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The European Central Bank
and EU procurement law:
a comparative outlook

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Abstract

Procurement law is rising in importance year after year. According to the European Commission, public procurement now accounts for over 14% of the EU's gross domestic product. Also at the ECB, spending through procurement is growing, and the evolution of its procurement law from non-binding internal guidelines to a transparent and comprehensive legal framework is a clear reflection of this development.

The purpose of this working paper is to summarise the legal framework for public procurement at the ECB, to compare it to the procurement rules of other EU institutions, and to analyse four key issues in contract award procedures, with due regard to the EU procurement directives and the case law of the Court of Justice of the EU.

Due to its specific legal status and organisational autonomy, the ECB can define and adopt its own procurement rules. It is not subject to the EU procurement directives. They are addressed to Member States and not to EU institutions. The ECB is also not bound by the EU Financial Regulation, which applies to most other EU institutions financed from the EU budget.

The working paper starts with a look back on the evolution of the ECB's procurement rules since the establishment of the bank in 1998. We then analyse the current framework, laid down in Decision ECB/2016/2, in more detail.

The second chapter summarises public procurement rules of other EU institutions, namely, the Financial Regulation and the procurement guide of the European Investment Bank which, like the ECB, is not subject to the Financial Regulation.

The third chapter analyses how the differences in these legal frameworks affect procurement procedures in practice, with a focus on four key aspects of the award process: selection and award criteria, transparency and publication, proportionality and legal remedies.

The working paper concludes with a comparative summary of the current state of public procurement law at the EU institutions.

Keywords: European Central Bank; Public Procurement; European Investment Bank; Financial Regulation; EU Procurement Directives; selection and award criteria; proportionality principle; transparency principle; legal remedies

JEL codes: K23, K40

Introduction

The law of public procurement is still a relatively young legal domain, but it increases in importance year after year. There are several reasons for this development. It is partly due to an ongoing increase in public spending, in particular since the beginning of the financial crisis. In 2017, public procurement accounted for more than 14% of the European Union's (EU's) gross domestic product.¹ But the increasing role of public procurement law is also linked to two legal developments. Procurement rules have changed in nature, from general and objective rules to enforceable individual rights. And they have continuously expanded in terms of scope, to cover new areas of public spending.

Long gone are the days of the 'budgetary approach', when the rules governing contract awards were merely an operating tool by which public authorities managed their expenditure. Today, obtaining value for public money remains the key objective of procurement law. But suppliers participating in contract award procedures can now invoke an individual right to claim compliance of the contracting authority with procurement principles like equal treatment and proportionality. The reliance on enforceable individual rights in tender procedures has been the basis of a further shaping, and often sharpening, of procurement law by the courts in charge of judicial review of contract award decisions.²

In parallel, the scope of public procurement law has seen a considerable expansion into areas that were previously exempt and subject to either no or only rather loose award procedures. Detailed tendering rules now govern public spending in the defence sector,³ and set principles and boundaries for sales of public property for urban development purposes.⁴ In addition, EU procurement law has expanded into the previously purely national domain of contracts whose value remains below the thresholds for public tendering set by the World Trade Organisation's Government Procurement Agreement.⁵

The EU institutions are no exception to these general trends in public procurement. For example, the European Central Bank (ECB) spends about EUR 500 million per

¹ European Commission, [Single Market Scoreboard, Performance per Policy Area – Public Procurement, Reporting period 01/2017 – 12/2017](#), p. 2.

² Judgement of the Court of Justice of the European Union (CJEU) in Case C-433/93, *Commission v Germany*, EU:C:1995:263, paras 45-47, which found that protection afforded by the rules regarding participation and advertising for the award of public contracts against arbitrariness on the part of the contract-awarding authority cannot be effective if a tenderer is not able to rely on those rules against the contract awarder and, if necessary, to plead a breach of those rules before national courts.

³ 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).

⁴ See Case C-451/08, *Helmut Müller*, EU:C:2010:168.

⁵ Commission interpretative communication of 23 June 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2), upheld by the CJEU in Case T-258/06, *Germany v Commission*, EU:T:2010:214. On 6 April 2014 the revised [Government Procurement Agreement](#) entered into force.

year for purchases, including the rent of office space.⁶ This significant budgetary impact stresses the need for a sound legal framework to ensure transparent procedures, fair competition and value for the money spent from the ECB's budget.

The EU co-legislator has played a pivotal role in driving progress towards transparency, soundness and publicity of contract awards. In 2014, the fourth generation of EU directives on public procurement entered into force.⁷ Most EU Member States have in the meantime adjusted their national procurement law to comply with the new directives.

While EU procurement law and its national implementation has been thoroughly analysed and explored,⁸ less is known about the procurement frameworks that the EU institutions use for their own purchases. These frameworks have a set of distinct features that set them apart from the procurement directives.

A first significant feature is that there is no uniform 'institutional procurement law' that applies to all EU institutions, and no common standard comparable to the harmonisation approach of the EU procurement directives. Most institutions, agencies and other bodies of the EU which are financed by the general EU budget are obliged to apply the procurement rules set out in the EU Financial Regulation.⁹ The ECB and the European Investment Bank (EIB) have adopted their own 'homemade' procurement rules. They do not fall under the Financial Regulation as they have their own, separate budgets, and enjoy organisational and administrative autonomy due to their status as supranational institutions.¹⁰

Second, not all EU institutions have actually adopted legally binding frameworks on contract awards. The EIB relies on a published guideline that binds its staff members but does not provide for individual rights for third parties (i.e., applicants and bidders in tender procedures). The ECB followed a similar approach until 2007, when it replaced a set of internal guidelines with a public legal act laying down the rules on ECB procurement (Decision ECB/2007/5).¹¹

⁶ The bulk of the ECB's expenditure is for IT hardware, software and consulting, general consulting work, as well as communication and media services.

⁷ 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); 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). The first generation comprised Directives 71/304/EEC and 77/62/EEC; the second, Directives 92/13/EEC, 92/50/EEC and 93/36/EEC and 93/37/EEC; and the third, a decade on, the coordination Directives 2004/17/EC and 2004/18/EC.

⁸ See the publications by Arrowsmith (2014), Bovis (2012) and Trepte (2012).

⁹ Article 2(67) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ L 193, 30.7.2018, p. 1). There are some exceptions to this; for example, the European Insurance and Occupational Pensions Authority (EIOPA) is an autonomous EU agency with its seat in Frankfurt am Main. It has its own set of procurement rules, which incorporate the Financial Regulation.

¹⁰ G. Gruber/M. Benisch, Privileges and Immunities of the European Central Bank, ECB Legal Working Paper Series No 4 (2007), p. 12. The ECB's autonomy is reflected in Article 12(3) of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (the 'Statute'), according to which the ECB's Governing Council adopts rules of procedure which determine the internal organisation of the ECB.

¹¹ Decision ECB/2007/5 of the European Central Bank of 3 July 2007 laying down the Rules on Procurement (OJ L 184, 14.7.2007, p. 34).

Third, while the EU procurement directives are binding on Member States, which are obliged to implement and comply with them by given deadlines, they do not actually apply to the purchases of EU institutions for their own account.¹² And due to their special legal status, the EU institutions are not subject to the national procurement law of their respective host states either.¹³ Instead, they act as legislators in their own procurement matters.

Nevertheless, the EU institutions did not develop their own procurement rules in a legal vacuum. They were bound by, and drew on, a number of sources:

1. the fundamental freedoms of primary EU law, such as the free movement of goods, the freedom of establishment, and the freedom to provide services. The fundamental freedoms apply to all contract award procedures carried out in the EU, including those that are not subject to the procurement directives;¹⁴
2. the 'essential procurement principles' that the Court of Justice of the EU has derived from the fundamental freedoms in its case law. They include equal treatment and non-discrimination of suppliers, mutual recognition and transparency.¹⁵ Every public authority in the EU must comply with these principles;
3. the case law of the CJEU on procurement cases in general, since procurement-related decisions of EU institutions are subject to judicial review by the EU courts.¹⁶ The CJEU has developed and refined its jurisprudence in more than 100 judgements on contract awards by the EU institutions;¹⁷ and
4. the EU procurement directives that should be taken into consideration to the extent that they implement the procurement principles as secondary EU law.¹⁸

In a nutshell, while the procurement law frameworks of EU institutions form an own and specific 'microcosm' of procurement law, they must be applied and interpreted in light of the binding principles and requirements of primary EU law.

¹² Directives are addressed to EU Member States, not to Union institutions; see Case T-553/11, *European Dynamics Luxembourg v ECB*, EU:T:2014:275, para 110. The General Court had left this question open in Case T-279/06, *Evropaiki Dynamiki v ECB*, EU:T:2009:241, para 44.

¹³ See, for the ECB, § 109(1)(b) and (2) of the Act against restraints of competition (*Gesetz gegen Wettbewerbsbeschränkungen*).

¹⁴ Case C-324/98, *Telaustria and Telefonadress*, EU:C:2000:669, paras 60-62; and Case C-458/03, *Parking Brixen*, EU:C:2005:605, paras 35 and 49. See also Chapter 1.1 and 1.2 of Commission interpretative communication of 23 June 2006 on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives, cited above, footnote 5; and S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2014, para 7-26.

¹⁵ Recital 1 of Directive 2014/24/EU.

¹⁶ Articles 263, 265, 267(b), 270 and 268 in connection with 340(1) and (3) of the Treaty on the Functioning of the European Union (TFEU).

¹⁷ More than half of the procurement cases involving EU institutions were filed by European Dynamics, a Greek IT company. While they were usually unsuccessful, the cases where European Dynamics has had award decisions of EU institutions annulled are very interesting (e.g. Case T-70/05, *Evropaiki Dynamiki v EMSA*, EU:T:2010:55; Case T-461/08, *Evropaiki Dynamiki v EIB*, EU:T:2011:494; see also Case T-160/03, *AFCOn Management Consultants and Others v Commission*, EU:T:2005:107).

¹⁸ See, for example, recital 4 of Decision (EU) 2016/45 of the European Central Bank of 9 February 2016 laying down the rules on procurement (ECB/2016/2) (OJ L 45, 20.2.2016, p. 15).

1 ECB procurement legislation

As mentioned, the ECB adopted its own procurement rules by way of a legally binding Decision published in the Official Journal of the EU (OJEU). This chapter traces the development of the ECB's procurement rules over time, and summarises the content of the current legal framework, Decision ECB/2016/2.

1.1 Chronological overview

The legal basis for ECB procurement legislation is Article 19 of the ECB Rules of Procedure.¹⁹ The first paragraph of this provision lists five principles to be observed in the procurement of goods and services: publicity, transparency, equal access, non-discrimination, and efficient administration. The second paragraph limits the grounds for deviations. Except for the principle of efficient administration, derogations may be made in cases of urgency, for reasons of security or secrecy, where there is a sole supplier, for supplies from the national central banks (NCBs) to the ECB, or to ensure the continuity of a supplier.

