

**PUBLIC PROCUREMENT AND CONTRACT AWARD IN THE EU:
DISCUSSION FROM ECONOMIC POLICY PERSPECTIVE**

**AB'DE KAMU İHALELERİ VE İHALE SÖZLEŞMELERİ: İKTİSAT
POLİTİKASI PERSPEKTİFİNDEN TARTIŞMA**

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ABSTRACT

Procurement law refers to a set of rules, regulations, and guidelines that govern the purchase and procurement of goods and services by businesses and government entities. These laws are designed to protect consumers and ensure fairness and transparency in the process. Public procurement law is an important part of public administration and is closely linked to other areas of law, such as contract law, administrative law, and competition law. It is also closely linked to public policy, as it is designed to ensure that public funds are spent in a way that is consistent with the public interest. Public procurement law is also closely linked to international trade law, as it is designed to ensure that public authorities are able to obtain the best value for money when purchasing goods and service. The law also seeks to ensure that public contracts are awarded in a way that promotes competition. The competitiveness will ultimately bring innovation. Public procurement law is a complex area of law that is constantly changing. The EU has adopted a number of directives in the field of public procurement law, which have been implemented in the national legal system. The aim of the study is to discuss the concept of procurement law in the EU from a historical and legal perspective and to explain its reflection on economic policy. The study begins with a historical and legal part. In the legal part, the term "procurement law" is to be defined. Furthermore, the problem in connection with the award of contracts will be illustrated by using two case studies. The first case is about a violation of public procurement law, and the second is about the debate about municipal water supply and its privatization. It will be illustrated how public procurement law affects the competition among companies, how it contributes to the stability of the European economy and how it reflects the European Union's commitment to sustainable development. The results show that the amendment to the public procurement law will have limited impact on achieving the goal of greater competitiveness and transparency, as some member states do not address any of the possible consequences of water privatization, such as public resistance to the change, the potential for unfair pricing, or lack of access to water for certain communities.

Keywords: Public Procurement Law, Contract Law, European Union, Water Supply.

Jel Codes: H57, K12, N44, N74.

ÖZ

İhale kanunu, işletmeler ve devlet kurumları tarafından mal ve hizmetlerin satın alınmasını ve satın alınmasını yöneten bir dizi kural, düzenleme ve yönerge anlamına gelmektedir. Bu yasalar, tüketicileri korumak ve süreçte adalet ve şeffaflık sağlamak için tasarlanmıştır. Kamu ihale hukuku, kamu yönetiminin önemli bir parçasıdır ve sözleşme hukuku, idare hukuku ve rekabet hukuku gibi hukukun diğer alanlarıyla yakından bağlantılıdır. Kamu kaynaklarının kamu yararına uygun bir şekilde harcanmasını sağlamak için tasarlandığından, kamu politikasıyla da yakından bağlantılıdır. Kamu ihale hukuku, kamu makamlarının mal ve hizmet satın alırken paranın karşılığını en iyi

şekilde alabilmesini sağlamak üzere tasarlandığından, uluslararası ticaret hukuku ile de yakından bağlantılıdır. Kanun kamu ihalelerinin rekabeti teşvik edecek şekilde verilmesini sağlamaya çalışmaktadır. Rekabet gücü nihayetinde inovasyonu getirecektir. Kamu ihale hukuku, sürekli değişen karmaşık bir hukuk alanıdır. AB, kamu ihale hukuku alanında ulusal hukuk sisteminde uygulanmış olan bir dizi direktif kabul etmiştir. Çalışmanın amacı, AB'de ihale hukuku kavramını tarihsel ve hukuki bir perspektiften ele almak ve ekonomi politikasına yansımalarını açıklamaktır. Çalışma tarihsel ve hukuki bir bölümle başlamaktadır. Hukuki kısımda "ihale hukuku" kavramı tanımlanacaktır. Ayrıca, ihalelerin verilmesiyle ilgili sorun iki vaka çalışması kullanılarak açıklanacaktır. İlk dava, kamu ihale yasasının ihlali ile ilgili, ikincisi ise belediye su temini ve özelleştirilmesiyle ilgili tartışmadır. Kamu ihale kanununun şirketler arasındaki rekabeti nasıl etkilediği, Avrupa ekonomisinin istikrarına nasıl katkıda bulunduğu ve Avrupa Birliği'nin sürdürülebilir kalkınma taahhüdünü nasıl yansıttığı gösterilecektir. Sonuçlar, kamu ihale kanununda yapılan değişikliğin, daha fazla rekabet gücü ve şeffaflık hedefine ulaşılması üzerinde sınırlı bir etkiye sahip olacağını göstermektedir. Çünkü bazı üye devletler, halkın değişime karşı direnişi, haksız fiyatlandırma potansiyeli veya belirli topluluklar için suya erişim eksikliği gibi su özelleştirmesinin olası sonuçlarının hiçbirini ele almamaktadır.

Anahtar Kelimeler: Kamu İhale Kanunu, Sözleşme Hukuku, Avrupa Birliği, Su Temini.

Jel Kodları: H57, K12, N44, N74.

