANSPARENCY AS PRINCIPLES OF PUBLIC PROCUREMENT IN THE LEGAL ENVIRONMENT OF THE EU NEIGHBOURHOOD POLICY

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**Summary:** The authors confront complexness and rigour of EU directives on public procurement vis-à-vis broad wording of international agreements concluded within EU neighbourhood policy. The first reason for this comparison is ongoing spread of principles of the EU law to the third countries. The second reason is that both rely on the same goals: access to market and fair environment via transparency because these principles constitute a subtle legal basis for public procurement legislation at all. Finally, these approaches were compared to the approaches employed in recent FTAs – CETA and EUSFTA.

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**Keywords:** public procurement, European Union, transparency, access to market, EU neighbourhood policy.

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## 1. Introduction

Encouragement of the integration of all countries into the world economy is one of the many goals of the European Union's (hereinafter only the "EU") external relations policy. EU often uses various levels of trade agreement to transfer EU values, principles and rules to the third countries. In our paper, we researched the access to the market and the transparency principle of the public procurement in the legal environment of the international agreements concluded by the EU and its Member States and countries participating in European Neighbourhood Policy<sup>1</sup>. We also analysed, whether current public procurement (hereinafter only "PP") legislation of the EU and its objectives in comparison

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<sup>1</sup> Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Republic of Moldova, Morocco, Syria, Palestine, Tunisia, Ukraine.

with the objectives with the European International PP legislation is adequate or even excessive.

When considering the appropriate standard, authors reviewed EU Neighbourhood public procurement policy. EU uses its requirements on effective public procurement in external relations as a tool to fight against the corruption and at the same time as a tool for economic development, which is one of the goals of the EU's external policy, as they are established in Article 21 TFEU. Fair and simple access to public procurement gives a small and medium-sized enterprises better opportunities to develop their business and thereby fosters economic growth.

## **2. Legal Framework Public Procurement in the EU**

The public procurement directives can be divided into several generations. The first generation consists of directives adopted since the 1970s: 71/305/EEC<sup>2</sup>, 77/62/EEC<sup>3</sup> and 90/531/EEC<sup>4</sup>.

The second generation consists of directives adopted during the 1990s on the basis of the White Paper with a view to completing the common market of the Communities: 92/50/EEC<sup>5</sup>, 93/37/EEC<sup>6</sup>, 93/36/EEC<sup>7</sup>, 93/38/EEC<sup>8</sup>.

The third generation consists of directives adopted in 2004: 2004/18/EC<sup>9</sup> and 2004/17/EC<sup>10</sup>.

- 2 Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ L 210, 21.7.1989, p. 1–21).
- 3 Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts (OJ L 13, 15.1.1977, p. 1–14).
- 4 Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 297, 29.10.1990, p. 1–48).
- 5 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1–24)
- 6 Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54–83)
- 7 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1–53)
- 8 Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84–138).
- 9 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114–240).
- 10 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1–113).

The fourth generation consists of directives adopted in 2014: 2014/24/EU<sup>11</sup>, 2014/23/EU<sup>12</sup> and 2014/25/EU<sup>13</sup>.

Parallel to these generations of directives on the coordination of procurement laws, the directives on procedural guarantees in review procedures (89/665/EEC<sup>14</sup> and 92/13/EEC<sup>15</sup>) have been adopted. Directive 2009/81/EC<sup>16</sup> on procurement in the sphere of defence and national security has a special status, thus its evaluation does not affect the following analysis due to its limited scope as well as the zero number of infringements and preliminary questions in relation to this directive.

Recognizing that the measuring of the extent of the legislative text according to the number of provisions may not always be absolutely accurate, but the increase in the legislative text from 105 articles in the first generation to 204 in the fourth generation (Table 1) is so striking that, for the purposes of this paper, it does not require more detailed evaluation. At the same time, a more precise and detailed regulation at the level of a directive undoubtedly leaves less scope to the Member State for the attainment of the objective of a directive and, therefore, to a greater extent interferes with national law.

*Table 1 (number of articles of legislative text)*

Generation of directives	directive	Number of articles	generation – number of article
I.	71/305/EEC	34	105
I.	77/62/EEC	32	105
I.	90/531/EEC	39	105

- 11 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65–242)
- 12 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1–64).
- 13 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243–374).
- 14 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395, 30.12.1989, p. 33–35)
- 15 Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76, 23.3.1992, p. 14–20).
- 16 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 L 216, 20.8.2009, p. 76–136).

