Developing Alternatives to Public Procurement in Social Services: what legal options exist?

Discussion note – December 2022

I. INTRODUCTION

1. The following discussion note aims to provide an analysis of the application of European Union ("**EU**") law and national laws in a sample of EU Member States regarding public procurement procedures and potential alternatives to public procurement of social services.

2. In the EU, public procurement is predominantly governed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement ("**Public Procurement Directive**", or the "**PPD**"). The PPD is a binding legislative instrument that has been implemented in all EU Member States.

3. The vast majority of stakeholders (social service providers, users of social services, many authorities, and others) consider the PPD unfit for purpose when it comes to the provision of social services. In particular, procurement procedures are regarded as overly complex, rigid, bureaucratic and not promoting quality and social considerations. Thus, EASPD wishes to explore legitimate ways to derogate from the application of such procedures, in particular in view of the European Commission's upcoming review of the PPD. To this end, EASPD received advice on this paper from Sidley Austin LLP.

4. To this end, the present memorandum, first, analyses the key provisions of the PPD relating to social services and explores the alternative models to public procurement allowed by EU legislation and case law (Chapter II). Then, it provides an overview of the national procurement laws implementing the PPD as well as the alternative models that have been developed in a sample of EU Member States: the Netherlands (Chapter III), Italy (Chapter IV), France (Chapter V), Germany (Chapter VI), Bulgaria (Chapter VII) and Finland (Chapter VIII).

5. Note that the information regarding the sample Member States is based on public sources only, and is not to be considered as legal advice. In addition, alternative models other than those provided in this memorandum may be available in the Member States concerned.

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II. EU

2.1 Introduction

1. In 2014, the European framework for public procurement was revised and updated. A package of three new public procurement Directives[1] was introduced, setting out the current EU legal framework for the procurement of goods, works and services by public authorities, including services of a social nature.

2. The present Chapter focuses on the PPD and on the purchase of social services by public administrations ("**PAs**") within and outside its scope. Section 2.2 sets out the key provisions of the PPD, including provisions on "reserved contracts". Section 2.3. analyses alternative models to public procurement that can be legitimately pursued beyond the PPD's scope of application.

2.2 The PPD and its application to social services

2.2.1 Scope, rationale ad principles of the PPD

3. Article 1 para. 2 foresees that the PPD applies to: "*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose*" (underlining added).

4. To fall within the PPD's scope, in addition, public contracts must meet certain value thresholds above which a cross-border/EU interest (*i.e.* a potential interest of foreign operators to participate in the tender) is deemed to exist. Such thresholds are set out in Article 4 of the PPD and can be summarized as follows:

Contract type	Value	Contracting authority
Public works contracts	€5,382,000	Any contracting authority
Public supply and service contracts	€140,000	Government departments and offices
Public supply and service contracts	€215,000	Local and regional authorities
Social & other specific services listed in Annex XIV	€750,000	Any contracting authority

5. The rationale of the PPD is intrinsically tied to the rules of the EU Treaties, in particular to the Treaties' fundamental freedoms (*i.e.* free movement of goods, freedom of establishment and the freedom to provide services) as well as the fundamental principles of equal treatment, non-discrimination, proportionality and transparency.

[1] 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; 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; and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94.

6. Being more specific, public procurement is aimed at eliminating or preventing barriers to free movement within the EU internal market. Barriers are generally erected when national operators are being favored. For public contracts above a certain value, the PPD comes into play to coordinate national procurement procedures so as to ensure that the above rules and principles are not jeopardized, and that public procurement is opened up to competition from all Member States.

7. The fundamental principles underpinning the PPD can be summarized as follows:

- **Equal treatment**. This is a broad principle with various declinations. Broadly speaking, the principle of equality entails that comparable situations must not be treated differently, unless this is objectively justified.[2] More specifically, this also entails that all tenderers must have equal access to contracts put out to tender, and must be afforded equality of opportunity when formulating their tenders. The tenders of all competitors must be subject to the same conditions.[3]

- **Non-discrimination**. One specific expression of the principle of equal treatment is the principle of non-discrimination. This is intended to afford equality of opportunity to all tenderers, regardless of their nationality, with the aim of avoiding that national operators are favored.[4]

- **Transparency**. The principles of equal treatment and non-discrimination imply a duty of transparency which enables the contracting authority to ensure that those principles are complied with. That obligation of transparency is imposed on the public authority and consists in ensuring a degree of advertising sufficient to enable the public contract to be opened up to competition.[5] Moreover, all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or tendering specifications.[6]

- **Proportionality**. This is a general principle of EU law according to which the measures adopted by the Member States must not go beyond what is necessary to achieve their objective.[7] This has been use to ensure that the actions of contracting authorities do not go beyond what is necessary to achieve the aim pursued in relation with, in particular, exclusion of tenderers,[8] the criteria for qualitative selection[9] or the evaluation of tenders.[10]

2.2.2 The application of the PPD to social services: the "light regime"

8. The EU legislator subordinated the procurement of social services to separate, more tailored, simpler rules (*i.e.* to a "**light regime**") set out in Articles 74-77 of the PPD.

2 See, *e.g.*, Case C-210/03 *Swedish Match*, EU:C:2004:802, para. 70.
3 See, *e.g.*, Case T-50/05 *Evropaïki Dynamiki*, EU:T:2010:101, para. 56.
4 See, *e.g.*, Case C-458/03 *Parking Brixen*, EU:C:2005:605, para. 48.
5 See, *e.g.*, Case C-458/03 *Parking Brixen*, EU:C:2005:605, para. 49.
6 See, *e.g.*, Case T-50/05 *Evropaïki Dynamiki*, EU:T:2010:101, para. 59.
7 See, *e.g.*, Case C-376/08 *Serrantoni and Consorzio stabile edili*, EU:C:2009:808, para. 33.
8 See, *e.g.*, Case C-376/08 *Serrantoni and Consorzio stabile edili*, EU:C:2009:808.
9 See. e.g., Case C-218/11 *Észak-dunántúli*, EU:C:2012:643.
10 See, e.g., Case C-546/16 *Montte*, EU:C:2018:752.

9. The rationale for setting up a separate regime relies on two considerations:

(i) Services for the person (such as social services) are considered to be by their very nature of a limited cross-border interest. To be of interest to foreign operators, their value has to be higher than that of standard public contracts.

(ii) Such services are provided within a particular context that varies amongst Member States due to different cultural traditions.[11] In particular, services of social value are generally classified as "services of general interest" and, if having an economic nature, as "service of general economic interest" ("**SGEIs**"). SGEIs are subject to peculiar EU rules, allowing Member States a greater degree of autonomy in their organization/regulation.[12]

10. The provisions of the "light regime" can be summarized as follows:

- **Article 74** of the PPD states that public contracts for social and other specific services listed in Annex XIV of the PPD shall be awarded within the "light regime" when their value meets the threshold of €750,000.

- **Article 75** ensures that the principle of transparency is always complied with, prescribing rules for publication of notices in public procurement procedures for social and other specific services.

- **Article 76** foresees that Member States are free to determine the procedural rules applicable to the award of social contracts as long as such rules allow contracting authorities to take into account the specificities[13] of the services in question and are in line with the principles of transparency and equal treatment.

- **Article 77** provides that Member States may reserve the right to participate in procedures for the award of public contracts for pre-defined social services exclusively for certain organizations so as to ensure their continuity. Member States can therefore narrow the circle of participants to such organizations that participate in delivering these services to end users.[14] The maximum duration of the contract shall be of three years and organizations shall fulfil a number of eligibility conditions set out in para. 2.

11. All in all, Member States are given a wide margin of maneuver and freedom to Member States in implementing the "light regime" procurement procedures, with the main limit being compliance with the fundamental principles underpinning the PPD.

11 See Recital (114) of the PPD.

12 See Article 1 para. 4 of the PPD: "*This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to*".

13 The list of characteristics of the services in question includes "*quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation*" (Article 76, para. 2).

14 AG Opinion in Case C-436/20 *ASADE*, EU:C:2022:77, para. 109.

2.2.3 The provision of social services outside the "light regime": the example of reserved contracts

12. Public procurement can be used to pursue social-policy goals even outside the "light regime". Article 20 allows Member States to reserve the right to participate in public procurement procedures to two specific categories of tenderers: (i) sheltered workshops; and (ii) economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons (*i.e.*, social enterprises).

13. Article 20, para. 1, lays down two criteria: (i) the contracts in question are to be 'performed in the context of sheltered employment programs'; and (ii) at least 30% of the employees of those workshops, economic operators or programs are disabled or disadvantaged workers. It follows from the case law of the Court of Justice of the European Union ("**CJEU**"), in particular case *Conacee*, that Article 20 para. 1 of the PPD does not contain an exhaustive list of conditions under which a contracting authority may limit the type of economic operator with which it may enter into a reserved contract.[15] Members States are free to adopt *additional criteria* as long as those criteria contribute to the social and employment policy objectives pursued by Article 20. Member States are thus allowed to, for example, add a criterion in their national laws that excludes profit-making entities.[16] It also follows from CJEU case law that the second condition of Article 20 para. 1 – *i.e.* the 30% threshold – is merely a minimum requirement.[17]

14. When a contracting authority decides to reserve a contract and limit the competition to the specific pool of tenderers who are qualified, the winning tenderer is chosen from this specific group. Contracting authorities are free to choose whichever public procurement procedure best works for that tender (which depends, *inter alia*, on the value of the contract, the circumstances of the case and national provisions).

15. It is to be noted that the PPD (or EU law in general for that matter) does not specifically define disabled or disadvantaged persons, national law thus applying.

16. Article 20 does have its limits. First, when Member States make use of the Article 20 option, they must explicitly refer to this Article (or the corresponding article in their national law) in the call for competition (see Article 20 para. 2). Second, Member States that use Article 20 must respect, *inter alia*, the freedom of establishment set out in EU internal market rules, as well as the principles deriving from that freedom, such as the principles of equal treatment and proportionality.[18]

17. Recent surveys show that the use of Article 20 is rather limited.[19] Reasons include the "elusiveness" of the wording of the Article and inconsistent transposition in various Member States.[20] Reserved contracts seems to be a widely used option in French law. Section 5.2.2. of the French Chapter explains how France has implemented Article 20 of the PPD into French law and how reserved contracts work in practice.

15 Case C-598/19 *Conacee*, EU:C:2021:810, para. 28.
16 AG Opinion in Case C-436/20 *ASADE*, EU:C:2022:77, para. 104.
17 Case C-598/19 *Conacee*, EU:C:2021:810, para. 22.
18 Case C-598/19 *Conacee*, EU:C:2021:810, para. 33.
19 European Commission, "*BSI – Buying for Social Impact*", December 2019.
20 Roberto Caranta et al., *European Public Procurement: Commentary on Directive 2014/24/EU*, p. 224.

18. Note that Article 20 does not apply to the procurement of social and other specific services as listed in Annex XIV of the PPD, for which a specific regime applies set out in Article 77 (see above Para. 15).

2.3 Alternative models for the award of social services allowed by the PPD

2.3.1 Introduction: the PPD's substantive conditions

19. EU rules take precedence over domestic rules.[21] Member States are prohibited from enacting legislation conflicting with EU legislation. As such, given that the PPD regulates the ways by which social services may be procured by national authorities, then legitimate alternative ways for providing those services without recourse to public procurement schemes must necessarily lie outside of the PPD's scope.

20. With respect to social services, the scope of the PPD encompasses the (i) *award of a public contract*, by a public administration, to (ii) *third party* (iii) *economic operators*, for the acquisition of the services listed in Annex XIV, (iv) *against consideration*, (v) *in excess of the relevant threshold* of € 750.000 set out in Article 4. If any of these substantive conditions fails to be fulfilled, the PPD ceases to apply, with the consequence that alternative models can be legitimately designed and pursued by national authorities.

21. In particular, national authorities are free to disregard the PPD: (i) through the mere financing of social services (instead of the award of a public contract); (ii) through the provision of the service by the PA itself (instead of the entrustment of a third party); (iii) when the service is of a non-economic nature (instead of being of an economic nature); (iv) through non-selective award procedures (instead of the award to a third party); (v) by awarding the service without consideration (instead of being awarded for consideration); and (vi) when the value of the contract falls below the relevant PPD threshold (instead of exceeding it).

2.3.2 The mere financing of social services

22. Recital (4) of the PPD stipulates that "*the mere financing, in particular through grants, of an activity,* […], *does not usually fall within the scope of the public procurement rules"*. Recital (114) recalls the same principle and Recital (7) specifies that the PPD "*does not deal with the funding of services of general economic interest or with systems of aid granted by Member States, in particular in the social field*".

23. Against this backdrop, the *disbursement of public funds* (*e.g.* grants) as well as the *relief from economic burdens* (*e.g.* tax reliefs), without the conclusion of a purchase contract, represent a legitimate avenue to promote the supply of social services. The key element is the lack of reciprocal obligations between the parties: for the PPD not to apply, the provision of public funding must not be linked to any specific service obligation to be

[21] This is based on the principle of EU law primacy. "*The principle of the primacy (also referred to as 'precedence') of EU law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU country (national law), EU law will prevail. If this were not to be the case, EU countries could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable*". See Eur-Lex, glossary of summaries, "Primacy of EU law", available here.

carried out by the social operator in favor of the disbursing authority.[22] Namely, only one party, *i.e.* the social operator, must benefit from the interaction.

24. The "mere financing" operates both as a general tool fueling the provision of social services at large (given the historical intervention of the State in supporting the social sector) and as a specific model for the provision of such services outside the context of the PPD procedures. In particular, as set out below in more detail, Member States such as the Netherlands, Germany, Italy and France all currently use systems of subsidy, allowances or vouchers as alternative models.

25. It is important to note, though, that the "mere financing" may nonetheless be caught by the application of EU State aid rules, in particular when the relevant *de minimis* thresholds for SGEIs are exceeded.[23]

2.3.3 The provision of services by public authorities themselves

26. Recital (5) of the PPD states that "*nothing […] obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive*". PAs always retain the prerogative to provide the service themselves.

27. In particular, this may happen through: (i) the *performance by a public authority's own resources* (*i.e.* the local authority entrusts the performance of certain welfare services to, for example, its own municipal department); and (ii) *in-house provision* (*i.e.* the local authority entrusts the performance of the activity to a separate public entity under its control).[24] The *performance by a public authority's own resources* does not entail the conclusion of a contract and therefore falls undoubtedly outside the PPD. *In-house provision*, to the contrary, escapes the application of the PPD insofar as the criteria set out in Article 12 (codifying the CJEU case law) are met.[25]

28. The in-house provision of social services can be considered as an alternative model to the PPD; although, for obvious reasons, it may be of less interest to social operators.

2.3.4 The provision of services of non-economic nature

29. As set out in Article 1 para. 2, the PPD applies to the extent that the contract is awarded to a (private) "economic operator". Recital (6) of the PPD recognizes the freedom of Member States "*to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as*

22 Commission Staff Working Document, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, 29 April 2013, SWD (2013) 53 final/2 ("**2013 Commission Guide on SGEIs**") available here, Q&A Q. 218.