1. INTRODUCTION

Public procurement law is the legal framework that governs the purchase of goods and services by public authorities. It is a set of rules and regulations that govern the purchase of goods and services by public entities. It is designed to ensure that public funds are spent in a transparent and efficient manner, and that public authorities are able to obtain the best value for money. Public procurement law is based on principles of fairness, transparency, and competition (Frenz, 2018:1-11). It is also designed to ensure that public authorities are able to obtain the best value for money. The law also provides that all potential suppliers have an equal opportunity to compete for contracts. The law also seeks to ensure that the public sector does not discriminate against potential suppliers and that the public sector is not exposed to corruption or other forms of malpractice (Bovis, 2012:276-277).

Since the goods and services are paid for primarily from public funds, those companies from which products and services are commissioned must also be selected according to statutory rules. The state therefore has a certain duty of care towards its citizens. It must be ensured that the allocation does not take place arbitrarily by giving preference to unlawful applicants who do not meet the legal requirements - as a result transparent procedures are important (Bovis, 2012:407).

The awarding of public contracts is also subject to the principle of proportionality. This principle requires that the measures taken by the contracting authority must be appropriate and necessary for the attainment of the intended purpose. In addition, the principle of equal treatment must be observed. This principle requires that all economic operators who meet the legal requirements must be treated equally (Schebesta, 2016:18).

Public procurement law is a far more important means of procurement for the state. A feature of public procurement, in contrast to private consumption, is that the public sector appears on the market as a consumer of goods and services. After the payment for goods and services is primarily made from public funds, those companies that produce products and services in order are given, can also be selected according to legally prescribed rules. The state therefore has a certain duty of care towards its citizens. It must be ensured that the award is not made

arbitrarily by giving preference to unlawful applicants who do not meet the legal requirements - transparent procedures are therefore important. important (Bovis, 2012:84).

The Sherman Antitrust Act does not exempt public water suppliers from its prohibitions on agreements that restrict competition. This includes agreements that fix prices, limit production, or divide markets. It also prohibits public water suppliers from engaging in any other activities that unreasonably restrain trade. This includes activities such as price-fixing, bid-rigging, and market allocation. Public water suppliers must also ensure that their contracts do not contain any provisions that could be interpreted as an agreement to restrict competition (Somach and Hitchings, 1996:26-27).

What is known is that the Federal Communications Commission (FCC) began to regulate CATV services in 1972, and this new regulatory framework superseded any municipal regulations that were in place. The FCC's regulations were designed to promote competition and encourage innovation in CATV services. This new regulatory framework provided a more uniform and consistent approach to regulating CATV services than what could have been achieved through local franchise agreements (Williamson, 1976:101).

The following work begins with a historical and legal part. In the legal part, the term "procurement law" is to be defined. Furthermore, the problem in connection with the award of contracts should be illustrated using two case studies. The first case is about a violation of public procurement law, and the second is about the debate about municipal water supply and its privatization.

1. HISTORICAL BACKGROUND AND LEGAL BASIS of the EU PUBLIC PROCUREMENT LAW

The European Union (EU) public procurement law is based on the principles of free movement of goods, services, and capital, as enshrined in the Treaty on the Functioning of the European Union (TFEU). The EU public procurement law is also based on the principle of equal treatment of all economic operators, regardless of their nationality or place of establishment. In addition, the use of public procurement as a tool to foster economic growth and economic efficiency in competitiveness has not been limited to the European Union, but has been seen in other parts of the world as well. (Graells, 2015:113).

The legal basis for public procurement law is the German Act against Restraints of Competition (GWB). This law regulates the award of public contracts and the Award procedure. According to Section 97(1) of the GWB, public contracts and concessions must be awarded in competition and through transparent procedures (Federal Ministry of Justice, 2013). The principle of competition aims to ensure that the greatest possible number of bidders can take part in the procurement process, as this enables the awarding authority to secure the best possible terms. To achieve this, an "open procedure" is usually the most suitable as it allows an unlimited number of companies to participate or submit an offer. In addition, an open procedure also fulfills the budgetary requirement for an economical and efficient use of public funds. The GWB is supplemented by the European Union's Public Procurement Directives, which are implemented in Germany by the Implementing Ordinance on Public Procurement (VgV). The VgV contains detailed rules for the award procedure. It establishes the framework for the evaluation of bids and the criteria for the award of public contracts. It also provides for the exclusion of certain suppliers from the award procedure and for remedies in case of irregularities (Bundesministerium für Wirtschaft und Energie, 2016).

The first European legal acts on public procurement law were the Council Directive of 25 July 1985 on the coordination of procedures for the award of public supply contracts (85/337/EEC)¹ and the Council Directive of 25 July 1985 on the coordination of procedures for the award of public works contracts (85/338/EEC)². These directives were the first steps towards the harmonization of public procurement law in the European Union. The European Union has since then adopted a number of directives and regulations in the field of public procurement law. These include the Public Procurement Directive (Directive 2004/18/EC)³ and the Utilities Directive (Directive 2004/17/EC).⁴ Directive 92/13 EEC for the coordination of legal and administrative regulations on the award of contracts previous regulations have also been extended to the areas of water, energy and transport supply as well as to the area of telecommunications (Official Journal of the European Communities, 1992). The directives are intended to ensure that public contracts are awarded in a transparent, non-discriminatory and competitive manner. They also provide for the possibility of awarding contracts without a public tender procedure in certain cases.

