



Cross-cutting policies



## ***Study on extending the Energy Community Treaty to include the rules on public procurement***

Rokas Law Firm et al.  
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## 0.I. Abbreviations and acronyms

BiH	Bosnia and Herzegovina
Classic Directive or CD	Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC
Concession Directive or CoD	Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts
Commission or European Commission	An institution of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU
CPs	Contracting Parties to the Energy Community Treaty
DCFTA	Deep and Comprehensive Free Trade Agreement
The Directives	The PP Directives and the Concession Directive
DSO	Distribution System Operator
ECT or Energy Community Treaty	Treaty establishing Energy Community
ECS	Energy Community Secretariat
EnC	Energy Community
Electricity Directive	Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC
Energy	In this Report, any reference to “energy” should be understood as gas and electricity
Energy markets	In this report, any reference to “energy markets” should be understood to mean the markets for electricity and gas (i.e. the markets for network energy)
EU	European Union
FBiH	Federation of BiH, one of the two Entities of BiH
FiP	Feed in Premium
FiT	Feed in Tariff
FYR of Macedonia	Former Yugoslav Republic of Macedonia
Gas Directive	Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
LPP or PP law	Law on Public Procurement
Member State or MS (plural MSs)	A state, which is a member of the EU

OJ	Official Journal
PD	Project Director
PP	Public Procurement
PSO	Public Service Obligation as defined in the Electricity Directive and in the Gas Directive
Regulation 2015/2171	Commission Delegated Regulation (EU) 2015/2171, of 24 November 2015, amending Directive 2014/25/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts
Remedies Directives	<p>Directive 89/665/EC and Directive 92/13/EEC as amended with 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts;</p> <p>Council Directives 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts</p> <p>Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.</p>
RE	Renewable Energy
RES	Renewable energy sources
RS	Republika Srpska, one of the two Entities of BiH
SEE CAO	Coordinated Auction Office in Southeast Europe
SMEs	Small and Medium sized Enterprises
SAA	Stabilisation and Association Agreements
TSO	Transmission System Operator
Utilities Directive or UD	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
WTO GPA	The World Trade Organisation Government Procurement Agreement



## 1 Executive Summary

The overall objective of the study on extending the ECT to include the rules on public procurement was to “obtain competent assessment of the current status of the procurement laws and rules relevant for the activities imposed by the implementation of the Treaty in the Contracting Parties, the compliance of these acts with the provisions of the relevant EU Directives in force as of 18 April 2016 and the efforts required to harmonise these acts with the provisions of the *acquis* including the associated costs and benefits from harmonisation”. The final goal of the Energy Community is to “identify and remove obstacles for market competition and market integration, stemming from the rules governing public procurement in the network energy business (electricity and gas) and in particular those providing public services related to the network energy in the Contracting Parties.”

The legal framework elaborated in Chapter 2 of this Study presents the legislation applied in the CPs as of September 2016. The analysis focused on the following issues:

- a) Analysis of current PP legislation in the Contracting Parties;
- b) Rules and practices applied for procurement of network energy (electricity and gas);
- c) Overview of applicable rules in each Contracting Party in comparison with the EU applicable rules and the new EU legislation;
- d) Identification of diverging provisions in the rules on PP.

In the first two sub-tasks an analysis was made on the current status of public procurement rules and procedures in the CPs both in general (sub-task a) and specifically in relation to procurement of network energy (sub-task b). The analysis focused on presenting an overall picture of the situation in the EnC CPs, while the findings were grouped where several CPs have legal frameworks with identical or similar characteristics.

With regard to sub-tasks (c) and (d), the Study focused on each particular CP and, further, on the level of compliance (in a wider sense) of the rules applicable in each CP with the respective rules included in the relevant PP Directives. The findings are mostly presented in the form of tables illustrating in a demonstrative way divergences between the provisions of the national legislation in each CP compared with the provisions of the EU Directives, accompanied with general conclusions and remarks. In addition to analysing the compliance of the CPs with the selected important rules applicable to the PP procedures and the exemptions to their application, we have included some practical examples of the application of PP Directives in the energy sector (such is the case of procurement of energy for own consumption of contracting authorities, or the selection of a PSO provider, or procurement of energy for provision of balancing services). These examples are not meant to limit the application of the PP Directives in the CPs energy markets but to provide better understanding on the impact of their application in such markets (particularly to cross-border competition and market integration).

Chapter 3 consolidates the above findings, evaluating the information gathered in relation to the applicable procurement rules in the CPs with a view to:

- a) Specifying the applicable procurement rules in the Contracting Parties, which create undue obstacles for cross-border competition and market integration, in particular for network energy; and assessing whether the diverging rules create undue obstacles for cross-border competition and market integration. In addition to the issues addressed in the Chapter 2, we have analysed the following issues which are

- important for a complete assessment: a) prioritising of domestic economic providers; b) promotion of environmental criteria; c) use of electronic self-declarations for bidders (ESPD); d) applicability of PP rules when purchasing electricity from the power exchange or other organised market; e) timing for fulfillment of other international obligations for harmonisation of PP rules (SAA, GPA and DCFA); and f) cooperation on the EnC level;
- b) Proposing necessary changes in the national legislation for each Contracting Party and on the EnC level (under reciprocity requirement). With regard to harmonisation on the EnC level we have taken into consideration several particular levels of harmonisation, namely harmonisation of legislation, of implementation and of monitoring;
  - c) Assessing the steps and timeframe to adjust the legislation; and
  - d) Providing an overview of costs and benefits of proposed changes for the power and gas sector utilities and for customers.

Chapter 4 of the Study focuses particularly on the assessment of the relevance of the Concession Directive for the gas and power market in the EnC, including the requirement for an impact assessment of the related costs and benefits, as well as the necessary steps for its incorporation in the Treaty.

It was organised in two sub-tasks as follows:

- a) Assessment of the relevance of the Concession Directive for the gas and power market in the EnC;
- b) Impact assessment of its incorporation in the Treaty - referring to the required steps, associated costs and assessment of the benefits for each of the beneficiaries.

After the initial overview of the New EU Concession Directive, this Chapter first identifies diverging provisions regarding the regulation on concessions on the selected number of significant issues. Further it describes the rules on concessions which reflect the standards introduced by the CoD and the main inconsistencies between the rules of certain CPs and the Concession Directive. Most CPs expressly apply the concession rules in relation to activities in the gas and electricity sectors. Almost all CPs have included in their legislation the general principles applicable in relation to the award of concession contracts. The main inconsistencies are regarding the definition of public authorities; in regard to the scope of application and the exclusions; maximum duration of concession contracts; and the performance of concessions (particularly the monitoring mechanisms).

Building on the above findings and the accumulated benefits of the implementation of the PP and Concession Directive by the CPs, in this Final Report, in Chapter 5, we assess different possibilities regarding the incorporation of these Directives into the legal framework of the Energy Community.

We provide concrete proposals and recommendations regarding the content as well as the procedures required for the harmonised and successful implementation of EU public procurement rules in the EnC acquis. After having identified the current gaps and obstacles in the CPs' legislation and policy, the possible impact that the incorporation of EU acquis on public procurement would have on the market, and the steps required for its adequate incorporation into the CPs' legal orders and administrative practice, in view of their specific

conditions and status, we elaborate proposals on adaptations of the Directives to enable their adequate and efficient implementation in the most proper way.

Our recommendation is that the CPs should adopt the PP and Concession Directives in their entirety and that the ECT should be amended respectively, securing that such harmonisation is binding for the CPs. We also recommend harmonisation of the CPs legislation with the Remedies Directives. Simultaneous harmonisation of the rules in all CPs together with introduction of other described provisions facilitating participation of economic operators from other CPs (such as prohibition of preferential treatment of domestic operators) would constitute reciprocity and benefit the increase of cross-border competition. For smooth harmonisation of legislation and its implementation on the EnC level we advise establishing of the Independent Procurement Authority within the EnC Secretariat. Its authorities would include: monitoring the harmonisation, providing recommendations, initiating infringement procedures; providing prior opinions and guidelines to CPs; monitoring and coordinating the implementation of the PP rules, providing technical assistance; and acting upon complaints of interested economic entities.

All our findings are based on the status of the legislation and regulation as of September 2016.

## 2 Identification and comparison of diverging provisions in the current network energy regulations in the CPs

In this Chapter we have focused our research to the specific legal issues which we consider particularly important for the liberalisation of the energy markets and have provided our assessment on the compliance of the CPs' regulation. Our Study includes a brief review of the respective provisions of the EU regulation and their implementation.

### 2.1 EU PP Policy and Legal Framework

The Public Procurement package of the European Union has been published in OJEU 28.3.2014, No. L94 and should have been transferred to the national legislation of the Member States by 16.4.2016. It consists of three Directives, namely:

1. Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC ("**Classic Directive**")
2. Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ("**Utilities Directive**")
3. Directive 2014/23/EU on the award of concession contracts ("**Concession Directive**")

Given the importance of the Remedies Directives for the implementation of the PP Directives and the Concession Directive, we have included them in our assessment and recommendations as well.

The Classic Directive, applies to contracting authorities<sup>1</sup> which do not exercise activities defined in Articles 8(1)<sup>2</sup> and 9(1)<sup>3</sup> of the Utilities Directive<sup>4</sup>. Procurement within the meaning of the Classic Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by these contracting authorities, whether or not the works, supplies or services are intended for a public purpose, unless some of the exemptions provided in the Directive apply.

The Utilities Directive applies to the procurement of utilities. In this Report we limit the assessment to energy, specifically electricity and natural gas, and view both the Classic and the Utilities Directive only in regard to these activities. Procurement within the meaning of the Utilities Directive is the acquisition by means of a supply, works or service contract of works, supplies or services by one or more contracting entities<sup>5</sup> from economic operators chosen by those contracting entities, provided that the works, supplies or services are intended for the pursuit of one of the activities referred to in Articles 8(1) and 9(1) of the Utilities Directive. In other words it applies to contracting entities active in energy sector when procuring energy related services as defined in Articles 8(1) and 9(1), unless some of the exemptions provided in the Directive apply.

For better understanding of the application of the PP Directives it should be clarified that the PP Directives apply to procurements of contracting authorities for their own consumption. It also applies in case of selection of the supplier of last resort or the public service supplier as described below. However, they would not apply in cases when contracting entities procure energy for supply<sup>6</sup> or for further sale<sup>7</sup> or export<sup>8</sup> as well as if the Commission issues a decision (implementing act) confirming that these activities are directly exposed to competition on markets to which access is not restricted<sup>9</sup>.

## 2.2 Identification of diverging provisions for rules on PP in the Contracting Parties

In this Chapter we present the issues which we consider particularly important for the functioning of integrated and competitive energy markets in the CPs and provide the respective compliance assessment. They include examples of the application of PP Directives in energy sector with the purpose to provide better understanding of the impact of

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<sup>1</sup> Article 2.1,(1) of the Classic Directive “contracting authorities” means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law”.

<sup>2</sup> Article 8(1) of the UD, Gas and heat, 1. As far as gas and heat are concerned, this Directive shall apply to the following activities: a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of gas or heat; and b) the supply of gas or heat to such networks.

<sup>3</sup> Article 9(1) of the UD, Electricity, 1. As far as electricity is concerned, this Directive shall apply to the following activities: a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of electricity; and b) the supply of electricity to such networks.

<sup>4</sup> Article 1 and 7 of the Classic Directive.

<sup>5</sup> Article 4(1) of the UD, see page 10 below.