23 Under the SGEI *de minimis* Regulation (Regulation (EU) No 360/2012, available here), public aid to SGEIs not exceeding €500,000 is not considered as State Aid. The amount is so small that it can be deemed not to have an impact on cross-border trade or competition.

24 Elisabetta Manunza, *Social Services of General Interest and the EU Public Procurement Rules*, Chapter 14 of the book "Social Services of General Interest in the EU", 2012, page 365.

25 The criteria foreseen by Article 12 of the PPD are as follows: (i) the authority exercises control over the awardee which is similar to that which it exercises over its own departments; (ii) the awardee must carry out more than 80% of its activities for the public authority; and (iii) there is no private participation in the awardee, with the exception of non-controlling capital participation required by national law.

non-economic services of general interest or as a mixture thereof." Moreover, it clarifies that "*non-economic services of general interest should not fall within the scope of this Directive*."

30. More broadly, non-economic services as well as non-economic operators are not subject to EU legislation and to the internal market and competition rules enshrined in the Treaties. This entails that services lacking an economic character can be provided outside of the PPD's scope of application, as an alternative model.

31. However, in line with the long-standing case law of the CJEU, Recital (14) clarifies that "*the notion of 'economic operators' should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate*" (underlining added).

32. As regards non-profit entities specifically, Advocate General Wahl[26] in *Spezzino* ruled that: "*the fact that a given entity is non-profit-making, and that its personnel provide their services as unremunerated volunteers, is irrelevant under EU public procurement rules. The concept of 'economic operator' is very broad and must be understood to encompass any entity which offers goods or services on the market. Thus, the nature of 'economic operator' in respect of a given entity does not depend on what that entity is (for example, its internal composition, structure or functioning), but rather on what that entity does (that is, the type of activities that it carries out)*"[27] (underlining added).

33. All in all, as long as a market exists, and the service is provided in competition with other operators, the economic character is supposed to be fulfilled.[28] Note that "*the question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned and may thus vary from one Member State to another* [and], *due to political choice or economic developments, the classification of a given activity can change over time*".[29]

34. The chances of providing non-economic services as an alternative model, falling outside the remit of the PPD, are thus rather thin.

2.3.5 The provision of services awarded through non-selective procedures

35. Recital (4) of the PPD stipulates that "*situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes*" (underlining added).

36. Recital (114) moreover provides that "*Member States and public authorities remain free to provide those services […], for example […] by granting licences or authorisations to all economic operators meeting the conditions established*

26 An Advocate General (AG) assists the CJEU by writing an impartial and independent opinion on a case that the judges consider before giving judgment. The opinion of the AG is not binding on the CJEU, but it is influential and is often followed by the Court.

27 AG Opinion in Case C-113/13 *Spezzino*, EU:C:2014:291, para. 24.

28 See, *e.g.*, Case C-180/98 *Pavlov*, EU:C:2000:428, para. 75.

29 EU Commission, *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union* (2016/C 262/01), para. 13.

beforehand by the contracting authority, without any limits or quotas, provided that such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination" (underlining added).

37. The award of services through procedures lacking a selective nature does not demand the application of the PPD. Admittedly, the very rationale of a public procurement procedure is to control and ensure the fairness of a competitive selection, of a choice, between different candidates. Absent any choice from the public authority, the control procedure loses its relevance.

38. As explained by the CJEU in *Falk Pharma*:[30]

- "*The risk of favouring national economic operators which that directive seeks to preclude is closely connected to the selection which the contracting authority intends to make from the admissible tenders and to the exclusivity which will result from the award of the contract concerned to the operator whose tender has been accepted or to the economic operators whose tenders have been accepted, in the case of a framework agreement, that constituting the objective of a public procurement procedure*." (para. 36) (underlining added)

- "*Consequently, where a public entity seeks to conclude supply contracts with all the economic operators wishing to supply the goods concerned in accordance with the conditions specified by that entity, the fact that the contracting authority does not designate an economic operator to whom contractual exclusivity is to be awarded means that there is no need to control, through the detailed rules of Directive 2004/18, the action of that contracting authority so as to prevent it from awarding a contract in favour of national operators*." (para. 37) (underlining added)

39. In a subsequent case, *Tirkkonen*,[31] the CJEU reiterated this principle and in particular the fact that no "choice" within the meaning of EU rules occurs, and thus no public procurement procedure is required, if the criteria set out by the public entity do not concern *award criteria* (*i.e.* criteria that are aimed at identifying the tender which is economically the most advantageous) but merely concern *suitability/authorization criteria* (*i.e.* criteria linked to the evaluation of the tenderers' suitability to perform the contract in question).

40. Therefore, public procedures foreseeing that *any* operator satisfying certain pre-determined suitability criteria is entitled to perform the activity in favor of individual users are not subject to the mechanisms of the PPD. As a matter of fact, the operator ultimately providing the service is chosen not by the authority itself but, rather, by the user or beneficiary of the scheme.

41. Systems of this kind have been largely implemented in EU Member States, becoming one of the predominantly used alternative models employed by national authorities. In particular, as will be analyzed in the national Chapters below, so-called "accreditation",

30 Case C-410/14 *Dr. Falk Pharma GmbH*, EU:C:2016:399.
31 Case C-9/17 *Tirkkonen*, EU:C:2018:142.

"authorization" or "open house" models are in place for instance in the Netherlands, Italy, and Germany.

2.3.6 The provision of services without consideration

42. As set out in Article 2, para. 1 (5), a "public contract" within the meaning of the PPD has to be a contract of "pecuniary interest"; that is to say that the contracting authority receives, in return for any form of consideration, a service which must be of direct economic benefit to that contracting authority.[32]

43. As for the economic character of the service, discussed above, the onerous nature of the contract is interpreted quite broadly by the EU jurisprudence. In relation to the direct award of an ambulance service without the use of public procurement procedures, the CJEU ruled that "*a contract providing for the exchange of services is covered by the concept of public contract, even if the remuneration provided for is limited to the partial reimbursement of costs incurred in order to supply the services agreed*" (underlining added).[33]

44. In *Spezzino*, the CJEU further clarified that "*the fact that a framework agreement and the specific agreements which flow from it do not provide for financial payments for the benefit of the voluntary associations other than the reimbursement of costs is not a decisive factor. A contract cannot fall outside the concept of public contract merely because the remuneration remains limited to reimbursement of the expenditure incurred to provide the agreed service*" (underlining added).[34]

45. In Italy for instance, only the reimbursement of documented "out-of-pocket expenses" does not cross the "pecuniary interest" threshold. The reimbursement of expenses such as the remuneration of the production factors – in particular capital or labor – and any type of additional financing exceeding operating costs, fulfils the "pecuniary interest" requirement (see Section 4.3.4 below).

46. The CJEU's reading of the "pecuniary interest" requirement went even farther. In *ISE*,[35] the judges ruled that a reciprocal obligation between the contracting authority and the contract awardee, even if not involving a direct monetary exchange but entailing a benefit for both parties, is sufficient to satisfy the requirement at hand.

47. Therefore, as is clear, little room remains to escape the application of the PPD from this viewpoint. Social operators and in particular voluntary associations may rely on the reimbursement of only a limited part of their costs.

2.3.7 The provision of below-threshold services

48. Public contracts whose value is below the threshold set out in Article 4 fall outside the scope of the PPD. These are, however, still subject to the fundamental principles underlying the EU Treaties (above all *non-discrimination, equal treatment* and

32 See, *e.g.*, Case C-606/17 *IBA Molecular Italy Srl*, EU:C:2018:843, para. 27.
33 Case C-386/11 *Piepenbrock*, EU:C:2013:385, para. 31.
34 Case C-113/13 *Spezzino*, EU:C:2014:2440, para. 37.
35 Case C-796/18 *Informatikgesellschaft für Software-Entwicklung (ISE)*, EU:C:2020:395.

transparency) in so far as the contracts retain a certain cross-border interest. Absent such interest, the contracts fall outside the scope of EU rules.[36]

49. A public contract has a cross-border interest if it is of interest to economic operators situated in other EU Member States.[37] Regarding above-threshold contracts, the cross-border interest was presumed to exist by the EU legislator. Regarding below-threshold contracts, the CJEU[38] set out the following factors that contracting authorities should take into account when determining whether a contract is capable of attracting foreign operators:

1. The significant amount of the contract or its complexity;
2. The place where the work is to be carried out;
3. The technical characteristics of the market;
4. The existence of (non-fictitious) complaints from foreign operators.

50. If a cross-border interest exists, the PPD fundamental principles apply. As clarified in the 2013 Commission Guide on SGEIs,[39] the principles of transparency, equal treatment and non-discrimination overall require that:

- The contracting authority's intention to conclude a public contract must be adequately publicized. The advertisement may be limited to a short description of the essential details of the contract to be awarded and of the award method together with an invitation to contact the public authority.
- All potentially interested EU service providers should have the possibility to express their interest in bidding for the contract.
- The public authority may then select, in a non-discriminatory and impartial way, the applicants to be invited to submit an offer and, where relevant, to negotiate the terms of the contract or of the concession.
- During such negotiations all economic operators should be on an equal footing and receive the same information from the public authority.
- Decisions adversely affecting a person who has or had an interest in obtaining the contract, such as a decision to eliminate a bidder, should be subject to review.

36 2013 Commission Guide on SGEIs, page 20. As consistently ruled by the CJEU: "*the award of contracts which, in view of their value, do not fall within the scope of the directives on the award of public contracts is nonetheless subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts are of certain cross-border interest*" (Case C-318/15 *Tecnoedi Costruzioni*, EU:C:2016:747, para. 19).

37 See 2013 Commission Guide on SGEIs, page 89.

38 See 2013 Commission Guide on SGEIs, page 89. See also AG Opinion in Joined Cases C-25/14 and C-26/14 *Union des syndicats de l'immobilier (UNIS)*, EU:C:2015:191, paras. 49 and 50.

39 2013 Commission Guide on SGEIs, page 91.

51. In sum, even if falling below the PPD value thresholds, contracts of a cross-border importance are nevertheless subordinated to the application of a certain procedure and administrative duties, to prevent violations of EU fundamental freedoms.

52. This rule is not without exceptions. In *Spezzino*[40] and *Casta*,[41] the CJEU allowed the *direct award* of a *below-threshold contract* for emergency ambulance services to certain voluntary associations on a preferential basis and *in the absence of any transparency*. Although this amounted to a difference in treatment to the detriment of for-profit and foreign undertakings, and thus to a potential restriction of EU free movement rules, the Court concluded that this restriction did not entail a violation of EU law insofar as it was *justified by objective circumstances*. Notably, recourse to voluntary associations was considered to be consistent with the social purpose of the emergency ambulance services and the pursuit of the objectives of the good of the community as well as budgetary efficiency relating to those services.[42]

53. In conclusion, below-threshold contracts of cross-border interest are still subject to simplified procedural requirements demanded by EU principles of transparency and non-discrimination, in particular the duty to advertise the procedure and not to favor national operators. In exceptional cases, non-compliance with those EU principles may be legitimate when there is an *objective justification* (*e.g.* of a social or health nature).

54. It is to be noted, however, that even below-threshold contracts of non-cross border interest generally have to adhere to administrative principles and procedures of some kind set out in *national* legislation and constitutions.[43] In Italy, for instance, below-threshold contracts are subject to slimmer procedures and to a principle of rotation of the awards (see Section 4.2). Thus, a certain degree of red tape can hardly be escaped.

2.3.8 Public-private partnerships

55. The last alternative model that should certainly be discussed in this section are public-private partnerships. They consist in *collaboration models* between public authorities and not-for-profit entities/third sector organizations which, through shared resources, contribute jointly to the realization of projects of social value for the community.

56. These could be considered as a *hybrid alternative model*, encompassing a mix of different components that – theoretically – shield such partnerships from the application of the PPD (even when they entail the conclusion of a *contract*). These elements appear to be: (i) the lack of a contract award within the meaning of the PPD, whereby the operator provides a service for the public benefit against consideration; (ii) the fact that public authorities may engage in collaborative interactions only in relation to services of general interest and only with organizations whose fundamental purpose is to serve

40 Case C-113/13 *Spezzino*, EU:C:2014:2440.
41 Case C-50/14 *Casta*, EU:C:2016:56.
42 *See* AG Opinion in Case C-113/13 *Spezzino*, EU:C:2014:291, para. 54: "*To my mind, it is clear that measures which are genuinely designed to ensure that medical services (such as, for example, medical transport services) provided on behalf of the public authorities to all citizens are reliable and of good quality, while at the same time minimising the cost to the public purse, are in principle capable of justifying a restriction of those fundamental freedoms*."
43 For instance, the Italian administrative law (Law 241/1990) in any case provides procedural requirements linked to national principles of transparency and non-discrimination.

the general interest; and (iii) in general, the limited level of reimbursement granted to such organizations covering only certain costs.

57. However, the dividing line between "public contracts" (subject to the PPD) and "public-private partnerships" (theoretically, not subject to the PPD) is yet to be clearly traced.

58. In December 2020, the High Court of Justice of Aragon in Spain made a request for a preliminary ruling[44] to the CJEU regarding the legitimacy of "public-private agreements" provided by legislation of the Autonomous Community of Aragon.[45] Such request is of great importance for the topics discussed in the present memorandum. The Spanish Court, in particular, asked the CJEU whether national legislation allowing public authorities to make use of *non-contractual agreements* with private non-profit organizations to provide social services against the mere reimbursement of costs, at the exclusion of for-profit entities, and without following the procedures set out in the PPD, are consistent with EU rules.

59. The CJEU has yet to provide its ruling, although the Advocate General already issued its Opinion on the case. The Opinion, for the present purposes, can be summarized as follows:

- The main characteristics of a "public contract" within the meaning of the PPD are (i) the existence of a contract for pecuniary interest, (ii) concluded between an economic operator and one or more contracting authorities, (iii) for the provision of services.

- If these characteristics are met, if there is a "choice" (*i.e.* selectivity) of an economic operator and if the contract exceeds the value thresholds set forth in Article 4, the PPD applies.

- It is for the referring/national court to determine, in light of the EU legislation and CJEU case law provided in the Opinion, whether these criteria are met.

- That said, the crux of the question is: "*can profit-making entities be excluded from concluding public contracts under the specific provisions of Directive 2014/24*?" (para. 96). They can do so to the extent that they comply with the underlying principles of the PPD, notably the principles of equal treatment[46] and proportionality. Although it is for the referring court to determine whether these principles are complied with, the AG provides its viewpoint:

> "*I do not see how the automatic exclusion of profit-making entities from the scope of national legislation ensures that the services at issue are provided in an appropriate way* […]. *Moreover, such automatic exclusion does not appear to contribute to the quality, continuity, affordability, availability and comprehensiveness of those services, as required by Article 76(2) of Directive 2014/24. In implementing the*

44 A request for a preliminary ruling from the CJEU is request for clarification on the interpretation and/or validity of national legislation in light of EU rules submitted by national courts to the CJEU.

45 *See* Request for a preliminary ruling in Case C-676/20 *ASADE* of 11 December 2020, available here.