Public procurement law can be structurally divided into two different regulatory areas. The Classification is based on defined value limits, which are defined by the European guidelines are specified. The value limits depend on the respective order type of the procurement process and become general also referred to as "EU threshold values". In the upper threshold range, public procurement law is based on the principle of competitive tendering and applies the principles of non-discrimination, equal treatment and transparency. This is why the procurement procedure must be carried out openly or, if appropriate, on the basis of restricted procedures. When awarding contracts, however, the contracting authority is bound to the principle of economy and efficiency. This means that the contracting authority is obliged to award the contract to the most economically advantageous tender. In the lower threshold range, the principles of competitive tendering are not applicable and the procurement procedure does not need to be carried out openly or on the basis of restricted procedures. The contracting authority is free to choose the tenderer who, in its opinion, offers the most economically advantageous solution. However, the contracting authority must still act in accordance with the principles of non-discrimination and equal treatment. Overall, it can be said that in the upper threshold range, public procurement law is based on the principles of competitive tendering and is more stringent than in the lower threshold range. In the lower threshold range, the contracting authority is more flexible and can make its own decision on the selection of the tenderer (see Figure 1).

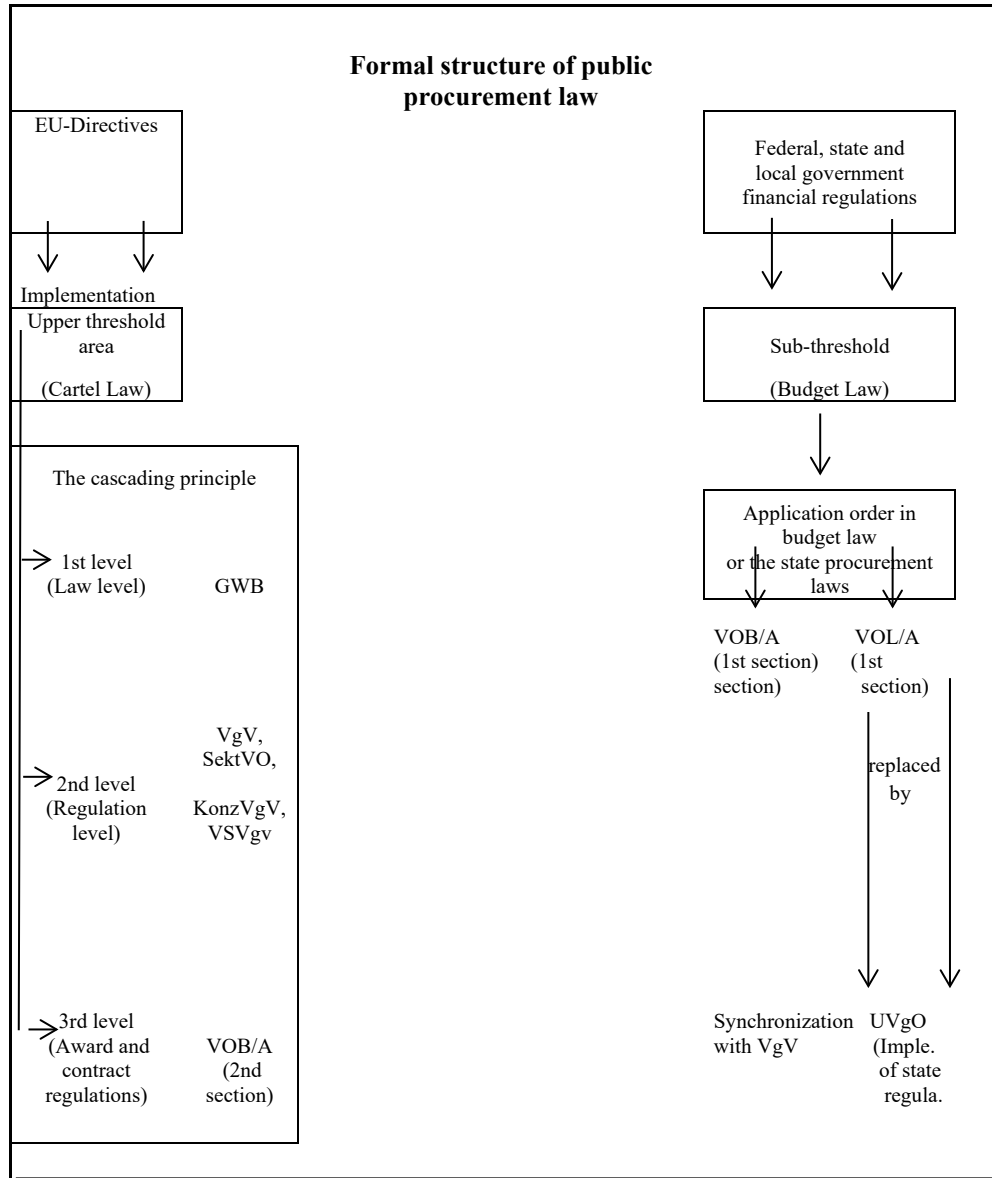
¹ The main aim of Directive 85/337/EEC was to ensure that public authorities take account of the environmental effects of their decisions. In order to do this, the Directive introduced a system of environmental assessment (EA) for all plans and programmes, which might have a significant effect on the environment.