<sup>6</sup> Article 23 of the Utilities Directive, where a contracting entity is active in the energy sector and is engaged in an activity referred to in Article 8(1) or Article 9(1) for the supply of (i) energy or (ii) fuels for the production of energy.

<sup>7</sup> Article 18 of the Utilities Directive, to contracts awarded for purpose of resale or lease to third parties, provided that the contracting entity enjoys no special or exclusive right to sell or lease the subject of such contract and other entities are free to sell or lease it under the same conditions as the contracting entity.

<sup>8</sup> Article 19 of the Utilities Directive, contracts awarded for the pursuit of such activity in a third country.

<sup>9</sup> Articles 34 and 35 of the Utilities Directive

their application in the respective markets (particularly to cross-border competition and market integration).

### **2.2.1 Do public procurement rules apply to contracting entities (contracting authorities, public undertakings and entities operating on the basis of special or exclusive rights), as defined in the Utility Directive?**

The Classic PP Directive (Article 7) regulates the PP rules for the acquisition, by means of a public contract, of works, supplies or services by contracting authorities, when the value exceeds certain thresholds. The Utilities Directive (Articles 4, 9 and 8) regulates the PP rules when the works, supplies or services intended for specific activities (including the provision or operation of fixed networks intended to provide services to the public in connection with production, transport or distribution of electricity or gas and the supply of electricity or gas to such networks) are acquired by contracting entities (public authorities, public undertakings and entities operating on the basis of special or exclusive rights) active in the energy sector.

Article 4 of the Utilities Directive defines the contracting entities as follows:

1. For the purpose of this Directive contracting entities are entities, which:
  - a) are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 8 to 14; or
  - b) have as one of their activities any of the activities referred to in Articles 8 to 14, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State (and are not contracting authorities or public undertakings).
2. 'Public undertaking' means any undertaking over which the contracting authorities may exercise a dominant influence either directly or indirectly, by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed in any of the following cases where those authorities, directly or indirectly:

- a) hold the majority of the undertaking's subscribed capital;
  - b) control the majority of the votes attaching to shares issued by the undertaking,
  - c) can appoint more than half of the undertaking's administrative, management or supervisory body.
3. For the purposes of this Article, 'special or exclusive rights' means rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 8 to 14 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria shall not constitute special or exclusive rights within the meaning of the first subparagraph.

Such procedures include:

- a) procurement procedures with a prior call for competition in conformity with Directive 2014/24/EU, Directive 2009/81/EC, Directive 2014/23/EU or the Utilities Directive;
- b) procedures pursuant to other legal acts of the Union listed in Annex II<sup>10</sup>, ensuring adequate prior transparency for granting authorisations on the basis of objective criteria.

Article 3 of the Utilities Directive defines the contracting authorities as follows:

1. For the purpose of this Directive ‘contracting authorities’ means State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law.
2. ‘Regional authorities’ includes all authorities of the administrative units, listed non-exhaustively in NUTS 1 and 2, as referred to in Regulation (EC) No 1059/2003 of the European Parliament and of the Council (30).
3. ‘Local authorities’ includes all authorities of the administrative units falling under NUTS 3 and smaller administrative units, as referred to in Regulation (EC) No 1059/2003.
4. ‘Bodies governed by public law’ means bodies that have all of the following characteristics:
  - a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
  - b) they have legal personality; and
  - c) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or which have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

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<sup>10</sup> ANNEX II - LIST OF UNION LEGAL ACTS REFERRED TO IN ARTICLE 4(3) Rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria do not constitute ‘special or exclusive rights’ within the meaning of Article 4 of this Directive. The following lists procedures, ensuring adequate prior transparency, for granting authorisations on the basis of other legal acts of the Union which do not constitute ‘special or exclusive rights’ within the meaning of Article 4 of this Directive:

- (a) granting authorisation to operate natural gas installations in accordance with the procedures laid down in Article 4 of Directive 2009/73/EC;
- (b) authorisation or an invitation to tender for the construction of new electricity production installations in accordance with Directive 2009/72/EC;
- (c) the granting in accordance with the procedures laid down in Article 9 of Directive 97/67/EC of authorisations in relation to a postal service which is not or shall not be reserved;
- (d) a procedure for granting an authorisation to carry on an activity involving the exploitation of hydrocarbons in accordance with Directive 94/22/EC;
- (e) public service contracts within the meaning of Regulation (EC) No 1370/2007 for the provision of public passenger transport services by bus, tramway, rail or metro which have been awarded on the basis of a competitive tendering procedure in accordance with Article 5(3) thereof, provided that its length is in conformity with Article 4(3) or (4) of that Regulation.



Level of compliance with the UD	CPs	Comments
Full Compliance	Albania	Definitions of contracting entities in the respective PP legislation and regulation are substantially in compliance with the UD and the PP rules apply to these entities.
	Bosnia and Herzegovina	
	FYR of Macedonia	
	Montenegro	
	Serbia	
	Kosovo*	
Ukraine		
Partial Compliance	Moldova	The PP Law does not apply to the energy sector and there is no other PP law which would apply. Definitions of the entity with exclusive rights should be harmonised.

### 2.2.2 Do public procurement rules apply when contracting authorities (except energy undertakings) purchase electricity or gas for their own consumption?

In the EU, in general, the PP rules apply. Some specific situations may fall under the rules which exclude the application of the PP rules, such as articles regulating the special relations and under the condition that such procurement exceeds the prescribed thresholds. The exclusion of Special relations is regulated by Articles 28-31 of the Utilities Directive and 12 of the Classic Directive. These articles provide that in cases where contracting authorities purchase electricity or gas for their own consumption from a public undertaking or an entity operating on the basis of special or exclusive rights in accordance with the Utilities Directive, the application of the PP rules would be excluded if certain conditions are fulfilled. More about the so called in-house contracts on page 33.

Some CPs do not apply the PP rules as they have only one registered supplier; thus the question is whether it is practicable to apply PP rules in cases of monopoly. Our recommendation is that the respective regulation should provide for PP rules to apply to the respective procurements above certain thresholds or alternatively should provide that such obligation will be triggered as soon as a second respective licence is issued in such CP. This obligation may raise interest for licensing and participation in procedures of a second (or other) supplier, thus enhancing cross-border competition and entrance of new participants.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	FYR of Macedonia	General rules on PP apply and the contracting authorities fully apply them in practice.
	Serbia	Application of procurement rules has been explicitly regulated.
Partial Compliance	Ukraine	General rules should apply but in practice are not regularly applied (often it is negotiated procedure)
	Bosnia and Herzegovina	The law exempted the respective application of the PP rules "until the relevant market is opened for competition". However, the BiH Council of Competition has declared that the electricity market is considered open for competition thus the exemption does not apply to the electricity market any more. Some authorities have already started to apply the PP rules in practice. The gas market is still not open for competition.
Non Compliance	Montenegro	Contracting authorities are not obliged and do not apply these rules in practice.
	Moldova	
	Albania	
	Kosovo*	

**2.2.3 Do public procurement rules apply where there is a public service obligation ("PSO") provider or a supplier of last resort or where there is a need to purchase electricity or gas in order to provide the PSO/ universal service (if there is no public procurement procedure<sup>11</sup> for the selection of the PSO provider / supplier of last resort)?**

Article 3 of the Electricity and Gas Directives provides for the regulation of the Public Service Obligation (PSO) and the universal service. More precisely, Article 3 provides that MSs may impose on all undertakings operating in the electricity/gas sector a PSO which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection. In addition, in relation to household consumers and where MSs deem appropriate small enterprises, MSs shall ensure universal services, which means the right to be supplied with electricity of a specified quality, within the territory, at reasonable, easily and clearly comparable, transparent and non-discriminatory prices. For providing of these services MSs may appoint a supplier of last resort.

The providers of the PSO and suppliers of last resort fall under the definition of entities which operate on the basis of special or exclusive rights granted by a competent authority of a MS (Article 41 b) UD). With the exception of when a PSO is imposed on all providers, selection of an entity which will provide a PSO/ universal service should be in compliance with the Utilities Directive rules.

However, if the special or exclusive rights have been granted to an entity in a procurement procedure, such entity should not be obliged to apply the PP rules for the procurement of electricity or gas.

In other words, a MS may choose to have a public procurement procedure for selection of a PSO provider / supplier of last resort, which is often the case in practice. In this procedure one of the criteria for selection among the applicants is the price at which it offers to provide the respective service under the scope of PSO/universal service. Thus there is no need to burden such entity further with additional public procurement procedures, having also in mind that it is in its interest to acquire electricity or gas at the lowest possible price in order to respect the undertaken obligation and supply the electricity at the price agreed through the PP procedure.

In cases where a PSO provider / a supplier of last resort is appointed without any PP procedure, e.g. where a vertically integrated energy entity is appointed as PSO provider / a supplier of last resort, such entity should apply PP procedures in order to procure electricity or gas.

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<sup>11</sup> Cf. Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*, EU:C:2003:415, paragraph 95.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Montenegro	Not applied in practice yet, the first PP procedure was planned to be organised within 12 months from the enactment of the Energy Law (i.e. by the end of 2016)
	Serbia	Procedures are organised both for electricity and gas in accordance with law.
	Kosovo*	The new Electricity Law adopted in June 2016 provides that the energy regulatory authority chooses the Supplier of Last Resort in a bidding procedure while a PSO would be imposed to energy companies through a transparent, non-discriminatory procedure which should provide equal access for electricity enterprises to local customers. Such application is expected.
Partial Compliance	Albania	PP rules are partially in compliance. The Albanian Energy Authority (ERE) chooses the Supplier of Last Resort according to a specific provision that allows auction after a public notification.
	Ukraine	In regard to gas, the PSO provider is selected by the tender committee according to the procurement procedure. In regard to electricity, according to the draft law on the electricity market No. 4493 registered in the parliament on 21 April 2016, the PSO shall be imposed by the Government. The supplier of last resort shall be selected by the NEURC according to the procedure yet to be approved by the Government.
Non Compliance	Moldova	No competitive procedure is envisaged for the selection of the provider nor for the procurement of energy
	Bosnia and Herzegovina	

#### 2.2.4 Do public procurement rules apply to the granting of the support scheme for renewable energy (to meet the 2020 targets and to comply with State Aid Guidelines 2014-2020<sup>12</sup>)?

The Guidelines provide that:

- (i) from 1 January 2016 all new aid schemes and measures may be granted as a premium in addition to the market price, while the generators sell their electricity directly on the market, beneficiaries are subject to balancing responsibilities unless no liquid intra-day market exists and measures are put in place to ensure that generators have no incentive to generate electricity under negative prices (see § 124 b).
- (ii) from 1 January 2017 the aid (premium) to new electricity capacity from RES should be granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria (see § 126), unless a MS demonstrates that:
  - a) only one or a very limited number of projects or sites could be eligible; or
  - b) a competitive bidding process would lead to higher support level (for example to avoid strategic bidding); or
  - c) a competitive bidding process would result in low project realisation rates (avoid underbidding). The bidding process may be limited to certain technologies.

<sup>12</sup> Articles 124 – 130 of the Commission Guidelines on State aid for environmental protection and energy 2014-2020, (OJEU C[2014] 200/1).

The Guidelines provide for certain exceptions related to the capacity of the RES producers in which cases the above obligations would not apply.