46 The principle of equality requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way, unless such treatment is objectively justified. See para. 119 of the Opinion at hand.

simplified regime, it would appear more appropriate to focus on the ability to provide cost-effective, quality social services, rather than on the nature of the entity providing those services." (para. 125)

"*Consequently, it is inconceivable, in my view, that such an exclusion is either justified or proportionate; it is therefore contrary to the principle of equal treatment.*" (underlining added) (para. 126)

- The AG's final opinion on the question posed by the Spanish Court is that the articles of the PPD applying to social services, and internal market rules on the freedom of establishment, *"must be interpreted as not precluding national legislation, which allows a public authority to conclude, without complying with the procedural requirements imposed by EU law, a public contract under which that authority entrusts only non-profit entities with the provision of certain social services in return for reimbursement of the costs incurred by those entities, provided that such legislation complies with the principles of equal treatment and proportionality, which is for the referring court to ascertain*" (underlining added).[47]

60. The final solution proposed by the AG is rather ineffective. It limits itself to concluding that the Spanish legislation at stake is consistent with EU law as long as all the key elements required by EU law are met in practice. However, the Opinion nonetheless contains a clear and systematic analysis of the relevant concepts and case-law regarding the award of social services, and will likely be of great use to the CJEU when providing its final ruling.

47 AG Opinion in Case C-676/20 *ASADE*, EU:C:2022:77, para. 158.

III. THE NETHERLANDS

3.1 Introduction

61. In the Netherlands, public procurement of social services is currently a widely debated topic. This is illustrated by the publication of various legislative proposals which are aimed at either completely removing social services from the mandatory public procurement requirements, or relieving the administrative burden on social services providers when participating in tenders.

62. This Chapter first sets out the current Dutch legislative framework regarding public procurement (Sections 3.2.1 and 3.2.2). This includes a brief description of the legislative proposals aimed at reforming Dutch public procurement laws regarding social services (Section 3.2.3). Lastly, Section 3.3 describes two alternative models of public procurement of social services that are currently used in the Netherlands.

3.2 Legislative framework

3.2.1 Public Procurement Act

63. The various public procurement Directives have been implemented in the Public Procurement Act ("**Procurement Act**"). [48] On 1 July 2016, the amended Procurement Act entered into force. The Procurement Act contains the current general legislative framework regarding public procurement in the Netherlands.

64. The Netherlands can be characterized as a decentralized unitary state, in which local authorities have far-reaching autonomy.[49] The Procurement Act applies to public procurement by contracting authorities at the national level (the Dutch State, "*Rijksoverheid*"), regional level (regional authorities, "*provincies van Nederland*"), local level (municipalities, "*gemeenten*") and other public bodies governed by public law that exercise public powers such as special sector entities (*e.g.*, water authorities, "*waterschappen*") and public transport authorities.

65. The current relevant EU thresholds for the applicability of the Procurement Act are as follows:[50]

Contracting authority	Supplies contracts	Service contracts	Works contracts
Central government	EUR 140,000	EUR 140,000	EUR 5,382,000
Decentralized government and public law institutions	EUR 215,000	EUR 215,000	EUR 5,382,000
Special sector company	EUR 431,000	EUR 431,000	EUR 5,382,000

48 Law of 22 June 2016 modifying the "Aanbestedingswet 2012" with respect to the implementation of public procurement Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, available here (in original language).

49 Currently, there are 12 provinces and 346 municipalities in the Netherlands, available here (in original language).

50 Thresholds as published by the European Commission, available here.

66. The various public procurement procedures applying in the Netherlands are set out in Section 2.2.1 of the Procurement Act:

- The open procedure (Article 2.26 Procurement Act); the restricted procedure (Article 2.27 Procurement Act);
- The competitive dialogue (Article 2.28 Procurement Act);
- The competition procedure with negotiation and prior notification (Article 2.30 Procurement Act); and
- The negotiated procedure without prior notification (Article 2.32 Procurement Act).

67. Articles 74-77 of the PPD (*i.e.* the "light regime") regarding the public procurement of social services are transposed in Articles 2.38 and 2.39 Procurement Act. These two articles are the main articles regarding the public procurement of social services in the Netherlands. Since 2015, municipalities are responsible for social services such as the procurement of home care services and youth care.

68. In accordance with the PPD, Article 2.38 of the Procurement Act provides that the "light regime" is obligatory for the public procurement of contracts of social services that are equal to or exceed the EUR 750.000 threshold.

69. Pursuant to Article 2.39 of the Procurement Act, in the public procurement of social services the contracting authority is required to:

- Make a (pre) announcement of the contract (prior information notice) which includes the information as listed in Article 2.58a of the Procurement Act;
- Check whether the tenders meet the technical specifications, requirements and standards set by the contracting authority;
- Draw up an official report of the award of contract; and
- Publish the contract award notice (this may be bundled per quarter).

3.2.2 Other key documents

70. Several provisions of the Procurement Act are further specified in the Public Procurement Decree ("**Decree**").[51] The principle of proportionality, which is a key principle in EU and Dutch procurement law, is one of the main concepts in the Decree. The Proportionality Guide ("**Guide**")[52] also includes specific guidance as to how this principle should be interpreted by public authorities in the various stages of procurement contracting in order to ensure that all requirements imposed by a contracting authority are proportionate to the object and scope of the public contract.

51 Public Procurement Decree ("Aanbestedingsbesluit"), available here (in original language).
52 Proportionality Guide ("Gids Proportionaliteit"), available here (in original language).

The Guide also explains which procurement procedure should be applied if the EU thresholds are not met.[53]

71. Pursuant to the Decree, this Guide is legally binding and mandatory. Currently, the Dutch States General is reviewing the latest draft of the revised Guide (which dates from February 2021).[54]

3.2.3 Recent legislative developments

72. Various Dutch stakeholders perceive the PPD and the Procurement Act as burdensome to both contracting authorities and social services providers.[55] Public procurement is seen as time consuming, complex and expensive. This is illustrated by various newspaper articles[56] and a recent trend that shows an increase in the number of court cases regarding the procurement of social services.

73. The discontent expressed by various parties has led to debates on reform of the Dutch (and therefore implicitly also the European) system of public procurement. This subparagraph discusses two recent legislative proposals in this field.

Legislative proposal 1

74. In December 2018, two members of the Dutch Parliament proposed to change the current legislative framework for public procurement of social services.[57]

75. In the proposal, the members of Parliament argue that the current legislative framework is often seen as highly undesirable and demanding by both municipalities and care providers. Therefore, the legislative proposal aims to add a specific article in the Procurement Act in which social services are exempted from any public procurement obligations.

76. The draft legislative proposal is currently pending in Parliament. According to the Dutch calendar of draft legislations, the last activity regarding this proposal dates from 12 April 2019.[58] This could be because the draft proposal seems contrary to the PPD (and thus the EU Treaties). Abolishing the procurement requirements for tenders in the social domain would mean that the obligations that arise from Article 74 of the PPD are no longer met.

53 Please note that which procurement procedure applies in a specific situation also depends on the local public procurement policy of the contracting authority.
54 "Concept Gids Proportionaliteit", available here (in original language).
55 See for example Deloitte, Study of regulatory burden and the level of cross-border dimension, available here. See also the Public Procurement Monitoring Report of the Netherlands of the Ministry of Economic Affairs and Climate Policy, available here.
56 NRC Handelsblad, Rotterdam slaat alarm om aanbesteding van zorg, available here (in original language).
57 Initiatiefvoorstel Ellemeet en Van der Staaij, Wijziging van de Aanbestedingswet 2012 in verband met het schrappen van de verplichte aanbesteding binnen het sociaal domein, available here (in original language).
58 Eerste Kamer der Staten-Generaal, Initiatiefvoorstel-Ellemeet en Van der Staaij over het schrappen van de verplichte aanbesteding binnen het sociaal domein, available here (in original language).

Legislative proposal 2

77. In November 2019, the then Dutch Minister of Health ("**Minister**") announced he wanted to simplify the procurement rules in the domain of social services.[59] The Minister would have preferred to completely exempt youth care and social support from the Procurement Act. However, as the Procurement Act is based on the PPD and the PPD is not expected to be amended in the near future, this was not seen as possible. Therefore, the Minister proposed to amend the Youth Care Act and the Social Support Act.

78. Currently, the Youth Care Act and the Social Support Act require tenders to be awarded to the most economically advantageous offer.[60] Contracting authorities are obliged to compare bids based on an award system. This prevents them from awarding a contract on the basis of the lowest price. In practice, it seems that contracting authorities have difficulties designing such award systems due to the complexities of the social care sector.

79. According to the Minister, the proposed changes to the Youth Care Act and the Social Support Act would result in easier procurement procedures for social services providers and enable contracting authorities to focus more on content than procedures.

80. On 19 April 2022, the draft proposal was passed by the Parliament, after which the Senate has the right to accept or reject the legislative proposal. It is unclear when the Senate will deal with the proposal.

3.3 Alternative models for the provision of social services

3.3.1 Introduction

81. When a contracting authority requires, for example, social services for disabled persons, it can choose to either buy these services on the market or it provide these services itself, even in cooperation with other related entities within the public sector.[61] The PPD specifically states that contracting authorities are free to choose how they wish to proceed.[62]

82. This section describes two alternatives to public procurement of social services that are being used in the Netherlands when contracting authorities want to buy these services on the market. Section 3.3.2 describes the instrument of subsidies, and the so-called "open house" model is explained in Section 3.3.3.

59 Wet maatschappelijk verantwoord inkopen Jeugdwet en Wmo 2015, available here (in original language).
60 Article 2.11, lid 2 Youth Care Act and Article 2.6.4 Social Support Act 2015.
61 The in-house exception relates to situations in which the contracting authority performs certain activities internally. Article 12 of the PPD provides two models of cooperation between entities within the public sector: vertical cooperation (Article 12(1-3) PPD, see *e.g.* CJEU 18 November 1999, Case C-107/98, *Teckal*, EU:C:1999:562) and horizontal cooperation (Article 12(4) PPD, see *e.g.* CJEU 9 June 2009, Case C-480/06, *Commission v. Germany*, EU:C:2009:357). These types of cooperation are exempted from public procurement requirements because, when the specific requirements are fulfilled, they do not qualify as a public contract. These models fall outside the scope of this memorandum and are thus not further explained.
62 See Recitals (5) and (31) and Article 1 para. 4 of the PPD.

83. These alternatives closely resemble the alternatives in Germany (see Section 6.4).

3.3.2 Subsidies

84. The first alternative to the public procurement of social services is the instrument of a subsidy, also known as grants. When awarding a grant, a governmental body (either centralized or decentralized) makes a direct financial contribution to support or stimulate a specific project in the social services domain. The precise amount (a contribution) is set by the governmental body, and the service provider is required to fulfil the purpose of the grant as specified in the contract. Subsidies are governed by the Dutch General Administrative Law Act ("**Awb**", see Title 4.2 Awb and *e.g.* Article 4:21 Awb for the definition of a subsidy).

85. Even though subsidies and public contracts share similarities, they are distinct instruments and different laws apply. Subsidies cannot be enforced by the governmental body (there is no legal entitlement). More importantly, as shown in the EU Chapter above, subsidies do not fall under the scope of the PPD or the Procurement Act as they do not involve any acquisition of services from the beneficiary. See in particular Recital (4) of the PPD, which states that:

> "(…) *Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules*. (…)" (underlining added).

86. In practice, the dividing line between a public contract and a subsidy can be blurry. This is complicated further by the option of a so-called "subsidy tender" ("*subsidie-tender*"), which is an instrument in which a subsidy is divided between various care providers. The municipality ranks the subsidy applications and awards the highest number of points to the tender that has the highest quality. The care providers with the best bids (highest scores) will receive the subsidy, until the subsidy ceiling, or the maximum number of subsidies that can be granted, is reached.

87. It is important to flag that the "label" does not matter; when the funding fulfils the characteristics of a public contract, it is a public contract, even though the municipality qualified the funding as a subsidy.

88. Subsidies are often used by Dutch municipalities in the social domain.

3.3.3 The "open house" model

89. The second alternative to public procurement of social services in the Netherlands is the so-called "open house" model. The origins of the open house model can be found in the 2016 *Falk Pharma* judgment of the CJEU (see above Section 2.3.5).[63]

90. The open house model acts as an admission system for the provision of care services. First, the contracting authority sets only the suitability requirements and/or minimum requirements to provide the service. All providers who meet these criteria can in principle enter the system and offer their services. Then, the contracting authority enters into agreements with operators who provide services at predetermined conditions. The

63 Case C-410/14, *Falk Pharma*, EU:C:2016:399. See also C-9/17, *Tirrkonen*, EU:C:2018:142.

contracting authority does not make a selection between these operators but rather lets them all enter into the system during the entire duration of the contract.

91. Because there is no selectivity, the open house model does not qualify as public procurement. See also Recital (4) of the PPD:

> "(…) *Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorisation schemes (for instance licences for medicines or medical services).*" (underlining added).

92. Even though the open house model does not qualify as public procurement, it must still be in line with the fundamental principles of the TFEU. These principles include the free movement of goods, freedom of establishment, the freedom to provide services and general principles such as equality of treatment, non-discrimination, mutual recognition, proportionality and transparency.

93. The open house model is widely used by Dutch municipalities in the field of youth care. In practice, municipalities often conclude agreements with all care providers that meet the predetermined requirements and that accept the standard conditions. Residents of the municipality who are entitled to support are then able to choose the care provider themselves.

IV. ITALY

4.1 Introduction

94. In Italy, the regulation of social services has recently undergone an important legislative overhaul. In 2017, the so-called "Code of the Third Sector" came into force introducing and codifying the main alternative models to public procurement for the provision of social services. This has sparked a lively debate on the legitimacy of such alternative models, seen as an attempt to elude the application of the PPD.

95. This Chapter first sets out the current Italian legislative framework regarding public procurement (Section 4.2). Then, it analyses the key aspect of the Code of the Third Sector, in particular with respect to its alternative models and the conflict with the PPD provisions (Section 4.3). Lastly, it briefly touches upon the historical models for the provision of social services used in Italy (Section 4.4).

4.2 Social services in the Italian Public Contracts Code

96. On 18 April 2016, the Italian government implemented the PPD (alongside Directive 2014/23/EU on public concessions and Directive 2014/25/EU on procurement of water, energy, transport and postal services) through Legislative Decree 50/2016 ("**Public Contracts Code**").[64]

97. The previous Public Contracts Code, issued through Legislative Decree n. 163/2006 (implementing the 2004 PPD), largely excluded social services from its scope. Only provisions regulating technical specifications and contract award notices applied to the sector, in line with the broader discretion left to Member States to organize services of social value in the manner deemed most appropriate.

98. The Public Contracts Code accurately transposed the content of the PPD. A "light regime" is ensured for social services, notably in Articles 140, 142 and 143 of the Code. Article 140 sets out the scope of application of the light regime, covering only services listed in Annex IX. Article 142 concerns the publication of tender notices and Article 143 foresees the possibility of reserving contracts for certain social, health and cultural services.

99. The other relevant provisions of the Code concern:

- **Contract thresholds**. Article 35 identifies, for social services, a specific threshold of EU relevance that for services provided in *ordinary sectors* corresponds to €750,000.00; and for services provided in *special sectors*[65] corresponds to €1,000,000.00.