² Directive 85/338/EEC aimed at assessing the effectiveness of Community policies and measures in relation to the environment.

³ The award of public contracts is subject to the principles of the Treaty, in particular the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services. These principles are enshrined in the Treaty and must be respected when awarding public contracts.

⁴ It sets out the minimum requirements that must be met in order for contracts between economic operators to be valid, including rules on contract formation, the use of standard forms, contract performance, termination and remedies.

Figure 1: Formal Structure of Public Procurement Law



Source: Naumann, 2019: 4

The EU public procurement directives set out the rules that govern how contracts above a certain value must be awarded by public authorities in the EU. The directives aim to ensure that contracts are awarded in a fair, open and transparent way, and that companies from all EU countries have a fair chance of winning. The EU internal market, which includes the 4 fundamental freedoms - the free movement of goods, persons, services and capital has been empowered to take measures with reference to Article 134(1) TFEU with the aim of achieving the fairest and most transparent possible award of contracts (Official Journal of the European Union, 2012). The EU has to ensure that public contracts are awarded in a non-discriminatory manner and that the principles of equal treatment and proportionality are respected. The following case study is intended to show how important fair and transparent

awarding of contracts is and how difficult the factual and legal situation becomes in the event of a violation of the designed procurement law.

3. HAMBURG-ENERGIE CASE STUDY: VIOLATION OF PUBLIC PROCUREMENT LAW?

According to reports in the ‘Hamburger Abendblatt’ and ‘Die Welt’ is said to be the municipal energy supplier Hamburg Energie (HE)⁵ 8 in November 2013 in Hamburg according to the Court of Auditors have violated public procurement law in several different cases (14 violations, including 5 cases of in-house transactions). In 5 cases it was a question of so-called in-house transactions, i.e. the awarding of orders to the parent company Hamburg Wasser (HWW) and HE. This also included the services of a call center and the administration of their customers. These allegations were vehemently rejected by Hamburg Energie CEO Michael Beckereit. He took the position that he had not violated the applicable law when awarding the contract. In addition, the services he received from the parent company had not been cheaper. The Hamburg Higher Regional Court only considered an award to the group to be inadmissible. The Hamburg Higher Regional Court ruled that the awarding of the contract to Hamburg Energie was inadmissible due to the fact that it was a subsidiary of Hamburg Wasser, the parent company. This ruling was based on the fact that the services provided by Hamburg Energie were not cheaper than those provided by an external call center. In another statement, Michael Beckereit replied: “Some of the previous contracts awarded by Hamburg Wasser to the subsidiary Hamburg Energie were objected to by the Court of Auditors. The inadmissibility is only in the case of in-house awards in a procedure by a corresponding Decision of the Hanseatic Higher Regional Court from 2010 has been established by a court. “According to him, an external call center would have been 15% cheaper. Michael Beckereit, the CEO of Hamburg Energie, defended his decision to award the contract to his own company by citing the need to preserve jobs. CEO Beckereit emphasized that the cooperation between the group and his subsidiary is quite market-compliant and argued that Hamburg Wasser offers its subsidiary services and is burdened with it the resources available in the Group even more efficiently. The services are charged to Hamburg Energie on a full cost basis in proportion to the associated overheads invoiced. Hamburg Wasser provides its subsidiary services to Hamburg Energie, charging them on a full cost basis. This means that Hamburg Energie pays for all of the costs associated with the services, including overhead costs. This allows Hamburg Wasser to use the resources available in the Group more efficiently (Hamburger Abendblatt, 2013).

The Court of Auditors said that the HWW did not have a contract with the HE for the provision of advertising services, and that the HWW did not have a contract with the HE for the provision of personnel and services. The Court of Auditors also replied that The HWW passed on all of its incurred costs to the HE. The waiver of the customary market surcharges for profit and risk charged to the HE. However, costs for personnel and services as well as rents, the free provision of advertising services and some contractual conditions are considered unusual among third parties evaluate. In this sentence, the HWW is the party that incurred the costs, and the HE is the party that was charged for them. The sentence states that the HWW waived the customary market surcharges for profit and risk, but that the HE was still charged for personnel and services, rents, advertising services, and some contractual conditions (Welt, 2013).

Ultimately, this deal between HHE and HE remained without legal consequences, despite careful investigation by the Court of Auditors. The Court of Auditors also examined the

⁵ Founded in 2009 after the sale of HEW.

business relationships between Hamburg Energie and Hamburger Wasserwerke. The aim was to examine whether and to what extent the group received advantages from the waterworks and this led to a competitive advantage. In the end, however, the Court of Auditors found no clues. The auditors, however, criticized that the performance relationships between the Hamburger Wasserwerke and Hamburg Energie would not stand up to a direct comparison with other companies (Welt, 2013).

The Court of Auditors concluded that the business relationship between HHE and HE was compliant with market standards and customary practices. The Court of Auditors also found that the performance relationships between the Hamburger Wasserwerke and Hamburg Energie could not be compared directly with other companies. However, the Court of Auditors found no evidence of any competitive advantage gained by the group from the waterworks. The Hamburg Parliament also conducted an investigation into the company, but found no evidence of dumping prices (Welt, 2013).