The Guidelines are “soft law” and thus not directly legally binding for the MSs; however they have legal effects through a) decision of the EU Courts and b) the application of the general principles of legitimate expectations and legal certainty. However, an analysis of the justification of this State aid (e.g. Feed in Tariffs), may lead to a conclusion that although it is justified for accomplishing the RES 2020 targets, in case that the amount of aid is determined without the application of the PP rules, it may be excessive and thus it may further lead to the issuance of a Commission’s decision ordering abolishing or altering of such aid as well as the recovery of the exceeding part of the aid<sup>13</sup>.

The MSs regulate PP procedures in separate pieces of legislation regulating the RES support schemes not only directly through the application of the general PP laws. Thus for instance, in Greece there is a new law which states that the new RES State aid will be awarded through competitive auction procedures which will be organised by the Regulatory Authority for Energy. A public procurement procedure and the general principles of the PP rules would apply in relation to issues not directly regulated by the above RES law/s, thus supplementing them when necessary. The PP rules would also apply for interpretation of the RES auctions when necessary.

Level of compliance with the PP Directives	CPs	Comments
Partial Compliance	Moldova	The Law provides for a competitive procedure for RES support. It has not been implemented so far.
	Montenegro	The Law provides for a competitive procedure for RES producers above 1 MW. It has not been implemented so far.
Non Compliance	Albania <sup>14</sup>	The amount of aid is determined without the application of the PP rules
	Bosnia and Herzegovina	
	FYR of Macedonia	
	Serbia	
	Kosovo*	
	Ukraine	

### 2.2.5 Are public procurement rules applied by TSOs when procuring for providing balancing and ancillary services ?

The Utilities Directive (as well as other respective energy regulations) would apply for TSOs when procuring energy and capacity necessary for providing balancing and ancillary services (Articles 4, 9 and 8 UD), including capacity mechanism auctions<sup>15</sup> and interruptability services<sup>16</sup>.

<sup>13</sup> Article 16 of the Council Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification)

<sup>14</sup> Note, that a new Law on promotion of energy from RES was adopted in Albania in February 2017, and has not been elaborated in this Study.

<sup>15</sup> Capacity mechanisms are measures taken by Member States to ensure that electricity supply can match demand in the medium and long term. Capacity mechanisms have an impact on competition in the internal electricity market. Many of

For balancing and ancillary services, both in the EU and the CPs, it is often required that the facilities procuring energy and capacity are domestic. Introducing competition in this sector would provide the possibility to SME to participate and to further develop competition. Compulsory application of a competitive procedure for balancing ancillary services in all CPs, with only limitation regarding the technical requirements, would enhance the implementation of the Memorandum of Understanding of Western Balkan 6 on Regional Electricity Market Development and Establishing a Framework for Other Future Collaboration<sup>17</sup>. Compulsory application of a competitive procedure for these procurements in all CPs, with only limitation regarding the technical requirements, would enhance the implementation of the Memorandum of Understanding.

The possibility of CPs to introduce competition in the procurement of electricity and capacity for provision of ancillary and balancing services may depend partially on the structure of each CP's market. Although it is recommended as such, one might argue that, similarly to the provision of the PSO there may be no competition where there is only one supplier in the CP's market. However, as long as potential new entrants know that there is no formal procedure in which they would compete with the domestic incumbent, they will not make the effort to enter the market. Regulating a formal obligation to organise PP would, in our opinion, be a good starting point, although the results might not be achieved immediately in all CPs. From the regulatory point of view, in case that there is only one (licensed) participant in the specific market, which may qualify for such procurement, the respective provision may state that the obligation to apply PP rules will apply as soon as there is a second licensee/participant. It is important to have in mind that the costs of the balancing services are often extremely and unjustifiably high, if there is no competition. The only way to reduce these prices is to introduce competition.

### The CPs have the following rules:

- **Albania**

The application of the PP Law is excluded, however according to the Power Sector Law (43/2015), these services should be procured based on a transparent, competitive and non-discriminatory procedure. During the year 2016, after the proposal of TSO, the Albanian energy regulator has approved the Decisions No. 79/2016 and No. 102/2016 "On the Approval of the Contract between TSO and KESH for the Provision of Ancillary and Balancing Services to the Electro Energetic System, reflecting that currently in the Albanian energy market only the generating units of KESH have the capacities to provide ancillary services", while it was impossible to apply the procurement procedures due to the short time period. On 23 June 2016 the Albanian energy regulator approved the Decision no. 103/2016 on the purchase and sale of electricity by DSO, TSO and entity/ies in charge of the PSO. Particularly this decision provides for an electronic tender procedure for the covering of TSO losses.

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these mechanisms involve State aid, so they are subject to EU State aid rules. Thus if CP decide to introduce capacity mechanisms TSOs should apply PP rules in regard to selection counterparts (producers of energy or intensive energy consumers).

<sup>16</sup> Interruptibility services are typically provided by large electricity consumers, which accept cuts in their electricity supply without prior notice, to the transmission system operator (the TSO).

<sup>17</sup> [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/4126415/3178C3FCD7C364E1E053C92FA8C0F233.pdf](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/4126415/3178C3FCD7C364E1E053C92FA8C0F233.pdf)

- **Bosnia and Herzegovina**

The electricity TSO applies PP rules for procurement for supply of ancillary services, for the purchasing of electricity to cover losses and for balancing services. They still do not apply to gas.

- **FYR of Macedonia**

TSO is procuring for the provision of balancing services from the incumbent generator (ELEM) based on the licence of ELEM issued by the Energy Regulatory Commission, where it is stated that it will provide the ancillary services to the TSO. The new amended Market rules (as amended in October 2016) that will apply from July 2017 provide that public procurement rules shall apply to procurement for ancillary services and to covering of losses. Based on the Rules of the energy market from 17 February 2014, Articles 66, 67 and 68, the electricity TSO and DSO are obligated to organise a public call for procurement of electricity to cover losses in the transmission network and distribution network under market conditions once a year at least, based on the rules and criteria approved by Energy Regulatory Commission. TSO and DSO should prepare the rules and submit them to the Energy Regulatory Commission for approval. Such rules have been prepared and approved in 2014 thus the prices are formed based on the offers of the interested parties.

- **Kosovo\***

The 2013 Market Rules regulate the operation of the balancing mechanism and provides that the TSO will activate purchasing or selling offers submitted by market participants. However in practice the TSO was not ready to apply this provision and has requested a temporary derogation, which was issued by the regulatory authority until 28 February 2017. Article 13 of the Market Rules in regard to ancillary services provides that the TSO “will undertake such procurement exercises as it may deem prudent to ensure that sufficient ancillary service contracts are in place and available to be utilised for each type of ancillary service”. Article 19 of the 2016 Law on Electricity provides that the TSO may engage in electricity and capacity procurement according to transparent, non-discriminatory and market-based procedure only for the following purposes: transmission network losses; system balancing; and provision of ancillary services. In practice no procurement rules are applied.

- **Moldova**

The law provides only that the rules used by the operator for such purposes shall be objective, transparent and non-discriminatory. The terms and tariffs shall be established in non-discriminatory ways by the operator and shall be approved by the energy regulator. In 2015 the Ministry of Economy issued an internal circular recommending the application of tender procedure for procuring energy for covering of network losses while issuing of the respective regulation by the energy regulatory authority is pending. In practice, the PP rules apply to covering energy losses while there are no plans in relation to balancing as yet.



- **Montenegro**

The law regulates only that it should be a transparent procedure. In July 2016 the energy regulator passed the methodology on regulating prices, deadlines and conditions for providing of ancillary and balancing services of the electricity transmission system (OJ 5/16) in which Article 7 provides that securing ancillary services is performed through public call (tender) to providers of services while the generators equipped to provide ancillary services, situated in Montenegro are obliged to submit an offer up to the determined level of reserves. The Methodology further provides details on the type of services and limits the maximum prices to be paid for some of the services. For some services it does not require the application of PP rules (capacity availability) while for some (interruptability service) it provides for a public tender procedure. Energy to cover for the network losses is also procured through a public tender. Still provision of electricity and capacity for some ancillary services are agreed directly and only with EPCG, the incumbent energy company. Subsequently PP are expected to be implemented in compliance with the Methodology without the need for further regulation.

- **Serbia**

Until 2015 the TSO was procuring electricity and capacity for balancing and ancillary services using PP procedures. From 2015 to date these services are in practice procured via bilateral agreements between market participants on a regulated market as the amended legislation and regulation do not provide for compulsory application of PP procedures. The respective regulations include: Decision on Enacting Regulations on the Operation of the Electricity Market (Official gazette RS no. 120/2012 and 120/2014); New Public Procurement Law introduced in 2015 and the Decision on Prices of the Lease of Power Reserve for Performing System Services of Secondary and Tertiary Regulation and Prices of Auxiliary Services for the Year 2017 issued on 26 December 2016 by the Regulatory Agency (Official gazette RS no. 105/2016). Thus there is only an obligation that the TSO procures electricity for the compensation of losses in the transmission network and ancillary services in its system, in accordance with transparent, non-discriminatory and market principles.

- **Ukraine**

Although the PPL explicitly excludes its application on procurement for balancing and ancillary services, the Law on Operating Principles of the Electricity Market of Ukraine provides that these services shall be purchased on a competitive basis and based on model contracts to be approved by the Ukrainian energy regulator. The same applies to gas in accordance with the Gas Transmission System Code.

Level of compliance with the PP Directives	CPs	Comments
Advanced Compliance	Montenegro	Subsequently PP are expected to be implemented in compliance with the Methodology without the need for further regulation.
	Moldova	The law has general provisions on objective, transparent and non-discriminatory procedure. In practice, the PP rules apply to covering of energy losses.
	Bosnia and Herzegovina	Applicable in compliance with the respective regulation and in practice for electricity, not for gas.
Low Compliance	Albania	The application of the PP Law is excluded; Decision 103/2016 introduces tender procedure for covering of losses. There is still no application in practice
	FYR of Macedonia	Since 2014, the electricity for covering losses is procured in compliance with the rules and criteria approved by the Energy Regulatory Commission. The amended Market rules (in 2016) should apply from July 2017.
	Kosovo*	The 2013 Market Rules provide for the obligation to apply PP rules in case of balancing services but the TSO requested and received the approval from the regulatory authority to delay the application of this rule. The 2016 Electricity law regulates that procurement of electricity and capacities for network losses, system balancing and ancillary services should be according to transparent, non-discriminatory and market-based procedure. No procurement is applied in practice.
	Serbia	Since 2014 there is no obligation to apply the PP rules and all procurements are provided via bilateral agreements.
	Ukraine	The PP law does not apply to procurement of energy and capacity for these services while the electricity and gas codes provide only that they will be purchased on a competitive basis.

## 2.2.6 Do public procurement rules apply to construction of new production facilities?

The Classic (Articles 1 and 7) or the Concession Directive (Articles 1 and 2) would apply in respect of constructing new production facilities. Note that here we do not consider the situation when the new production facility is private project within the meaning that it is not project of public interest and/or with participation of the public finances. Thus when the State provides concession for such a project or when it is financed by the State, public procurement rules should apply. Articles 7<sup>18</sup> and 8<sup>19</sup> of the Electricity Directive, which should

<sup>18</sup> Article 7 of the Electricity Directive. Authorisation procedure for new capacity

1. For the construction of new generating capacity, Member States shall adopt an authorisation procedure, which shall be conducted in accordance with objective, transparent and non-discriminatory criteria.
2. Member States shall lay down the criteria for the grant of authorisations for the construction of generating capacity in their territory. In determining appropriate criteria, Member States shall consider:
  - (a) the safety and security of the electricity system, installations and associated equipment;

be implemented in the CPs in compliance with the ECT, regulate the issues of issuing authorisation for new capacity and if that is not applicable, tendering for the new facility.