II.	92/50/EEC	45	117
II.	93/37/EEC	37	117
II.	93/36/EEC	35	117
II.	93/38/EEC	48	117
III.	2004/18/EC	84	159
III.	2004/17/EC	75	159
IV.	2014/24/EU	94	204
IV.	2014/25/EU	110	204

The adaptation of the Member States' legal systems has not always been sound and timely, and the Court of Justice has found in 106 cases that Member States have failed to comply with their obligations under the public procurement directives, which represents 2.7% of all infringement proceedings at the CJ EU<sup>17</sup>. It seems logical that more than half of these violations were found in the context of the second generation of directives, as this was the time when the European Commission's diligent efforts to complete the common market were employed (Table 2). The third and fourth generation of directives are rather "fine tuning" the system as a revolutionary transformation of the system. The highest number of violation (almost a quarter) was found in relation to Italy (Table 4), which is not out of the total statistics on infringement proceedings, where, for Italy, the highest number of cases has been held so far (although the share of all infringement proceedings is somewhat lower – 16.5%)<sup>18</sup>. Similarly, other countries with a higher number of infringements (Germany, France, Spain, Greece) are in similar situation.

*Table no. 2 (Number of proceedings in which the Court of Justice found that the Member State had failed to fulfill its obligations)*

Directive	Member State	Number of violations/directive	Number of violations/generation
77/62/EEC	IT (3), ES (2), IE (1), EL (1), NL (1)	8	23
71/305/EEC	IT (8), ES (2), FR (1), DE (1), DK (1), IE (1)	14	23
90/531/EEC	BE (1)	1	23

17 COURT OF JUSTICE OF THE EUROPEAN UNION. *Annual Report 2017 Judicial Activity*. Luxembourg: Court of Justice of the European Union, 2018. Available [https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/\\_ra\\_2017\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/_ra_2017_en.pdf). Accessed 31.10.2018

18 COURT OF JUSTICE OF THE EUROPEAN UNION. *Annual Report 2017 Judicial Activity*. Luxembourg: Court of Justice of the European Union, 2018. Available [https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/\\_ra\\_2017\\_en.pdf](https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/_ra_2017_en.pdf). Accessed 31.10.2018

92/50/EEC	DE (9), IT (4), EL (2), AT (2), FR (2), BE (1)	21	54
93/36/EEC	IT (5), DE (2), EL (1), ES (1), FR(1)	10	54
93/37/EEC	ES (4), IT (4), FR (2), IE (1), BE (1), AT (1), DE(1)	14	54
93/38/EEC	EL(4), FR(3), CY(1), IT(1)	9	54
2004/18/EC	DE(4), AT(1), EL(1), NL(1), IE(1), FR(1), BE(1), LU(1), SE(1)	12	16
2004/17/EC	PT (1), BE(1), LU(1), SE(1)	4	16
89/665/EEC	IE (2), FR(1), ES(2), PT(1), AT(2)	8	13
92/13/EEC	CY(1), IE(1), FR(2), AT(1)	5	13

*Table 3 (Number of infringements detected by Member State)*

Member State	Number of infringements
IT	25
DE	17
FR	13
ES	11
EL	10
AT	7
IE	7
BE	5
CY	2
LU	2
NL	2
PT	2
SE	2
DK	1

The interplay between the European Union and the national legal order can also be measured by the number of preliminary rulings conducted in relation to the area in question, since the preliminary rulings ensure a real convergence of the laws of the Member States. The number of preliminary rulings has been increasing since the mid-1990s with regard to the second generation of directives (Graph 1)<sup>19</sup>. In spite of this increase, the number of questions for the third generation of directives was even higher (Table 4), with fewer preliminary questions regarding the fourth generation of directives being foreseen as the fourth

19 The following methodology was used for the calculation: 1. The year of the question referred for a preliminary ruling is the year in which the national court applied to the Court of Justice; 2. only those issues in which the Court of Justice has directly interpreted the Directive in the operative part of the judgment (not as part of the recitals or obiter dictum) are taken into account; 3. every point of interpretation of a directive is considered a separate question regardless of the number of proceedings in the given cases.

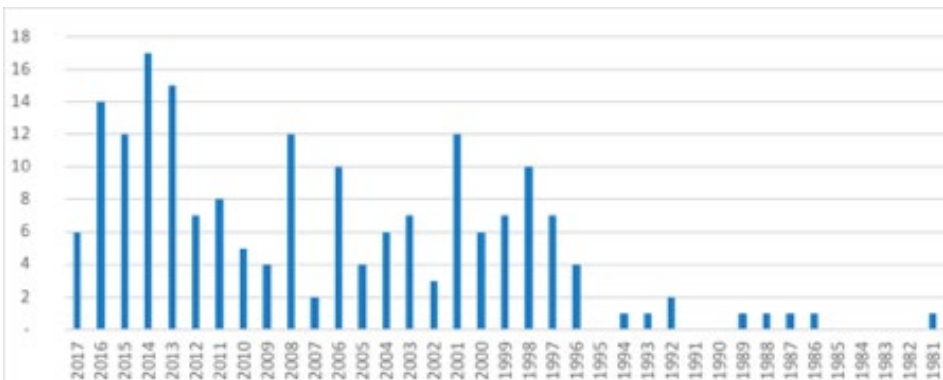
generation Directives do not encode the previous generation but often create completely new rules.<sup>20</sup>

The total number of preliminary questions on public procurement (187) accounts for only 1.8% of the total number of preliminary rulings (10149), but it should be pointed out that it is only the application of one group of secondary law legislation focusing on a specific area. By way of comparison, 79 questions were raised with regard to the directives on the free movement of persons and the right of residence of citizens of the European Union<sup>21</sup>, with regard to agreements restricting competition 143 and abuse of a dominant position 95 questions.