4. THE AMENDMENT OF THE EU PUBLIC PROCUREMENT LAW

The new EU public procurement law is intended to create greater legal certainty, simplify the award procedure, and make public procurement more transparent and competitive. The new directives focus on creating a level playing field to avoid distortion of competition, simplifying and increasing flexibility of award procedures, extending electronic procurement, improving access for small and medium-sized enterprises to the award procedures, and increasing legal certainty for companies and public clients. According to new directives, when public entities are required to publicly disclose information about the goods, services, and works that they are procuring, this breaks down information and awareness barriers in public markets. This allows for increased competition among suppliers, which leads to lower prices (Bovis, 2012:4-10).

The European Commission recommends that public procurement should be carried out in a more efficient manner, with an optimal price-performance ratio being the goal. This means that the public client should be able to get the best value for their money when awarding contracts. To achieve this, the Commission recommends that public procurement should be carried out in a more transparent and competitive. This includes ensuring that the award procedure is simpler and more practical for both public clients and companies. Against the background of the current economic situation and to create greater legal certainty, a reform of the rules seemed necessary, which would make the award procedure simpler and more practical for public clients and companies. In addition, public procurement should be carried out as transparently and competitively as possible. In the Green Paper of the European Commission, goals were defined that should make public procurement more efficient. According to the Green Paper an optimal price-performance ratio should be aimed at awarding public contracts.

Table 1: Public Procurement Targets in the Green Book (2011)

Economic/Fiscal	Administrative/Governance
<ul style="list-style-type: none"> The use of electronic procurement systems to reduce administrative costs and increase transparency 	<ul style="list-style-type: none"> The use of standardized contracts and procedures to reduce the complexity of the award procedure
<ul style="list-style-type: none"> The use of performance-based criteria to ensure that the best value for money is achieved 	
<ul style="list-style-type: none"> The use of alternative dispute resolution mechanisms to reduce the time and cost of resolving disputes 	
<ul style="list-style-type: none"> The use of innovative procurement techniques to ensure that the best value for money is achieved 	
	<ul style="list-style-type: none"> Establishing clear and transparent rules for the award of public contracts
	<ul style="list-style-type: none"> Ensuring that public contracts are awarded on the basis of fair and open competition
<ul style="list-style-type: none"> Ensuring that public contracts are awarded in a timely and cost-effective manner 	
	<ul style="list-style-type: none"> Ensuring that public contracts are awarded in a manner that is consistent with the principles of good governance
<ul style="list-style-type: none"> Ensuring that public contracts are awarded in a manner that is consistent with the principles of sustainability 	
	<ul style="list-style-type: none"> Simplification and flexibility of award procedures
	<ul style="list-style-type: none"> Extension of electronic procurement
	<ul style="list-style-type: none"> Improving access for small and medium-sized enterprises to the award procedures
	<ul style="list-style-type: none"> Increased legal certainty for companies and public clients

Source: (European Commission, 2011a).

The goal should be taken into account when awarding contracts to ensure that public funds are used efficiently and that public contracts are awarded on the basis of quality, innovation and environmental protection, as they are in the common interest. This means that the criteria for awarding contracts should include the potential of the bidder to contribute to the achievement of the strategic goals. This could include the bidder's commitment to resource and energy efficiency, their ability to combat climate change, and their capacity to promote innovation. The evaluation of the bids should also take into account the bidder's ability to deliver the project on time and within budget. In addition, the evaluation should consider the bidder's track record in delivering similar projects, their financial stability, and their commitment to ethical and responsible business practices. The evaluation should also consider the bidder's ability to provide value for money, as well as their ability to provide a high-quality service. Finally, the evaluation should consider the bidder's ability to meet the specific requirements of the project, such as any specialized skills or expertise that may be required (European Commission, 2011a).

The development of generic procurement schemes has been driven by the recognition that the traditional approach of relying on individual contractors to develop their own occupational safety and health management systems is ineffective and can lead to a lack of consistency and quality in the services provided. Generic procurement schemes provide a more consistent improvement of the scheme. There is a need for a debate on the effectiveness of social and eco labels. Actions that could be debated include support for education and awareness around labor conditions issues, promotion of best practice through sponsorship of

company awards, facilitation of the development of multi-stakeholder partnerships and the development of standards in social and eco labeling (Commission of the European Communities, 2001:9-20).

In December 2011, the European Commission presented its proposal for a reform of European public procurement law. The proposal for an amendment to the Public Procurement Act was finally adopted by the European Parliament on January 15, 2014. The new guidelines for public procurement entered into force on April 17, 2014 and must be transposed into national law by the member states by April 18, 2016 at the latest. The new rules aim to reduce the administrative burden on public authorities and suppliers by simplifying procedures and introducing more flexibility. For example, the new rules allow for the use of electronic procurement tools and the use of electronic invoices. This will help to reduce the time and cost of public (European Commission, 2016:6).