- (b) the protection of public health and safety;
- (c) the protection of the environment;
- (d) land use and siting;
- (e) the use of public ground;
- (f) energy efficiency;
- (g) the nature of the primary sources;
- (h) the characteristics particular to the applicant, such as technical, economic and financial capabilities;
- (i) compliance with measures adopted pursuant to Article 3;
- (j) the contribution of the generating capacity to meeting the overall Community target of at least a 20 % share of energy from renewable sources in the Community's gross final consumption of energy in 2020 referred to in Article 3(1) of Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources [\(17\)](#); and
- (k) the contribution of generating capacity to reducing emissions.

3. Member States shall ensure that specific authorisation procedures exist for small decentralised and/or distributed generation, which take into account their limited size and potential impact.

Member States may set guidelines for that specific authorisation procedure. National regulatory authorities or other competent national authorities including planning authorities shall review those guidelines and may recommend amendments thereto.

Where Member States have established particular land use permit procedures applying to major new infrastructure projects in generation capacity, Member States shall, where appropriate, include the construction of new generation capacity within the scope of those procedures and shall implement them in a non-discriminatory manner and within an appropriate time-frame.

4. The authorisation procedures and criteria shall be made public. Applicants shall be informed of the reasons for any refusal to grant an authorisation. Those reasons shall be objective, non-discriminatory, well-founded and duly substantiated. Appeal procedures shall be made available to the applicant.

<sup>19</sup> Article 8 of the Electricity Directive. Tendering for new capacity

1. Member States shall ensure the possibility, in the interests of security of supply, of providing for new capacity or energy efficiency/demand-side management measures through a tendering procedure or any procedure equivalent in terms of transparency and non-discrimination, on the basis of published criteria. Those procedures may, however, be launched only where, on the basis of the authorisation procedure, the generating capacity to be built or the energy efficiency/demand-side management measures to be taken are insufficient to ensure security of supply.

2. Member States may ensure the possibility, in the interests of environmental protection and the promotion of infant new technologies, of tendering for new capacity on the basis of published criteria. Such tendering may relate to new capacity or to energy efficiency/demand-side management measures. A tendering procedure may, however, be launched only where, on the basis of the authorisation procedure the generating capacity to be built or the measures to be taken, are insufficient to achieve those objectives.

3. Details of the tendering procedure for means of generating capacity and energy efficiency/demand-side management measures shall be published in the Official Journal of the European Union at least six months prior to the closing date for tenders.

The tender specifications shall be made available to any interested undertaking established in the territory of a Member State so that it has sufficient time in which to submit a tender.

With a view to ensuring transparency and non-discrimination, the tender specifications shall contain a detailed description of the contract specifications and of the procedure to be followed by all tenderers and an exhaustive list of criteria governing the selection of tenderers and the award of the contract, including incentives, such as subsidies, which are covered by the tender. Those specifications may also relate to the fields referred to in Article 7(2).

4. In invitations to tender for the requisite generating capacity, consideration must also be given to electricity supply offers with long-term guarantees from existing generating units, provided that additional requirements can be met in this way.

5. Member States shall designate an authority or a public or private body independent from electricity generation, transmission, distribution and supply activities, which may be a regulatory authority referred to in Article 35(1), to be responsible for the organisation, monitoring and control of the tendering procedure referred to in paragraphs 1 to 4 of this Article. Where a transmission system operator is fully independent from other activities not relating to the transmission system in ownership terms, the transmission system operator may be designated as the body responsible for organising, monitoring and controlling the tendering procedure. That authority or body shall take all necessary steps to ensure confidentiality of the information contained in the tenders.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Albania	The concession law should apply to the production of plants using hydro or other natural resources, also in projects of public interest, particularly if there are no applicants or there are several of them. PP procedures apply for construction of new generating capacity to manage demand and energy efficiency requirements in compliance with Articles 7 and 8 of the Electricity Directive.  Application of the Concession Law will be further elaborated in Chapter 4 of this Report;  In case of Kosovo* there is no Concession Law but the PP law applies in all cases of procurement of new facility by public authority or in the public interest.
	Bosnia and Herzegovina	
	Montenegro	
	FYR of Macedonia	
	Serbia	
	Ukraine	
	Kosovo*	
Partial Compliance	Moldova	The PP rules do not apply to the energy sector until the new Utilities PP law (planned for 2018) is passed; however the provisions may also be interpreted that tendering is compulsory if Moldova intends to construct a certain facility which has not been proposed by a developer. Clear application to the energy sector would be preferable as well as the application of Articles 7 and 8 of the Electricity Directive.

### 2.2.7 Do public procurement rules apply to construction of interconnections or extension of the grid?

The Utilities Directive (Articles 4, 7 and 8) as well as the Concession Directive (Article 1 onwards) would apply in respect of constructing interconnections or extending the grid. Note that here we particularly refer to the situation when the TSO procures for the works for the construction of an interconnection or a part of the grid.

Level of compliance with the EU Directives	CPs	Comments
Full Compliance	Bosnia and Herzegovina	The concession law applies to the construction of interconnections or extension of the grid.
	Montenegro	
	Serbia	
	FYR of Macedonia	
	Ukraine	
	Albania	
	Kosovo*	
Non Compliance	Moldova	There is no application of the PP rules.

## 2.2.8 Are there general principles (transparency, equal treatment, free competition and non-discrimination) applicable to all public procurements (regardless of value or subject matter)?

Article 18 of the Classic Directive and Article 36 of the Utilities Directive, both entitled "Principles of procurement" explicitly provide for the principles of equal treatment of economic operators, non-discrimination, transparency and proportionality of contracting authorities' actions, as well as the prohibition of artificial narrowing of competition and intentional exclusion of public procurement from the scope of the Directive without any reference to the value or subject matter of the public procurement.

Level of compliance with the EU Directives	CPs	Comments
Full Compliance	All CPs	-

## 2.2.9 What are the thresholds and main exclusions?

### (i) Thresholds

Pursuant to Article 4 of the Classic Directive, it shall not apply to the procurement of public works, supplies and services with a value net of value-added tax (VAT) below the following thresholds:

- a) €5 186 000 for public works contracts;
- b) €134 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities;
- c) €207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.

Pursuant to Article 15 of the Utilities Directive, it shall not apply to the procurement of public works, supplies and services with a value net of value-added tax (VAT) below the following thresholds:

- d) €414 000 for supply and service contracts as well as for design contests;
- e) €5 186 000 for work contracts;
- f) €1 000 000 for service contracts for social and other specific services.

The Directive should be interpreted as providing the minimum thresholds which MSs are obliged to apply. MSs are free to adopt lower thresholds for the application of the PP if they wish so. For this reason, we confirmed the compliance with the Directive in cases when CPs have lower thresholds than those provided in the Directive for its compulsory application.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Montenegro, Serbia, Ukraine, Albania, Bosnia and Herzegovina, Moldova, FYR of Macedonia, and Kosovo*	All CPs have the same or lower thresholds than required by the UD, which means that the PP rules apply to them as well. Providing high thresholds would not be in compliance with UD. Lower freeholders are in compliance.

(ii) Other exclusions

1. Regarding international agreement and international organisations' rules. Article 9 of the Classic Directive and 20 of the Utilities Directive provides that the Directives do not apply to public contracts awarded and design contests organised pursuant to international rules (international treaties or rules of an international organisation);
2. Service contracts awarded on the basis of an exclusive right. Article 11 of the Classic Directive and 22 of the Utilities Directive provide that the Directives do not apply to public service contracts awarded by a contracting authority/association of contracting authorities to another contracting authority/association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a law, regulation or published administrative provision which is compatible with the TFEU;
3. Regarding in-house contracts. Article 12 of the Classic Directive and Articles 28-31 provide that the Directives do not apply to public contracts within the public sector in case of the Classic Directive and Special relations (between contracting authorities, to an affiliated undertaking and to a joint venture with participation of a contracting entity) in case of the Utilities Directive;
4. Contracts for resale and lease. Article 18 of the Utilities Directive provides that the Directive does not apply to contracts awarded for purpose of resale or lease to third parties;
5. Contracts regarding other activities than the ones covered in the Utilities Directive or for pursue of such activity in third country. Article 19 of the Utilities Directive provides that the Directives do not apply to contracts awarded or organised for purposes other than the pursuit of a covered activity or for the pursuit of a such an activity in a third country;
6. Awarded by contracting entities active in energy sector for the supply of energy and of fuels for energy production. Article 23 of the Utilities Directive provides that that the Directive does not apply to contracts awarded by certain contracting entities for the supply of energy or of fuels for the production of energy or supply; and
7. Contracts directly exposed to competition. Article 34-35 of the Utilities Directive provides that the Directive does not apply to contracts directly exposed to competition.

**The CPs have the following exclusions:**

- **Albania**

It has only several of the above exclusions, namely, regarding international agreement and international organisations' rules and in regard to service contracts awarded on the basis of an exclusive right.

- **Bosnia and Herzegovina**

It has the following exclusions: regarding international agreement and international organisations' rules, service contracts awarded on the basis of an exclusive right, regarding in-house contracts, for re-sale or lease, and regarding other than covered activity.



- **FYR of Macedonia**

It has the following exceptions: regarding international agreement and international organisations' rules and regarding in-house contracts.

- **Kosovo\***

It has the following exclusions: procurements in which contracting entities are Socially Owned Enterprises, and regarding international agreement and international organisations' rules.

In addition, procurements by socially owned enterprises are excluded from the application of the PP rules regardless whether they are contracting entities. Such general exclusion would not be in compliance with the UD, as even the socially owned enterprises, when acting as contracting entities, should apply the PP rules. Note that socially owned entities are not contracting authorities but may be public undertakings or entities operating on the basis of special or exclusive rights, as defined in the UD

- **Moldova**

Utilities are excluded - this is not in compliance with the UD. In addition, it has the following exclusions: public procurement contracts awarded by purchasing bodies acting in the field of energy, water resources, transport and postal services, regarding international agreement and international organisations' rules, service contracts awarded on the basis of an exclusive right, and for resale.

- **Montenegro**

It has the following exclusions: regarding international agreement and international organisations' rules, regarding in-house contracts, for resale and lease, and purchase of energy or of fuels for the production of energy procured by a contracting entity (supply of energy not included).

- **Serbia**

It has the following exclusions: regarding international agreement and international organisations' rules, service contracts awarded on the basis of an exclusive right, regarding in-house contracts, for resale and lease, regarding covered in third country, by contracting entities active in energy sector for the supply of energy and of fuels for energy production, and contracts directly exposed to competition.