The activity of respective national courts in relation to public procurement is also not uniform, with more than a quarter of the questions put by the Italian courts (Graph 2). When compared with the figures of all preliminary rulings, the dominance of the Italian courts is not as high as it is comparable to the number of questions put forward by other “big” or “founding” Member States (generally German courts with almost a quarter of all questions). Nevertheless, it is clear that the highest degree of public procurement interaction can be observed in the case of Italy, since the highest number of violations of the obligations arising from the public procurement directives were confirmed and, at the same time, the Italian courts were submitted most questions within preliminary ruling procedure.

It is clear from the above analysis that the judicial interaction in European public procurement law is considerable and at least comparable to other areas of the internal market.

*Graph 1 (Number of PP related questions referred for a preliminary ruling)*



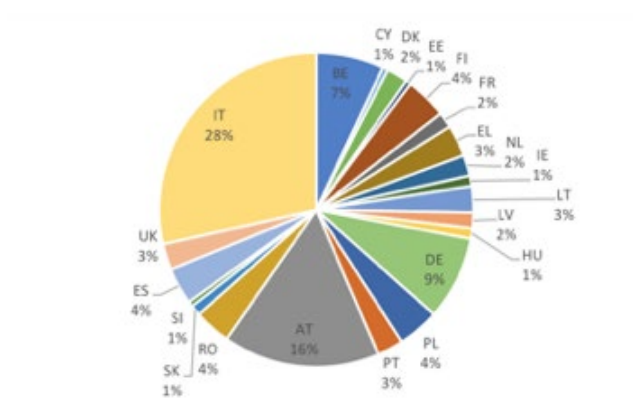
<sup>20</sup> Cf Judgment of 7 April 2016, Partner Apelski Dariusz, C-324/14, EU:C:2016:214, par. 82–94.

<sup>21</sup> 2004/38/ES, 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC a 93/96/EEC.

Table 4 (number of preliminary questions in relation to PP directives)

Directive	Number of questions referred / Directive	Number of questions referred / generation
2014/24/EU	1	1
2004/17/EC	9	73
2004/18/EC	64	73
92/50/EEC	32	60
93/37/EEC	18	60
93/36/EEC	10	60
71/305/EEC	10	12
77/62/EEC	2	12
89/665/EEC	35	41
92/13/EEC	6	41

Graph 2 (Number of references of the questions of public procurement to the courts of the Member States)



Notwithstanding the extent of legal regulation and the shaping of the relationship between national and European Union law, the issue of the European Union's power to regulate national procurement processes remains crucial. Neither the Treaty on European Union (TEU) nor the Treaty on the Functioning of the European Union (TFEU) contain explicit Union's competence in the field of public procurement. The legal basis for these directives, as finally stated in the preambles of

the directives, is Art. 53 par. 1<sup>22</sup>, Art. 62<sup>23</sup> and Art. 114<sup>24</sup> TFEU. These TFEU provisions are only frameworking and teleologically are defined only by Art. 26<sup>25</sup> TFEU. In other words, the functioning of the internal market should be the only objective and at the same time the only reason for the adoption of the public procurement directives.

In general, the following possible objectives of the procurement system can be identified:

1. Economic value (value for money efficiency) in the acquisition of goods, works and services,
2. Integrity – prevention of corruption and conflict of interest,
3. Liability,
4. Equal opportunities and equal treatment in relation to suppliers,
5. Fair treatment of suppliers,
6. Effective application of “horizontal policies” in public procurement (industry, environment, social objectives),
7. Opening public markets to the international environment,
8. Efficiency of the procurement process.<sup>26</sup>

The stated public procurement objectives, or some of them, are the primary objective of the national legislature. The European legislator has, *prima facie*, only a limited competence in this area, and therefore only to the extent that it follows the Union’s conferred power regarding proper functioning of the internal market (Article 5 (2) TEU).

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22 “In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons” (emphasis added).

23 “The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.” (i.e. “Services”)

24 “The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”

25 “1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”

26 ARROWSMITH, Sue. Understanding the purpose of the EU’s procurement directives: the limited role of EU regime and some proposals for reform. In: KONKURRENSWERKET (SWEDISH COMPETITION AUTHORITY): *The Costs of Different Goals of Public Procurement*, Stockholm, 2012, p. 47.