64 Legislative Decree no. 50 of 18 April 2016 on the Public Contracts Code. English version is available here.

65 Ordinary sectors are those not falling within the following list of special sectors: (i) gas; (ii) electricity; (iii) water; (iv) transportation services; (v) ports and airports; (vi) postal services; and (vii) gas, coal and other solid fuels extraction.

- **Prior information notice**. Article 70 stipulates that with regard to public contracts for social services, the prior information notice[66] may cover a period which is longer than twelve months but cannot exceed twenty four months.

- **Award criteria**. Article 95 foresees that social services can be exclusively awarded to the most economically advantageous offer based on the best quality/price ratio.

- **Reserved contracts**. Article 112 provides that contracting authorities may reserve the right to participate in contract and concession procedures or may reserve their execution to economic operators and social cooperatives and their consortia whose main purpose is the social and professional integration of disabled or disadvantaged persons. Authorities may reserve their execution in the context of sheltered employment programs when at least 30% of the employees of those economic operators are disabled or disadvantaged workers.

- **Specific exclusions**. Article 17 excludes from the scope of the Code services contracts concerning civil defense, civil protection and danger prevention services that are provided by non-profit organizations or associations.

100. The Code sets out a specific treatment for *below-threshold contracts*. According to Article 36, the award of below-threshold contracts shall comply with the principles of economy, effectiveness and fairness as well as of free competition, non-discrimination and transparency. Contracting authorities cannot distort competition by favoring certain subjects. As such, the award of those contracts is subject to a varying degree of simplified procedures (depending on the proximity of the contract value to the Article 35 thresholds)[67] and, in particular, must necessarily respect the so-called *principle of rotation of the awards*. The latter principle prohibits the *invitation* to tender and the *awarding* of contracts to the *outgoing contractor* in the awarding of the subsequent contract, to avoid the consolidation of privileged positions.

4.3 The Code of the Third Sector: alternative models for the provision of social service

4.3.1 Key content and provisions

101. In view of the fragmented, chaotic nature of the legislation applying to the procurement of social services, the Italian government on 3 July 2017 issued the so-called "**Code of the Third Sector**" ("*Codice del Terzo Settore*" – "**CTS**") by Legislative Decree no. 117.[68] The CTS attempts to unify, restructure and consolidate the scattered pieces of legislation applicable to not-for-profit entities in Italy.[69]

66 The notice is published by the public administrations and indicates the procurement plans for the following year.

67 The lowest threshold is €40,000. Contracts falling below this threshold can be awarded directly to any operator without the publication of a notice.

68 The legislative text of the CTS is available here (in original language). A summary of the CTS drafted by the Italian Parliament's Chamber of Deputies is available here (in original language).

69 The CTS has the "*purpose of supporting the autonomous initiative of citizens who contribute, also in associated form, to pursue the common good, to raise the levels of active citizenship, social cohesion and protection, promoting the participation, inclusion and the full personal development, so as to enhance the potential for growth and employment, in implementation of Articles 2, 3, 4, 9, 18 and 118, fourth paragraph, of the Constitution*" (Article 1).

102. The CTS applies to "Third Sector Organizations" ("**TSOs**") only. Article 4 defines TSOs as not-for-profit entities constituted for the "*pursuit of civic objectives or objective of solidarity or social utility, which carry on, exclusively or principally, one or more activities of general interest in the form of voluntary work or the free provision of money, goods or services, or mutual assistance or production, or the exchange of goods or services, and which are registered in the national third sector register*".[70] Subjects covered by the above definition are particularly: associations, foundations, social enterprises, social cooperatives, philanthropic entities, voluntary organizations, associations for social promotion and mutual aid societies.

103. The CTS regulates the foundation, registration, monitoring, budgetary obligations as well as the financing and preferential fiscal treatment applying to the various TSOs. Most importantly, Title VII of the CTS introduces the following models of interaction between TSOs and public authorities – so-called "**public-private partnership models**"[71] – in the planning and provision of social services: (i) co-programming, project co-development and accreditation ("*co-programmazione*"; "*co-progettazione*"; "*accreditamento*"); and (ii) contracts ("*convenzioni*").

104. Although placed outside of the Public Contracts Code and of general administrative law rules and regulations, partnership models are not automatically shielded from the latter's application. As discussed further below, the reconciliation between the Code's and CTS's partnership models is an intricate issue, still under debate before Italian and EU courts. As regards general administrative rules, the CTS makes explicit reference to the application of the fundamental principles of administrative law (of, for example, transparency, non-discrimination and budgetary efficiency) implying the subordination of CTS's partnership models to (albeit elementary) public procedures.

4.3.2 Partnership models: co-programming, project co-development and accreditation

105. Article 55 of the CTS regulates the active "*involvement of TSOs*" in the provision of services of general interest, including social services, through partnership/collaboration models with PAs consisting of the following three-phased activities:

(i) **Co-programming** ("*co-programmazione*") is aimed at the *identification* of the societal needs, as well as of the related necessary actions, implementation procedures and available resources. In essence, this is a participative and shared administrative procedure taking the form of a *preliminary investigation* mapping out the societal needs as well as the key areas of action and taking advantage of the synergies arising from the close cooperation among TSOs (contributing with their practical experience and know-how) and PAs (meeting their constitutional, social obligations).

(ii) **Project co-development** ("*co-progettazione*") follows the co-programming phase. It is aimed at the *definition*, and eventually the *realization*, of specific service/intervention projects meeting the needs identified in the co-

70 The Italian Ministry of Labour has further specified the requirements of third sector organizations in its Note n. 2088 of 28 February 2020, available here (in original language).

71 An exhaustive description of the models set out in the CTS is provided in the Guidelines of the Italian Ministry of Labour concerning the interaction between TSOs and PAs as set out in Article 55-57 of the CTS, adopted by Decree n. 72/2021, available here.

programming stage.[72] Project co-development entails the implementation of a pre-defined project through *shared human and capital resources*. TSOs' workers are compensated by the PA for their contribution. The project co-development procedure, mainly consisting of round-table meetings among the parties, is followed by the stipulation of a *contract* regarding the actual execution of the project.

(iii) **Accreditation** ("*accreditamento*") consists of the (optional) procedure aimed at the *identification* of the TSOs with whom PAs may activate the project co-development partnership. In essence, the PA through a public administrative procedure sets out the *suitability criteria* that TSOs must satisfy to be able to participate in the above private/public partnership procedures. Accredited partners are entered into a *register* used to *select* the entity that will eventually participate in the partnership model. The final choice of such entity should, in principle, be operated by the ultimate beneficiary of the project. Only if this is not possible, the choice will be made by the PA in an impartial manner and by specifically evaluating the suitability of the TSO in relation to the needs of the final beneficiary.[73]

106. The rationale behind the above partnership models – which also justifies their exclusive application to TSOs – lies in the pivotal role played by TSOs in society as well as the synergies flowing from the close collaboration between private operators and PAs naturally leading to better outcomes for people in need.

107. This has been recognized by the Italian Constitutional Court in its Judgment n. 131/2020, pointing out that TSOs "*constitute a capillary net of proximity and solidarity on the territory,* (...) *able to put at the disposal of the public administration both precious informative data (otherwise achievable in longer times and with organizational costs at its own charge), as well as an important organizational and intervention capacity: which often produces positive effects, both in terms of saving of resources and of increase of the quality of the services and of the performances supplied in favour of the 'society of need'.*"[74]

4.3.3 Contracts

108. The CTS regulates through Articles 56 and 57 other alternative models for the provision of social services, consisting of the stipulation of "contracts" ("*convenzioni*") between TSOs and PAs.[75]

109. Article 56 foresees that:

72 Project co-development was already foreseen by Italian legislation concerning the award of social services (*i.e.* Prime Ministerial Decree of 30 March 2001) although only for "experimental and innovative" interventions, requiring the active involvement of social operators.

73 As explained in the EU Chapter, any selection made directly by the PA may meet the "selectivity" criteria of the PPD and trigger the application of a public procurement procedure.

74 Judgment of the Italian Constitutional Court n. 131/2020, 20 May 2020, available here.

75 These are specific contracts, different from the contracts mentioned above in relation to the project co-development partnership.

- PAs can conclude contracts with "*voluntary organisations and associations for social advancement"*[76] (*i.e.* not with any TSO) with the objective of carrying out "*social activities or social services of general interest"* in favor of third parties (*i.e.* not their own members), provided this proves to be "*more favourable than resorting to the market"*.[77]

- For this purpose, those type of TSOs can obtain the reimbursement of only the "*documented and actually incurred expenses*".[78]

- They are to be identified and selected in accordance with the principles of impartiality, publicity, transparency and equality of treatment, through reserved, comparative (but not public procurement) procedures. Moreover, they must demonstrate adequate moral, technical and professional suitability.

- Contracts shall: (i) ensure the existence of the necessary conditions to carry out *with continuity* the agreed activities; (ii) ensure the *respect of users' rights and dignity*; (iii) regulate the essential aspects of the relationship, *e.g.* duration, content of the voluntary work, the required professional qualifications, financial reporting and the methods of reimbursement of the expenses.

110. A special form of contract is regulated by Article 57 of the CTS. PAs can decide to *directly award* service contracts (only) for "*emergency ambulance transport services*" (and only) to accredited *voluntary organizations* as long as this ensures that the criteria of solidarity, social utility and economic efficiency are met, and insofar as the service is provided in compliance with the principles of transparency and non-discrimination.

111. Articles 56 and 57 therefore provide for the possibility of concluding social services contracts with a limited subjective and objective scope; however, only certain TSOs can make use of this tool and only for certain services. In this way, the CTS, it appears, codifies the CJEU jurisprudence analyzed in the EU Chapter above. Article 56 embeds in "contracts" several key elements shielding this model from falling within the scope of the PPD – *i.e.* the reimbursement of operating expenses only, the price of the service being below market conditions, and the effective contributions to social goals of voluntary organizations and associations for social advancement. Article 57 designs a specific type of contract adhering to the rulings of the CJEU in *Spezzino* (C-113/13) and *Casta* (C-50/2014).

112. However, it is worth noting that the legislative design of these articles proved to be insufficient to shelter them from judicial challenges. Currently, there are two similar preliminary ruling requests[79] at the attention of the CJEU referred by the Italian Council of State (*i.e.* the highest administrative court in Italy) regarding the *discriminatory*

76 The subjective limitation to voluntary organizations and social promotion associations is justified by the consideration that these entities make use mainly of the activities of their own associates-volunteers and therefore express a more marked connotation of solidarity than other TSOs.

77 This sentence was inserted at the request of the Council of State when expressing its Opinion n. 1405/2017 to ensure that the contract would not fall within competition dynamics protected by EU rules demanding the application of the PPD.

78 Article 56 para. 4 firmly excludes the possibility of any supplementary financial attribution and limits the reimbursement to the indirect costs directly attributable to the activity covered by the covenant.

79 Requests for clarification on the interpretation and/or validity of national legislation in light of EU rules, submitted by national courts to the CJEU. The CJEU is yet to issue its ruling.

nature of Article 56 and, in particular, Article 57, given that they exclude the possibility of concluding "contracts" with other types of TSOs.[80]

4.3.4 The reconciliation between partnership models and the Public Contracts Code

113. The CTS, at least in part, fell short of expectations to bring clarity and legal certainty in the field. Its transversal application to all aspects of TSOs' life sparked reconciliation issues between CTS's partnership models and the Public Contracts Code, calling upon Italian courts and administrative authorities to provide clarification and guidance.

114. The debate – which is still ongoing – has been predominantly centered around whether, with the CTS, the Italian legislator has artificially eluded the application of the Public Contracts Code and its overarching principles of competition within the EU internal market.

115. In this respect, the Italian Council of State provided clarification through its Opinions nn. 1405/2017 and 1382/2018. These Opinions – (overly) oriented towards the strict interpretation of the CTS in an EU-compatible manner – can be summarized as follows:

- "*The European Treaties do not confer to the Union any competence in the field of non-profit organizations. Despite this policy choice – traditionally justified by the proximity between the activities of non-profit organizations and national welfare systems – the competence of the Member States must, nevertheless, be exercised in compliance with competition rules*".

- In this context, the CJEU has consistently adopted a "*functional notion of 'undertaking*'". This notion holds a "*vast semantic latitude*", entailing the "*consequent necessity to submit to competition rules every human activity characterized by an economic importance, in order to avoid the permanence of 'pockets' subtracted to the competitive dialogue*".

- As such, any activity that can be characterized as "*non-economic*" naturally escapes the application of competition rules. As provided by the PPD (and the Italian Public Contracts Code), "*non-economic services of general interest should not fall within the scope*" of public procurement rules. To the contrary, services of general *economic* interest, such as social services provided at market conditions, do demand the application of competition rules and, by extension, of public selection procedures.

- Against this background, the tools provided by the CTS can escape the application of the Public Contracts Code insofar as:

  i. They do not have a selective nature; or

  ii. They are not aimed at the award of a service contract; or

[80] See summary of preliminary ruling requests in Case C-213/21 *Italy Emergenza Cooperativa Sociale v Azienda Sanitaria Locale Barletta-Andria-Trani*, available here; and in Case C-214/21 *Italy Emergenza Cooperativa Sociale v Azienda Sanitaria Provinciale di Cosenza*, available here.

iii. Even if the underlying service is awarded to a selected party, this will be provided free of charge.[81]

- In this light, "accreditation" systems must be open to any TSO willing to be accredited, along the lines of a licensing scheme. "Project co-development" – by definition entailing an upstream selection of potential partners – must be provided "free of charge" (see footnote 81). Moreover, the general principles of transparency, equal treatment and non-discrimination must always be complied with, and, considering the exclusion of for-profit entities from the CTS models, resort to these models must be justified by the inherently social character of the service at stake. Otherwise, the Public Contracts Code will represent the applicable regime.

116. A second clarificatory contribution came through Judgment n. 131/2020 of the Constitutional Court. The Court stressed the lack of any apparent conflict between EU rules, in particular on public procurement, and the CTS partnership models (those regulated by Article 55), supporting the exclusion of the latter from public procurement mechanisms.

- The models provided by Article 55 of the CTS establish "*a channel of shared administration, alternative to that of the profit and the market: 'co-programming', 'co-development' and 'partnership' (which can also lead to forms of 'accreditation') are configured as phases of a complex procedure that expresses a different relationship between the public and the private social sector, not based simply on a* […] *relationship* [of reciprocal obligations]".

- The above-mentioned models are "*not based on the payment of prices from the public to the private sector, but on the convergence of objectives as well as on the aggregation of public and private resources for the planning and development, in common, of services and interventions aimed at raising the levels of active citizenship, cohesion and social protection, according to a relational sphere that goes beyond the mere utilitarian exchange*".

- "*EU law itself – including under the* [Public Procurement Directive and the Concessions Directive], *as well as according to the relevant case law of the Court of Justice* [in particular *Casta* and *Spezzino*] *– maintains, on closer inspection, in the hands of Member States the possibility of providing, in relation to activities with a marked social value, an organizational model inspired not by the principle of competition but by that of solidarity*".