As mentioned above, the ECB initially implemented this provision by way of an operational framework for procurement procedures set out in internal guidelines (administrative circulars).²⁰ These guidelines included both procedural rules and organisational decisions. They were communicated to external parties only on request. They also did not enable rejected bidders to challenge the award decision by way of internal remedies.

Taking into account the growing financial volume of ECB contract awards, this situation was increasingly considered unsatisfactory. As of 2003, the ECB was preparing the planning and construction of its new headquarters in Frankfurt, which would require a number of highly visible procurement processes.²¹ It decided to develop a comprehensive set of procurement rules, in the form of a public and binding legal act. These rules were adopted by the Executive Board on 3 July 2007 as an ECB Decision.²² Three technical amendments followed between 2009 and 2012.²³ In 2014, after the adoption of the new EU procurement directives, the ECB embarked on

¹⁹ Decision ECB/2004/2 of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80, 18.3.2004, p. 33), as amended by Decision ECB/2009/5 (OJ L 100, 18.4.2009, p. 10), Decision ECB/2014/1 (OJ L 95, 29.3.2014, p. 56), Decision ECB/2015/8 (OJ L 114, 5.5.2015, p. 11) and Decision ECB/2016/27 (OJ L 258, 24.9.2016, p. 17).

²⁰ These administrative circulars were adopted by the Executive Board based on Article 11.2 of the ECB Rules of Procedure; such circulars are binding (only) on the staff of the ECB.

²¹ The construction of a new headquarters was completed in November 2014. See the [project and its implementation, including the procurement strategy](#) for further information.

²² Decision ECB/2007/5 which refers to Article 132(1) TFEU and Article 11(6) of the Statute.

²³ Decisions ECB/2009/2 (OJ L 51, 24.2.2009, p. 10), ECB/2010/8 (OJ L 238, 9.9.2010, p. 14) and ECB/2012/10 (OJ L 178, 10.7.2012, p. 14).

a more comprehensive review of its procurement law framework. The recast procurement rules entered into force on 15 April 2016 as Decision ECB/2016/2.²⁴

As the following chapter will show, this move from operational guidelines to a fully-fledged, published and binding procurement law was accompanied by an approximation to the standards of the EU procurement directives.

1.2 The 2016 Decision

Decision ECB/2016/2 (hereinafter the 'ECB Decision') governs the award of all supply, work, and service contracts on behalf of the ECB,²⁵ with the few exceptions listed below.²⁶ It also allows, for the first time, the award of concession contracts by the ECB, and establishes specific provisions concerning the calculation of their estimated value and their allowed duration.²⁷

The ECB Decision is structured in four chapters. Following the enunciation of principles and general rules in Chapter I, Chapter II elaborates on the conduct of the standard public procedures. The third chapter governs non-public procedures. The final chapter deals with the cancellation of procedures as well as remedies against award decisions.

The ECB respects the general principles of procurement law as expressed in the ECB Rules of Procedure, the EU procurement directives, and the Financial Regulation. Recital 4 of the ECB Decision recalls the principles of transparency, publicity, proportionality, equal access, equal treatment, non-discrimination and fair competition. In this respect, there are two innovations in the ECB Decision: first, non-discrimination and fair competition have been added to the list of binding principles; and second, the ECB Decision now explicitly lists proportionality among the general principles to be followed, in conformity with both the CJEU case law and the EU procurement directives.²⁸

²⁴ The ECB Decision was the subject of an amendment introducing some clarifications by way of Decision (EU) 2016/956 of the European Central Bank of 7 June 2016 amending Decision (EU) 2016/245 (ECB/2016/2) laying down the rules on procurement (ECB/2016/17) (OJ L 159, 16.6.2016, p. 21).

²⁵ The ECB procurement rules do not only apply to the procedures which are carried out on behalf of the ECB, but also where the ECB acts on behalf of other NCBs, EU institutions or bodies, international organisations and, since 2016, national competent authorities within the Single Supervisory Mechanism (SSM) established in 2014. The most relevant framework for the performance of such common procedures is the joint Eurosystem procurement framework, established by Decision ECB/2008/17 of the European Central Bank of 17 November 2008 laying down the framework for joint Eurosystem procurement (OJ L 319, 29.11.2008, p. 76). It was amended by Decision ECB/2015/51 to extend the possibility of participating in Eurosystem procurements to all national authorities, EU institutions or bodies and international organisations. While NCBs of the euro area can automatically participate in joint procurement, participation of other institutions is subject to an invitation by the Governing Council of the ECB.

²⁶ The ECB Decision also applies to the award of engineering and building contracts by other parties, if such contracts are funded by the ECB by more than 50%, see Article 2(6).

²⁷ Article 20 of the ECB Decision. Until now, the ECB has awarded very few concession contracts.

²⁸ The role of the principle of proportionality in public procurement is specifically addressed below, in Chapter III.

The exact scope of application of the ECB Decision is specified in its Article 2. In addition to the exceptions already foreseen by the previous rules,²⁹ other groups of services have been excluded: broadcasting services, public transportation by rail or metro, legal representation in judicial or arbitration proceedings and contracts concerning services of notaries, trustees and court officials. Additional exclusions concern the appointment of high-level experts.

Like its predecessor, the ECB Decision does not apply to cooperation agreements between the ECB and NCBs, EU institutions and other public authorities which aim at fulfilling public tasks. It also does not apply to procurement procedures organised by public authorities in which the ECB participates, provided that such procedures are carried out in line with the general principles of EU procurement law. With regard to these exclusions, two main changes have taken place. First, the ECB Decision extends the circle of possible public counterparties in a cooperation agreement or other procedure to any public authority.³⁰ Such contracts are becoming more common nowadays given the close cooperation required in the context of the single supervisory mechanism for the EU banking industry (SSM).³¹ Second, cooperation agreements must comply with the new criteria regarding horizontal cooperation among public authorities: the cooperation must be governed only by public interest considerations, and the parties must not perform more than 20% of the relevant activities on the open market.³²

The ECB Decision also explicitly includes exceptions concerning in-house entities, in line with the case law of the CJEU and the criteria of Directive 2014/24/EU. Agreements with legal persons subject to control similar to that which the ECB exercises over its own business units, where the legal person's activities towards the ECB amount to over 80% of the legal person's total activities, are excluded from the scope of application of the ECB Decision, insofar as there is no direct private capital participation that would allow a controlling interest in that legal person.³³

As in the general EU legal framework, it is primarily the value of the contract to be awarded that determines which type of procurement procedure applies. Where the value exceeds the threshold for public procurement, the usual public procedures

²⁹ These exceptions include, for instance, cooperation agreements; procedures which are organised by other EU or national public authorities (provided that they are in line with the general principles of EU law); the procurement of banknotes, governed by Guideline (EU) 2015/280 of 13 November 2014 on the establishment of the Eurosystem Production and Procurement System (OJ L 47, 20.2.2015, p. 29); the issue, sale, purchase and transfer of financial instruments and related financial services; the acquisition or rental of immovable property; employment contracts; arbitration and conciliation services; and specific research and development services which are remunerated by the ECB and which are for its exclusive benefit.

³⁰ Under the previous Decision ECB/2007/5 participation was restricted to EU, international and government agencies.

³¹ F. von Lindeiner, 'The new procurement rules of the European Central Bank' (2016) 25 *Public Procurement Law Review*, Issue 5, 213 at 215.

³² These criteria have been developed by the CJEU (see Case C-480/06, *Commission v Germany*, EU:C:2009:357, highlighting the relevance of public interest considerations). They are now incorporated in Article 12(4) of 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).

³³ Article 2(4) of the ECB Decision, which adopts the criteria of Article 12 of Directive 2014/24/EU.

apply. Otherwise, contracts are awarded through the special procedure of Articles 35 and 36 of the ECB Decision. Contracts of very low value can be awarded directly.³⁴

There are two main categories of exceptions to this system of thresholds. The first concerns a series of specific and exceptional circumstances (e.g. urgency, security, technical and legal grounds) in which the ECB may waive certain requirements of the standard procedures, or even proceed with direct awards. The second is based on the nature of the deliverables: all contracts whose main subject is listed under Annex I to the ECB Decision are awarded through the special procedure of Chapter III. In comparison to the previous rules, several new exceptions have been introduced, relating both to specific situations (e.g. the possibility to purchase replacement supplies from the original provider, where particularly convenient) and to additional types of deliverables (e.g. postal services).³⁵

The ECB Decision describes all the classic procurement procedures. The default procedure is the open tender, where all interested suppliers may simply request the tender documents from the ECB and submit their bids. Subject to specific conditions, the ECB may restrict the number of suppliers admissible to tender (restricted procedure) or negotiate with suppliers where the specifications cannot be established *ex ante* with sufficient precision, including by way of a competitive dialogue (Articles 10 to 13 of the ECB Decision).

The ECB Decision brought further changes with respect to the scope of the different types of procedures, in line with Directive 2014/24/EU. With the aim of promoting flexibility in the conduct of the procedures, it broadened the scope of application of the competitive dialogue and the negotiated procedure, by eliminating their exceptional character.³⁶ It also transposed the innovation partnership into the ECB procurement rules and defined basic principles for design contests.³⁷ Minor changes concerned the provisions on framework agreements and dynamic purchasing systems.³⁸ Finally, the ECB Decision paid special attention to electronic or 'e-procurement', again in line with the current trend towards these innovative forms of tendering.³⁹

³⁴ Article 37 of the ECB Decision. The current thresholds are very close to those established by the last generation of EU procurement directives (see Article 4 of the ECB Decision and Article 4 of Directive 2014/24/EU). They are also in line (with a 5% increase) with the 2007 ones, except for the threshold for direct awards, now doubled to EUR 20,000.

³⁵ The exceptions allowed by the ECB Decision correspond to those foreseen by Annex XIV to Directive 2014/24/EU. A specific change concerned contracts for the provision of legal services, among which a differentiation has been introduced. Whereas the previous Decision ECB/2007/5 governed all of them, although exceptionally, through non-public procedures, now some of them are fully excluded from its scope of application, while the others remain governed by it, under the special regime of Chapter III. Also this innovation is fully in line with Directive 2014/24/EU.

³⁶ See recital 42 of Directive 2014/24/EU, which advocates the benefits of enhanced flexibility on the effects of cross-border trade. As already pointed out by von Lindeiner, cited above, footnote 31, the ECB is particularly sensitive to this theme, given the consistent number of non-German tenderers.

³⁷ Respectively Articles 14 and 9(4) of the ECB Decision.

³⁸ Concerning the first, Article 18 of the ECB Decision allows for more flexibility and the award of orders within framework agreements. Regarding the latter, their procedure now follows the restricted one (Article 19(1) of the ECB Decision).

³⁹ The use of electronic communications, electronic auctions and electronic catalogues is also envisaged by Directive 2014/24/EU under Articles 22, 35 and 36. The presentation of electronic applications can now be required whenever it is possible in a safe and non-discriminatory manner. Special provisions concern the presentation and use of electronic catalogues.