It should be noted that, in the area of assessment of subsidiarity and proportionality principles, the reasoning of directives given in preamble recitals is quite laconic, while only copying the definition contained of these principles in the TEU<sup>27</sup>. It is logical that the aim of the directive, which is the coordination of national rules, cannot be achieved at Member State level, but only at Union level. But it does not say anything about assessment whether the objective of the measure as such (i.e. transparent and non-discriminatory regulation of public procurement) can be achieved at Member State level and whether the scope of the adjustment is appropriate. The directives contain the following principles that should determine their purpose:

1. Prohibition of discrimination (i.e. prohibition of discrimination on grounds of nationality),
2. Transparency of procurement procedures (i.e. contracting authorities must ensure transparent procedures to prevent discriminatory treatment in subjective decision-making,
3. Removing barriers to market access (this is not explicitly stated in the directives), although in cases where non-discriminatory obstacles are removed, it may be questionable whether the framework set for the directives is exceeded.

These principles are derived from the harmonization framework defined in Art. 114 TFEU, following the principle of delegation of power (Article 5 (2) TEU) and all the measures of the directives and their implementation should be subject to these three principles. It is true that entrepreneurs may perceive the public procurement rules in individual countries as complicated, and the need to study the rules of another Member State may discourage them from participating in public procurement in another country.<sup>28</sup> However, this alone is not sufficient to harmonize legal orders<sup>29</sup>, since differences between the legal systems

27 E.g. directive 2014/24/EU rec. 136: "Since the objective of this Directive, namely the coordination of laws, regulations and administrative provisions of the Member States applying to certain public procurement procedures, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective."

28 EUROPEAN COMMISSION: Commission Staff Working Paper: *Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation. Part 1*. Brussels, 27.6.2011, SEC(2011) 853 final.

29 Judgment of 5 October 2000, Germany/Parliament and Council, C-376/98, EU:C:2000:544, par. 83: " Those provisions, read together, make it clear that the measures referred to in Article 100a(1) of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that

actually or potentially constitute a barrier to the functioning of the internal market, but if such obstacles are to occur in the future, such barriers must be likely and preventive must be the subject of the measure.<sup>30</sup>

Therefore, all measures concerning the choice of the most suitable bidder or the conditions for participation should be perceived only and exclusively through prism of transparency and non-discrimination. In other words, the measures, such as the criteria for the evaluation of tenders defined in the directives, or other details relating to the procurement procedures themselves, should be seen only as a means of ensuring transparency, thus avoiding discrimination on grounds of nationality. And in this connection, the principle of proportionality, which is one of the principles of the European Union's activity, ie whether the Union does not go beyond its power by excessive harmonization and unjust unification<sup>31</sup>, is becoming a matter of concern. Moreover, the directives may result in the expulsion of Member States' legislation. As the contracting authority can obtain the most effective offer to secure effective competition, the CJ EU considers compliance with a PP directive as a sufficient guarantee for the effective competition to operate<sup>32</sup>. Therefore, if the directives are to be considered as the only and sufficient guarantee of effective public procurement at national level and Member States will be allowed to only a minimum level of instruments to ensure the efficiency and transparency of public procurement<sup>33</sup> (ie EU-level over-regulation), this can lead to overall under-regulation of public procurement as such.

Since principles and requirements of non-discriminatory access to market and transparency are also involved in "market" provisions of international agreements concluded with third countries, further analysis will focus on reflection of these principles in such agreements, particularly within neighbourhood policy.

### 3. Public Procurement in European Neighbourhood Policy

The Court of Justice in its opinion 2/2015<sup>34</sup> (Free Trade Agreement between the European Union and the Republic of Singapore-EUSFTA) confirmed that public procurement falls partially to the scope of common commercial policy (Art. 3(1)e TFEU)<sup>35</sup> and hence are exclusive competence of the EU, while public

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the powers of the Community are limited to those specifically conferred on it."

30 Judgment of 5 October 2000, Germany/Parliament and Council, C-376/98, EU:C:2000:544, par. 86.

31 ARROWSMITH, Sue. Understanding the purpose of the EU's procurement directives: the limited role of EU regime and some proposals for reform. In: KONKURRENSWERKET (SWEDISH COMPETITION AUTHORITY): *The Costs of Different Goals of Public Procurement*, Stockholm, 2012.

32 Judgment of 15 October 2009, Hochtief and Linde-Kca-Dresden, C-138/08, EU:C:2009:627.

33 Eg. judgment Michaniki, C-213/07, EU:C:2008:731, judgment Assitur, C-538/07, EU: C: 2009: 317.

34 Opinion 2/2015 of 16 May 2017, EU: C: 2017: 376.

35 "75. Chapter 10 of the envisaged agreement, entitled 'Government Procurement', contains

procurement in respect of international maritime transport services, rail transport services, road transport services and internal waterways transport services, and to public procurement in respect of services inherently linked to those transport services, they do not fall within the common commercial policy.<sup>36</sup> However, since these transport services fall into the scope of directive 2014/24/EU and directive 2014/25/EU and the objective of the EUSFTA to ensure that "principles of non-discrimination and transparency are observed when public procurement procedures take place", this regulation falls into the scope of exclusive external competence of the EU due to Art. 3(2) TFEU.<sup>37</sup>

In this part we will analyse only the agreements in force and which are effective. Therefore, we will not analyse the agreements with an Egypt and Palestine who have not yet signed any enabling formal Protocol, upon which they would be allowed to participate in EU programmes Neither agreements with a Belarus, Libya and Syria will be analysed, as their agreements have been postponed due to their political situation.