117. Further, in the attempt of drawing a demarcation line between CTS models and Public Contracts Code, the Italian Ministry of Labour in its Guidelines on the subject clarified that: "*In the context of a public procurement procedure, the public administration defines substantially everything, with the exception of* […] *the content of economic operator's offer. The relationship of subsidiary collaboration, characterizing the CTS models, is – for the entire duration of the contractual/conventional relationship – based on co-responsibility, starting from the co-construction of the project (of the service*

81 According to the Council of State, "free of charge" means that only the reimbursement of documented out-of-pocket expenses is acceptable. The reimbursement of expenses such as the remuneration of the production factors (in particular, capital or staff) and any type of financing from the PA defeats the gratuitous character of the service.

and/or intervention), passing through the reciprocal provision of resources that are functional to the project, up to the conclusion of the project activities and the reporting of expenses".[82]

4.4 Historical models for the provision of social services in Italy

118. The Italian system provides for other, historical models of interaction between non-profit organizations and PAs going beyond the application of the Public Contracts Code. These models are partly superseded by the models of the CTS analyzed above. Below we analyze the most relevant ones.

Contracts

119. The conclusion of contracts ("*convenzioni*") between PAs and not-for-profit organizations has always been the most employed model in Italy. In the absence of public procurement laws, initially PAs could directly award the provision of social services through this tool. In particular, the Framework Law on Voluntary Work (Law n. 266/1991) and the Prime Ministerial Decree of 30 March 2001 enabled PAs to stipulate contracts for the provision of social services with *voluntary organizations* without following any procurement procedure. This is now superseded by Articles 56 and 57 of the CTS (see above).

120. As regards other third sector organizations (other than voluntary organizations), the Prime Ministerial Decree of 30 March 2001 provided for the stipulation of contracts as well – however, in this case public procurement procedures applied, *i.e.* the contract was awarded through *comparative, negotiated procedures*, based on the *most economically advantageous offer*.

Authorization and accreditation of residential care services

121. Law n. 328/2000 regulates the authorization and accreditation of residential care services.[83] "Authorization" implies the verification of the *structural* and *organizational* requirements to exercise the relevant activity, based on objective criteria established by regional law beforehand. "Accreditation" is the act by which *municipalities* certify the possession of *additional quality standards* and proceed with the payment of tariffs to accredited subjects. Municipalities can then issue *vouchers* to beneficiaries for the purchase of social services from (any of) the accredited subjects. Thus, it is the beneficiary of the service who chooses the preferred supplier. These authorization and accreditation models are still in use.

82 See Guidelines of the Italian Ministry of Labour concerning the interaction between TSOs and PAs as set out in Article 55-57 of the CTS, adopted by Decree n. 72/2021, page 6, available here.

83 Law of 8 November 2000 n. 328, *Framework Act for the Implementation of the Integrated System of Interventions and Social Services*, GU n. 265, available here (in original language).

V. FRANCE

5.1 Introduction

122. The Public Procurement Directive was implemented in France through (i) Order No. 2015-899 of 23 July 2015 on public procurement; and (ii) Decree No. 2016-360 of 25 March 2016 on public procurement.[84]

123. On 1 April 2019, the French Public Procurement Code ("*Code de la commande publique*") ("**CCP**") entered into force.[85] The CCP applies to public procurement contracts, concession contracts and public-private partnership contracts. The CCP contains several provisions regarding contracts for social services and other specific services.

124. The key provisions of the CCP that are relevant to social services are set out Section 5.2. Section 5.3 contains a short summary of the French Guide on Social Aspects in Public Procurement and Section 5.4 sets out several alternative models to public procurement that exist in France.

5.2 Legislative framework applicable to social services and other specific services

5.2.1 Relevant thresholds and procedural rules

125. The thresholds included in the CCP are in line with the thresholds of the PPD (as updated in 2019)[86]:

Contracting authority	Supplies contracts	Service contracts	Works contracts
State or a national public institution	EUR 140,000	EUR 140,000	EUR 5,382,000
Local authority or public health institution	EUR 215,000	EUR 215,000	EUR 5,382,000
Public purchaser who is a network operator (production, transport or distribution of electricity, gas, water, etc.)	EUR 431,000	EUR 431,000	EUR 5,382,000

126. For contracts whose value exceeds the thresholds, a contract notice has to be published in the Official Journal of the European Union ("**OJEU**"), in addition to the *Bulletin Officiel des Annonces des Marchés Publics*.

127. The conditions for the publication and competition processes can be determined freely by the contracting authority ("*procédure adaptée*") (i) for contracts whose estimated

84 The order and the decree on public procurement were subsequently repealed.

85 Available here on Légifrance, the French government's website for the publication of legislation. See also Order No. 2018-1074 of 26 November 2018 on the legislative part of the Public Procurement Code and Decree No. 2018-1075 of 3 December 2018 on the regulatory part of the Public Procurement Code.

86 All amounts indicated are *without* VAT. See Commission Delegated Regulation (EU) 2019/1828 of 30 October 2019 amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the thresholds for public supply, service and works contracts, and design contests, available here.

value is below the thresholds set out above (art. R. 2123-1, 1°); and (ii) for lots of a contract whose total estimated value is equal to or exceeds the thresholds for the formal procedure when the following conditions are met: (a) the estimated value of each lot is below EUR 80,000 for supply and services contracts or EUR 1,000,000 for works contracts; and (b) the aggregate value of these lots does not exceed 20% of the total estimated value of the contract (art. R. 2123-1, 2°). The conditions should be adapted to the object and specifics of the contract, the number and location of the economic operators likely to be interested in the contract and the circumstances of the contract to be concluded (see art. R. 2123-4 to art. R. 2123-7).[87]

128. The CCP also foresees that contracting authorities may use a negotiated procedure without prior publication of a contract notice, if the conditions foreseen in art. R. 2122-1 and following of the CCP are fulfilled and that contracting authorities may use a competitive procedure with negotiation or competitive dialogue if certain conditions are fulfilled (see art. R. 2124-3 and R. 2124-4 of the CCP for the procedure with negotiation and art. R.2124-5 and R.2124-6 for the competitive dialogue).

129. In addition, the CCP sets out that for contracts for social and other specific services, contracting authorities may resort to the adapted procedure regardless of the value of the contract (see art. R. 2123-1, 3° of the CCP).[88]

130. A notice has been annexed to the CCP setting out a number of rules applicable to public procurement contracts relating to social and other specific services ("**Notice**").[89] The categories in the Notice correspond to those listed in Annex XIV, and are referred to in Article 74 of the PPD.

131. The Notice sets out that the thresholds as of which public contracts for social services and other specific services included in the Notice are subject to publication measures in line with the measures set out in the PPD (see art. R.2131-7 to R.2131-9 of the CCP). Those thresholds are:

For contracting authorities	EUR 750,000
For contracting entities	EUR 1,000,000

132. The CCP explicitly foresees the possibility to reserve certain contracts or lots to certain providers of social services and specific services (see Sections 5.2.2 and 5.2.3 below).

5.2.2 Reserved contracts for economic operators employing disabled and disadvantaged workers (art. L. 2113-12 to L. 2113-14 of the CCP)

133. Contracting authorities can reserve contracts or lots to (i) adapted enterprises ("*EA – entreprises adaptées*"),[90] establishments and services providing assistance through

87 The CCP also provides for intermediary thresholds and specific rules for example for contracts below EUR 40,000 or lots whose amount is below EUR 40,000 (see art. R. 2122-8 and art. R. 2123-4 of the CCP), as well as for contracts worth between EUR 90,000 and the thresholds mentioned in the table (see art. R. 2131-12, 2° of the CCP). The CCP is available here.

88 Available here, on the website of the marche-public.fr, instructor in procurement contracts.

89 Notice on public procurement contracts for social and other specific services, JORF n°0077 from 31 March 2019 - text n° 83 / Annex 3 of the CCP, available here.

90 See art. L. 5213-13 to L. 5213-19-1 and R. 5213-62 to D. 5213-86 of the French Labour Code (*Code du travail*); see also the webpage of the French government, available here.

work ("*ESAT – établissements et services d'aide par le travail*")[91] and equivalent structures, provided they employ a minimum percentage of disabled workers who cannot exercise a normal professional activity; (ii) structures for integration through economic activity ("*SIAE – structures d'insertion par l'activité économique*")[92] and equivalent structures, when they employ a minimum percentage of disadvantaged workers; and (iii) economic operators who meet a number of conditions set out in the CCP.[93]

134. In order to benefit from the reserved contracts, the above-mentioned establishments or structures must have at least 50% of disabled or disadvantaged workers (art. R. 2113-7 of the CCP).[94]

5.2.3 Reserved contracts for companies in the social and solidarity economy (art. L. 2113-15 and L. 2113-16 of the CCP)

135. Contracting authorities can reserve contracts or lots that exclusively relate to social services and other specific services listed in the Notice (under Point III), for companies in the social and solidarity economy ("*entreprises de l'économie sociale et solidaire*") or equivalent structures, when their objective is to take on a public service mission related to the delivery of services mentioned in the Notice.

136. The categories listed under Point III are health, social and related services; administrative, social, educational and cultural services and health care services; and other community, social and personal services including services provided by trade unions, political organizations, youth associations and other services of membership organizations.[95]

137. The duration of those reserved contracts is limited to three years, and it is not possible to award a contract to a company that, in the three years preceding the tender, has held a contract with the same contracting authority (art. L. 2113-16 of the CCP).

138. The CCP further clarifies that if a purchaser decides to reserve his contract for one or more companies in the social and solidarity economy, the contract notice or, in the absence of such a notice, the consultation documents have to refer to art. L. 2113-15 and art. L. 2113-16 of the CCP (see art. R. 2113-8 of the CCP).

91 See art. L. 344-1 to L. 344-7 of the French Social Action and Family Code (*Code de l'action sociale et des familles (CASF)*); see also the webpage of the French government, available here.

92 See art. L. 5132-4 of the Labour Code; see also the webpage of the French government, available here.

93 Note that a Law No. 2020-1525 of 7 December 2020 on the acceleration and simplification of public action (*Loi ASAP*) was adopted in light of the COVID-19 crisis and introduced a number of changes in the CCP, available here. The changes include the fact that a purchaser may now reserve the same contract or the same lot of a contract both to economic operators who meet the conditions of Article L. 2113-12 (Reservation of contracts for disabled and disadvantaged workers – adapted enterprises (*EA*) and establishments and services providing assistance through work (*ESAT*)) and to those who meet the conditions of Article L. 2113-13 (Reservation of contracts for structures for integration through economic activity (*SIAE*)). Previously it was not possible to reserve the same contract to both categories.

94 Note that the Commission Notice "Buying Social – a guide to taking account of social considerations in public procurement (2nd edition)" of 26 May 2021 includes an example of a reserved tender that was granted to a social enterprise working with persons with disabilities in Vendée (France) (see p. 60).

95 See Ordonnance n° 2015-899 du 23 Juillet 2015 related to public markets, available here.

139. Companies in the social and solidarity economy are defined in art. 1 of Law No. 2014-856 of 31 July 2014 on the social and solidarity economy.[96] The companies included in the scope of the social and solidarity economy are private legal entities that fulfil a number of cumulative conditions set out in the law, including that they need to have a purpose other than the mere purpose of profit sharing (art. 1, I, 1°). The law also foresees conditions regarding the governance and management of those entities (art. 1, I, 2° and 3°). Companies in the social and solidarity economy need to be managed in a democratic and participatory way, and the use of the profits they make is strictly controlled: individual profit is prohibited and the results have to be reinvested.

140. Art. 1, II sets out the types of entities that are covered. This includes entities organized in the form of cooperatives, mutual companies, associations or foundations, whose internal functioning and activities are based on a principle of solidarity and social utility.[97]

141. A list of companies in the social and solidarity economy is published by the Regional Chambers of the Social and Solidarity Economy ("*Chambres Régionales de l'Economie Sociale et Solidaire*" *(CRESS)*) (see art. 6 of Law No. 2014-856).[98]

142. Finally, it should be noted that there are different ways in which companies in the social and solidarity economy can be financed. Those include for example the financing through impact contracts ("*contrats à impact social*"). Launched in September 2020, those contracts constitute a new form of partnership with a social and environmental purpose. The project is financed by one or several private investors who are reimbursed by the State depending on the success of the project. Different types of contracts are available.[99]

143. Another option is to make donations. This possibility is available since 1 October 2020 to holders of a "*Livret de développement durable et solidaire*" *(LDDS)*.

144. A third option is the financing through the accreditation as a "solidarity company with a social utility" ("*entreprise solidaire d'utilité sociale*"*(ESUS)*) (see art. 11 of Law No. 2014-856). This ESUS accreditation makes it possible to attract private investors through solidarity savings.[100] Those investors benefit, in exchange for an investment in the capital of certain categories of SMEs, from certain tax reduction schemes.[101]

96 LOI n° 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire, available here.

97 See the webpage of the French government, available here; see also BPI France, *Les structures de l'économie sociale at solidaire*, available here.

98 See the latest version of the list (as updated at the end of May 2021), available here. See also Decree No. 2015-1732 of 22 December 2015 on the obligation for regional chambers of the social and solidarity economy to update and publish the list of companies governed by Article 1 of Law No. 2014-856 of 31 July 2014 on the social and solidarity economy, available here.

99 See the Centre of documentation for Economy and Finances, *Le financement de l'économie sociale et solidaire (ESS)*, available here.

100 See Decree No. 2015-719 of 23 June 2015 on the "social utility enterprise" approval governed by Article L. 3332-17-1 of the Labour Code, available here and Order of 5 August 2015 fixing the composition of the application file for approval as a "social utility enterprise", available here.

101 See Centre of documentation for Economy and Finances, *Economie sociale et solidaire: qu'est-ce que l'agrément « Entreprise solidaire d'utilité sociale?*, available here.

5.3 Guide on Social Aspects in Public Procurement

145. Three French ministries have jointly published a "Guide on Social Aspects in Public Procurement" ("*Guide sur les aspects sociaux de la commande publique*").[102] The most recent version was published in July 2018 and takes into account the evolution of the rules resulting from the 2016 public procurement reform.

146. The guide includes the pre-existing legal instruments, identifies the common framework of social clauses and describes the particularities of the different types of contracts and the different types of clauses (including those in contracts reserved for economic operators employing disabled and disadvantaged workers and for companies in the social and solidarity economy).

147. The guide focusses in particular on the professional and social integration of persons that have difficulties getting access to employment. The guide provides examples of categories of persons that could be targeted by such measures (see table on p. 10) and identifies certain organizations and structures focusing on integration through work for persons with disabilities (see table on p. 16).

148. It moreover includes the different legal instruments that are available (see table on p. 20). Those include inserting an integration clause in a public contract, whether the contract is allotted or global; reserving certain contracts to structures for the professional integration of disabled workers; reserving certain contracts for structures for integration through economic activity employing disadvantaged workers; reserving contracts for companies in the social and solidarity economy; using an adapted procedure for service contracts whose focus is an integration service; or including a social criterion in the contract award criteria. The guide provides advantages and suggestions for each of those options, as well as practical advice for the procurement process.