- **Ukraine**

It has the following exclusions: regarding international agreement and international organisations' rules, for resale and lease and works and services if their prices (tariffs) are established by state collegial authorities (like NEURC), other authorities in accordance with their powers, or established according to procedures approved by such authorities. In addition, the regulation regarding collegial and other authorities are not in compliance with the UD rules regarding in-house contracts.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Serbia	Has all the selected exclusions.
Advanced Compliance	Bosnia and Herzegovina	Missing exclusions are: procurements by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and for contracts directly exposed to competition
Low Compliance	Albania	Missing exclusions are: regarding the in-house contracts; for resale and lease; regarding other than covered activity or for the pursue of such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition
	FYR of Macedonia	Missing exclusions are: service contracts awarded on the basis of an exclusive right; for resale and lease; regarding other than covered activity or for the pursue of such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition.
	Kosovo*	Missing exclusions are: for service contracts awarded on the basis of an exclusive right; regarding the in-house contracts; for resale and lease; regarding other than covered activity or for the pursue of such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition. In addition, procurements by socially owned enterprises are excluded from the application of the PP rules.
	Moldova	Utilities are excluded - this is not in compliance with the UD. In addition the following exclusions are missing: regarding in-house contracts; regarding other than covered activity or for the pursue of such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition.
	Montenegro	Missing exclusions are: service contracts awarded on the basis of an exclusive right; regarding other than covered activity or for the pursue of such activity in third country; by contracting entities active in energy sector for the supply of energy; and contracts directly exposed to competition
	Ukraine	Missing exclusions are: service contracts awarded on the basis of an exclusive right; regarding other than covered activity or for the pursue of such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition.

### 2.2.10 What types of procurement procedures are available and what are the prescribed time limits?

Articles 26-32 of the Classic Directive and 43-50 of the Utilities Directive provide for the application of:

- a) **An open procedure.** Both Directives: the minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent, which may be shortened to 15 days under certain conditions, and reduced by five days in case tenders may be submitted by electronic means. In case of publication of prior information notice the time may be shortened to 15 days.
- b) **A restricted procedure.** Classic Directive: The minimum time limit for the receipt of requests to participate shall be 30 days (in cases of substantiated urgency, at least 15 days for receipt of tenders) while the minimum time for receipt of tenders shall be 30 days which may be shortened to 10 days in the following cases: a) if contracting authorities have published a prior information notice which was not itself used as a means of calling for competition and b) in case of urgency. The time for receipt of tenders may be reduced by five days in case tenders may be submitted by electronic means. The time limit for receipt of tenders may be agreed by the participants, but not below the limit of 10 days. The Utilities Directive provides that the time limit for the receipt of request to participate is 30 days which shall in no event be reduced to less than 15 days. Time for submission of the tender may be agreed by the participants. In case there is no agreement it shall be 10 days.
- c) **A competitive procedure with negotiation** (Classic Directive). The minimum time limit for the receipt of requests to participate/initial tenders shall be 30 days. **Negotiated procedure with prior call for competition** (Utilities Directive). The minimum time limit for the receipt of requests shall be fixed at no less than 30 days from the notice or when a periodic indicative notice is used not less than 15 days.
- d) **A competitive dialogue.** Classic Directive: the minimum time limit for the receipt of requests to participate shall be 30 days. Utilities Directive: the minimum time limit for the receipt of requests shall be fixed at no less than 30 days from the notice or when a periodic indicative notice is used not less than 15 days.
- e) **An innovation partnership.** Classic Directive: The minimum time limit for the receipt of requests to participate shall be 30 days. Utilities Directive: the minimum time limit for the receipt of requests shall be fixed at no less than 30 days and shall in any event not be less than 15 days.
- f) **A negotiated procedure without prior publication of a call for competition** (Classic Directive) or **a negotiated procedure without prior call for competition** (Utilities Directive). This procedure may be used for public service contracts, where the contract concerned follows a design contest as well as for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract. In the latter case, this procedure may be used only during the three years following the conclusion of the original contract. Further, in certain specific cases such as for example in cases concerning supplies quoted and purchased on a commodity market, for reasons of extreme urgency, when works, supplies or services can be supplied only by a particular economic operator.

### The CPs have the following procedures and the prescribed time limits:

- **Albania**

The rules in Albania provide for the following procedures:

- Open procedure:** i) not less than 50 calendar days with higher value thresholds; and ii) at least 30 calendar days with value between the higher and lower thresholds;
- Restricted procedure:** 20 calendar days;
- Negotiated procedure with or without prior publication of a contract notice:** 20 calendar days;
- Request for proposals (without call for competition):** 20 calendar days.

In case of procurement procedures falling under the minimum threshold, the prescribed time limit is 10 calendar days. When notifications are drafted and published electronically: i) the time limits for delivering the bids for the open procedures may be reduced to 7 calendar days and ii) the time limits for submitting the bids for the other procedures may be reduced to 5 calendar days.

- **Bosnia and Herzegovina**

The rules in Bosnia and Herzegovina provide for the following procedures:

- Open procedure;**
- Restricted procedure;**
- Negotiated procedure with publication of procurement notice;**
- Competitive dialogue;**
- Negotiated procedure without publication of procurement notice.**

The minimum deadlines for submission of the offers depend on the thresholds. Therefore, for procedures with certain higher value thresholds for the procedures under b and c above, the deadline for submission of the offer is 45 days for the open procedure and 35 days in the restricted procedure; while the deadline for receipt of the applications for participation in the procedure is 30 days in the restricted procedure, the negotiated procedure with publication of procurement notice and the competitive dialogue. For the lower value thresholds the deadline for submission of the offer is 20 days for the open procedure and 15 days in the restricted procedure; while the deadline for receipt of the applications for participation in the procedure is 15 days in the restricted procedure, the negotiated procedure with publication of procurement notice and the competitive dialogue. These deadlines may be reduced by 5 days in case that tender documents and information are provided by electronic means. In case of publication of the prior notice the above deadlines may be reduced from 45 days to 20 and from 30 and 35 days to 13.

Bosnia and Herzegovina has some additional procedures not regulated by the UD for lower value contracts which are thus not relevant for the purposes of this Study.

- **FYR of Macedonia**

The rules in FYR of Macedonia provide for the following procedures:

- Open procedure:** the deadline for submission of the tenders must not be shorter than 45 days for the procurements above certain thresholds (€130.000 or €200.000 in specific cases for goods and service and € 4.000.000 for works regarding the contracting authorities). As an exception, the contracting authority may shorten the deadline for submission of the tenders up to 36 days, provided that a prior indicative notice has been published;
- Restricted procedure:** the deadline for submission of the requests for participation must not be shorter than 30 or 40 days depending on the value of the procurement (€130.000 / € 200.000 in certain cases for goods and services and € 4.000.000 for works regarding the contracting authorities. In case of urgency the deadlines may be reduced for 15 days. As an exception, the contracting authority may shorten the deadline for submission of the tenders up to 36 days, provided that a prior indicative notice has been published;
- Competitive dialogue:** the deadline for submission of the requests for participation must not be shorter than 15 days;
- Negotiated procedure with prior publication of a contract notice:** the deadline for submission of the requests to participate must not be shorter than 12 days;
- Negotiated procedure without prior publication of a contract:** notice does not provide for a specific deadline;
- Simplified competitive procedure:** the deadline for submitting tenders in case of a simplified competitive procedure must not be shorter than five days.

- **Kosovo\***

The rules in Kosovo\* provide for the following procedures:

- Open procedure;**
- Restricted procedure;**
- Negotiated procedure with publication of procurement notice;**
- Competitive dialogue;**
- Negotiated procedure without publication of procurement notice.**

The time limits for receipt of tenders when using the open procedure for i) large value contracts the time limit is 40 days after publication of the contract notice, ii) for medium value contracts the time limit is 20 days, iii) for low value contracts the time limit is 5 days and for iv) minimal value contracts the time limit is 1 day. When applying the restricted procedure the applicable time limits for receipt of requests for participation and receipt of tender are the following: i) for large value contracts, 20 days regarding the receipt of participation requests and 40 days for receipt of tenders, whereas for ii) medium value contracts there are shorter time limits, i.e. 15 days for receipt of participation requests and 20 days for receipt of tenders. The same time limits for receipt of participation and tenders requests apply when

using the negotiated procedure after publication of contract notice. In case of award of large value contracts, subject to an indicative notice, the time limit for receipt of tenders when using the open procedure is reduced to 24 days. When the restricted procedure is applied, the time limit for receipt of participation requests is 20 days, whereas that of receipt of tenders is 24 days. Moreover, time limits can be reduced in certain circumstances. In particular, they may be reduced to, in the open procedure: i) for large value contracts it is 15 days and ii) for medium value 10 days. In restricted procedure and negotiated procedure after qualification of the applicants, the time limits are i) 15 days for receipt of participation requests and ii) 10 days for receipt of tenders.

Except for the procedures provided in the Utilities Directive, there are also a procedures for values below the thresholds prescribed in the Directives, which are thus not relevant for this Study.

- **Moldova**

The rules in Moldova provide for the following procedures:

- a) **Open procedure:** deadlines for submission of the offer are: 20 days, in some cases 52 and 36 days, depending on different exceptions;
- b) **Restricted procedure:** deadlines for submission of the offer are: 20 days, in some cases 37 days when it is above certain thresholds and 10 days in case of electronic form;
- c) **Competitive dialogue:** deadlines for submission of the offers are: 20 days, in some cases 37 days above certain thresholds;
- d) **Negotiated procedure with and without prior publication of announcement for participation (call):** deadlines for submission of the offers are: 20 days, in some cases 37 days depending upon certain threshold, not less than 15 days in certain emergencies, in case of electronic form it is 5 days;
- e) **Request for price offers:** deadlines for submission of offers is 20 days.

The Law stipulates that the main procedures include open procedure and restricted procedure, while other procedures may be applied under certain conditions provided by the law.

- **Montenegro**

The rules in Montenegro provide for the following procedures:

- a) **Open procedure;**
- b) **Restricted procedure;**
- c) **Negotiated procedure with prior publication of a contract notice;**
- d) **Negotiated procedure without prior publication of a contract notice;**

The deadline for submission of an offer in the open procedure should not be less than 37 days, while in case of emergency it may be reduced to 22 days. Deadline for a prequalification in a restricted procedure may not be less than 37 days from publication on the PP portal, 22 days from documents for the second phase has been delivered to the



qualified participants. In negotiated procedure without prior notice the deadline may not be less than 22 days from publication of the notice.

Except for the procedures provided in the Utilities Directive there are also a procedures for values below the thresholds prescribed in the Directives, which are thus not relevant for this Study.

- **Serbia**

The rules in Serbia provide for the following procedures:

- Open procedure:** deadlines for submission of tenders are: 30 days for the small value procedure, and 35 days above the threshold for the small value procedure; in case a prior notice is published, not less than 35 days from publication and not more than 12 months before the publication of the tender, the deadlines are 15 and 20 days respectively;
- Restricted procedure:** deadlines for submission of tenders may not be below 20 days from the date the call was sent;
- Negotiated procedure with prior call for competition:** deadlines for submission of tenders may not be below 20 days from the date the call was sent;
- Competitive dialogue:** deadlines are the same as the ones described above;
- Negotiated procedure without prior call for competition;**
- Qualification procedure:** deadline expires 8 days from publication.

Except for the procedures provided above, there are also a procedures for values below the thresholds prescribed in the Directives, which are thus not relevant for this Study.