### *Algeria*

**Association Agreement** with Algeria<sup>38</sup> (2005) deals with the public procurement in just one provision (Article 46), which establishes as the mutual objective a reciprocal and gradual liberalisation of public procurement contracts. It obliges the both EU and Algeria to take steps necessary to implement this goal.

### *Armenia*

The **Partnership and Cooperation Agreement** with Armenia<sup>39</sup> (1999) obliged parties to approximate public procurement law (Art. 43) and cooper-

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the commitments by which each Party is to treat the other Party's suppliers of goods and services no less favourably than its own economic operators in procurement for governmental purposes. It also contains a vast body of rules designed to lay down a framework for public procurement, in both Singapore and the European Union, by providing that public contracts will be awarded only after an award procedure involving a full notice of procurement which will have been readily accessible to the candidates and including appropriate conditions governing participation and selection. 76. That chapter accordingly has the specific aim of determining the arrangements under which the economic operators of each Party may participate in procurement procedures organised by the other Party's public authorities. Furthermore, as those arrangements are founded on considerations of non-discriminatory access, transparency and efficiency, they are such as to have direct and immediate effects on trade in goods and services between the Parties. 77. Chapter 10 of the envisaged agreement consequently falls within the exclusive competence of the European Union pursuant to Article 3(1)(e) TFEU..."

36 Opinion 2/2015, par. 219.

37 Opinion 2/2015, par. 219–224.

38 Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, (O.J. EU L 265/13. 10.10.2005).

39 Partnership and Cooperation Agreement between the European Communities and their

ate to develop the conditions for open and competitive award of contracts for goods and services through calls for tenders (Art. 48). EU-Armenia Action Plan<sup>40</sup> (2006) then required the compliance of the Armenian procurement system with the EU procurement legislation and principles, in particular transparency, information provision, access to legal recourse, awareness and training among contracting authorities and business community as well as limited use of exceptions, implementation of electronic procurement system, accession to the WTO Agreement on Government Procurement. Despite Armenia's decision in September 2013 not to sign the Association Agreement with the EU, Armenia and the EU continue their trade dialogue in areas, where this is compatible with Armenia's obligations to Eurasian Economic Union, where it is a member.

The result is the 2017 **Comprehensive and Enhanced Partnership Agreement**<sup>41</sup> (hereinafter only "CEPA"). This agreement is currently applicable on provisional base (in the area of exclusive powers of the EU) as for full force, a ratification by Member States is required.

Concerning to PP, parties affirm their mutual rights and obligations generally under 2012 WTO Government Procurement Agreement<sup>42</sup>. Specific issues as electronic publication of procurement notices, requirements for review procedures, standstill period, ineffectiveness, non-discrimination of established companies are regulated in the agreement. CEPA specifically distinguishes to scope of application of the WTO legislation and the scope of application of the specific CEPA regime.

### *Azerbaijan*

In 1999 Azerbaijan concluded with the EU the **Partnership and Cooperation Agreement**<sup>43</sup> (hereinafter only "PCA"). Azerbaijan commits to approximate the public procurement legislation to that of the EU (Article 43). Both parties obliged themselves to cooperation on development of conditions for open and competitive award of contracts for goods and services through calls for tenders

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Member States, of the one part, and the Republic of Armenia, of the other part. (O.J. of the EU L 239/3, 9.9.1999).

40 Available at: <https://library.euneighbours.eu/content/eu-armenia-action-plan>. Accessed 31.10.2018.

41 Council Decision (EU) 2018/104 of 20 November 2017 on the signing, on behalf of the Union, and provisional application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part (O.J. of the EU L 23/1, 26. 1. 2018).

42 [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf)

43 Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part – Protocol on mutual assistance between authorities in customs matters – Final Act – Joint Declarations – Exchange of Letters in relation to the establishment of companies – Declaration of the French Government (O.J. of the EU L246, 17. 9. 1999)

(Article 49). Implementation process of this settlement is guided under EU-Azerbaijan Action Plan<sup>44</sup>. Action Plan contained requirements on increasing of transparency, information provision, access to legal recourse, awareness and training among contracting authorities and business community, limited use of exceptions, reinforcement of the administrative capacities, preparing e-procurement and conversion and implementation EU public procurement key principles (e.g. transparency, non-discrimination, competition and access to the legal recourse). According the Business report 2017<sup>45</sup> legal certainty and public procurement are two indicators still remains problems in Azerbaijan as most entrepreneurs still tend to avoid courts in the settlement of economic disputes due to perceived biased, non-transparent and lengthy procedures with even more troublesome enforcement processes.