149. It should also be noted that the guide explains in quite some detail how contracts can be reserved for economic operators employing disabled and disadvantaged workers (see Chapter 4 of the guide). Chapter 5 of the guide focuses specifically on contracts reserved for companies in the social and solidarity economy.

5.4 Alternative models for the provision of social services

5.4.1 Service vouchers

150. In France, every person has a right to have access to services provided at home. Those services are also referred to as services to the person ("*Services à la personne*" *(SAP)*). Services to provide help and support at home are offered specifically to vulnerable groups: the elderly, persons with disabilities or vulnerable families.[103]

151. Services to the person are defined in the French Labour Code (see art. L. 7232-1) and refer to activities such as childcare, household or family tasks or assistance to the elderly or disabled persons when they are carried out on the basis of a mandate. Individuals who use those services may be direct employers, choosing whether or not

102 See the joint guide by French Ministries of Labour, Economy and Public Action, *Guide sur les aspects sociaux de la commande publique*, July 2018, available here.

103 More information on the different types of services is available here.

to be accompanied in their administrative procedures by a mandated service, or they may call on an organization or company that acts as a service provider.

152. Services to the person give rise to a number of tax and social security benefits and can be paid for by means of the universal service voucher ("*chèque emploi service universel*" *(CESU)*). Individuals who employ a person at home in the context of personal services can use the "declarative" CESU scheme to declare and pay the employee. There is also a "pre-financed" CESU scheme which allows the payment of services provided by a personal services provider or agent, or a childcare facility, or the payment of a certified childminder or an employee employed by a private individual for an activity falling within the scope of personal services.[104]

5.4.2 Allowances

153. The French system also foresees the possibility of providing allowances in a number of instances.[105]

154. For example, different allowances exist for persons with disabilities. The funding of social care services for persons with disabilities in France is managed by local authorities. For home care, funding stems from the budget of the departments, which are then partially reimbursed by the social security funds allocated through the "*Caisse nationale de solidarité pour l'autonomie*" *(CNSA)*.

155. Disability service providers are generally private organizations working on a non-profit basis, but they also include private for-profit companies and public organizations. In order to obtain public funding, they must be accredited by the competent body. The competent body depends on the type of care provided. Article L. 313-1-1 of the CASF sets out the general rules for the authorization procedure of service providers for persons with disabilities (see also art. L. 313-3 of the CASF). Authorizations are granted through calls for tenders, which the competent public institutions use to define the supply of services within their territory.[106]

156. In terms of types of allowances,[107] there is the possibility of obtaining a disability compensation benefit (*prestation de compensation du handicap (PCH)*), which is a personalized allowance designed to finance the needs of persons with disabilities who have lost their independence. The PCH includes five types of assistance (human, technical, home improvement, transport, specific or exceptional assistance, assistance relating to animals). Its allocation depends on the degree of autonomy, the age, resources and residence of the person concerned. The amount per person and the type of services that are available are determined by the departmental homes for persons with disabilities (*maisons départementales des personnes handicapées (MDPH)*). The

104 See Centre of documentation for Economy and Finances, *Le Cesu: Un outil complet pour les services à la personne*, available here.

105 See Centre of documentation for Economy and Finances, *Quelles aides pour financer des prestations de services à la personne*?, available here.

106 See the paper on the authorization process for social services and medical-social services by the FEHAP, the French Federation of solidary private Hospitals and Establishments of assistance to persons, available here.

107 See the webpage of the French government, available here.

PCH is awarded for a minimum of one year but can be awarded for life if the health condition of the person concerned cannot improve.[108]

157. An allowance is moreover available for adult persons with disabilities (*allocation aux adultes handicapées (AAH)*). The AAH is an assistance that supplements the financial resources of persons with disabilities and allows them to have a minimum of resources. The allowance is granted subject to certain criteria including the disability, age, residence and resources of the person concerned. The amount is allocated by the MDPH.[109]

158. There is also the possibility of obtaining an increase for independent living (*majoration pour la vie autonome (MVA)*). This is an allowance aimed at supporting persons who are not living in an institution and is generally intended to contribute to the costs of adapting the person's home to their disability. It is granted if the person concerned receives the AAH or the additional disability allowance (*allocation supplémentaire d'invalidité (Asi)*). It is awarded automatically when certain conditions are met. The amount is currently set at EUR 104.77 per month.[110]

159. It should be noted that a reform (*projet SERAFIN-PH*) is currently ongoing in France to review the way in which the budget and resources of institutions and services supporting persons with disabilities are designed and allocated.[111]

160. Solidarity allowances are also available in France for elderly persons, aimed at ensuring a minimum income for persons who are at least 65 years old (or who have reached the legal retirement age in the case of incapacity for work or similar situations) (*l'allocation de solidarité aux personnes âgées (ASPA)*),[112] or daily allowances can be obtained by caregivers (*l'allocation journalière du proche aidant (AJPA)*).[113] The AJPA is a replacement income for carers of a person with a particularly serious disability or loss of autonomy, whether they are employees, civil servants, self-employed persons reducing or interrupting their activity, or unemployed persons on benefit who suspend their job search in order to accompany a family member.

161. A personalized autonomy allowance (*allocation personnalisée d'autonomie (APA)*) can be granted in the context of home care and is based on the development of an assistance plan that takes into account all aspects of the elderly person's situation (*APA à domicile*)[114] or if the person is in an institution (*(APA) en établissement*).[115]

162. Those allowances are offered by the municipality, the department or by pension funds.

108 See the webpage of the French government, available here.
109 See the webpages of the French government, available here and here.
110 See the webpage of the French government, available here.
111 See Caisse Nationale de la Solidarité pour l'Autonomie, *Réforme tarifaire des établissements et services pour personnes handicapées SERAFIN-PH*, available here.
112 See the webpage of the French Ministry of Health, available here.
113 See the webpage of the French Ministry of Health, available here.
114 See the webpage of the French Ministry of Health, available here.
115 See the webpage of the French Ministry of Health, available here.

VI. GERMANY

6.1 Introduction

163. The German legislative framework for public procurement is dispersed. First, the national framework is shaped by a handful of acts and regulations, which reduce clarity but have the benefit of allowing more flexible public procurement procedures in social services. Second, states and even municipalities have the option of modifying the federal law, which creates a geographic patchwork of different laws. This can be perceived as a barrier for service providers with a wider geographic reach compared to service providers with a strong local anchoring.

164. The key legislative provisions are set out in Section 6.2. Section 6.3 then goes on to describe the triangular relationship between government, social service provider and beneficiary, characterized by transparency and non-discrimination but allowing for other award systems than public procurement.

165. Section 6.4 sets out alternative models for the provision for the provision of social services. This first of all includes licensing systems characterized by direct contracts between the service provider and the beneficiary. Second, it describes the funding financing model, involving subsidies to selected providers on the one hand and a contribution by the beneficiary on the other hand. The third model is the open house contract, a mechanism that takes on board all service providers meeting a number of pre-defined criteria.

6.2 Legislative framework

6.2.1 Overview

166. The Public Procurement Directive was implemented into German law (alongside Directive 2014/23/EU on public concessions and Directive 2014/25/EU on the procurement in the water, energy, transport and postal services sectors), through the Public Procurement Law Modernization Act ("*Vergaberechtsmodernisierungsgesetz*", "**VergRModG**")[116] which entered into force on 18 April 2016.

167. The VergRModG amended the Act against Restraints of Competition ("*Gesetz gegen Wettbewerbsbeschränkungen*", "**GWB**"). In addition to the GWB, several legal ordinances, particularly the Ordinance on the Procurement of Public Contracts ("*Vergabeverordnung*", "**VgV**") contain the necessary detailed individual regulations for the award procedure relating to the procurement of social services.[117]

168. Comparable regulations have been created for the award of public contracts that are below the threshold values relevant for the application of the GWB. Two regulations are of particular importance below the EU thresholds: the Procurement and Contract Regulations for Services Part A ("*Vergabe- und Vertragsordnung für Leistungen Teil*

116 Gesetz zur Modernisierung des Vergaberechts (Vergaberechtsmodernisierungsgesetz) – VergRModG available here (in original language).

117 Wissenschaftliche Dienste der Deutscher Bundestag, "Nachhaltige Beschaffung im Vergaberecht" (2018), available here.

A", "**VOL/A**")[118] and the Sub-threshold Procurement Regulation ("*Unterschwellenvergabeordnung*", "**UVgO**").[119]

6.2.2 Act against Restraints of Competition – GWB

169. The GWB governs social services in Section 4 on the Award of Public Contracts, Chapters 1 (Award Procedure) and 2 (Review Procedure). The key provisions concern:

- **Thresholds**. Sec. 106 GWB refers to the thresholds set out in the PPD. For public service contracts for social and other specific services the threshold is € 750,000.

- **Specific exclusions**. Sec. 107 GWB generally excludes from the scope of the Act contract services concerning civil defense, civil protection and danger prevention services that are provided by non-profit organizations or associations, as well as exempt patient transport ambulance services.

- **Reserved contracts**. Under Sec. 118 GWB, public contracting authorities may reserve the right to participate in public procurement procedures regarding workshops for persons with disabilities, and enterprises whose main aim is the social and professional integration of persons with disabilities or disadvantaged persons. Alternatively, they may determine that public contracts are to be carried out within the framework of programs with sheltered employment programs when at least 30% of the employees in these workshops or companies are people with disabilities or disadvantaged employees.

- **Award criteria**. Sec. 127, para. 1 GWB stipulates that the contract shall be awarded to the most economical bid, provided that the bid meets the specified award criteria. The most economical bid shall be determined on the basis of the best price-performance ratio. In accordance with the newly added sentence 4 of sec. 127 para. 1 GWB, qualitative, environmental or social aspects may be taken into account in addition to price or cost to determine this best price-performance ratio.[120]

- **Flexibility**. Sec. 130 GWB serves to simplify and make the awarding of contracts for social and other special services more flexible. For example, contract amendments are permitted without a new procurement procedure if the value of the amendment does not exceed 20% of the original contract value. This development comes in response to the need for greater flexibility due to the changing economic environment confronting the federal employment agency (*Bundesagentur für Arbeit*) in particular, which is the most significant public-sector contracting authority.

6.2.3 Legal ordinances

170. The German legislator chose to implement the PPD into the GWB via various legal ordinances, namely the Ordinance on the Award of Public Contracts

118 Vergabe und Vertragsordnung für Leistungen (VOL) 2009: Allgemeine Bestimmungen für die Vergabe von Leistungen (VOL/A), available here (in original language).

119 Unterschwellenvergabeordnung (2017), available here (in original language).

120 Immenga/Mestmäcker/*Kling*, 6. Aufl. 2021, GWB § 127 Marg.5 f.

("*Vergabeverordnung*", "**VgV**"), the Sectors Ordinance ("*Sektorenverordnung*", "**SektVO**"), the Concession Award Ordinance ("*Konzessionsvergabeverordnung*", "**KonzVgV**") and the Ordinance on Public Procurement Statistics ("*Vergabestatistikverordnung*", "**VergStatVO**").[121] The content of these ordinances is consolidated under the Procurement Law Modernization Ordinance ("*Vergaberechtsmodernisierungsverordnung*", "**VergRModVO**").

171. The Ordinance on the Procurement of Public Contracts ("**VgV**") is of particular relevance to the procurement of social services. It provides for further specific regulations and grants public contracting authorities greater freedom of action regarding the procurement of social services. The main takeaways of the revised VgV are:

- **Framework agreements**. Sec. 65 VgV complements Sec. 130 GWB by capitalizing on the leeway created by Art. 76 of the PPD. Specifically, Sec. 65 para. 2 VgV provides that notwithstanding the general rule in Sec. 21 para. 6 VgV, which assumes a maximum term of four years, the term of a framework agreement in connection with the procurement of social services may not exceed six years. The term may also be extended beyond this period when justified in the subject matter of the framework agreement.

- **Deadlines and transparency**. Furthermore, due to Sec. 65 para. 3 VgV, the contracting authority is not bound by the generally applicable minimum deadlines of Sec. 15 to 19 VgV when procuring social and other special services. It refers to Sec. 20 VgV, according to which the time limits set by the contracting authority must in any case be reasonable.

  In addition, pursuant to Sec. 66 VgV, all public contracts for social and other special services and their procurement must now be published throughout the EU. This is intended to serve enhanced transparency on the EU internal market.

- **Uniform European Self-Declaration**. Due to the provision of Sec. 65 para. 4 VgV, the obligation of the contracting authority to accept the Uniform European Self-Declaration ("*Einheitliche Europäische Eigenerklärung*") does not apply in the area of the award of social and other special services.

- **Award criteria**. Finally, Sec. 65 para. 5 clarifies that the success and quality of services already provided by the bidder or the personnel deployed by the bidder may be taken into account when evaluating the award criteria specified in Sec. 58 para. 2 sentence 2 no. 2 VgV (organization, qualification and experience).

172. With these special regulations, the legislator wishes to acknowledge that certain personal services in the social, health and education sectors are provided in a special cultural context and therefore have only a limited cross-border dimension.

6.2.4 Procurement of contracts below the threshold of the PPD

[121] For an overview of the most important contents of the amended GWB and ordinances, please refer to Federal Ministry for Economic Affairs and Energy, *Overview and legal bases at the federal level*, available here (in original language).

173. Contracts awarded on the state and municipal level often fall below the threshold value at which the PPD becomes applicable. These contracts are instead governed, depending on the individual case, by the VOL/A and/or the UVgO.[122]

174. At the state level, the UVgO, replaces the previous first section of VOL/A for the award of federal service and supply contracts below the threshold values.[123] Today, almost four years after the UVgO came into force, the states of Hesse, Rhineland-Palatinate, Saxony-Anhalt and Saxony have not yet implemented the UVgO, and the first section of VOL/A still applies there, resulting in legal fragmentation.

175. Where the first section of the VOL/A or the UVgO has been declared applicable in the relevant federal state, there are no significant differences in the procurement procedure of contracts above the threshold of the PPD. The main differences in the procurement above the threshold result from the way in which the procurement regulations have been modified by the respective state and municipal law with regard to the types of award (*e.g.*, restricted or public tender, innovation partnership), the provision of evidence (*e.g.*, more stringent verification options for compliance with social criteria, in particular by excluding verification by means of self-declarations) and the minimum requirements (*e.g.*, environmental requirements regarding the service).[124]

176. While all German states have clearly committed themselves to awarding public contracts in accordance with VOL/A or UVgO for their state institutions, the states take quite different approaches for *municipal* institutions.

177. Since each state has the option of a modified introduction of the UVgO, entities operating nationwide will have to prepare for numerous state-specific special regulations and also various state procurement platforms on the internet (*e.g.*, www.vergabe.bayern.de/ or www.evergabe.sachsen.de).

178. The application of the UVgO is problematic, such as in Bavaria, where it is *not* binding for municipalities in procurement procedures at the municipal level. The Free State of Bavaria merely recommends the use of the UVgO at the municipal level.[125] This means that municipalities in Bavaria can decide whether they want to introduce or use the UVgO in full, in part, modified or not at all.