The rules on the conduct of the procedures follow the general scheme of Directive 2014/24/EU. The ECB publishes a contract notice in the Official Journal of the EU and on its website, which must contain at least the information specified in Annex V to Directive 2014/24/EU.⁴⁰ Additional flexibility is allowed by the possibility of publishing periodical prior information notices, and the use of calls for expression of interest.⁴¹

The time limits given for the receipt of applications and tenders must be proportionate to their complexity and to the predictable difficulty in their preparation. The minimum time limits set by the ECB Decision coincide with those laid down by Directive 2014/24/EU.⁴² In any case, in addition to proportionality, the principle of equal treatment must be respected.

Articles 24 and 25 of the ECB Decision list the minimum content of the invitation to tender and of its technical specifications. They spell out the basic criteria on the choice of specific products or techniques, on the necessary assessments and certificates (such as environmental labels) and on the minimum information concerning variants, where possible. A request for further documents and clarifications is allowed, in conformity with the principles of equal treatment and transparency.

Articles 29 to 34 of the ECB Decision lay down the rules on tender evaluation and contract award, which will be further addressed below, in Section 3.1.

The third chapter, Articles 35 to 37 of the ECB Decision, addresses the simplified procedure for contracts below the thresholds. These contracts do not usually involve publication in the OJEU. The ECB selects participants from respondents to either a contract notice, or a call for expression of interest, or a dynamic purchasing system. Alternatively, the ECB compiles a list of suppliers following a thorough market analysis. The minimum number of participants varies depending on the estimated contract value.⁴³ As mentioned, contracts of particularly low value might be directly awarded. In any case, the general principles of Article 3 of the ECB Decision also apply to these special procedures.

The ECB immediately informs candidates and tenderers whose application or offer has been rejected. Once the procedure is concluded, it notifies the award decision to all other bidders. Candidates then have 15 days to request the motivation of the decision and other information pertaining to the evaluation phase.

⁴⁰ The notice on the ECB's website cannot anticipate the publication in the OJEU. In case of discrepancies, the OJEU notice prevails.

⁴¹ Calls for expression of interest are used to create lists of suitable tenderers in case of need of recurrent provision of the same deliverables. They are published in the OJEU, last four years and remain open to any eligible bidder until three months before their expiration. Depending on the estimated contract value they can be used as candidates' pools for restricted procedures or for special procedures under Chapter III.

⁴² 35 days for open procedures and 30 days for the other types of procedure. Shorter time limits might be applied where the ECB has previously issued prior information notices (15 to 10 days), for e-procurement procedures (terms shortened by 5 days) and for accelerated procedures (15 to 10 days).

⁴³ The minimum number of participants must be at least three in case of estimated contract values above EUR 20,000, and at least five in case of values above EUR 50,000 for service contracts and above EUR 500,000 for work contracts.

Contracts can be signed after a standstill period of 10 to 15 days, and have a default maximum duration of four years.⁴⁴ In duly justified cases, the term can be extended where such possibility was already envisaged in the contract notice or the request for proposal, and provided that the final contract value remains below the relevant threshold.⁴⁵

The ECB Decision innovates with regard to the modification of contracts, the replacement of contractors and the purchase of additional deliverables, most importantly by introducing a division between substantial and non-substantial contract amendments.⁴⁶ It also allows a higher threshold value for the purchase of additional deliverables.⁴⁷

Candidates and tenderers in public tender procedures who are dissatisfied with the outcome of a procedure have a period of 15 days to file an appeal. The ECB Decision establishes a simple review procedure carried out by the Procurement Review Body (PRB), a dedicated internal organ of the ECB. The PRB assesses the appeal and notifies its decision one month after receipt. To the extent an appeal remains unsuccessful, the appellant can challenge the award decision before the CJEU, or involve the European Ombudsman with claims of maladministration.⁴⁸

⁴⁴ Possible exceptions are limited to specific subject matters and other legitimate reasons, Article 7(1).

⁴⁵ Article 7(2), whereas under Decision ECB/2007/5 exceptions were allowed up to an overall duration equal to that of the original contract. Since 2016 the four-year limit applies to the contract inclusive of any extensions.

⁴⁶ This innovation is also in line with the general EU framework; see Article 72(2) of Directive 2014/24/EU.

⁴⁷ Shifting from a 50% threshold for the aggregate value of additional deliverables to a 50% threshold for each single case, see Article 8(3) of the ECB Decision and Article 8(2) of Decision ECB/2007/5. See, in this respect, Article 72(1) of Directive 2014/24/EU.

⁴⁸ Legal remedies are further addressed below, in Section 3.4.

2 Procurement rules of other EU institutions

As mentioned above, the EU institutions do not have a uniform procurement framework, but rely on different tendering rules. The most widely used framework is the Financial Regulation. It applies to nearly all EU institutions, bodies and agencies that are financed from the general EU budget. The European Investment Bank is not subject to the Financial Regulation but has adopted its own set of rules, notably the Corporate & Technical Assistance Procurement Guide.⁴⁹

2.1 The Financial Regulation

Regulation (EU, Euratom) 2018/1046,⁵⁰ also known as the Financial Regulation, sets out the financial rules applicable to the general budget of the EU. Since the EU institutions are, in principle,⁵¹ financed by the EU general budget they need to follow the Financial Regulation when purchasing from this budget. This chapter will discuss in more detail how the procurement rules of Directive 2014/24/EU and the Concessions Directive 2014/23/EU⁵² are incorporated in the Financial Regulation.

The number of rules governing public procurement in EU institutions has increased significantly over the last 45 years. In 1973 the first Regulation applicable to the general budget of the European Communities was established.⁵³ It was updated in 1977, with only minor changes affecting the field of procurement.⁵⁴ Title IV of the 1977 Financial Regulation addressed the conclusion of contracts, together with inventories and accountancy. Only Section 1 of title IV dealt with issues that currently fall under procurement. While general principles were not mentioned yet, there was an article explicitly prohibiting discrimination between nationals of Member States on grounds of nationality.⁵⁵ Contracts could be awarded following adjudication, request for tenders or under certain conditions by direct agreement.⁵⁶

Adjudication implied an invitation to tender, which could be open or restricted. The contract should be granted to the lowest offer. The second approach, a request for tenders, could likewise be open or restricted; the contract could be awarded to the offer that was, in the wording used at the time, 'thought to be most attractive'. The

⁴⁹ [EIB Corporate & Technical Assistance Procurement Guide](#), latest release 19 February 2018.

⁵⁰ See above, footnote 9.

⁵¹ For example, Eurojust and EIOPA have their own budget and accordingly have their own financial regulations. They largely or fully incorporate the EU Financial Regulation.

⁵² 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).

⁵³ Financial Regulation (73/91/ECSC, EEC, EURATOM) of 25 April 1973 applicable to the general budget of the European Communities (OJ L 116, 1.5.1973, p. 1).

⁵⁴ Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ L 356, 31.12.1977, p. 1).

⁵⁵ Article 61 Financial Regulation 1973 and Article 51 Financial Regulation 1977.

⁵⁶ Article 58 Financial Regulation 1973.

contracting authorities were obliged to take into account 'the cost of performance, running costs involved, technical merit, the time for performance, together with the financial guarantees and the guarantees of professional competence put forward by each of the tenderers'.⁵⁷

The third approach was that goods, services and works with a value below 5,000 units of account⁵⁸ could be purchased via direct agreement (Article 60 Financial Regulation 1973).⁵⁹ The conditions for a direct agreement can to a large extent still be found in recital 50 of Directive 2014/24/EU. They included urgency, situations where only one suitable candidate results from an adjudication procedure, where a particular contractor needed to be hired for technical, practical or legal reasons, and contracts that could not be separated from the main contract. Contracts exceeding 12,000 units of account needed to be approved by an Opinion of a Purchases and Contracts Advisory Committee, which comprised a representative of the administration, financial, and legal departments and one financial controller as observer.⁶⁰

The 1977 Financial Regulation stayed in force until 2002 when a new framework was adopted. The Financial Regulation (EC, Euratom) No 1605/2002⁶¹ not only introduced considerable changes but also expanded considerably the procurement rules to 19 articles in four sections, reflecting the increasing interest in and complexity of procurement. The applicability of the principles of transparency, proportionality, equal treatment and non-discrimination were ensured in Article 89. The 2002 Financial Regulation also introduced the negotiated procedure and design contests.⁶²

The next revision, Financial Regulation (EU, Euratom) No 966/2012,⁶³ introduced definitions (Section 1) and rules on cases when publication may not be necessary.⁶⁴ Section 3, which laid down the procurement procedures, was significantly longer than the corresponding provisions of the 2002 Financial Regulation. It foresaw detailed rules on how each procedure functioned, and introduced the competitive dialogue, the innovation partnership and procedures involving a call for expression of interest.⁶⁵ Section 4 dealt with the possibility to ask for a guarantee, how to handle serious errors or fraud, and rules on contracts awarded by the Community institutions on their own account.

⁵⁷ Article 59 Financial Regulation 1973.

⁵⁸ As all Member States had different currencies the unit of account was established to represent units with the same value linked to the weight of fine gold and their currency as declared by the International Monetary Fund. In 1973 the value of the unit of account in which the budget was established was 0.88867088 grams of fine gold; see Articles 10 and 27 Financial Regulation 1973.

⁵⁹ In addition, the first financial regulations included the possibility to ask a contractor for a preliminary deposit to ensure the assignment would be carried out correctly and on time. The deposit was mandatory for works with a value of initially more than 100,000 (1973) respectively, 200,000 units of account (1977).

⁶⁰ Articles 61 and 62 Financial Regulation 1973.

⁶¹ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1).

⁶² Article 91 Financial Regulation 2002.

⁶³ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012, p. 1).

⁶⁴ Article 90 Financial Regulation 2012.

⁶⁵ Article 104 Financial Regulation 2012.

The Financial Regulation was complemented by rules of application published on the European Commission's website.⁶⁶ In September 2016 the Commission adopted a proposal for a new Financial Regulation which incorporated the main elements of the rules of application in the text of the Regulation itself. The aim of this reform proposal was to reduce the complexity of the rules.⁶⁷ In July 2018 the new Financial Regulation was published in the OJEU. It applies from 2 August 2018.⁶⁸

In addition to the Financial Regulation, some institutions have published practical guidance on how to conduct a procurement procedure. For instance, the Commission has put together a vade-mecum, which explains in plain terms what procurement is and clarifies which decisions should be taken at which point in the procedure.⁶⁹

2.2 The procurement rules of the EIB

Like the ECB, the EIB is excluded from the scope of the Financial Regulation and has its own public procurement regime. The EIB has defined two procurement frameworks, one for procurement of EIB-funded projects, which is set out in the Guide to Procurement,⁷⁰ and one for the EIB's own procurement procedures. For this paper, only the latter is relevant for comparison with the ECB Decision.