### Georgia

Georgia too, begun relations with the EU with Partnership and Cooperation Agreement<sup>46</sup> (1999), which counted on development of conditions for open and competitive award of contracts between the parties. Action Plan<sup>47</sup> (2005) envisaged the convergence with and effective implementation of the key principles of the PP legislation of the EU (transparency, non-discrimination, competition and access to legal recourse). Mutual relations were later upgraded to an **Association Agreement**<sup>48</sup> (2014) including the **Deep and Comprehensive Free Trade Area** (hereinafter only the “DCFTA”). This document substantively regulates the Pp. It also contains the commitment of Georgia to ensure that its legislation on PP will be gradually approximated to the EU PP acquis according to the agreed schedule and in the extent specified in Annexes to the Agreement. Both parties shall ensure, that those aspects and areas of PP which are not covered by the agreement on approximation, comply with the principles of transparency, non-discrimination and equal treatment. Both parties opened their procurement market on the reciprocal basis. After the implementation of the last phase in the

44 Available at: [https://cdn5-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/LOCmUA7-XZMNKhquuxzkIFGIsoKnfvSGX63J4V2wk4/mtime:1475839290/sites/eeas/files/au-az\\_action\\_plan\\_azerbaijan.pdf](https://cdn5-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/LOCmUA7-XZMNKhquuxzkIFGIsoKnfvSGX63J4V2wk4/mtime:1475839290/sites/eeas/files/au-az_action_plan_azerbaijan.pdf)

45 DEUTSCH-ASERBAIDISCHANISCHE AUSLANDSHANDELSKAMMER: „EU Business Climate Report Azerbaijan 2017. Perception of EU Businesses active in Azerbaijan. Available at: [https://cdn2-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/MK7NCccm8S-3D4RhU7jV084QY4WeK6PDABSoVrYkUxrY/mtime:1497600803/sites/eeas/files/eu\\_business\\_climate\\_report\\_azerbaijan\\_2017.pdf](https://cdn2-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/MK7NCccm8S-3D4RhU7jV084QY4WeK6PDABSoVrYkUxrY/mtime:1497600803/sites/eeas/files/eu_business_climate_report_azerbaijan_2017.pdf), p. 21. Accessed 31.10.2018.

46 Council and Commission decision of 31 May 1999 on the conclusion of the Partnership and Cooperation Agreement between European Communities and their Member States, of the one part and the Georgia, of the other part. (OJ L 205/1, 4.8.1999)

47 Available at: [https://eeas.europa.eu/sites/eeas/files/georgia\\_enp\\_ap\\_final\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/georgia_enp_ap_final_en_0.pdf). Accessed 31.10.2018.

48 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part. (O. J. of the EU L 261/4. 30. 8. 2014)

process of approximation, parties will examine the possibility to mutually grant market access with regard to procurement below the value thresholds set out in the Agreement.

### *Israel*

The legal basis for relations between EU and Israel is an **Association Agreement**<sup>49</sup> (2000) Progressive liberalisation of public procurement is here understood as one of tools to promote the harmonious development of economic relations. The parties committed to take measures to mutual opening of their respective government procurement markets and the procurement markets of undertakings operating in the utilities sectors for purchase of goods, works and services beyond the scope of what has been mutually and reciprocally covered under the WTO Government Procurement Agreement (Article 35). According to the Action Plan<sup>50</sup> (2005) enhanced access to one another's PP markets presumes the effective and regular communication to identify obstacles to PP access, and expansion of the scope of respective commitments.

### *Jordan*

**Association Agreement**<sup>51</sup> (2002) create the legal framework between EU and Jordan. In this agreement, parties agreed on the objective of a gradual liberalization of the PP as a part of the progressively established free trade area. In Action Plan<sup>52</sup> (2013), we can find measures to be adopted by Jordan to its way to DCFTA with EU, such as adoption and implementation of the new regulatory framework of the PP, including the adoption and harmonisation of relevant by-laws and procurement relevant regulations, aligning with the key EU standards (transparency, non-discrimination, competition and access to legal recourse), strengthening of administrative capacities, e-procurement, increase of openings of the PP markets within the Euromed region.

### *Lebanon*

Relations of Lebanon with the EU are governed by **Association Agreement**<sup>53</sup> (2002), which stipulates, that reciprocal and gradual liberalisation of PP con-

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49 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part. (O.J. of the EU L 147/3, 21. 6. 2000)

50 Available at: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eu-israel\\_action\\_plan\\_2005.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eu-israel_action_plan_2005.pdf). Accessed 31.10.2018.

51 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part. (O.J. of the EU L 129/3, 15. 5.2002)

52 Available at: [https://eeas.europa.eu/sites/eeas/files/2013\\_jordan\\_action\\_plan\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/2013_jordan_action_plan_en.pdf). Accessed 31.10.2018.