122 "*The UVgO is intended to replace VOL/A, Sec. 1, at the state and municipal level. For this purpose, the federal states can include an application instruction in the implementation of the UVgO within the administrative regulations to the respective state budget code or in the respective state procurement law. In some federal states, the application of the UVgO is not mandatory for the municipalities, but only recommended.*", see Federal Ministry for Economic Affairs and Energy, procurement below EU thresholds, available here, last section (in original language).

123 Explanations of the German Federal Ministry for Economy and Energy to the UVgO, published in the Federal Gazette BAnz AT 07.02.2017 B2, available here (in original language).

124 See Gabriel/Krohn/Neun/*Mertens*, HdB Vergaberecht, 3. Aufl. 2021, Marg. 25 f.

125 Announcement of the Bavarian State Ministry of the Interior and for Integration on the awarding of contracts in the municipal sector dated 31 July 2018 (AllMBl. p. 547), last amended by announcement dated 8 December 2020 (BayMBl. No. 787), subsection 4.1, available here (in original language).

6.2.5 Monitoring of procurement procedures

179. In principle, the supreme federal authorities perform the monitoring tasks for their own procurement procedures and for those procurement procedures of their subordinate authorities in the respective business area.[126]

180. At the state and municipal levels, the application of public procurement law is ensured as part of general legal and/or technical supervision (*allgemeine Rechts– und/oder Fachaufsicht*). In addition, there is an accompanying audit by accounting offices and audit courts. Other measures include the four-eyes principle and the general professionalization of public procurement through central state procurement tribunals.[127]

6.2.6 Conclusion

181. While the PPD is generally applicable on all regulatory levels (federal, state, municipal) in Germany when it comes to procurements above the EU threshold, increased caution is advised regarding the procurement laws at state and municipal level.

182. The UVgO, or in some states still the VOL/A, may be applicable. As the UVgO can be modified at the state level, a variety of differing regulations may apply. These inconsistent regulations can be seen as a barrier to competition, especially for entities operating nationwide.

6.3 The application of public procurement law to the provision of services in the so-called socio-legal triangular relationship under German social law

183. In the area of social services, the law governing the provision of services is characterized by the legal relationships among the government, non-profit or private service providers, and the person in need of assistance legally entitled to a specific benefit or service under German social law.

184. The government fulfils its obligation to provide such a benefit or service through the external service providers. The so-called socio-legal triangular relationship ("*sozialrechtliches Dreiecksverhältnis*") in the broader sense symbolically represents the entire legal relationships among the government acting through its governmental agencies, the service provider and the person entitled to benefits and/or services.

185. The question of whether public procurement law applies to the provision of services in the socio-legal triangular relationship is disputed and cannot be answered uniformly. The prevailing opinion is that:[128]

- The application of public procurement law to the provision of services in the socio-legal triangular relationship depends on the structure of the specific legal relationships among the government, service provider and service recipient;

126 German Federal Government (Bundesregierung), Monitoring Report of the Federal Government on the application of the Public Procurement Law 2017, p. 6, available here (in original language).
127 Ibid., p. 8.
128 *Fülling*, Die Reform des Vergaberechts und ihre Auswirkungen auf die Erbringung sozialer Dienstleistungen, SRa 2017, 226 (228).

- Depending on the nature of the case, there may be a pure authorization of services without procurement character or a public contract; and

- A blanket exemption from procurement law for services in the socio-legal triangular relationship is neither possible under European law nor justified for any other reason.

186. Hence, as the applicable social law provides for a selection decision, *i.e.* selective contracts by a public contracting authority, or makes this possible in individual cases, a transparent, non-discriminatory award procedure must therefore be carried out as a matter of principle.[129]

187. The national (social) legislator, however, is not obliged to organize social services via public contracts. In this context, the European directives already state that public procurement law does not affect the way in which the member states organize their social security systems. Hence, each nation state can – as before – organize social services in the form of public contracts or in other ways.[130] To this end, for instance, licensing systems ("*Zulassungssysteme*") can be established in which all service providers who meet certain requirements have a legal right to accreditation or in which only the service recipient selects the service provider (for further details please refer to Section 6.4 below).

6.4 Alternative models for the provision of social services

6.4.1 Licensing systems within the framework of the socio-legal triangular relationship under German social law

188. Licensing systems (*Zulassungssysteme*) within the framework of the socio-legal triangular relationship are not subject to public procurement law. The German legislator already provides for such licensing models in many areas of German social law.

189. Within the framework of the socio-legal triangular relationship under German social law, the government or the governmental agency is obligated to fulfil the social benefits claims *vis-à-vis* the beneficiary, but may use an external service provider. As a vicarious agent of the government, this third party fulfils the social service obligation incumbent on the governmental authority.[131]

190. Under this model, no selection decision is made by the governmental authority and no remunerated exchange contract is concluded. Rather, every service provider that is capable of providing the respective services and meets certain criteria has a right, without any selectivity, to be licensed to provide such services *vis-à-vis* the beneficiary and concludes the service agreement with the beneficiary directly. As such, the

129 *Fülling*, Die Reform des Vergaberechts und ihre Auswirkungen auf die Erbringung sozialer Dienstleistungen, SRa 2017, 226 (228).

130 *Fülling*, Die Reform des Vergaberechts und ihre Auswirkungen auf die Erbringung sozialer Dienstleistungen, SRa 2017, 226 (228).

individual beneficiary is granted the greatest possible freedom of organization and choice when making use of the benefits.

6.4.2 Funding financing model

191. For voluntary benefits and compulsory benefits without legal entitlement, a public contracting authority could generally also choose a funding financing model (*Förderungsfinanzierungsmodell* or *Subventionsfinanzierung*).

192. This model is generally used where the service provider is supported by the service supplier in the fulfilment of state tasks without the latter acting on the basis of a state mandate (*e.g.* regarding youth services according to Sec. 74 and 77 Social Code Book VIII (*SGB VIII*)).

193. The local public welfare agency grants subsidies to selected facility operators for the provision of a service that is in the public interest. The amount of funding is determined unilaterally by the state. In this respect, there is a relationship of subordination between the grantor and the grantee. The costs are not covered in full, but the recipient is expected to make an appropriate contribution. In return for the grant, the operator is required to fulfil the purpose of the grant without this being further specified in the contract.

194. This model is characterized by the fact that the service provider receives benefits from the service supplier on the basis of a grant notice. As there is no contractual relationship between the public contracting entity and the service supplier, there is also no contract subject to tendering under the GWB.[132]

6.4.3 Open House Contracts

195. A rather new procurement model in Germany is the so-called “Open House Contracts” model.[133] Under these contracts, the contracting authority predefines binding terms and, without any selectivity, grants to each service provider a license to provide certain services or sell certain goods that accepts the predefined terms. The service agreement is concluded between the service provider and the beneficiary.[134]

196. These procurements do not fall under the tender commitment under the GWB, as Sec. 103 para. 1 GWB requires the contracting authority to make a selection decision when awarding the contract.[135]

197. These procurements serve the goal of social legislation to ensure security of care. They also ensure the diversity of service providers and the associated freedom of choice for insured persons. It is necessary that the procurement of such open house contracts be carried out according to clear rules.[136]

132 Münder/Meysen/Trenczek/*v. Boetticher/Johannes*, Frankfurter Kommentar SGB VIII, § 77 Marg. 9 ff.
133 Pünder/Schellenberg/*Mußgnug*, Vergaberecht, GWB § 130 Marg. 19.
134 Portner/Rechten, Das Open-House-Modell, NZBau 2017, 587.
135 Fuhrmann/Klein/Fleischfresser/*Schneider*, Arzneimittelrecht, § 49 Vergaberechtliche Rahmenbedingungen Marg. 17; Osseforth, jurisPR-VergR 3/2016 Annot. 2.
136 Portner/Rechten, Das Open-House-Modell, NZBau 2017, 587.

198. The ECJ clarified the legal question of whether the award of a contract by way of an "open house model" constitutes a public contract. In its judgment of 2 June 2016 (Case C-410/14 – Falk Pharma), it provided significant guidance and impetus for the implementation of open house models.[137]

199. For open house models, it is also a prerequisite that the contracting authority must not be able to exert any influence on joining the open house during the term of the contract. A bid evaluation in any form is diametrically opposed to an open house approach.

200. Furthermore, all economic operators who meet certain requirements must be able to participate in the open house contract without any further intermediate steps.[138] In the aforementioned decision, the ECJ ruled that open house procedures are permissible under European law.

201. In Germany, open house contracts are widely used and recognized by public health insurers in social service contracting, especially in the medical sector, *e.g.* the case of drug discount agreements between health insurances and pharmaceutical companies.

137 Portner/Rechten, Das Open-House-Modell, NZBau 2017, 587, 588.

138 Fuhrmann/Klein/Fleischfresser/*Schneider*, Arzneimittelrecht, § 49 Vergaberechtliche Rahmenbedingungen Marg. 16 f.

VII. BULGARIA

7.1 Introduction

202. The right to "social assistance" ("социално подпомагане") is enshrined in Article 51, (1) of the Constitution of the Republic of Bulgaria ("**Constitution**").[139]

> *(1) Citizens shall have the right to social security and **social assistance**.*
>
> *(2) Persons who are temporarily unemployed shall be provided with social security under terms and according to a procedure established by a law.*
>
> *(3) Elderly people without immediate family who are unable to support themselves from the property thereof, as well as persons with physical and mental disabilities, shall enjoy the special protection of the State and society.*

203. According to the Social Assistance Act ("**SAA**") and the established case law of the Bulgarian courts, the right to "social assistance" encompasses two elements: (i) the right to social services ("право на социални услуги") and (ii) the right to social assistance benefits ("право на социални помощи").[140] While social services are generally understood to cover services provided either directly through the state, or through contractors to citizens (*e.g.*, center for children with disabilities, shelters, assistance to disabled people, etc.), social assistance benefits are defined as "*resources provided in cash and/or in kind which supplement or substitute incomes up to an amount sufficient to meet the basic necessities of life or to meet incidental needs of the beneficiary persons and families*".[141]

204. When talking about the provision of "social services" in Bulgaria, the general understanding is that this refers to the special regime created under the new Social Services Act ("**SSA**").[142] The provision of social services is rarely discussed under the regime of public procurement (or public concessions).

205. In line with the constitutional requirements, Bulgaria has created a special regime for the *provision of social services* (please see further below, Section 7.2.2), while the regime of public procurement is usually understood to be used for the *acquisition of materials* necessary for the provision of social services.

206. Thus, the SSA appears to regulate all possible models for the provision of such services.

139 Constitution of the Republic of Bulgaria (Конституция на Република България), in force since 13 July 1991, available here.

140 Social Assistance Act (Закон за социално подпомагане), published on 19 May 1998, available here (in original language).

141 SAA, Article 11, (1).

142 Social Services Act (Закон за социалните услуги), published on 22 March 2019, available here (in original language).

7.2 Legislative framework

7.2.1 Public Procurement Act

207. The Public Procurement Directive has been transposed in the Bulgarian legal system, alongside Directive 2014/25/EU, through the Public Procurement Act published on 16 February 2016 ("**PPA**").[143] The legislation is further detailed in a Regulation for Implementation of the Public Procurement Act ("**RIPPA**"), adopted by Bulgaria's Council of Ministers, and has been in force since 15 April 2016.

208. The old Public Procurement Act, in force between 2004 and 2016, made no explicit reference to social services.[144] Some social services (*e.g.*, education and vocational education services, health services and recreational, cultural and sporting services)[145] were awarded according to an (i) open procedure, (ii) a restricted procedure or a (iii) negotiated procedure with publication of a contract notice.[146]

209. Under the new PPA, there is no special regime for the provision of social, medical and other services. Instead, different regimes are used depending on the estimated value of the contract. This means that the awarding of social services can happen either under the most difficult regime through competitive dialogue, or under the lightest regime, through direct awarding. In addition, it is worth mentioning that the PPA sets monetary thresholds, which are lower than the ones prescribed by the Public Procurement Directive.[147]

210. The regime applying to social services can be summarized as follows:

- **Social Services Regulation**. The regulation of public procurement of social services is not regulated in a designated chapter. Article 11, para. 3, introduces the regime for social services contracts and Annex 2 lists which services are to be considered "social". Overall, the PPA follows closely the definitions for "social, medical and other services" of the Directive.

- **Thresholds and procedures**. Article 20 of the PPA defines specific monetary threshold values for the public procurement of social services. Depending on what the monetary value of the service is, three different procedures could apply:

    - If the service is valued **at** or **more** than BGN 500,000 (rough estimate €255,870) for public contracting entities,[148] and BGN 1,000,000 (rough

143 Public Procurement Act (Закон за обществените поръчки), published on 16 February 2016, available here (in original language).

144 Old Public Procurement Act (Закон за обществените поръчки), published on 6 April 2004, available here (in original language).

145 Annex 3, Old Public Procurement Act.

146 Article 5, (1), 3, Old Public Procurement Act.

147 Practical Guide for the Implementation of Public Procurement Legislation (Практическо ръководство за прилагане на законодателството в областта на обществените поръчки) ("**Guide**") published in 2019 by the Public Procurement Agency, available here (in original language), pp. 98-100.

148 "Public contracting entities" are defined in Article 5, (2) of the PPA and include, *inter alia*, the President of the Republic of Bulgaria, the governing ministers, the regional governors, the chairmen of state agencies, executive directors of executive agencies, etc.

estimate EUR 511,740) for sector contracting entities,[149] then one of the following **eleven procedures** can be engaged: (i) open procedure; (ii) restricted procedure; (iii) a competitive procedure with negotiation; (iv) a negotiated procedure with prior call for competition; (v) a negotiated procedure with publication of a contract notice; (vi) a competitive dialogue; (vii) an innovation partnership; (viii) a negotiated procedure without prior publication; (ix) a negotiated procedure without prior call for competition; (x) a negotiated procedure without publication of a contract notice; or (xi) a design contest.[150] In general, these are the procedures sanctioned under the Public Procurement Directive.[151]

- If the estimated value of the service is **between** BGN 70,000 and BGN 500,000 (rough estimate between EUR 35,790 and EUR 255,870) for public contracting entities, and **between** BGN 70,000 and BGN 1,000,000 (rough estimate between EUR 35,790 and EUR 511,740) for sector contracting entities, then one of the following two procedures can be engaged: (i) a public contest; or (ii) direct negotiations.[152] In general, these procedures are considered and described as the "national procedures".[153]

- If the estimated value of the social service is **less** than BGN 70,000 (rough estimate EUR 35,790), then the contracting entities will engage in what is referred to as "**direct awarding**".[154] This means that there is no need for a written public procurement contract. Instead, the contracting authority can make payments solely on the basis of a primary payment document, *i.e.* invoices.[155] This is considered the "lightest awarding mechanism" under the PPA.

- **Award criteria**. Article 70 PPA states that procurement awards shall be based on the most economically advantageous tender. The most economically advantageous tender must be identified on the basis of one of the following award criteria: (i) the lowest price; (ii) level of costs, taking into account cost effectiveness, including life-cycle costing; and (iii) best price-quality ratio, which shall be assessed on the basis of the price or level of costs, as well as indicators including qualitative, environmental and/or social aspects related to the subject-matter of the public procurement.