EIB procurement is governed by the EIB's Corporate & Technical Assistance Procurement Guide for services, supplies and works for its own account (hereinafter 'the EIB Procurement Guide').⁷¹ It was updated in July 2017 and, subsequently, in January 2018 with respect to the thresholds. The EIB Procurement Guide sets out the whole EIB procurement procedure, but is not legally binding. Unlike the previous version of October 2014, the current rulebook directly refers to, and sometimes supplements, the provisions of Directive 2014/24/EU.⁷² This has the advantage that there can be no misinterpretation of the articles due to the wording. However, it has also resulted in a rather technical document, which can only be understood when having the Directive at hand. This is why the EIB has also produced an internal vade-mecum to provide guidance to its staff in a more practical way.

⁶⁶ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU/Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

⁶⁷ The [reform proposal](#).

⁶⁸ Article 282 Financial Regulation 2018.

⁶⁹ Vade-mecum on public procurement in the Commission. Central Financial Service, March 2008, last update: December 2014.

⁷⁰ Updated in September 2018, the [Guide to Procurement](#).

⁷¹ Available in three languages on the EIB website, last updated 19 February 2018: the [EIB's Corporate & Technical Assistance Procurement Guide](#).

⁷² For remedies and concessions it also refers to Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31) and Directive 2014/23/EU.

Although the EIB is officially not bound by Directive 2014/24/EU, the EIB Procurement Guide states clearly that it is committed to following the general EU principles on public procurement and that it follows the Directive ‘subject to certain adaptations’.⁷³

The main derogation from Directive 2014/24/EU concerns contracts that pertain to the EIB’s functioning and status as a financial institution. According to Article 2.6.5,⁷⁴ the EIB may opt for a different procedure to award such types of contracts. In these cases, an active or passive market analysis should be carried out and equal treatment and transparency should be taken into account. The principle of best value for money still applies.⁷⁵ On an organisational level the EIB has made the derogation subject to approval by the EIB’s Compliance Officer in order to ensure a consistent application. The Compliance Officer will consider the exemptions stated in the Directive and a fixed set of internal criteria.

With regard to joint procurement, Article 2.16 of the EIB Procurement Guide recognises and extends the use of Article 38 of Directive 2014/24/EU. The EIB works with its subsidiary, the European Investment Fund, whenever this will result in efficiency gains. In case of joint procurement with other contracting authorities such as public administrations of member states of the EU, EEA or EFTA, or other countries, the procedural rules of the other contracting authority may apply if it has a share of 50% or more of the total contract value.⁷⁶ Contracts to be awarded in joint procurement must be necessary for the implementation of a joint operation between the EIB and one or more contracting authorities.

Interinstitutional procurement is coordinated by the EIB’s Procurement Service. The rules of the EIB Procurement Guide do not have to apply if the EIB decides to participate in interinstitutional procurements for which another EU institution will then be remunerated.⁷⁷

Another specific feature of the EIB procedure is the standstill period of 15 calendar days between contract award and signature.⁷⁸ Lastly, the EIB provides the possibility to overrule the recommendation of the Evaluation Committee. While contracts are usually awarded following a recommendation by the Evaluation Committee, the Director of the concerned Business Unit can overrule this decision in exceptional circumstances, if duly justified and documented and following consultation with the Group Chief Compliance Officer and the General Council.⁷⁹

⁷³ Article 1.1(c) of the EIB Procurement Guide.

⁷⁴ Article 2.6.5.1 of the EIB Procurement Guide. This derogation existed in previous versions as well.

⁷⁵ Ibid.

⁷⁶ Provided they apply standards which offer adequate equivalence to internationally accepted standards, especially relating to transparency, non-discrimination and prevention of conflicts of interest. Article 2.16 of the EIB Procurement Guide.

⁷⁷ Article 2.17 of the EIB Procurement Guide.

⁷⁸ Article 5.1.5.1 of the EIB Procurement Guide.

⁷⁹ Article 5.1.4 of the EIB Procurement Guide.

3 Comparative analysis

While the previous chapter focused on the legal nature and history of the procurement rules that apply to EU institutions, the following chapter provides a comparative analysis of four general topics that have a key impact on the lawful conduct of a procurement procedure: selection and award criteria; proportionality; transparency and publication; and legal remedies. These topics will be discussed from a comparative perspective, taking into account the ECB Decision, EU procurement law as well as the procurement rules of other EU institutions.

3.1 Selection and award criteria

Procurement law uses two types of criteria. Selection criteria define which vendor is suitable to perform the contract to be awarded; they can include vendor-focused exclusion criteria. Award criteria are used to determine the best bid. While both processes of suitability review and bid evaluation are necessary to define the winner of a tender, these processes are distinct and should not be confused. They can be carried out at the same time; however they should always be governed by different rules.

Award criteria should not include criteria which are linked to the candidates' ability to perform the contract. Selection and award criteria should be clearly set out from the moment the tender is published and not be changed afterwards.⁸⁰ They should always be relevant and proportionate to the subject matter of the contract. During the process it is vital that selection and award criteria will be strictly followed. This helps to avoid any claims relating to discrimination based on nationality or favouring of a particular undertaking.⁸¹

3.1.1 Grounds for exclusion

Grounds for exclusion can be of a mandatory or discretionary nature. Each call for tenders should specify, beside the selection criteria, on which grounds a bidder can or will be excluded from the procedure. The ECB Decision excludes candidates from participation if they have engaged in 'illegal activity detrimental to the financial interest of the Union, the ECB or the NCBs and refers to the mandatory exclusion grounds mentioned in Article 57(1) of Directive 2014/24/EU. Accordingly, candidates cannot participate if they have been convicted by a final judgment of being part of a criminal organisation, corruption, fraud, terrorist offences or financing, money laundering, child labour or human trafficking. In this case, the ECB still needs to assess whether exclusion is proportionate to the conviction, eventually taking into account remedial

⁸⁰ Case C-532/06, *Lianakis and Others*, EU:C:2008:40, paras 44-45.

⁸¹ C. Bovis, *EU Public Procurement Law*, 2012, p. 21; S. Treumer, 'The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception' (2009) 18 *Public Procurement Law Review*.

measures adopted by the candidate.⁸² Furthermore, the ECB has established several discretionary exclusion grounds which closely follow Directive 2014/24/EU.⁸³ To decide whether a candidate will be excluded, proportionality is a decisive factor. In addition, it is important that exclusion decisions are always based on recent information. Non-mandatory exclusion grounds range from bankruptcy, guilt of grave professional misconduct to failure to pay social security or tax contributions.⁸⁴

The EIB's Corporate and Technical Assistance Procurement Guide simply states that Article 57 of Directive 2014/24/EU is applicable in its entirety.⁸⁵

While the exclusion grounds are mainly the same as in the Directive, the Financial Regulation provides very detailed guidance on the grounds on which a candidate may or must be excluded and what information can be published surrounding this decision.⁸⁶

3.1.2 Selection criteria

The procurement law frameworks of the EU institutions use similar approaches to selection criteria, with different wording. The Financial Regulation summarises their purpose by stating that selection criteria 'shall be such as to make it possible to assess the applicant's ability to complete the proposed action or work programme'.⁸⁷

Article 31 of the ECB Decision makes clear that selection criteria relate to the candidate's or tenderer's authorisation and suitability to carry out the relevant professional activity, their economic and financial standing, and their technical or professional ability. These three categories are the same as mentioned in Article 58 of Directive 2014/24/EU, where more details are provided for each category. The EIB also decided in this regard to fully follow the Directive.⁸⁸

Suitability to carry out the activity requirements may in particular be related to being part of a trade association or national trade registers to ensure a certain level of professionalism and compliance with local legal requirements. Criteria regarding economic and financial standing are often linked to a minimum yearly turnover. Financial and economic standing can be demonstrated by an operator in different ways, such as balance sheets and statement of profits and losses, but also less common standards, such as the value of work which can be carried out at any one time.

⁸² Article 30(4) of the ECB Decision. This largely coincides with the grounds mentioned in Article 136(1)(d) of the Financial Regulation. Exclusion decisions shall not go against the proportionality principle, for example where the candidate or tenderer has already undertaken sufficient remedial measures.

⁸³ Article 30(5) of the ECB Decision.

⁸⁴ The other discretionary grounds for exclusion are having shown significant or persistent deficiencies in the performance of another public contract; a conflict of interest; serious misrepresentation in providing information or attempts to contact other candidates with the purpose of unduly influencing the procedure, see Article 30(5) of the ECB Decision.

⁸⁵ Article 4.3.2 of the EIB Procurement Guide.

⁸⁶ Articles 136-140 Financial Regulation 2018.

⁸⁷ Article 198 Financial Regulation 2018.

⁸⁸ Article 4.3.3 of the EIB Procurement Guide.

The last category of selection criteria concerns the technical or professional ability of the candidates and tenderers. While the obvious requirement here is proof of professional qualification by means of diplomas and the like, candidates and tenderers can also be required to show a sufficient level of experience by suitable references from contracts performed in the past. A conflict of interest may lead the contracting authority to assume that there is no sufficient level of professional ability.⁸⁹

The manner in which these selection criteria should be proven by documents is also specified in the contract notice. The documents should not go beyond the subject of the contract and the contracting authority is required to take into account the protection of business secrets. If compliance with the selection criteria cannot be proven by the suggested documents the authority has the possibility to accept other documents which it deems acceptable. This is decided on a case-by-case basis.⁹⁰

3.1.3 Award criteria

Article 32 of the ECB Decision provides that the contract shall be awarded to the most economically advantageous tender (the so-called 'MEAT' standard). The MEAT can use and rely on many different elements, as long as all criteria are mentioned in order of importance in the invitation to tender. These criteria cannot be arbitrary, and once they are mentioned in the invitation to the tender they should be taken into account in the selection of the tenderers.⁹¹ While lowest price could be one way to decide the MEAT, in many cases other factors are taken into account as well. The ECB Decision explicitly mentions that the best price-quality ratio, or even quality alone in case of fixed prices, can be options to determine the MEAT.⁹² These three forms of evaluation of the MEAT are also stated in Directive 2014/24/EU and the Financial Regulation.⁹³

Lowest price in this regard should be interpreted in a broad sense. More specifically, it is not only the cheapest tender proposal: factors such as life-cycle costs, maintenance and even environmental impact and costs should be considered as well⁹⁴. This is in line with the Financial Regulation and more broadly explained in Directive 2014/24/EU which has a separate provision on life-cycle costs.⁹⁵

When it comes to the definition of the price-quality ratio several factors can be taken into account. Before Directive 2014/24/EU, it was clear that award criteria should not look at the candidate's ability to perform the contract.⁹⁶ Article 67 of Directive 2014/24/EU seems to have softened this strict separation by also accepting experience and quality of staff as a criterion, in cases where this has a significant impact on the performance of the contract.⁹⁷ This is reflected in the ECB Decision

⁸⁹ Article 58 Directive 2014/24/EU and C. Bovis, *EU Public Procurement Law*, 2012, pp. 69-85.