A total of three new directives were passed to replace the previous EU procurement directives:

- Directive on the award of public contracts (RL 2014/24/EU), replaces the previous procurement coordination directive 2004/18/EG) (general award guideline), which applies to the award of public contracts for the supply of goods, services and works by contracting authorities in the European Union (European Commission, 2014a).
- Directive on the award of contracts by clients in the field of water, energy and transport supply and postal services (sector directive, RL 2014/25/EU, replaces directive 2004/17/EG), which defines the scope of the procurement procedures, including the types of contracts and the value thresholds above which the coordination of procurement procedures applies, the procedures for the award of contracts, including the criteria for the selection of tenderers, the award criteria and the procedures for the evaluation of tenders and the rules for the publication of notices and the submission of tenders (European Commission, 2014b).
- Directive on the award of concession contracts (new Concession Directive, RL 2014/23/EU). The new concession guideline covers all construction and service concessions. In the following, the problem in connection with the new concession directive will be explained. For a better understanding, the term is explained and based on the case study is intended to show how sensitively the public reacts to the award of concessions in the water supply (European Commission, 2014c).

The new rules aim at making public procurement more efficient, transparent and competitive. They also seek to reduce bureaucracy and administrative costs, while ensuring that public contracts are awarded to the most economically advantageous bidder. The new rules also introduce a number of new measures, such as the possibility for contracting authorities to award contracts on the basis of the lowest price, the introduction of electronic procurement, and the possibility for contracting authorities to award contracts without a prior call for tenders. Furthermore, the new rules also introduce a number.

5. THE CONCESSIONS DIRECTIVE AND ITS DEBATE

A concession is understood to be a kind of “partnership” between the public sector and a private company. In the EU member states, concessions are used in a wide variety of areas, from motorway construction to water supply. Concessions differ from public contracts in that the concessionaire does not receive a fixed remuneration from the contracting authority, but the right to use the right granted to it economically or the right of use plus a fee. The concessionaire is responsible for the design, construction, financing, operation and

maintenance of the works or services. The contracting authority is responsible for monitoring the performance of the concessionaire and ensuring that the works or services are provided in accordance with the terms of the concession agreement. The concessionaire is also responsible for the financial risks associated with the project (Weidenholzer, 2014).

For example, a private company like Austrian road financing agency (ASFINAG) operates a motorway and is paid for by the toll revenue. In this case, ASFINAG is exposed to the risk of not being able to cover its costs if the toll revenue is not sufficient. This could be due to a variety of factors, such as a decrease in traffic on the motorway, an increase in operating costs, or a decrease in the amount of money people are willing to pay for tolls. To mitigate this risk, ASFINAG could look into ways to increase the amount of traffic on the motorway, reduce operating costs. The company bears the risk that the income is not sufficient to cover his investment and other costs (OECD, 2014: 30-31)

The new directive, which is the “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”, is more comprehensive and specific in its regulatory framework. It also targets the main areas where the previous directive had weaknesses. The main focus of the new directive is to ensure an equal and transparent playing field for all tenders and to prevent companies from engaging in anti-competitive practices. It does this by providing a set of rules and regulations that all companies must abide by when bidding for public contracts. This includes specific rules on how the public bodies advertise their contracts, how tenders are evaluated and the remedies available in case of disputes. It also provides for a more effective monitoring system of the entire procurement process and ensures that the awarding of contracts is done in a transparent and fairer manner (Official Journal of the European Union, 2014c).

To date, the general principles of the Treaty on the Functioning of the European Union and the case law of the European Court of Justice have applied to the concessions. The new directive should provide a clear and consistent framework for the award of concessions in the field of water, energy and transport supply. It should ensure that the award of concessions is done in a transparent, non-discriminatory and competitive manner. The directive should also ensure that the award of concessions is done in accordance with the principles of the Treaty on the Functioning of the European Union and the case law of the European Court of Justice.

The directive should also provide for the possibility of awarding concessions in the form of competitive tendering. This should ensure that public authorities can benefit from the most competitive bids from the private sector in the delivery of public services. The directive should also provide for the possibility of awarding concessions in the form of direct awards.

For reasons of concern about a possible forced privatization of the local water suppliers, this has led to excitement in Germany, among others, like the following example of municipal water supply shows. In Germany, the issue of forced privatization of local water suppliers has been met with strong opposition from citizens and local governments. In response, many municipalities have taken steps to protect their water supply from privatization. For example, the city of Berlin has passed a law that requires the city to own and operate its own water supply. This law also requires that any private company that wants to provide water services in Berlin must first obtain a license from the city. Additionally, the city has established public water. In addition to Berlin, other cities in Germany have also taken steps to protect their water supply from privatization. For example, the city of Munich has passed a law that requires the city to own and operate its own water supply. This law also requires that any private company that wants to provide water services in Munich must first obtain a license

from the city. Additionally, the city has established public water supply companies that are owned and operated by the city.

Typically, standardized contracts can be supplemented with additional contracts. The scope of contract adjustments is relatively small, as the regulations will entail high transaction costs. Adjustments can be made if raw material prices will be constantly rising (Höhn, 2010:106). In addition to contract agreements, the OEM⁶ may make concessions to a supplier as part of so-called strategy negotiations since its automatic set up by the Franzén and Svenberg families.