- **Reserved contracts**. Article 12 of the PPA contains a list of: (i) products and services which are intended to be awarded to specialized undertakings or cooperatives of persons with disabilities or to business entities whose main aim is the social and professional integration of persons with disabilities or disadvantaged persons; and (ii) sheltered employment programs, within the

149 "Sector contracting entities" are defined in Article 5, (4) of the PPA and include the representatives of public undertakings, the representatives of merchants or other persons who are not public undertakings and the heads of central purchasing bodies established to satisfy the needs of sector contracting entities.
150 PPA, Article 20, (1) and Article 18, (1), 1-11.
151 Guide, page 101.
152 PPA, Article 20, (2) and Article 18, (1), 12-13.
153 Guide, pages 100 and 102.
154 PPA Article 20, (4).
155 Guide, pp. 306-307.

framework of which the contracting entities have the right to reserve procurements.[156] Participation in these procedures is available only where at least 30% of the employees are persons with disabilities or disadvantaged persons.[157]

- **Specific exclusions**. Art. 13, (1), 11 PPA excludes from the scope of the Code the contracts services concerning civil defense, civil protection and danger prevention services that are provided by non-profit organizations or associations, as well as exempt patient transport ambulance services.

7.2.2 Social Services Act

Background

211. In March 2019, the Bulgarian Parliament adopted the new SSA, which changes the legal framework for planning, providing, financing and monitoring social services. Its main aim is to improve access to social services and enhance efficiency, by mapping the social services so as to reflect the needs of the citizens.

212. The regime for the financing of social services under the SSA is considered a *special regime* compared to the general public procurement regime under the PPA. On the one hand, the SSA introduces a narrower definition of "social services" and does not cover educational, healthcare and cultural services. On the other hand, the SSA introduces a special awarding procedure with the participation of the local municipalities.

213. The Law establishes a new Agency for the Quality of Social Services at the Ministry of Labour and Social Policy, which became operational as of 2020.[158] The new structure monitors how municipalities and private providers spend state funds. It verifies compliance with the rights of users of social services, monitors national performance and licenses all private providers of social services. It creates common standards for providers but, at the same time, gives them the freedom to develop their own practices and relationships among professionals, children and parents, since the system was previously highly restricted by methodological guidelines.

214. The SSA introduces the National Map of Services, which should enter into force in 2022, and is intended to be updated annually.[159] It should provide information on

156 The list was issued first in 2016 through Decision № 591 from 18 July 2016 for determining the List of goods and services under Art. 12, para. 1, item 1 of the Public Procurement Act (Решение № 591 от 18 юли 2016 г. за определяне на Списък на стоките и услугите по чл. 12, ал. 1, т. 1 от Закона за обществените поръчки), available here (in original language).

157 Article 12, (5) and (6) PPA – In the cases referred to in item (1) (*i.e.* products and services), such persons must have been registered as specialized undertakings or cooperatives of persons with disabilities at least three years before the date of commencement of the particular public procurement award procedure. Eligibility for participation in a public procurement under item 1 is limited to specialized undertakings or cooperatives of persons with disabilities capable of performing at least 80 percent of the subject-matter of the said procurement using machinery, plant and human resources of their own. In order to fulfil this condition, such undertakings or cooperatives may subcontract or refer to the capacity of third parties if the said subcontractors or third parties are specialized undertakings or cooperatives of persons with disabilities.

158 Agency for the Quality of Social Services (Агенцията за качеството на социалните услуги), available here (in original language).

159 Ordinance on the Planning of Social Services (Наредба за планирането на социалните услуги), published on 6 April 2021, available here (in original language).

available services and on the needs of target groups throughout the country, which should then guide decisions on funding as well as on opening/closing of services on a national scale.[160]

Covered services

215. The law enables social services to be provided to any person who needs support to prevent or overcome social exclusion, enforce their rights or improve their quality of life.[161] The new regulations in the SSA focus mainly on assistance services, defining their content and describing the functions of the assistant. The law also states that a right to assistance will be given to the elderly who cannot take care of themselves and to other people in need of assistance.

216. The SSA defines "social services" as "*activities aimed at supporting individuals in: (i) prevention and/or overcoming of social exclusion; (ii) exercising rights; or (iii) improving the quality of life*". The blank definition allows new activities to be recognized as "social" depending on the needs of individuals. In general, social services cannot be commercial in nature.

Generally Available and Specialized Social Services

217. The SSA introduces two types of social services: (1) generally available social services and (2) specialized social services.[162] Generally available social services include: (i) providing information, counselling and training for the exercise of social rights and for the development of skills for a period of no more than two months, and (ii) mobile preventive community work. Specialized social services are services provided in the cases of: (i) the occurrence of a particular risk to the person's life, health, quality of life or development, and (ii) specific needs of a particular group of persons.

218. Generally available social services are available to each person, whereas specialized social services are available only with a formal referral by the Social Assistance Directorate or the municipality and after a preliminary needs assessment.

Principles

219. Under the SSA, social services need to be organized and provided in accordance with several principles, including:

- availability of different types of social services;
- accessibility of social services;
- individualization of support;
- comprehensiveness, integration and continuity of support;
- prevention of institutionalization;
- respecting the rights of persons who are beneficiaries of social services and ensuring their active participation in decision making;
- flexibility and transparency in managing social services;

160 SSA, Article 21.
161 SSA, Article 7.
162 SSA, Article 12.

- involving all stakeholders and using all available resources.

Private Providers

220. The new law enables private entities (including corporations and non-governmental organizations ("**NGOs**")) to provide social services.[163] According to the SSA, the service is open to entities registered in Bulgaria as well as in other Member States of the EU. Private providers can be: (i) Bulgarian natural persons registered under the Commerce Act, (ii) any legal person, registered in Bulgaria, and (iii) companies that have been registered according to the legislation of another Member State of the European Union or of another State that is a party to the European Economic Area Agreement.

Authorization / License

221. In order to provide social services in the territory of the Republic of Bulgaria, companies need to be authorized and granted a license by the Executive Director of the Agency for Quality of Social Services.[164] In addition, companies which have the right to provide social services according to the legislation of another Member State of the European Union or of another State that is a party to the European Economic Area Agreement will *not be subject to licensing* when providing such services on a *single occasion or temporarily without establishment in the territory of the Republic of Bulgaria*.

Awarding Procedure

222. The awarding of the provision of social services is done by the mayor of the municipality through a **competition** for awarding of social services established by the municipality or through a competition for awarding of services that are not established by the municipality.[165]

223. Awards of social services are admissible if: (i) financing by the state and/or the municipal budget has been provided for the social service; (ii) the facilities, furnishings and equipment required for the provision of the services are provided by the municipality; (iii) the private provider holds a license for the social service; and (iv) the license of the private provider has not been revoked.

224. The announcement for conducting the competition is published in at least one national daily newspaper and on the official website of the respective municipality at least 45 days before the date of the competition. All the submissions are reviewed and assessed by a commission. Based on the decision of the commission, the mayor issues an order and a contract with the private provider is signed. The *estimated monetary value of the social service* is of no relevance and is not considered during the awarding process.

Outlook on participation of NGOs

225. In theory, the new SSA increases the funds available for delegated social services, *i.e.* services provided to citizens that the state delegates to municipalities and NGOs at a

163 SSA, Article 30.
164 SSA, Article 31.
165 SSA, Article 64.

local level. However, as a share of total delegated state spending, the amount has been slightly reduced: from 9.2% to 8.1%, according to data from the Institute of Market Economy. The total delegated costs have increased more than the increase in the cost of social services.

226. According to the Bulgarian Centre for Not-for-Profit Law ("**BCNL**"), several basic concepts in the new law create very high expectations of a real and irreversible reform that will lead to better-quality services for direct recipients. As to positive trends triggered by the new legislation, BCNL emphasizes the clear statement that only quality services will be developed and funded. All private providers will now be licensed, and even municipal services will have to meet the same high-quality standards; if the standards are not met, funding will be phased out. Currently there are municipal and private/NGO providers of services, but they are not licensed, just registered. Under the new law, private services for adults will be licensed and services for children and municipal services will be monitored by the new Agency for the Quality of Social Services. In addition, a crucial point in the new legislation is the focus on the individual needs of every person; this is something entirely new as a philosophy and a basis for further quality development of services.

227. At the same time, as the Institute for the Market Economy states, imbalances in the provision of services at the local level still exist. It is unrealistic to target full territorial coverage of social services. It needs to be clarified whether imbalances are a problem or are a natural result of the imbalances in the search for such services locally. In summary, the new Social Services Act is based on principles, common objectives and rules that meet current requirements for the provision of such services in the community. This is an important step forward. More attention will now be needed to plan the scale of services and their prices, so as to achieve an adequate supply and quality of service for all citizens who need such services.

228. Finally, while the new SSA introduces a special regime for the awarding of contracts to private providers, which is considered special to the general public procurement procedures, the procedures closely mirror the steps of a public tender. What brings additional procedural burden to private providers and NGOs is the fact that each municipality publishes these competitions separately. It has been reported that this sometimes leads to few participants learning about the procedure.

VIII. FINLAND

8.1 Introduction

229. The Public Procurement Directive was implemented in Finland by the Act on Public Procurement and Concession Contracts (Act 1397/2016, "**Finnish Public Procurement Act**" or "**Act**"). The Act entered into force on 1 January 2017.[166]

230. Section 8.2 sets out the key provisions of the Act with regard to social services. Section 8.3 explains the alternative models to public procurement for social services that are currently used in Finland. The Finnish chapter is considerably shorter than the other chapters as limited information was available in English.

8.2 Legal framework

231. Public procurement procedures apply to social services contracts valued above the *national threshold* of EUR 400,000.[167] For such contracts, a public notice must be published in HILMA, the free electronic forum for publishing contract notices, maintained by the Ministry of Economic Affairs and Employment.

232. The Act prescribes that the principles of non-discriminatory treatment, transparency and proportionality must be respected.[168] These principles do not preclude the authority from imposing criteria related to societal or social considerations.[169]

233. The Finnish procurement procedure for contracts exceeding the national threshold but not exceeding the EU threshold is not regulated in detail. The contracting authority thus fills out the procedural details itself but should inform potential candidates of those details in the contract notice.[170] However, the authority can in principle not conclude the contract during the first 14 days after sending notice of the award decision to the candidates, thus respecting a standstill period.[171]

234. Specifically in relation to social services, the Finnish Public Procurement Act prescribes that the authority "*shall consider factors related to the quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, to the special needs of various user groups, to user participation and increased empowerment, and to innovation.*"[172] For this reason, the Act does not prescribe a minimum or maximum number of bidders that are allowed to participate.

235. The Finnish Public Procurement Act also implemented the provision from the PPD on "reserved contracts" by foreseeing that contracting authorities may reserve a bid to

166 Section 173 of the Finnish Public Procurement Act ("**Act**"), available here.
167 Section 25, para. 1 (3) of the Act.
168 Section 3, para. 1 of the Act.
169 Section 93, para. 2 of the Act.
170 Section 109, para. 1 of the Act.
171 Section 129, para. 1 of the Act.
172 Section 108, para. 2 of the Act.

sheltered workshops where at least 30% of the employees are persons with disabilities.[173]

8.3 Alternative models for the provision of social services

8.3.1 Personal assistance

236. Public procurement legislation does not apply to services provided by personal assistants to a person with a severe disability. Such personal assistance is regulated by the Act on Services and Assistance for the Disabled ("**Disability Services Act**", 380/1987). A person with a severe disability can designate as their personal assistant a social worker for disability services of their choosing. The Finnish municipalities are in charge of overseeing the personal assistant system and are the largest financial contributors to the system.

237. The personal assistance can take the shape of assistance in a broad range of activities, whether professional, personal or social. The assistance needs to be defined. The Finnish Institute for Health and Welfare, which resides under the Ministry of Social Affairs and Health, clarifies that for personal hygiene, assistance is covered by the Disability Services Act. Cleaning or home nursing, however, is not covered by the Act. Applications for personal assistance occur through three different systems, namely a service voucher system, an employer-employee system and a service arrangement system.

238. In the service voucher system, either the municipality or a service voucher provider approved by it assesses which services the person with the disability requires and provides that person with a voucher to obtain the service. In the employer-employee system, the social worker is employed by the person with the disability. If the person with a disability qualifies for personal assistance based on the information they provide, the municipality and government are in charge of the personal assistant's salary. In the service arrangement system, the municipality itself arranges the personal assistance services, either by providing the assistance itself or by invoking an independent service.

8.3.2 Direct procurement

239. In situations where an urgent need for social care arises and the standstill period would prevent the provision of appropriate care, the Act allows for direct procurement. This means that the public procurement rules, including the standstill period, do not apply. Only individual cases of social care provision can benefit from this exception. The Act emphasizes the exceptional nature of such direct procurement by allowing it only "*if arranging competitive tendering or changing a service provider would be manifestly unreasonable or especially inappropriate in order to secure some care*".[174]

173 Section 24 of the Act.
174 Section 110 of the Act.

IX. CONCLUSION

240. The PPD casts a wide net, leaving little margin to national authorities to acquire social services through different, less rigid and less burdensome procedures. Yet, Member States, drawing on the case law of the CJEU, developed a number of alternative models not fulfilling the substantive conditions of the PPD. These are:

(i) **Grants, allowances and vouchers**. The mere financing of social services is not covered by the PPD as it does not entail any obligation from the beneficiary to the disbursing PA. This can take various forms, including *grants* and *allowances* when the funding is provided to the service provider, and *service vouchers* when the funding is provided to the beneficiary. Mere financing is used in all the Member States analyzed.

(ii) **Authorisation schemes**. Authorisation schemes are admittedly the most employed and effective alternative model. They escape the application of the PPD as no selection, or "choice", occurs; any service provider is able to participate in the scheme upon satisfaction of pre-defined suitability criteria. Authorisation schemes are being used in the Netherlands and Germany under the "open house" model, and in Italy in the residential care sector (Law n. 328/2000) as well as under the Code of the Third Sector in the form of "accreditation".

(iii) **Public-private partnerships**. Public-private partnerships have recently been implemented and expanded within Italian legislation under the name of "co-programming" ("*co-programmazione*") and "project co-development" ("*co-progettazione*"). These are hybrid collaboration models, excluded from the PPD in light of their gratuitous nature and because not aimed at the award of a service contract. Public-private partnerships developed in Spain are currently subject to the review of the CJEU in the *ASADE* case.

(iv) **Contracts with specific TSOs**. In Italy, PAs can conclude *contracts* with voluntary organisations and associations for social advancement for the provision of social services of general interest. Contracts can be also concluded with voluntary organisations with regard to emergency ambulance transport services. Such contract models escape (for the moment) the application of the PPD due to their intrinsic predisposition to pursue social objectives.

241. When the PPD substantive conditions are not fulfilled, contracting authorities must nonetheless comply with fundamental EU and national principles entailing the application of simplified administrative procedures. The ultimate objective is to promote the equality of opportunities for all economic operators and to ensure that undistorted competition is maintained in the EU and the single Member States.

242. Please note that this discussion note is indicative only and aims at supporting discussions at national and EU level in these fields, in particular in view of developing alternative models to public procurement.

243. If the content of this discussion note contains any errors, please contact thomas.bignal(at)easpd.eu or info(at)easpd.eu.