- **Ukraine**

The rules in Ukraine provide for the following procedures:

- Open procedure:** the minimum time limit for the receipt of tenders is 15 days from the date of publication of the contract notice. In case the value of the procurement exceeds the equivalent of € 133.000 for goods and services or € 5.150.000 for works, the minimum time limit for the receipt of tenders shall be thirty (30) days from the date of publication of the contract notice at the web-portal;
- Competitive dialogue:** at the first stage of the procedure the minimum time limit for the receipt of tenders is 30 days after the announcement of the competitive dialogue. At the second stage of the procedure the minimum time limit for the receipt of final tenders is 15 days from the date the invitation to participate in the second stage of the competitive dialogue has been received;
- Negotiated procedure (without prior call for competition):** the procedure should be used by the contracting entity as an exception. The procurement contract may be concluded with the selected tenderer within 10 days, (5 days in case of urgency) after publication of the announcement of the negotiated procedure.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Bosnia and Herzegovina	Only Innovation Partnership is not regulated
Partial Compliance	Albania	Some deadlines are lower than required; there is no competitive dialogue and innovation partnership.
	Montenegro	Some of deadlines are lower than required; there is no competitive dialogue and innovation partnership.
	Moldova	Some of deadlines are lower than required; there is no innovation partnership.
	FYR of Macedonia	Deadlines in the negotiated and simplified competitive are lower than required.
	Serbia	Deadlines are not harmonised with the UD.
Non Compliance	Ukraine	There is no restricted procedure and innovation partnership; No deadlines for negotiated procedures causing breach of the transparency principle and inconsistency of the application by different authorities and lack of predictability;
	Kosovo*	Deadlines are significantly below the deadlines provided in the UD Directive; there should be no deadlines of 5 and 1 days;

### 2.2.11 What techniques and instruments are available (framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, and centralised purchasing activities/bodies)?

The techniques and instruments for electronic and aggregated procurement are set out in Articles 33-39 of the Classic Directive and include:

- framework agreements;
- dynamic purchasing systems;
- electronic auctions;
- electronic catalogues;
- centralised purchasing activities and central purchasing bodies;
- occasional joint procurement; and
- procurement involving contracting authorities from different Member States. We have not taken into consideration this instrument since the CPs are not members of the EU.

#### The CPs have the following techniques and instruments:

- **Albania**

Provides for framework agreements, dynamic purchasing systems, electronic auctions, e-tendering and centralised systems.

- **Bosnia and Herzegovina**

Provides for electronic auctions, dynamic purchasing systems, joint procurement and centralised purchasing bodies.

- **FYR of Macedonia**

Provides for framework agreements, electronic auctions and e-tendering, centralised purchasing bodies and pre-qualification systems.

- **Kosovo\***

Provides for framework agreements, dynamic purchasing systems and electronic auctions, centralised procurement and occasional joint procurements.

- **Moldova**

Provides for framework agreements, dynamic purchasing systems, and electronic auctions.

- **Montenegro**

Provides for framework agreements and pre-qualification systems.

- **Serbia**

Provides for framework agreements, electronic auctions, dynamic purchasing systems, joint procurement and centralised purchasing bodies.

- **Ukraine**

Provides for framework agreements, electronic auctions, centralised purchasing activities.

Level of compliance with the EU Directives	CPs	Comments
Advanced Compliance	Serbia	Electronic catalogues and occasional joint procurement are missing
	Bosnia and Herzegovina	Framework agreements are missing
	FYR of Macedonia	Dynamic purchasing systems, electronic catalogues and occasional joint procurement; are missing
	Kosovo*	Electronic catalogues are missing
	Moldova	Electronic catalogues, centralised purchasing body and occasional joint procurement are missing
	Albania	Electronic catalogues and occasional joint procurement are missing
	Ukraine	Dynamic purchasing system, electronic catalogues and occasional joint procurement; are missing.
Low Compliance	Montenegro	Dynamic purchasing systems; electronic auctions; electronic catalogues; centralised purchasing activities and central purchasing bodies; and occasional joint procurement are missing.

### 2.2.12 What rules apply to contracts between contracting authorities or to entities and their affiliated entities?

A public contract awarded by a contracting authority to a legal person and governed by private or public law falls within the scope of the EU Directives (Article 28 UD) in case where:

- the contracting authority (on its own or jointly with other contracting authorities) exercises control over the legal person concerned which is similar to that exercised over its own departments;

- more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
- there is no direct private capital participation in the controlled legal person, with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

Besides, a contract concluded exclusively between two or more contracting authorities shall fall outside the scope of the Directive where all of the following conditions are fulfilled:

- the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services that have to be performed are provided with a view to achieving objectives they have in common;
- the implementation of that cooperation is governed solely by considerations relating to the public interest; and
- the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation.

In addition, contracts between a contracting entity and its affiliated entities shall fall outside the scope of the Utilities Directive (Article 29 UD) in cases where:

- a) service contracts - provided that at least 80% of the average total turnover of the affiliated undertaking over the preceding three years, taking into account all services provided by that undertaking, derives from the provision of services to the contracting entity or other undertakings with which it is affiliated;
- b) supply contracts - provided that at least 80% of the average total turnover of the affiliated undertaking, taking into account all supplies provided by that undertaking, over the preceding three years derives from the provision of supplies to the contracting entity or other undertakings with which it is affiliated
- c) to works contracts - provided that at least 80% of the average total turnover of the affiliated undertaking, taking into account all works provided by that undertaking, over the preceding three years derives from the provision of works to the contracting entity or other undertakings with which it is affiliated.

#### The level of compliance of the CPs' national rules is set out below:

- **Bosnia and Herzegovina, Serbia, Montenegro, and FYR of Macedonia** are in full compliance with the Directive.
- **Moldova** does not provide for an exception for such procurement. This means that it applies the PP rules regardless of whether the procurement may be obtained from an affiliated entity (which is considered in compliance with the requirements of the Utilities Directive).
- **Ukraine** is only partially compliant with the Utilities Directive. Contracts between a contracting entity (or a joint venture of contracting entities formed for providing energy activity) and an affiliate of such entity are exempted from the PP obligation rules. An affiliated enterprise is defined by the PP Law as a department of the contracting entity, the assets and transactions of which are stated at the consolidated balance sheet of the contracting entity; or an economic operator over which the contracting entity may

exercise a control, or economic operator which together with the contracting entity is subject to the control of another economic operator. This exemption may in certain cases be narrower than in the Utilities but in some cases, particularly in case when it “may exercise a control”, the exemption is wider than stipulated in the Utilities Directive.

- **Albania.** The exemption from procurement rules in Albania, as provided in the law, is too broad. Article 9 of the PP Law provides that the PP rules are not applied for public service contracts awarded to a Contracting Authority by another Contracting Authority, based on the exclusive rights granted by law. The interpretation of this provision is that the PP Rules are not applied to contracts concluded between contracting authorities only if: a) the contracts concerned are for performing public services and b) the contracting authority which provides services, is carrying out its activity based on exclusive rights. We consider that such interpretation limits the exceptions of the application of PP rules. Also it is not clear if this exemption apply to public undertakings and other contracting entities as well.
- **Kosovo\*.** Public Procurement rules do not apply to contracts between contracting authorities (public authorities) or their affiliated entities. The public procurement law requires that a contracting authority (in case the latter is a public authority) “take reasonable measures to ensure that objects meeting [its] needs are not available from another public authority”.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Bosnia and Herzegovina, Serbia, Montenegro, Moldova and FYR of Macedonia	There is full compliance with the rules.
Partial Compliance	Ukraine	There is partial compliance with the UD. Contracts between a contracting entity (or a joint venture of contracting entities formed for providing energy activity) and an affiliate of such entity are exempted from the PP obligation rules.
	Albania	There is partial compliance as the exemption is too broad.
Non Compliance	Kosovo*	There is no compliance

### 2.2.13 What are the applicable award criteria? Is it possible to reject a participant for abnormally low tenders?

- According to Article 67 of the Classic Directive and 82 of the Utilities Directive, contracting authorities shall base the award of public contracts on the most economically advantageous tender, which shall be identified on the basis of the price or cost, using a cost effectiveness approach (such as life-cycle costing) and may include best price-quality ratio which shall be assessed on the basis of criteria, including quantitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question;
- According to Article 69 of the Classic Directive and 84 of the Utilities Directive, abnormally low tenders may be rejected by contracting authorities in the following cases:

- the evidence provided by the tenderer is not satisfactory to account for the low level of price or costs proposed;
- a tender does not comply with the applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions;
- a tender is abnormally low because the tenderer has obtained State aid, provided that the tenderer is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Albania, Bosnia and Herzegovina, FYR of Macedonia, Moldova, Kosovo*, Montenegro and Serbia	The CPs have regulated both issues in the same way as it is regulated in the UD
Partial Compliance	Moldova	Does not have environmental and social criteria as applicable award sub-criteria.
	Ukraine	Does not contain provisions on abnormally low offers

#### 2.2.14 What are the grounds for modification of a PP agreement?

Pursuant to Article 72 of the Classic Directive and Article 89 of the Utilities Directive, the concluded PP agreements may be amended in the following cases:

- The modifications have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.
- Additional works, services or supplies by the original contractor have become necessary and were not included in the initial procurement (when it is not possible to change a contractor for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and such a change would cause significant inconvenience or substantial duplication of costs for the contracting authority).
- The need for modification has been brought about by circumstances which a diligent contracting authority could not foresee, the modification does not alter the overall nature of the contract and any increase in price is not higher than 50 % of the value of the original PP agreement. Where several successive modifications are made, that limitation shall apply to the value of each modification.
- A new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of either:
  - an unequivocal review clause or option in conformity with point (a);



- ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or
  - iii) in the event that the contracting authority itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation pursuant to Article 71.
- e) The modifications, irrespective of their value, are not substantial.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Albania, Bosnia and Herzegovina, FYR of Macedonia, Kosovo*, Moldova, Serbia	In all of these CPs only minor and justified modifications are exceptionally allowed.
Partial Compliance	Ukraine	There is a significant number of permitted and regulated reasons for introducing amendments.
Non Compliance	Montenegro	Modification of the agreement is not regulated or prohibited, allowing for different interpretation or even modification of agreements without restrictions

### 2.2.15 What are the available remedies?

The available remedies, in accordance with the Remedies Directives, are as follows:

- imposing interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
- setting aside or ensuring the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
- awarding damages to persons harmed by an infringement; and
- considering contract ineffective by a review of a body independent of the contracting authority in case of certain grave infringements such as if a contract was awarded without prior publication of a contract notice in the OJ of the EU when it is required; National laws may provide *ex nunc* or *ex tunc* consequences of such cancellation.

With regard to this question we have particularly estimated the following factors: whether the monitoring authority is independent or is part of the Government establishment; whether the initiation of the appeal procedure triggers the suspension of the PP procedure, whether there are both pre-judicial and judicial procedures; and what are the deadlines for submission of the appeals.

Level of compliance with the PP Directives	CPs	Comments
Full Compliance	Albania, Bosnia and Herzegovina, Montenegro, Serbia, FYR of Macedonia	These CPs have an independent appeal body, automatic suspension of the procedure, pre-judicial procedure and judicial procedure
Partial Compliance	Kosovo* and Ukraine	Deadlines for the submission of the appeal and for deciding are too short for complex matters.
	Moldova	The appeal body (pre-judicial review) is subordinated to the Ministry.

### 2.3 Summary of the findings

All CPs, except Moldova, have included the UD definition of contracting entities in their public procurement legislation, which is the first and necessary step for the correct implementation of the PP rules.

Moldova plans to enact the PP Utilities law in a couple of years. However, currently its PP law stipulates that it does not apply to the utilities sector. In cases when certain issues regarding the utilities sector are not regulated at all, it is unclear whether the general rules of PP law should apply to the utilities sector until the PP Utilities law is enacted or it should be understood that no PP procedure would apply to any issue related to the utilities sector. This could mean that similar situations might be interpreted in different ways, therefore this issue should be regulated.