⁹⁰ Article 31(3) and (4) ECB Decision.

⁹¹ C. Bovis, *EU Public Procurement Law*, 2012, p. 273.

⁹² Article 32(2) ECB Decision.

⁹³ Article 67 Directive 2014/24/EU and Article 167 Financial Regulation 2018.

⁹⁴ Article 32(3) of the ECB Decision.

⁹⁵ Article 68 Directive 2014/24/EU and Article 167 Financial Regulation 2018.

⁹⁶ S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2014, paras 7-183.

⁹⁷ Article 67(2)(b) Directive 2014/24/EU.

which also follows closely other price-quality criteria such as technical merit and after-sales service.⁹⁸

Again, the EIB follows almost completely Directive 2014/24/EU. Nevertheless, under the EIB Procurement Guide, price or cost may be used as the sole award criterion without any restrictions,⁹⁹ whereas the Directive offers the Member States the possibility to prohibit price or cost as the sole criterion.¹⁰⁰

3.2 Transparency and publication

Transparency is one of the general principles of EU law and a failure to comply with it can lead to the annulment of a contract award decision by the CJEU. The principles of transparency and publicity are connected to the right of good administration, which is significant to the general accountability and legitimacy of EU institutions, by prescribing fair and impartial procedures to be carried out within a reasonable time.¹⁰¹

In procurement law, after a period during which the focus was on the prohibition of discriminatory measures restricting market access, the principle of transparency has been recognised as playing a central role, as it is directly related to the free movement of goods and services.¹⁰² Indeed, on the one side the publication of procurement opportunities, by broadening the scope of potential bidders, combats discrimination on the basis of nationality and increases competition.¹⁰³ On the other side, the transparency of the procedure is a necessary implication of the principle of equal treatment, as it permits compliance with the latter to be verified.¹⁰⁴

In the field of procurement law, the principle of transparency has four main implications: publicity of the procedure, public and clear rules, rule-bound discretion of the awarding entity, and the possibility of verification and judicial challenge of the outcome.¹⁰⁵ These concepts stem from the two main dimensions of transparency, namely 'publicity' and 'verifiability', mentioned above.¹⁰⁶

The publicity of the procedure aims at ensuring that the procurement opportunity is open to undistorted competition. The degree of openness varies depending on the kind of procedure, as does the publicity requirement which, in exceptional cases such as extreme urgency, can be waived. However, due to the close connection between the principles of publicity and non-discrimination, such exceptions are admissible only where based on objective circumstances.¹⁰⁷

⁹⁸ Article 32(4) ECB Decision.

⁹⁹ Article 5.1.1 of the EIB Procurement Guide.

¹⁰⁰ Article 67(2) Directive 2014/24/EU.

¹⁰¹ Article 41 of the Charter of Fundamental Rights of the European Union.

¹⁰² S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2014, paras 4-33.

¹⁰³ Case C-26/03, *Stadt Halle and RPL Lochau*, EU:C:2005:5, para 44; and C-324/98, cited above, para 62.

¹⁰⁴ Case C-275/98, *Unitron Scandinavia and 3S*, EU:C:1999:567, para 31; and Case C-324/98, cited above, paras 61 and 62.

¹⁰⁵ S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2014, paras 4-37, 4-38 and 4-42.

¹⁰⁶ Case C-324/98, cited above, para 62.

¹⁰⁷ Case C-231/03, *Coname*, EU:C:2005:487, para 19.

In addition to having the possibility of expressing interest in participation, bidders are entitled to transparent selection and award procedures. This means, for example, that award criteria must be formulated in a way which is unequivocal to the normally diligent tenderer and that adjudicating authorities must interpret them in a uniform manner throughout the whole procedure.¹⁰⁸ This is necessary to avoid an arbitrary exercise of discretion by the awarding entities and to avoid favouritism, by safeguarding the principle of legal certainty.¹⁰⁹

Finally, the principle of transparency implies access to the procurement files to ensure that candidates and bidders understand the outcome of the procedure and receive a due motivation of the award decision. The transparency of the selection procedure and of its documentation is the obvious corollary of the principle of public and unequivocal rules. It finds a limit in the duty to safeguard the privacy and commercial interest of the other participants and the public interest of the awarding institution itself.¹¹⁰

The importance of transparency in public procurement is strongly reflected in Directive 2014/24/EU, which refers to it as a key principle.¹¹¹ An important innovation to the previous law, enhancing the possibility of participating in procedures, has been the new set of rules on electronic communication with candidates and bidders, now made obligatory with the aim of improving both efficiency and transparency.¹¹²

Under Directive 2014/24/EU, the primary form of publication is a call for competition through a contract notice to be published in the OJEU.¹¹³ Additional forms of publication are allowed, but only afterwards, and they cannot contain information other than that published in the OJEU.¹¹⁴ Awarding authorities have the additional possibility of using a prior information notice (PIN) to inform potentially interested suppliers of their future procurement plans. In some specific cases the PIN can substitute the standard contract notice as a call for competition,¹¹⁵ and in exceptional circumstances contract awards can be allowed without prior publication.¹¹⁶

Directive 2014/24/EU lists the basic content of both the contract notice and the PIN.¹¹⁷ In conformity with CJEU case law, the principle of transparency implies that the award criteria specified therein are both simple and objective, to enable all reasonably informed tenderers to be sufficiently aware of how the award decision will be

¹⁰⁸ Case C-19/00, *SIAC Construction*, EU:C:2001:553, paras 42 and 43; and Joined Cases C-72/10 and C-77/10, *Costa and Cifone*, EU:C:2012:80, para 73.

¹⁰⁹ Case C-250/06, *United Pan-Europe Communications Belgium and Others*, EU:C:2007:783, para 46; and Joined Cases C-72/10 and C-77/10, cited above, paras 73 and 74.

¹¹⁰ The contracting authority is not obliged to engage in a debate with rejected tenderers, after having duly notified them the outcome of the procedure; see, for example, Case T-70/05, cited above, paras 166-171.

¹¹¹ Article 18 Directive 2014/24/EU.

¹¹² See recital 52. The use of electronic communication is subject to limitations set out in Article 22.

¹¹³ They are subsequently easily accessible under the [Tenders Electronic Daily platform](#).

¹¹⁴ See Article 52 Directive 2014/24/EU.

¹¹⁵ See Articles 26(5) and 48(2) Directive 2014/24/EU.

¹¹⁶ See Article 32 Directive 2014/24/EU.

¹¹⁷ Annex V, parts C and B respectively.

reached.¹¹⁸ They must also ensure effective and fair competition and restrict the freedom of choice on the contracting authority.¹¹⁹

Candidates are immediately notified of the main decisions.¹²⁰ On request, they are informed of the grounds of their rejection and, where admitted to the procedure, of the identity of the successful bidders and the features of their offers.¹²¹ Directive 2014/24/EU has preserved the two-step system according to which – for reasons of administrative efficiency – unsuccessful suppliers do not get full information upfront but need to expressly request details of their bid's evaluation. Generally, as the principle of transparency is to be applied in conformity with that of proportionality, such access right is not absolute. It finds limitations on grounds of public or commercial interest, competition, and law enforcement.¹²²

Once the outcome of an award procedure is published in the OJEU,¹²³ access to the procurement documents is in general granted fully, electronically, and free of charge.¹²⁴ The whole procedure is documented in writing and, where this is not possible, through equally traceable means, such as audio records.¹²⁵ To enhance verifiability, the essential elements are then presented in a final report. Documents are stored for at least three years from the contract award date.¹²⁶

3.2.1 The ECB Decision

The ECB publishes its contract notices in the OJEU and on its website. Additional publications are possible, but the OJEU version prevails in case of discrepancies. The ECB also makes use of PINs. The content of all notices is aligned with what is prescribed by Annex V to Directive 2014/24/EU. Once a notice is published, admitted candidates may request the invitation to tender which provides full information on the procurement details. The latter is made available electronically on a dedicated internet platform with individual access.¹²⁷

During the procedure candidates may ask questions, which the ECB has to answer within a reasonable time. If the answer to a question might be relevant for other candidates or tenderers, e.g. due to its general character, it is then communicated to them, to ensure clarity and equal treatment.¹²⁸ At the same time the ECB may ask

¹¹⁸ See recitals 89 and 90 Directive 2014/24/EU.

¹¹⁹ See recital 92 Directive 2014/24/EU.

¹²⁰ I.e. decisions to award contracts, to conclude framework agreements, and to allow participation in a dynamic purchasing system. Decisions not to conclude any contract or framework agreement or to redo the procedure must be duly motivated. See Article 55(1) Directive 2014/24/EU.

¹²¹ Article 55(2) Directive 2014/24/EU.

¹²² Articles 21 and 55(3) Directive 2014/24/EU.

¹²³ The content of the award notice to be published is also specified by Directive 2014/24/EU, under Annex V, part D.

¹²⁴ Article 53 Directive 2014/24/EU. Exceptions are allowed to safeguard confidentiality, and when an electronic publication is not possible for technical reasons.

¹²⁵ Article 22(2) Directive 2014/24/EU.

¹²⁶ Recital 126 and Article 84(1) and (2) Directive 2014/24/EU.

¹²⁷ See the [procurement platform](#).

¹²⁸ Article 26 of the ECB Decision.

tenderers to submit additional evidence or clarifications on their offers, whenever they appear to be incomplete or erroneous.¹²⁹ In doing this the ECB needs to ensure the equal treatment of all tenderers. Such refining process could entail several rounds of communication exchanges and constitutes one of the most important phases of the procurement procedure. Communication usually takes place exclusively in writing.

According to Article 34 of the ECB Decision, decisions to reject an application or a tender are immediately notified, and candidates and tenderers have 15 days to ask for the reasons. The decisions also inform candidates of the judicial remedies available to them, which are also mentioned in the contract notice. Only candidates whose bid was admissible have a right to be informed of the identity of the successful bidders and of the features of their offers, and to access the documents pertaining to the evaluation of the successful offers.¹³⁰ Other candidates must wait for the publication of the contract award notice in the OJEU, where foreseen.

A publication is mandatory only for contracts awarded according to the ordinary procedure of Chapter II and for those whose subject matter is listed in Annex I, where their value exceeds EUR 750,000.¹³¹ However, the ECB publishes every year on its website a list of all contracts awarded under the special regimes of Chapter III and Article 6(1) of the ECB Decision and whose value exceeds EUR 50,000.¹³²

In addition to these specific rules, Decision ECB/2004/3 on public access to ECB documents sets out the general rules and modalities of access to documents drawn up or held by the ECB.¹³³ In general, any EU citizen or resident, including legal persons, has a right of access to ECB documents. The ECB may refuse access only to safeguard specific public interests. They include, as most relevant exceptions with respect to procurement documents, the internal finances of the ECB as well as private interests, such as individual privacy and commercial interests.¹³⁴

Where an applicant files a sufficiently detailed access request, the ECB is bound to answer within 20 working days, either granting access or specifying the grounds for refusal. In the latter case the applicant can submit a 'confirmatory application' to the Executive Board of the ECB. A further refusal must again be motivated and specify the available remedies, such as recourse to the CJEU and the European Ombudsman.¹³⁵

¹²⁹ Article 27 of the ECB Decision.