53 Council (EU) Decision No 7293/02 of 18. April 2002 on Euro-Mediterranean Agreement

tracts is the common aim of the parties. Action Plan<sup>54</sup> (2006) then introduces the steps how to implement this goal – improvement of the existing system, increase of transparency, information, limited use of exceptions and easy access to judicial review; reform of the Lebanese PP legislation with a view to adopt key and international principles of transparency, information, non-discrimination, open competition, and access to remedies procedures. Action Plan for EU-Lebanon Partnership and Cooperation 2013–2015<sup>55</sup> then focused on adopting measures on anti-corruption fight in PP and creation of oversight mechanisms in short-time period and increasing the transparency.

### *Republic of Moldova*

Firstly, mutual relations were regulated in **Partnership and Cooperation Agreement**<sup>56</sup> (1998). Towards PP, Moldova committed to gradually approximate the PP law with EU law. Both parties then committed to cooperate to develop conditions for open and competitive award of contracts for goods and services in particular through calls for tenders. This agreement was later upgraded to an **Association Agreement**<sup>57</sup> (2014) including the DCFTA. Amongst other, it binds parties to cooperate in relation to fostering approximation of procurement procedures with existing practices in EU as they recognise the contribution of transparent, non-discriminatory, competitive and open tendering to sustainable economic development. They set as their objective the effective, reciprocal and gradual opening of their respective procurement markets on the basis of the principle of national treatment. Republic of Moldova then shall gradually approximate EU PP legislation, accompanied with institutional reform and the creation of an efficient PP system based on the principles governing PP in the Union and the terms and definitions set out in 2004 EU Directives on Pp. Until the approximation of laws, Agreement substantively set basic standards regulating the award of contracts. After the implementation of the last phase in the process of legislative approximation, EU and the Ukraine will examine the possibility to mutually grant market access with regard to procurements below the value thresholds set out in this Agreement.

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establishing an association between the European Communities and their Member States, of the one part, and the Republic of Lebanon, of the other part – Decision and Association Agreement

54 European Neighbourhood Policy. EU-Lebanon Action Plan. Available at: [https://eeas.europa.eu/sites/eeas/files/lebanon\\_enp\\_ap\\_final\\_en\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/lebanon_enp_ap_final_en_0.pdf). Accessed 31.10.2018.

55 Available at: [http://www.europarl.europa.eu/cmsdata/124080/action\\_plan\\_for\\_eu-lebanon\\_partnership\\_and\\_cooperation\\_2013-2015\\_en.pdf](http://www.europarl.europa.eu/cmsdata/124080/action_plan_for_eu-lebanon_partnership_and_cooperation_2013-2015_en.pdf). Accessed 31.10.2018.

56 Council and Commission decision of 28 May 1998 on the conclusion of the Partnership and Cooperation Agreement between European Communities and their Member States, of the one part and the Republic of Moldova, of the other part. (OJ L 181/1, 24. 6. 1998)

57 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (OJ L 260/4, 30.8.2014, p. 4–738).



*Morocco*

**Association Agreement**<sup>58</sup> (2000) implements from 2013 DCFTA. Towards public procurement, the agreement set only a mutual objective – development of the conditions for the open, competitive award of public contracts and a reciprocal and gradual liberalization of PP contracts. Action Plan<sup>59</sup> (2005) then required Morocco to consolidate the process of reforms guaranteeing openness, transparency, information and competition, complete the system of judicial review, implement the principle of non-discrimination. The EU-Morocco Action Plan implementing the advanced status (2013–2017)<sup>60</sup> in relation with the creation of DCFTA, requires from Morocco, in short term – by the end of 2014, to improve the transparency and effectiveness of procedures for the award public contracts and concessions, continue alignment of Moroccan legislation on European standards to ensure openness, transparency, equal access to information and competition, establish an effective and independent dispute-settlement system for procurement procedures, continue modernisation of the procedures for administering managing and monitoring the performance of public contracts, in particular progress in implementing electronic procedures and standardise the procurement procedures of public institutions and undertakings specifically designed to meet general-interest needs that are not of an industrial or commercial nature.

*Tunisia*

Cooperation between Tunisia and EU has developed under an **Association Agreement**<sup>61</sup> (1998) and further strengthened in 2012 with a Privileged Partnership with aim to progress to DCFTA (currently, the 2<sup>nd</sup> round of negotiations were closed). The mutual objective is a reciprocal and gradual liberalisation of PP contracts. Action Plan<sup>62</sup> (2005) then requires from Tunisia to increase the transparency, information and training and appropriate legislative adjustments, ensure governance with the key principle governing all levels of PP, introduce a system of appeals against rulings by PP committees, etc.

58 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. (OJ L 70, 18. 3. 2000)

59 EU-Morocco Action Plan (2005). Available at: <https://library.euneighbours.eu/content/eu-morocco-enp-action-plan>. Accessed 31.10.2018.

60 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013JC0006>. Accessed 31.10.2018.

61 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (OJ L 097, 30.3.1998, p. 2–183)

62 EU-Tunisia Action Plan (2005). Available at: <https://library.euneighbours.eu/content/eu-tunisia-enp-action-plan>. Accessed 31.10.2018.