It is a good practice that some CPs have already ensured that their state administrations purchase electricity for their own consumption by the application of the PP rules. The same should apply for the PSO obligation in regard to which some CPs have understood the need for competition and are making steps in implementation. The situation with the TSOs procuring energy and capacity for balancing and ancillary services and construction works related to the grid is less clear in some CPs. None of the CPs has introduced Feed in Premium support scheme and auctions for determination of the premium. Construction of new facilities, when procured, would in most CPs, be in accordance with the PP rules.

We have particularly looked into the exclusions and thresholds, in order to understand whether these regulations may be used for distortion of competition. In most CPs the situation is satisfactory: low thresholds and significant number of exclusions harmonised with those provided in the PP Directives. Further harmonisation is needed. Deadlines for the submission of the offers are important if they are short, as they may limit participation in the PP procedures. Our general conclusion is that in some CPs these deadlines should be prolonged for the values above the UD thresholds.

All CPs should increase the number of techniques and instruments available for the PP procedures so they may better assist the purpose of the procurement than any reduction of deadlines for the submission of offers.

Rules on the use of the economically advantageous offer criteria should be further developed in some CPs to allow criteria related to environment protection and social issues. Amendments of the already awarded tender should be restricted to a minimum. This issue should not be left unregulated as there is a risk of diverse interpretation in practice.

Finally, monitoring and remedies are some of the crucial PP issues for enabling competition in the respective areas.

Our conclusion regarding the application of the PP rules is that there is an understanding in the CPs about the functioning of the PP rules on the markets in general but not always in regard to the energy network markets. It should be also noted that the regulation of the energy sector is ongoing and thus changes may be expected to all or some issues reviewed in this Report.

### 3 Proposal for necessary changes in the national regulation

#### 3.1 Diverging provisions for rules on PP in the Contracting Parties

This task continues the research performed and presented in Chapter 2 of this Report, and relays on its findings. Here we specify the applicable procurement rules in the CPs which create undue obstacles for cross border competition and market integration, in particular for network energy.

In the EU certain public procurements in the energy sector may be regulated by other EU legal acts, such as the Electricity Directive and the Gas Directive, or the Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01). Such acts take into consideration a specific subject matter such as state aid or PSO specifics. As the PP Directives regulate procurement procedures more completely and in significant detail, from the initiation of such a procedure until the awarding of a contract and its implementation, also giving sufficient flexibility and space for choosing between different types of procedures, techniques and instruments, the PP Directives are and may be used to supplement other specific procedures, thus also simplifying the task of the lawmaker in regard to such legal acts. We should keep in mind that in the EU MSs, the PP Directives have already been implemented in their national legislation, therefore when a new specific procurement procedure is enacted on the EU level, it may be implemented uniformly in all MSs, having the PP Directives as supplementing rules<sup>20</sup>. Regardless of whether a new specific procurement procedure is drafted with the aim of harmonised regulation of a new subject matter and of whether it is drafted in a more or less detailed manner, any such new specific procurement procedure is drafted in compliance with the PP Directives already transposed into national legislations and harmonised between the MSs. Drafting of new procedure rules, each time, in the CPs for specific procurements which would be in compliance with the PP

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<sup>20</sup> It should be noted that the harmonization procedure in the EU MSs has been a long, painful, gradual and dynamically evolving process (as derives from the comparison between the implementation of the first generation of short and simple PP directives No. 71/30420, 77/6220, and the next generations of such directives, which were more and more detailed: No. 88/29520, 89/44020, 92/5020, 93/36-37-3820, 2004/17-18 and finally the currently applicable directives No. 2014/23-24-25). This permitted the MSs to gradually adjust to the new rules and develop a relevant mentality. This process was effected particularly through numerous litigation and proceedings before the national courts, which, in their turn, have had a fruitful and long dialogue with the European Court of Justice (ECJ) which developed significant relevant jurisprudence, guiding the MSs in the implementation of the PP rules.

Directives and the harmonised rules on the EnC level would be a burdensome procedure and would delay their implementation.

In this Chapter, we assess the specific issues analysed in Chapter 2 and after that present several new issues which are important for implementation of the PP Directives. These issues are: a) prioritising of domestic economic providers; b) promotion of environmental and other criteria; c) electronic self-declarations for bidders (ESPD); d) applicability of PP rules in case of purchase of electricity from the power exchange or other organised market; e) timing for fulfilment of other international obligations for harmonisation of PP rules (SAA, GPA and DCFA) and f) cooperation on the EnC CPs level.

### **3.1.1 Application of the PP rules by contracting entities as defined in the Utilities Directive**

Application of procurement rules by all contracting entities as defined in the Utilities Directive enhances the competition as it makes it easier for new suppliers (both domestic and foreign) to gain a foothold in the market. On the other hand, not having PP rules creates undue obstacles for cross-border competition, as it makes it more difficult for foreign players to enter the market. This is particularly valid for the energy markets. One of the main goals achieved through the introduction of the Utilities Directive, in addition to the Classic Directive, was to amend the definition of a contracting authority (to contracting entity) so that the PP rules would apply to entities operating on the basis of special or exclusive rights. This would further enhance competition. However, mere harmonising of the definitions is not sufficient. Monitoring of the implementation of PP procedures (both that they are applied to all procurements unless explicitly exempted and that they are applied properly) is of the utmost importance.

### **3.1.2 Application of the PP rules when contracting authorities purchase electricity or gas for their own consumption**

For all CPs, public procurement rules should apply when contracting authorities purchase electricity and such purchase exceeds a certain threshold. Some CPs do not apply the PP rules where there is only one registered supplier. The question is whether it is practical to apply PP rules in case of monopoly. Our recommendation is that there should be regulation rendering the application of the PP rules obligatory, even if there is only one registered supplier. The implementation of such measure may raise interest for registration and participation in procedures of a second (or other) supplier.

Another issue is the threshold for participation. In comparison with the PP Directives thresholds, most CPs have much lower (or even very low in general terms) thresholds for compulsory application of the PP rules. The assessment of the applicable thresholds, depending on the particularities of the respective markets, should, in our opinion rests with the CPs, while the CPs may agree on a particular common EnC level threshold, which, if decided, may be lower than the EU threshold. A common EnC level threshold would simplify and harmonise the application of the PP rules, if agreed by the CPs, thus stimulating the cross-border competition. Where the EnC level thresholds are agreed, the application of the unified PP procedures should be compulsory for the procurements above these thresholds. This would be in compliance with the Utilities Directive which provides the minimum thresholds above which the PP rules are compulsory, leaving the MSs with the possibility to establish lower thresholds in their jurisdictions. The application of the PP rules positively affects any cross border competition. Providing lower thresholds may enable cross-border

competition for smaller energy projects, provided that there is cross-border interest for such project values.

### **3.1.3 Application of the PP rules to the selection of the PSO provider or to the purchase of electricity or gas in order to provide to the PSO/universal service (if there is no PP for the selection of the PSO provider / the supplier of last resort)**

Some PSOs, which may relate to security, including security of supply, regularity, quality and price of supplies and environmental protection, including energy efficiency, energy from renewable sources and climate protection may, in the general economic interest, be imposed to all undertakings performing certain energy activity in the electricity or gas sector<sup>21</sup>. In this case, there is no need to apply the PP procedures for the selection in order to secure competition as the rule applies to all entities active in electricity or gas sector.

CPs may appoint a provider of last resort<sup>22</sup> or regulate that a PSO will be provided by one or several (but not all) suppliers in such CP. In this case PP rules should apply, either to the selection of the PSO provider or to his procurements for fulfilment of the PSO. Such provider would, according to the Utilities Directive<sup>23</sup>, fall under the definition of entities which operate on the basis of special or exclusive rights granted by a competent authority of a MS. This means that when these entities procure electricity or gas in order to fulfil the PSO or the universal service obligation, they should apply the UD PP rules. However, if special or exclusive rights have been granted to these entities in a procurement procedure, these entities will not be obliged to apply the PP rules for the procurement of electricity or gas necessary to fulfil the PSO obligation<sup>24</sup>.

In other words, a MS may choose to have a public procurement procedure for the selection of the PSO provider, which is often the case in practice. In this procedure one of the criteria for choosing among the applicants is the price at which they offer to provide the PSO. Thus there is no need to burden the PSO provider selected in this way with additional public procurement procedures for procuring the electricity or gas necessary to fulfil the PSO obligation, given that it is in the interest of such provider to acquire electricity or gas at the lowest possible price in order to respect the price it offered.

However, when a PSO provider is appointed without any PP procedure, e.g. where an incumbent energy entity is appointed as the PSO provider, this entity would have to apply the UD procedure in order to procure electricity or gas and not simply purchase energy from the producer which belongs to the same group.

Selecting the PSO provider by means of a public procurement process is necessary to provide space for the development of competition, transparency and with a well-designed tender process, it will also provide the consumers with fair energy prices.

Where there is no second supplier in a CP which may respond to such PP, the obligation to procure these services would enhance cross-border competition by providing all market players with the opportunity to become PSO providers.

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<sup>21</sup> Article 3(2) of the Electricity Directive and the Gas Directive.

<sup>22</sup> Article 3(3) of the Electricity Directive and the Gas Directive.

<sup>23</sup> Article 4(3) of the UD.

<sup>24</sup> Article 22 of the UD.

This particular procedure may be politically sensitive and thus it is necessary that the reciprocity rule is applied in the whole EnC as only then the suppliers would be in position to compete in different CPs, for the benefit of all consumers in the EnC. Particularly for the application of the reciprocity principle it is necessary that the respective rules are introduced simultaneously in all the CPs. We recommend these amendments in order to accomplish development of competition and liberalisation of the markets, which should further benefit the end consumers with the lower prices.

### **3.1.4 Application of the PP rules to the granting of the support scheme for renewable energy (to meet the 2020 targets and to comply with State Aid Guidelines 2014-2020)**

PP procedures for the support schemes enhance competition. Thereby, this gives consumers electricity from RES at competitive prices. Conversely, not having PP procedures for the support scheme impedes cross-border competition among potential investors, as this will normally make it more difficult for foreign investors to establish domestic RES facilities. Selection criteria in such PP procedures would include the amounts of the support proposed by the bidders.

The benefit of introducing competitive procedures in determining the level of RES support is immediately evidenced in the value of premiums. The total amounts paid for electricity from RES have been significantly reduced in the MSs which introduced such competitive procedures thus leading to lessening the burden of RES levies paid by final consumers<sup>25</sup>.

The competitive systems market-based price setting are superior in comparison with, for example regulated, fixed feed-in tariffs. This is because the competitive systems allow the subsidies to be adjusted to the technological changes. Typically, the technologic development will lower the costs of the RES. For feed-in tariff fixed in advance on a historic cost basis, it is difficult to follow its development. However, the competitive systems make it possible to follow these trends automatically.

Although some CPs have introduced the possibility of establishing a competitive procedure in their legislation, this is far from sufficient. There should be a clear legal obligation on relevant authorities to implement competitive PP procedures with compulsory timeframe. Only when the specific requirements, conditions, and types of procedures and techniques which may be exempted from competition are regulated, such procedures would be implemented in practice. For this reason we consider that there is no (full) compliance in any CP.