¹³⁰ Access to these documents can be restricted for reasons related to public or private interest, competition and law enforcement, in line with the provisions of Directive 2014/24/EU.

¹³¹ Articles 34(5) and 36(3) ECB Decision. The EUR 750,000 threshold is the same as in the Directive for the social services listed under its Annex XIV, equal to Annex I to the ECB Decision.

¹³² Article 36(3) of the ECB Decision.

¹³³ Decision ECB/2004/3 of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (OJ L 80, 18.3.2004, p. 42), as amended by Decision ECB/2011/6 (OJ L 158, 16.6.2011, p. 37) and Decision ECB/2015/1 (OJ L 84, 28.3.2015, p. 64).

¹³⁴ Article 4 of Decision ECB/2004/3.

¹³⁵ Articles 6-8 Decision ECB/2004/3.

3.2.2 The Financial Regulation

Transparency is also one of the principles mentioned by the Financial Regulation.¹³⁶ Concerning procurement opportunities, for procedures above threshold values, the standard means of advertisement is the publication of a contract notice in the OJEU.¹³⁷ When the contract value does not exceed the relevant threshold, appropriate means of publicity must nonetheless be ensured.¹³⁸

Additional forms of publication are possible but, as in the frameworks mentioned above, publication in the OJEU, where required, is still the most relevant means. In order to ensure the equal treatment of candidates, any other form of advertisement must not precede in time nor exceed in content the publication in the OJEU, which is the sole authentic notice in case of divergences.¹³⁹

In the framework of the Financial Regulation, the publicity requirements for contract awards differ considerably from the ECB Decision, depending on the contract value, its object and other circumstances. Whereas contract award notices are generally published in the OJEU within 30 days after signing the agreement, the publication of such notices before signature is required for certain categories of deliverables. In other cases, only a contract award notice – but no contract notice – must be published. In some cases, the publicity requirement is complied with simply by publishing a list of all contracts awarded in the previous year. Finally, for certain groups of agreements, such as building contracts, the list must be sent to the European Council and the European Parliament.¹⁴⁰

Provisions on access to procurement documents are largely akin to what is foreseen by the ECB Decision: electronic access must be provided free of charge, with limited exceptions. The principle of good faith implies that the awarding authority replies to questions as soon as possible but, at the same time, that such questions are asked well before the deadline for bids.¹⁴¹ In line with general EU procurement law, the Financial Regulation expressly allows authorised representatives of tenderers to attend the opening of the offers in open procedures.¹⁴²

The Financial Regulation provides for the appointment of an Opening Committee and an Evaluation Committee. To ensure transparency, both bodies are composed of representatives of different organisational entities, such as procurement officers and legal counsel.¹⁴³ This is a standard organisational scheme which is also used by the

¹³⁶ Article 160 Financial Regulation.

¹³⁷ Except for the negotiated procedure of Article 164(1)(d) of the Financial Regulation, limited to certain kind of deliverables and exceptional situations according to Point 11.1 of Annex I thereto.

¹³⁸ Except for the negotiated procedure mentioned above and for contracts whose value is below EUR 15,000. In certain cases, a call for expression of interest must nevertheless be published in the OJEU.

¹³⁹ Point 5 of Annex I to the Financial Regulation.

¹⁴⁰ Points 2 and 3 of Annex I to the Financial Regulation.

¹⁴¹ Point 25 of Annex I. This rule is also used by the ECB, being often included in the invitations to tender.

¹⁴² Point 28.1 of Annex I. It is settled case law that this also implies an obligation to communicate the date and place of the opening session, even when held in publicly accessible places, see Case C-359/93, *Commission v Netherlands*, EU:C:1995:14, para 21.

¹⁴³ Article 150 Financial Regulation and Point 28.2 of Annex I thereto.

ECB, although not expressly prescribed by the ECB Decision. The Evaluation Committee is responsible for completing the evaluation report.¹⁴⁴

3.2.3 The EIB Procurement Guide

The EIB Procurement Guide makes extensive reference to Directive 2014/24/EU. Differently from the Financial Regulation and the ECB Decision, which constitute clearly independent sets of rules, although generally in line with the general framework of EU procurement law, the EIB policy seems rather aimed at an almost full transposition of the Directive, complementing it where necessary. Here too, transparency is recognised as one of the key principles.

There are only a few special features. The EIB does not make use of PINs as calls for competition. Contracts concerning non-EU countries can be communicated using official forms of publication abroad. Finally, the EIB does not make use of the possibility of quarterly group notices for the award of framework agreements, the provisions of Directive 2014/24/EU find full – albeit indirect – application.

Regarding procedures not covered by the Directive, such as procurements below the threshold, the EIB's approach is similar to the ECB's, involving a negotiated procedure with no prior contract notice publication. Contracts of particularly low value can be directly awarded to a single bidder with no publication.¹⁴⁵ However, like the Financial Regulation, the EIB Procurement Guide does not provide for the publication of a list of contract awards which fall below the threshold values.

3.2.4 Summary

Transparency is clearly a central theme in the procurement carried out by EU institutions. Its relevance is constantly growing, also thanks to the development of 'e-procurement', which fosters the creation of an even more competitive environment by allowing fast, reliable and cheap – or even free – information access. Moreover, the use of electronic means of communications allows faster procedures with shorter deadlines, and a more effective data recovery, resulting in more efficient procurement and more information available to tenderers with fewer burdens on the awarding authorities.

Given the role and importance of the transparency principle, it is not surprising that the content of the norms aimed at its promotion does not substantially differ between the ECB legal framework and the other sets of EU rules. A difference can be found in the simpler, and hence more transparent, way in which the ECB Decision is structured, whereas the EIB framework makes extensive use of references to the Directive and the Financial Regulation only gives general rules to be complemented with the prescriptions of its Annex I. The Decision constitutes a detailed but very clear framework, whose rules are easily understandable by any candidate or tenderer.

¹⁴⁴ Point 30 of Annex I to the Financial Regulation.

¹⁴⁵ The threshold for direct award laid down in the EIB Guide is EUR 35,000.

3.3 Proportionality

The principle of proportionality has long been recognised as a general principle of EU law that derives from the fundamental legal principles common to the Member States.¹⁴⁶ However it has not played a very prominent role in procurement law. The 2004 Procurement Coordination Directives only mentioned it in passing,¹⁴⁷ and the CJEU applied it in a procurement case for the first time as late as 2008.¹⁴⁸

This limited role of the proportionality principle has changed significantly with Directive 2014/24/EU: the Directive lists it in the very first, and in another six, recitals. It is now highlighted as a key procurement principle alongside equal treatment and transparency.¹⁴⁹ More specifically, proportionality appears at very diverse instances in the Directive, as in defining requirements for temporary groupings to participate in tender procedures (Article 19(2)), IT security requirements for e-procurement (Article 22(6)), the drafting of technical specifications (Article 42(1)) and the extension of submission deadlines (Article 42(3)).

What, then, is the impact of the proportionality principle on public procurement? Generally, it requires that measures implemented through EU law provisions are appropriate for attaining the legitimate objectives pursued by the legislation at issue, and do not go beyond what is necessary to achieve them¹⁵⁰. By its very nature, the principle is designed to govern bipolar relationships. In the case of public procurement, it frames the interaction between the contracting authority and the prospective supplier. This bipolar dimension is also how proportionality aspects have been discussed by the CJEU in procurement cases.¹⁵¹

However, the situation in tender procedures is often not of a bilateral nature. For example, allowing a bidder with prior knowledge of the specifications to participate in the procurement, because it would be disproportionate to exclude the supplier, maintains that bidder's competitive prospects and reduces those of other suppliers. Defining unduly lax selection criteria allows a large number of possibly unsuitable bidders to participate in the procurement. Overly strict criteria go beyond what is necessary to remove suppliers lacking capacity but at the same time they increase the chances of success of those few suppliers who pass the threshold.

¹⁴⁶ In Case C-92/09, *Volker und Marcus Schecke and Eifert*, EU:C:2010:662, para 74, it is referred to as 'an unwritten principle of EU law'. It is unwritten because its mention in Article 5(4) of the Treaty on European Union only addresses proportionality in the relationship between the EU and its Member States (Callies in C. Callies/M. Ruffert, *EUV/AEU*, 2011, Article 5 para 45).

¹⁴⁷ Recital 2 of Directive 2004/18/EC mentioned that the award of contracts concluded in the Member States by public authorities is subject to the respect of the principles of the Treaty establishing the European Communities (TEC) and to the principles deriving therefrom, such as the principle of proportionality.

¹⁴⁸ See expressly Case C-213/07 *Michaniki*, EU:C:2008:731, para 48 which refers to Case C-21/03, *Fabricom*, EU:C:2005:127, where the CJEU did not answer the claimed violation of the proportionality principle.

¹⁴⁹ Article 18(1) of Directive 2014/24/EU entitled 'Principles of procurement' states that contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

¹⁵⁰ Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA and Others*, EU:C:2005:741, para 68.

¹⁵¹ See, for example, Case C-213/07, cited above, para 48; Opinion of Advocate General Kokott in Case C-368/10, *Commission v Netherlands*, EU:C:2011:840, and the judgment in the same case, EU:C:2012:284, paras 66-70. See also S. Arrowsmith, *The Law of Public and Utilities Procurement*, 2014, paras 7-24 and 25.

Such a 'multipolar' situation can be analysed from the perspective of proportionality if it is not limited to a protection mechanism of an individual against the public sector, but as a general requirement to strive for a balanced handling of the interests of all individuals involved in an administrative decision.¹⁵²

3.3.1 The ECB Decision

The ECB Decision makes explicit references to proportionality at five instances: once with respect to the principle as such, and four with regard to specific situations.

Article 3(1) lists 'General principles' for procurement procedures including transparency and publicity, proportionality, equal access and equal treatment, non-discrimination and fair competition;

- According to Article 6(1)(f), the ECB may deviate from specific procedural requirements or award a contract directly to one supplier in the case of additional products acquired under a supply contract that replace or extend the initial products or installations, where a change of supplier would lead to disproportionate difficulties in operation and maintenance. The duration of contracts relating to such additional products must not exceed three years;
- According to Article 25(4), the specifications and the related evidence requested from the bidders shall be necessary and proportionate to meet the objectives of the procurement, and based on objective and non-discriminatory considerations that avoid any unjustified obstacle to competition;
- According to Article 30(8), the ECB may exclude a candidate or tenderer that is in one of the situations described in paragraphs 4 and 5 from participation in any future tender procedure for a reasonable period of time. The ECB decides on the exclusion and determines the period of its duration applying the principle of proportionality, taking into account a number of criteria specified in the same article;
- Finally, Article 31(1) requires the ECB to specify in the contract notice the selection criteria for assessing a candidate's or tenderer's capacity to perform the contract. The selection criteria must be necessary and proportionate to ensure fair competition and achieve the contract objectives.