The awarding of concessions for municipal water supply within the EU is a socially sensitive issue. The European Commission is well aware of the importance of good water at affordable prices for all consumers. Therefore, on December 20, 2011, the EU Commission proposed a directive on the award of concessions. This proposal for a directive contains individual regulations for the selection of concessionaires. This should be objective and transparent. The proposed directive would also establish a framework for the award of concessions, including a requirement that public authorities assess the economic and social effects of a proposed concession before awarding it. The proposal does not require Member States to privatize their water services. It does not require them to award concessions to private operators, to open up their water services, to competition, to introduce market-based pricing, to introduce any particular form of ownership to introduce any particular form of regulation or any particular form of financing (European Commission, 2011b).

The EU Commission is committed to ensuring that all citizens have access to safe and affordable water services. To this end, the Commission has adopted a number of initiatives to support local authorities in providing water services, such as the Water Framework Directive 2000/60/EC⁷, the Drinking Water Directive 98/83/EC⁸, and the Urban Waste Water Treatment Directive 91/271/EEC.⁹ These initiatives provide guidance, improve access to drinking water for all citizens, ensure that the quality of water is maintained and support to local authorities in providing water services, but do not interfere in the decision-making process. The EU Commission is clear that the decision to provide water services lies solely with local authorities. They do not want to interfere in this decision and will not attempt to shake it. This is in line with the EU's commitment to respecting the autonomy of local authorities and allowing them to make decisions that are best for their communities.

The EU Commission respects the right of local authorities to decide whether to provide services themselves or to outsource them to private companies. The Commission does not interfere in the decision-making process and does not seek to influence the outcome. The Commission is committed to ensuring that the decision-making process is transparent and that the rights of all stakeholders are respected. The Commission also encourages local

⁶ Original Equipment Manufacturers (OEMs) are companies that produce products for other companies to use as components in their own products. Consumers are individuals or entities that purchase products or services from a business. OEMs create components, parts, or whole products to be used as an add-on or integrated into another product by another company. This could include parts for a computer, a car, consumer electronics and other products. Consumers are the end user of the product, they are the people who purchase the products and services from the business. Consumers use the products or services of the company for their own personal use. OEMs and consumers have different relationships. OEMs have a business relationship with the companies they supply products and services to, while consumers have a customer relationship with the businesses they purchase products and services from. OEMs focus on developing and providing quality components that meet the needs of the company they are supplying to, while consumers focus on finding the best product that meets their needs. OEMs and consumers have different goals and objectives, but both are essential for the success of any company. see: OEM, "About OEM" <https://www.oem.se/en/about-oem-international>, 01.07.2022.

⁷ The Directive should establish a comprehensive and integrated approach to water policy in the Community, based on the principles of integrated water resources management and the precautionary principle.

⁸ The directive applies to water distribution systems serving more than 50 people, potable water from tankers, potable water in bottles or containers, and water used in the food processing industry that raises public health concerns. The directive requires water suppliers to implement a water safety plan and to carry out regular monitoring of their water quality.

⁹ The Directive establishes minimum requirements for the collection, treatment and discharge of urban waste water and for the treatment and discharge of waste water from certain industrial sectors.

authorities to consider the potential benefits of public-private partnerships when making their decisions.

The Commission also encourages local authorities to ensure that any contracts they enter into with private companies are in line with the principles of good governance and fairness, including transparency, accountability and public participation. The Commission also encourages local authorities to ensure that any contracts they enter into with private companies are in line with the principles of sustainability, including environmental protection, social inclusion, economic efficiency, equal access to services, fair wages and working conditions, and respect for human rights.

The decision as to whether the service should be provided on their own or, if necessary, with the involvement of a private partner, lies solely with the local authorities, with the water supply. The local authorities are responsible for making the decision as to whether the service should be provided on their own or, if necessary, with the involvement of a private partner. This decision should be based on the needs of the local community and the resources available to the local authority. The local authority should also consider the potential benefits of involving a private partner, such as access to additional capital, expertise, and technology. Ultimately, the local authority should make the decision that best serves the needs of the local community.

In making this decision, the local authority should consider the potential risks associated with involving a private partner, such as the potential for reduced public control over the service, increased costs, and reduced quality of service. The local authority should also take the potential for conflicts of interest between the private partner and the local community into account. The local authority should also consider the potential for increased competition in the market, which could lead to lower prices and improved quality of service.

The primary argument in favor of privatization is that it can increase efficiency. Private companies have the potential to be more productive and efficient in the use of resources than public utilities, which are often subject to bureaucratic delays and inefficiencies. In addition, private companies may have access to capital and technology that state-run utilities do not. With more resources, private companies can provide better services at lower costs. Privatization also has the potential to increase accountability, as private companies are more likely to be held to account for their performance than public utilities. Private companies must respond to customer demands, as failure to do so can lead to a loss of market share. This can encourage companies to be more innovative and responsive to customers' needs. However, privatization of the water supply sector can also have some drawbacks. Private companies often have the potential to abuse their power and set high prices, limit access to services, and reduce quality of services. Private companies may also lack transparency and accountability, as they may not be subject to the same oversight and scrutiny as public utilities. Finally, privatization can lead to job losses and reduced wages for workers in the water sector. In short, privatization of the water supply sector has the potential to increase efficiency and accountability. However, these benefits must be weighed against the possible risks associated with privatization, such as high prices, lack of transparency, and job losses. Therefore, it is important to ensure that the privatization process is well-regulated and monitored in order to ensure that the benefits of privatization outweigh the risks. (Wei, 2014:11-19).