### Ukraine

Relations with Ukraine started with **Partnership and Cooperation Agreement**<sup>63</sup> (1998) which counted on development of conditions for open and competitive award of contracts between the parties. Action Plan<sup>64</sup> (2005) then required the increase of transparency, information and training, limited use of exceptions, access to judicial review and appropriate legislative adjustments, approximation to PP legislation of the EU in order to ensure effective implementation of the key principles of transparency, non-discrimination, competition and access to legal recourse, cooperation with the EU in the application of modern e-tendering technologies in PP and facilitation of the effective, reciprocal and gradual opening of the PP markets. Same as in Armenia, Georgia and Moldova, mutual relations were upgraded to an **Association Agreement**<sup>65</sup> (2014) including the DCFTA. Ukraine commits to adopt the PP legislation of the EU according to the schedule agreed in this Agreement. Both parties open PP markets to each other on the basis of the principle of national treatment. PP system in Ukraine shall be based on principles governing PP in EU and terms and definitions set in EU Public procurement Directives. Until the approximation of laws, Agreement substantively set basic standards regulating the award of contracts. After the implementation of the last phase in the process of legislative approximation, EU and the Ukraine will examine the possibility to mutually grant market access with regard to procurements below the value thresholds set out in this Agreement.

Various levels of approximation of PP standards, as were described above, can be illustrated in Table 5:

*Table 5 (Levels of approximation of PP standards)*

State	Liberalisation of PP contr.	Approx. of legislation	WTO regime	key EU PP principles	open access to PP markets	Competitive award of contracts	Substantive regulation	Type of agreement
Algeria	X							AA
Armenia		X	X	X		X		CEPA

63 Council and Commission decision of 26 January 1998 on the conclusion of the Partnership and Cooperation Agreement between European Communities and their Member States, of the one part and Ukraine, of the other part. (OJ L 181/1, 24. 6. 1998)

64 Available at: <https://library.euneighbours.eu//content/eu-ukraine-action-plan-0>. Accessed 31.10.2018.

65 Association Agreement between the European Union and their Member States, of the one part, and the Ukraine, of the other par (OJ L 161/3, 29.5.2014, p.).

Azerbaijan		X		X		X		PCA
Georgia		X		X	X	X		DCFTA
Israel	X		X		X			AA
Jordan	X	X		X	X			AA
Lebanon	X			X				AA
Moldova		X		X	X	X		DCFTA
Morocco	X			X		X		DCFTA
Tunisia	X			X				AA
Ukraine		X		X	X	X		DCFTA

The most approximative elements are the key public procurement principles: transparency, non-discrimination, competition and access to legal recourse, which are common almost to all types of trade agreements. As we can see, advanced trade agreements (DCFTA) require from the contracting parties the commitment to approximate the EU legislation on public procurement. In this relation, all texts of these Agreements refer to the third generation of the EU public procurement Directives. In 2014, they were replaced by the fourth generation of the PP directives, which are even larger and complicated than the previous legislation. Therefore, we do not consider this to be an entirely appropriate solution.

The answer to this issue may be the new generation trade agreement – Comprehensive Economic and Trade Agreement (hereinafter only “CETA”) (2017) or EUSFTA (2018)<sup>66</sup>. In Chapter 19 of EU–Canada CETA, EU has in fact offered an alternative to large-scale PP rules. This chapter substantively sets out rules under which suppliers from EU and Canada have access to the PP markets of both CETA contracting parties. The objectives of this chapter are similar to those of 2014 Public Procurement Directives: allowing market access (Article 19.4(1) and equal treatment and (Article 19.4(2), transparent and impartial procedures (Article 19.4(4). Compared to the Directives, the provisions of the CETA have a more general character, while leaving the Contracting Parties space for appropriate implementation, whilst maintaining the transparent and non-discriminatory approach. The clarity and extent of the CETA regulation of the PP are other

<sup>66</sup> Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore (*OJ L 267, 25.10.2018, p. 1–2*)

added values of this regulations. Equally, newly signed EUSFTA contains similar provisions in Chapter 9 thereof (*mutatis mutandis*, the same provisions can be found in the respective articles of Chapter 9 of EUSFTA as in Chapter 19 of EU–Canada CETA).

We consider the CETA regulation on public procurement not only appropriate solution for EU external relations, but even to the internal environment, as well. As the objective of both regulations is the same, objection that the CETA forms a lower degree of economic integration we consider as irrelevant. As an example of voluntary proliferation of the EU model of rules can be seen competition rules (that are in fact quite close to the aim of the of PP) and copy of EU competition rules can be found in several regional integration groups, such as UEMOA, ECOWAS, COMESA, CARICOM, CAN, EAC, EAEU.

#### 4. Conclusion

The EU belongs among the most important business partners of the most countries in the World. Therefore, simplification of the PP rules inward and outward the EU legal system may be the basis for the creation of global PP standards, which will not only simplify the negotiations on this aspect of trade agreements, but also “export” the values and principles of the EU to the legal orders of the third countries. By this, the EU will stabilise and strengthen its position as a global player in the international scene.

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