Only one of these references, namely the one concerning specifications, directly originates from the EU procurement directives. Article 42(1) of Directive 2014/24/EU states that the required characteristics of a work, service or supply may refer to the

¹⁵² S. Arrowsmith (*The Law of Public and Utilities Procurement*, paras 7-24 and 25) presents yet another dimension of the proportionality principle. According to her view, proportionality is also important for interpreting the EU directives in a balanced way, to limit the procedural burdens for both contracting authorities and suppliers, and to avoid imposing unnecessary constraints on the discretion of national authorities to implement national procurement goals in accordance with their own circumstances. In this perspective, the principle of proportionality is directed, so to say, against EU procurement law itself. Public procurement rules should only go as far as necessary to achieve their objective, and leave the rest up to the national legislator and those applying procurement rules.

specific process or production method or process, provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

Otherwise, the mentioning of proportionality in the ECB procurement rules seems fragmented and haphazard. However, the same phenomenon appears in comparable legal frameworks.

3.3.2 The Financial Regulation and the EIB Procurement Guide

The Financial Regulation mentions proportionality as a general principle at the start of the chapter on procurement (Article 160(1)) and, for instance, in the context of exclusions (Article 136) and of guarantees (Article 152).

The EIB Procurement Guide has four references in diverse places¹⁵³ while its Guide to Procurement (for the award of contracts co-financed by the EIB) does not mention proportionality at all.¹⁵⁴

3.3.3 Conclusion

There is, thus, no consistent pattern of referencing the principle of proportionality across the EU institutions' frameworks for public procurement. It is neither mentioned in similar fields of procurement law, nor is it consistently mentioned in particularly critical situations. The only exception is the exclusion from participation in tender procedures. But even in this sensitive field the ECB and EU legal frameworks differ at least in wording. The ECB Decision expressly requires proportionality only with regard to forward-looking exclusions ('blacklisting'). It is not mentioned with regard to ad hoc exclusions from a particular tender procedure although there is no doubt that an exclusion from a specific tender procedure in itself has to meet the proportionality test.

This curious phenomenon is explained by the fact that proportionality, as a general principle of EU law, applies in any case where an EU institution interacts with an economic agent or a private person. In other words, EU institutions need to comply with this principle generally, and not only when it is expressly mentioned in the legal framework applicable to a given situation. The instances in the institutional procurement rules where we find express references are simply situations where the legislators wanted to emphasise the importance of proportionality, and remind those applying the procurement rules of their obligation to carefully identify and assess the relevant facts, and find a balance between the need to ensure a sound conduct of the tender procedure and the rights of the economic agent.

¹⁵³ Chapters 4.1.8 on tender guarantees and 6.2 on performance guarantees; 7.1.3.6 for timelines in Annex IV procurements and 7.4.1.2 on the general conduct of procurements below the threshold.

¹⁵⁴ The Guide to Procurement only states on p. 40 that 'Special or exclusive rights' mean rights which arise from a grant made by a competent authority of the country by way of any legislative, regulatory or administrative provision, the effect of which is to limit the exercise of activities defined in paragraphs 2.1 to 2.9 below to one or more entities, and to substantially affect the ability of other entities to carry out such activities on the same territory under substantially equivalent conditions. Rights granted on the basis of objective, proportionate and non-discriminatory criteria that allow any interested party fulfilling these criteria to enjoy these rights should not be considered special or exclusive rights.

There is, by consequence, no decision of a contracting authority in the context of contract award procedures that impacts the (prospective) suppliers but would not be subject to proportionality requirements. This is true even of decisions of a general nature that affect all tenderers in the same manner, for example the definition of specifications or of selection criteria. Another example is the setting of timelines for the submission of requests to participate and tender offers: they can be short enough to ensure the economic efficiency of the award process but proportionality requires them to be long enough for bidders to have a fair chance to put together the requested documents and to submit them in due time.

This general application of the proportionality principle is illustrated by several instances in the ECB Decision where it 'shines through' without being spelled out expressly. A good example is Article 6(1)(2) concerning exceptional situations, like urgency and bankruptcy, where the ECB may deviate from specific procedural requirements or award a contract directly to one supplier.¹⁵⁵ While these cases allow significant deviations from the standard process and, as such, can negatively affect competition, this provision expressly requires the ECB to maintain effective competition between several suitable suppliers whenever possible. In other words, proportionality is applied here in order to limit the negative impact of procedural decisions of the ECB on the competition principle.

Another example of 'implied proportionality' is Article 7(1) on the duration of contracts; they may not run for more than four years unless their subject matter or another legitimate reason justifies a longer duration. Again, proportionality is used as a tool to limit undue restraints on free competition resulting from overly long contract durations, and it ensures that contracts are put out for tender at appropriate intervals to keep up with market developments and continuously seek value for money. Article 34(4) on the ECB's duty to inform rejected bidders of the outcome of the procurement provides an example of where proportionality impacts a three-party situation.

The ECB may refuse access to information about competing bids where its release would affect other suppliers' legitimate commercial interests. In this case proportionality requires a careful balancing of the rejected bidder's interest in receiving as much information as possible about the successful bid, in order to ascertain whether the ECB was right in awarding the contract, with the interests of the successful bidder that price sensitive information and trade secrets are not shared any further than with the ECB as its contract partner.

3.4 Legal remedies

The main differences between the procurement law frameworks of the EU institutions concern the availability of legal remedies. Any contract award decision of an EU institution is subject to legal review by the CJEU by way of an action for annulment (Article 263 TFEU), irrespective of the legal framework that governed the procurement

¹⁵⁵ These situations are defined based on Article 32(2) of Directive 2014/24/EU; see also Article 19 of Decision ECB/2004/2.

process. The remedies at the pre-litigation stage are diverse and, in any case, differ from the standard established by the Remedies Directive 89/665/EEC.¹⁵⁶

3.4.1 The ECB Decision

With regard to the possible legal remedies against final rankings and contract awards, the ECB Decision differs from both the Financial Regulation and the EIB Procurement Guide as it provides for an internal review body, the Procurement Review Body (PRB). This body has now existed for over 10 years, being initially envisaged by Decision ECB/2007/5.¹⁵⁷ It is composed of senior managers from different organisational units, in order to guarantee independence and transparency of the procedure within the bank. Indeed, the PRB's proceedings do not constitute a conciliatory mechanism between unsatisfied candidates and the awarding authority, but rather aim at guaranteeing an independent second assessment on the regularity of the outcome of the procurement.¹⁵⁸

Candidates and tenderers who are not satisfied with the result of a tender procedure conducted under Chapter II of the ECB Decision have 15 days to file an appeal. The deadline starts to run from either the receipt of the rejection, or the communication of its grounds and the granting of access to the relevant documents, where requested.¹⁵⁹ As mentioned above, such access rights find a limit in the need for a balanced application, safeguarding public and private interests, in particular the commercial interests of the other candidates.

Although no specific provisions exist concerning language preference, appeals are usually made in English. Once the appeal is received, the PRB reaches its final decision within one month and notifies it immediately to the appellant. To further safeguard its independence, its proceedings are confidential. They are also of revisory, rather than adversarial nature. Hence, no exchange of arguments between the parties takes place. The final decision is usually reached solely on the basis of the documents of the procedure. The PRB can hear both parties to obtain further information or clarifications.

While the lodging of an appeal has no automatic suspensive effect on the procedure, the PRB can adopt precautionary suspension measures while it reviews the case.¹⁶⁰ To avoid immediate contract awards in controversial cases, the ECB Decision defines a standstill period between the award decision and signing the contracts. The period is

¹⁵⁶ 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).

¹⁵⁷ See Article 33 thereof.

¹⁵⁸ Case T-553/11, cited above, para 32.

¹⁵⁹ Article 39(1) of the ECB Decision. While Article 39 only mentions rejection decisions, the PRB also examines the appeals of successful tenderers who are dissatisfied for other specific reasons, such as a low position in the final ranking for the award of multiple contracts.

¹⁶⁰ Article 39(3) ECB Decision. The ECB is considering changing the appeal system, by introducing an automatic suspensive effect following the decision of the General Court in Case C-35/15 P(R), *Commission v Vanbreda Risk and Benefits*, EU:C:2015:275, paras 30 and 38.

currently 10 days.¹⁶¹ Where an appeal is upheld, the PRB can give instructions to the Procurement Committee and order that the procedure be fully or partially repeated. In conformity with the general principles of administrative law, the PRB's decisions are always motivated.¹⁶²

Filing an action for annulment based on Article 263 TFEU is possible once the PRB has reached its decision. Differently from most national procurement frameworks, applicants can make use of new arguments before the General Court that they have not previously raised before the PRB. The Court made this point clear with regard to time limits for raising arguments against procedural documents,¹⁶³ but the reasoning can be applied to appeals before the PRB as well.¹⁶⁴ The main argument is that precluding arguments would severely limit the right to an effective remedy and the court's power to review procurement decisions.¹⁶⁵

During its history the PRB has proven to be very successful in settling controversies without appeals before the General Court. This is confirmed by the limited procurement litigation history of the ECB, with only three cases going to court since 1999.

In the first case,¹⁶⁶ a candidate contested its exclusion from a procedure on several grounds, including the alleged illegitimacy of the requirement to hold a certain certificate prescribed by German labour law. The candidate claimed that such requirement constituted an undue discrimination against foreign candidates. The General Court, however, confirmed that the ECB was bound to comply with German law.¹⁶⁷ It also stated that the remedy chosen by the appellant, i.e. an action of annulment under Article 230 TEC (now Article 263 TFEU), prevented the Court from determining the compatibility of German law with the Treaties. This could only be assessed in the context of a preliminary ruling under Article 234 TEC (now Article 267 TFEU).¹⁶⁸

Indeed, in an action for annulment of a procurement decision the Court's review is limited to the presence of manifest and serious errors in the conduct of the procedure, which was found not to be the case. Given that the candidate had implicitly admitted that it could not obtain the required certificate, and given that such requirement was legal, the Court declared the other claims inadmissible due to the absence of legal interest in the proceedings.

The candidate filed an appeal, claiming in particular the non-mandatory nature of the permit requirement, and affirming its legal interest in the examination of the other

¹⁶¹ Article 34(2) of the ECB Decision. The standard deadline is 15 days, reduced to 10 in case of use of fax or electronic communication.

¹⁶² Article 39(2) of the ECB Decision.

¹⁶³ According to Article 28(2) of the ECB Decision, originally Article 21(2) of Decision ECB/2007/5.

¹⁶⁴ See F. von Lindeiner, 'The new procurement rules of the European Central Bank' (2016) 25 *Public Procurement Law Review*, Issue 5, 213 at 220.