The EU Commission has the right to exercise its fundamental right to ownership, but it must do so in accordance with European law. This means that local authorities will continue to have the freedom to decide whether to provide services themselves or to outsource them to private companies. The EU Commission will not interfere in this decision-making process. The EU Commission can and wants to exercise this fundamental right don't shake. That

would also violate European law: ownership is a matter for the EU states. Local authorities will therefore continue to be free to decide at any time whether to provide services themselves or to outsource them to private companies. In such cases, the guidelines should be applied. This is because the company is no longer considered to be owned by the public sector and is therefore subject to the same rules as any other private company. The guidelines should ensure that the company is transparent and accountable in its operations, and that it is not taking advantage of its position to gain an unfair advantage over competitors. This includes ensuring that the company is not using its position to influence the market or to gain access to resources that are not available to.

Furthermore, these planned guidelines should not apply to municipalities that keep the water supply in public hands. In such a case, there is no obligation to advertise. During the policy negotiations, the demarcation in the Cases discussed in which municipal utilities are no longer considered to be owned by the public sector. These are companies with several divisions (water supply, energy, etc.) in a private legal form. These are still very common working beyond their own community boundaries. They should therefore be regarded as private companies and should therefore be subject to the general obligation to tender. The delimitation should be dependent on sales, i.e. at least 80 percent in your own. There should no longer be an obligation to tender (“80% clause”) in the urban area. Some German municipal utilities are in a special situation. In this regard, EU Internal Market Commissioner Barnier said: “I am willing to support the suggestion that the 80% rule applies only to water supply activities (and not to total sales). This is on condition that that the company introduces a structural separation or otherwise separate accounting for activities of a public nature (e.g. water supply) and private nature (e.g. energy supply).” Barnier's proposal is now included in the directive negotiations. Furthermore, he has repeatedly made it clear with his proposal that for citizens water is a vital and public good and another reason why transparent and non-discriminatory rules must apply when a municipality decides to privatize the water supply (European Public Service Union, 2013).

The European Court of Justice and German courts have ruled that utilities cannot be protected public companies if they also compete with private companies on free markets. This ruling is in line with the European Union's directive on public procurement, which states that public contracts must be awarded through open and transparent procedures. The 80% clause is an exemption from this directive, which allows for the continued application of European legislation to individual cases. In the opinion of the EU Commission, it is for all parties better to create a general European legal framework than to leave the public procurement to a case-by-case interpretation of the courts.

6. CONCLUSION

Procurement law is a branch of public law that regulates the purchase of goods, services, and works by public authorities. The EU has put in place a legal framework to ensure that public procurement is conducted in a fair, transparent and non-discriminatory manner. This framework is based on the principles of equal treatment, non-discrimination, transparency, proportionality and mutual recognition. The EU also provides guidance and support to public authorities to help them make the most of their procurement budgets. This includes providing information on best practices, tools and guidance on how to use public procurement to achieve policy objectives.

The new directive will require that all public contracts be published in the Official Journal of the European Union, and that all tenders be published in the same way. This will ensure that all potential bidders have access to the same information and can compete on an equal footing. The directive also requires that all contracts be awarded on the basis of the most

economically advantageous tender, and that the criteria for evaluating tenders be made public. This will ensure that the award of contracts is based on objective criteria.

The new law also seeks to ensure that public contracts are awarded in a fair, transparent, and non-discriminatory manner. It requires public authorities to publish all tenders and contracts in the Official Journal of the European Union, and to provide access to all documents related to the award procedure. It also requires public authorities to provide reasons for their decisions and to ensure that all bidders are treated equally.

The new directive will also require that all public contracts be subject to a competitive tendering process. This will ensure that the best value for money is obtained for the taxpayer. The directive also requires that all contracts be awarded on the basis of the most economically advantageous tender, and that the criteria for evaluating tenders be made public. This will ensure that the award of contracts is based on objective criteria.

In general, public contracts are awarded in accordance with the principles of transparency, equal treatment, non-discrimination, proportionality and mutual recognition. The contracting authority must ensure that the award of the contract is based on objective criteria and that the most economically advantageous offer is selected.

The previous directive has some legal weaknesses that offer room and loopholes for a lack of transparency, such as the Hamburger – Energie case study very well shows (see chapter 3). This means that transparent and fair competition cannot be guaranteed. In order to make the award of contracts more transparent and competitive, the EU Commission has decided to amend the procurement law.

The question is whether the amendment to public procurement law comes closer to the goal of greater competitiveness and transparency. Parliament approved the proposal for the new directive from the Commission, with the award of concessions to the water privatization was removed from the directive. It thus falls within the decision-making power of the member states. Public resistance from some member states was too great, as the debate about municipal water supply shows.

The answer to this question is that it is difficult to say whether the amendment to public procurement law comes closer to the goal of greater competitiveness and transparency. The amendment does remove the award of concessions to the water privatization from the directive, which could potentially lead to greater competition and transparency. However, the public resistance from some member states to the amendment could limit the effectiveness of the amendment in achieving its goal.

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