¹⁶⁵ This applies especially when it is not clear that the deadlines for submitting complaints set out in the procedural acts do not apply only to the procedure, but also affect any future legal proceedings; see Case T-553/11, cited above, paras 108-110.

¹⁶⁶ Case T-279/06, cited above; appealed in Case C-401/09 P, *Evropaïki Dinamiki v ECB*, EU:C:2011:370.

¹⁶⁷ Case T-279/06, cited above, paras 72 and 81.

¹⁶⁸ *Ibid.*, paras 75 and 82.

claims. The appeal was rejected, as it mostly repeated the arguments raised before the General Court without adding specific complaints against the judgment.¹⁶⁹

The second case, relating to the new ECB premises and concerning a supplier's exclusion on grounds of low quality and an abnormally low price, was settled out of court.¹⁷⁰

In the third case,¹⁷¹ an appellant contested the exclusion of the consortium of which it was part from the final stage of a restricted procedure. The exclusion was based on a failure to comply with minimum requirements concerning experience. The General Court first addressed the arguments concerning the admissibility of the claim, especially those concerning the nature of the proceedings before the PRB and the conditions for representing a consortium.¹⁷² It then reviewed the lawfulness of the rejection with regard to the alleged breaches of the principles of transparency, proportionality, sound administration and motivation.¹⁷³ The Court also provided clarifications on the amount of information to be provided by the ECB when rejecting tenders, and on the scope of the clarifications to be requested and provided during the procedure. In fact, the right to ask candidates for additional evidence and clarification, which the ECB Decision leaves to the ECB's discretion, can turn into an obligation, in line with the general principles of procurement law, where the ambiguities the ECB has identified in an application can be easily resolved.¹⁷⁴

In any case, the ECB is not obliged to award a contract following a procurement procedure. They can be cancelled until a written agreement is signed.¹⁷⁵ Hence candidates usually try to obtain monetary compensation for damages under Article 340 TFEU following a successful action for annulment. The action for damages can be dealt with independently or together with an action under Article 268, if they are directly related.¹⁷⁶

As an alternative to exercising legal remedies before the CJEU, it is possible to submit a case to the European Ombudsman, a non-judicial body that investigates cases of alleged maladministration by EU institutions and bodies, in particular those that might

¹⁶⁹ Case C-401/09 P, cited above, paras 49, 55-57 and 61.

¹⁷⁰ Order of the President of the First Chamber of the General Court of 3 December 2012 on the deletion of Case T-468/09 from the register, EU:T:2012:639.

¹⁷¹ Case T-553/11, cited above.

¹⁷² The General Court recognised the importance of the PRB decisions and confirmed that they constitute an important object of its judicial review, in addition to the procurement procedure, given that besides re-assessing it they also complement it, for example with regard to motivation, see paras 48-49. Despite the consortium being the candidate in the procurement, the General Court admitted the appeal on behalf of the appellant alone, given the lack of sufficient mandate to represent the consortium. In doing this, the Court made clear that the legal personality of the consortium does not prevent individual members thereof from seeking legal remedies on their own account, see para 89.

¹⁷³ In addition to the alleged breach of the principles of transparency, equal treatment, non-discrimination, proportionality and sound administration, the appellant claimed a breach of the duty to state reasons with regard to the exclusion decision; the introduction of new selection criteria during the procedure; the existence of manifest errors in the assessment of the references relating to its experience; and the misuse of powers due to the claimed misuse of the selection stage as an award phase.

¹⁷⁴ Case T-553/11, cited above, paras 298-300.

¹⁷⁵ Article 38 of the ECB Decision. Such decisions must nonetheless respect the general principles of Article 3 and be duly motivated.

¹⁷⁶ For example, in Case T-553/11, cited above, both claims are raised and dealt with together, but rejected by the General Court.

infringe the European Code of Good Administrative Behaviour.¹⁷⁷ With regard to the ECB's procurement procedures, this has happened only in two instances.

In the first case, the Ombudsman dealt with the principle of equal treatment and transparency with regard to award criteria under the previous administrative circular regime.¹⁷⁸ In line with case law, the Ombudsman explained the importance of transparency both to allow equal treatment of all candidates and to verify compliance with the general procurement principles. Regarding compensation for damages, the Ombudsman confirmed that this award is necessarily bound to the assumption that the candidate was entitled to the award of the disputed contract.¹⁷⁹

The second case concerned the division of procurements into lots. A supplier claimed, among other things, that the bundling of different services in a single lot constituted discrimination in favour of the incumbent service provider. Although the division of procurement procedures into lots is encouraged by general EU procurement law,¹⁸⁰ the ECB Decision does not contain any specific mandatory requirement to this end. The Ombudsman recognised this absence, but recommended the ECB to revise its procedures, so that specific account is taken of the need and convenience of bundling different services into single lots.¹⁸¹ The Ombudsman eventually closed the case since the ECB complied with his recommendation by editing the internal procedural guidelines.¹⁸²

3.4.2 The Financial Regulation and the EIB Procurement Guide

In contrast to the ECB rules, neither the EIB legal framework nor the Financial Regulation establishes an internal system of legal review concerning public contracts.¹⁸³

The EIB Procurement Guide only states that the CJEU is competent for such questions.¹⁸⁴ Despite this absence of pre-litigation arrangements, the recent litigation history of the EIB is limited to only two cases. One of them, concerning a procurement

¹⁷⁷ Article 228 TFEU. The notion of 'maladministration' is largely modelled on Article 41 of the Charter of Fundamental Rights of the European Union concerning 'Good Administration'.

¹⁷⁸ Administrative Circular No 8/2003 of 16 September 2003.

¹⁷⁹ Decision of the European Ombudsman on complaint 1137/2005/(OV)ID against the European Central Bank of 11 December 2007, paras 1.2-1.3 and 1.10. All decisions and recommendations of the European Ombudsman are available at www.ombudsman.europa.eu.

¹⁸⁰ See Directive 2014/24/EU, recital 78 and Article 46(1).

¹⁸¹ Recommendation in case 644/2015/PMC concerning the European Central Bank's alleged failure to organise a non-discriminatory contract procedure for the provision of travel services for its staff of 6 October 2016, paras 26 and 27.

¹⁸² Decision in case 644/2015/PMC on the ECB's procurement procedure for the provision of travel services for its staff of 23 November 2017, paras 8-10.

¹⁸³ This absence of internal appeal possibilities was criticised by the European Court of Auditors in its 2016 special report 'The EU institutions can do more to facilitate access to their public procurement', see para 107, available at www.eca.europa.eu.

¹⁸⁴ EIB Procurement Guide, Article 8.2.

for the provision of network communication services where the applicant contested its position in the final ranking, was settled out of court.¹⁸⁵

In the other case, very instructive given the variety of topics covered, the EIB failed to notify the contract award to one of the unsuccessful tenderers due to an internal administrative error. Once the tenderer became aware of the award from the publication of the contract notice in the OJEU, he filed an appeal. The tenderer claimed infringement of several general principles with regard to the transparency of the procedure (illegality of the non-notified award decision, and failure to provide adequate reasons for such decision) and the evaluation criteria used by the EIB (improper use of selection criteria as award criteria, imprecise formulation, and disproportionate ratio between financial and technical criteria). Finally, the supplier also alleged that, after the conclusion of the procedure, the EIB conducted separate negotiations with the successful bidder, which adjusted its original offer as a result. All pleas were upheld.

Whereas the illegitimacy of separate confidential negotiations carried out only with the successful bidder after conclusion of a procurement process is evident, the other issues appeared more controversial. In synthesis, the General Court made clear that awarding authorities, besides communicating the disaggregated final scores of the requesting parties and of the successful tenderers, must also make clear the reasoning behind such evaluation, including specific comments.¹⁸⁶ While recognising the broad discretion enjoyed by awarding entities in determining selection and award criteria, the Court stated that these constitute two separate sets of parameters which must not be confused. It also found that their vagueness could easily amount to a discriminatory favouritism towards some candidates, for example an incumbent service provider.¹⁸⁷ It also made clear that whenever the most economically advantageous tender is used as award criterion, the discretion allowed in determining the ratio between the financial and the technical criteria must not result in the neutralisation of either of them.¹⁸⁸

Finally, the judgment specified the relationship between the procurement directives and the EIB Procurement Guide. On the one side, it remains undisputed that EU directives do not apply to the EIB. On the other side, however, the general principles of procurement law do apply to EIB procurements, and this is especially the case where the EIB Guide makes direct references to the content of the directives, which then become 'appropriate references' for interpreting its provisions.¹⁸⁹

The action of annulment also included an unsuccessful claim for damages. The reasons for its rejection can be found in the uncertainty of the award of the contract to the applicant. The General Court also took into account that, similarly to what said

¹⁸⁵ Order of the President of the Ninth Chamber of the General Court of 8 June 2017 on the deletion of Case T-158/17 from the register, EU:T:2017:423.

¹⁸⁶ Case T-461/08, cited above, paras 114-116.

¹⁸⁷ *Ibid.*, para 151.

¹⁸⁸ *Ibid.*, para 194.

¹⁸⁹ *Ibid.*, paras 90 and 93.

about the ECB, the EIB is under no obligation to enter into a contractual relationship, and can cancel any procedure with no specific reasons or compensation.¹⁹⁰

¹⁹⁰ Ibid., para 211.

Conclusion

The comparative analysis of the legal frameworks for public procurement set out in the Financial Regulation, in the ECB Decision, and in the EIB Procurement Guide, taking into account the standards set by Directive 2014/24/EU, has shown a number of distinct features.

We have found similarities in the way that selection and award criteria are defined, in the transparency and publication of procurement opportunities as well as the outcome of tender procedures. The three frameworks do not generally define the role of the proportionality principle in procurement procedures. We consider this to reflect the fact that this principle applies to any activity of the EU institutions, and that many rules laid down in the procurement frameworks can already be seen as expressing this principle.

Differences became mostly apparent in the comparison of the remedies open to unsuccessful bidders. Only the ECB has established a robust internal appeal process. While not consisting of independent experts, it does provide a relatively fast and efficient review mechanism. This is indeed a strong asset in ECB procurement as, in our view, leaving the review of contract award decisions exclusively to the CJEU has disadvantages for all sides. The suppliers have to make the effort of going to court, the institution foregoes the chance to correct administrative errors in house, and both sides have to wait, usually for years, until they have full legal certainty about the contract award.

Besides these common features and differences, we found that the procurement rules of EU institutions have followed the general trend towards professionalisation and individualisation of public procurement law. The rulebooks have become more detailed and more comprehensive. Both the Financial Regulation and the ECB Decision of today provide for individual and enforceable rights of participations in public tender procedures. This may be seen as evidence that procurement rules, and adherence to these rules, are not purposes in themselves, but reflect the interest of public administrations, including the EU's, in sound management of their finances and rule-bound spending of public money.

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