### **3.1.5 Application of the PP rules to TSOs when obtaining energy and capacity for balancing and ancillary services**

Procuring energy and capacity for balancing and ancillary services, both in the EU and the EnC, is mostly restricted to domestic facilities. Some EU MSs have introduced cross-border

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<sup>25</sup> Note: Greece is currently introducing Feed in Premium scheme in which the amount of the premium is determined on auctions with regulated initial price, while the participants will compete by placing their bids below the initial price. The scheme will apply only for new facilities. For more information see <http://www.rokas.com/en/press-articles-a-publications/energy-and-environment/item/434-energy-news-new-support-scheme-for-res-and-chp-producers>



competition for these procurements. Introducing competition in this sector would provide the possibility for SMEs to participate and to further develop competition. Introducing PP procedures to balancing and ancillary services would also require amendments to the CPs' energy regulations in compliance with their obligations for harmonisation. As referred under section 2.2.5 of this Study, some CPs have already expressed their intention to enable cross-border procurement of energy and capacity for balancing services in the April 2016 Memorandum of Understanding of Western Balkan 6.

If the CPs regulate that these procurements must be domestic there is no cross-border competition. Hence, acceptance of cross-border delivery of energy is only one step. In another step, PP procedures must be implemented in order to reap the benefits of multinational competition. One may note how long it has taken for EU Member States to introduce some cross-border competition for these services.

The possibility of CPs introducing competition to the provision of energy and capacity for ancillary and balancing services may depend partially on the structure of each CP's market. Although it is recommended as such, one may argue that, similarly to the selection of a PSO provider there may be no competition where there is only one supplier in the CP's market. However, as long as potential new entrants know that there is no formal procedure in which they would compete with the incumbent domestic provider they will not make an effort to enter the market. Regulating formal obligations to carry out PP procedures would, in our opinion, be a good starting point, although the results may not be achieved in all CPs immediately. It is important to have in mind that the costs of energy for balancing services are often extremely and unjustifiable high if there is no competition. The only way to reduce these prices is to introduce competition.

By having a transparent, market-based purchase, competition is increased and the prices are adjusted to the actual market situation. Even if at the outset there is only the local incumbent provider as the seller, a market-based procurement is recommended. High prices will automatically attract more sellers, as experience from Northern Europe has illustrated<sup>26</sup>. For example, industrial consumers may have flexibility in their consumption, which they may bid at the market. Further, in Northern Europe, there have been examples of small diesel engines being established if the price for capacity was considered attractive.

### **3.1.6 Application of the PP rules to the construction and operation of new production facilities**

It concerns competition for the opportunity to build, own and operate domestic production facilities. Such obligation is in compliance with Article 8 of the Directive 2009/72/EC (in the interest: of security of supply, of providing for new capacity or energy efficiency/demand side management measures through tendering for new capacity or in case of granting of a concession for a new facility). The issues regulated by the concession laws as well as any recommendation to amend these laws are further analysed in the Chapter 4 of this Report.

The benefit of these procedures is developing of competition and acquiring of better offers, thus ensuring security of supply at a competitive price.

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<sup>26</sup> <http://www.nordpoolspot.com/Market-data1/Regulating-Power1/Regulating-Prices1/ALL/Hourly/?view=table>

### **3.1.7 Application of the PP rules to the construction of interconnections or extension of the grid**

In case of construction of part of the grid or of an interconnector, as is the case in the CPs, the economic entity does not obtain any ownership or operation rights over the new part of the grid except in the case of direct line in the sense of Article 34 of Electricity Directive 72/2009 or new interconnector in the sense of Article 17 of the Regulation 714/2009 or new infrastructure in the sense of Article 36 of Gas Directive 73/2009. In principle the network operator is entitled and obliged to plan, develop, build and operate the network on its area of responsibility. Subsequently, the application of the PP rules would affect only competition in the construction sector not the energy sector in the strict sense.

More relevant for the network energy sector would be the case when a network developer is designated as a system operator as well. Where this is the case the operator must apply the PP rules for all its procurements (goods, services and works), on the basis of granted exclusive right to operate on the territory.

Application of the Concession Law is further elaborated in Chapter 4 of this Report which also provides details on the provisions which should be amended in each CP, if any.

### **3.1.8 Main exclusions and thresholds**

Generally, lower thresholds should be regarded as acceptable and should not be amended. However, if the full implementation of the PP Directives is required, the application of the full package may be considered burdensome for all the procedures. In this case there may be a double track adopted, meaning that some PP procedures apply only to upper thresholds (EU regulated thresholds) while some simpler procedures to apply only to lower thresholds. The CPs may also decide to revise their thresholds. Given the peculiarities of the specific markets, the CPs may reach consent on EnC level based thresholds, which may be lower than the EU thresholds. Such coordination of the thresholds on the EnC level would be desirable for encouraging of the cross-border competition. It would also pave the way for unique tenders / auctions portal for the EnC. The EnC may establish and it is recommended that they establish a rule that all procurements above a certain threshold would be published at this EnC portal.

The exemptions should be applied in compliance with the PP Directives. Thus, for example, it should be clear that the PP rules do not apply to energy entities procuring for export, or for resale, or for supply (except in the case of PSO obligation as explained above). With regard to the exception relating to direct exposure to competition, this is not directly applied. However, a procedure for confirming whether or not competition exists should be provided in compliance with the PP Directives, in which case the Independent Procurement Authority would be the authority to establish the exposure to competition.

### **3.1.9 Types of procurement procedures and the prescribed time limits**

For competition in general, and for market integration and cross-border competition specifically, short deadlines are very unfortunate. All other things being equal, short deadlines will affect the ability of, not only foreign, but also domestic players to submit their bids.

Further, harmonisation of the CPs procurement procedures will enhance market integration, as it makes it easier for a player to be a supplier in several countries. This is why it is recommended that the CPs use the public procurement rules as prescribed in the PP Directives i.e. to harmonise their legislation in full with the PP Directives.

The correlation between the value of the procedure and the time necessary for preparation of the application as well as the choice of the particular procedure should be balanced to not present an obstacle to participation for both domestic and foreign economic entities in the respective procedures. It is our understanding from the interviews performed in CPs that the requirement of complex documentation in combination with short deadlines is one of the main practical obstacles for participation, when the PP procedure is carried out.

Thus, our recommendation is to extend all deadlines to match those provided in the PP Directives.

Correlated to this is the issue of simplifying the requested documents and recognising issued in another CP, as well as the acceptance of self-declaration instead of certificates before selection. This can be achieved by the application of the PP Directives in a coordinating manner throughout the EnC.

Timing of the harmonisation in all CPs is essential for cross-border integration of the energy market.

### **3.1.10 Techniques and instruments (framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, and centralised purchasing activities/bodies)**

The CPs need not necessarily swiftly apply all the instruments even though we recommend their full adaptation in the respective CPs regulations. Implementing the instruments will ease the PP procedures. For market integration and cross-border competition, the important element is that the PP process is transparent, easy-to-understand and there are no undue obstacles or discrimination of foreign players.

The PP Directives provide for the following instruments: 1) framework agreements; 2) dynamic purchasing systems; 3) electronic auctions; 4) electronic catalogues; 5) centralised purchasing activities and central purchasing bodies; 6) occasional joint procurement; and 7) procurement involving contracting authorities from different Member States. Most of the CPs have included most of the techniques and instruments in their regulation. It is necessary to include the rest and to improve their implementation to suit the procedures adequately.

Exchange of experience and best practices in different jurisdictions and an established system of monitoring is recommended for the improvements and using of best practices of other CPs in the implementation of these techniques.

### **3.1.11 Application of the PP rules for contracts between contracting authorities or entities and their affiliated entities**

The respective provisions of the Utilities Directive are of particular importance for the energy markets in the CPs. Full compliance is necessary for the liberalisation of energy markets, particularly in regard to small and medium size markets dominated by an incumbent energy entity. If there is no restricted exception for the in-house contracts, all the respective energy will be provided by the state owned incumbent company. It is also important for market integration and cross-border competition. Participating in tenders for sale to big or medium-

sized consumers is a nice way of establishing a foothold in the new market. Hence, this provides foreign players with entry to the domestic market (and it provides domestic players an entry to the neighbours' market).

### 3.1.12 Award criteria and the exclusion of participants for abnormally low tenders

The award criteria must be clear and transparent – and the rules must be enforced. Otherwise, foreign players will probably not bother to place bids. Naturally, this will impede market integration and cross-border competition. Provisions on excluding abnormally low tenders are useful legal tool for securing minimum quality of services and thus important for development of legitimate competition.

Implementing the Utilities Directive is the simplest and most efficient way of establishing transparent rules.

### 3.1.13 Grounds for modification of a PP agreement

Amendments should only be allowed in exceptional circumstances. The grounds for amendments must be transparent, and the rules must be enforced. Otherwise, both domestic and foreign players are discouraged from participating. Naturally, this will impede market integration and cross-border competition.

### 3.1.14 Remedies

A trustworthy, independent appeal body will create confidence among (foreign) players. This will enhance market integration and cross-border competition. An expedient measure will be to set up an Independent Remedies Authority at the EnC level. This proposal is further analysed in Chapter 5 of this Report.

The Commission has played significant role in the development of harmonised PP rules in the EU MSs. In addition, the EU Court ("ECJ") was particularly active through the instrument of the reference for **a preliminary ruling** and in **infringement procedures** initiated by the Commission. Examples of these activities may be seen in the following sources (a) Selected Court Cases of the ECJ in the field of Public Procurement<sup>27</sup> and (b) EU Public Procurement Law by Professor Christopher H. Bovis JD, MPhil LLM FRSA H.K. Bevan Chair in Law, Law School, University of Hull Law (p. 15-22)<sup>28</sup>

This considerable experience and case law should be utilised by the CPs when developing its own PP practice.

Given the importance of the proper implementation of the PP rules in practice and the experience collected in the MSs during the last few decades, we propose that this best practice is implemented in the EnC. In this regard, in Chapter 5 of this Report, we provide respective recommendation for the EnC level harmonisation.

<sup>27</sup> Selected Court Cases of the ECJ in the Field of Procurement [http://balkantenderwatch.eu/btw/uploaded/EU%20eng/Documents/Valik%20Euroopa%20Kohtu%20ja%20C3%9Cldkohtu%20seisukohti%20\(2007\)%20eng.pdf](http://balkantenderwatch.eu/btw/uploaded/EU%20eng/Documents/Valik%20Euroopa%20Kohtu%20ja%20C3%9Cldkohtu%20seisukohti%20(2007)%20eng.pdf)

<sup>28</sup> EU Public Procurement Law <http://sate.gr/nea/EUPublicProcurementLaw.pdf>

## 3.2 Supplementing issues

### 3.2.1 Preferential treatment of domestic economic operators

Whilst collecting data regarding the PP procedure, it came to our attention that two CPs, namely Bosnia and Herzegovina and Serbia, apply a domestic preference principle. Particularly, when applying the most economically advantageous offer as awarding criteria, the contracting entity in Serbia is obliged to choose a domestic participant where the difference in the final calculation of points between a domestic and a foreign is equal to or less than 5 out of 100 points, while in case of procurement of goods with a price-only criteria, it is 5% price preference for goods of domestic origin.

If economic providers are from CEFTA countries, the respective CEFTA 2006 agreements should apply. Where providers come from an EU MS, the provisions of the SAA agreement - in effect from 1 September 2013 - shall apply. In regard to the letter, the preferential treatment **for the EU MS** shall be abandoned on 1 September 2018.

In Bosnia and Herzegovina, the preferential treatment is applied by reducing the price of the domestic provider, for the purpose of determining of the successful bidder, by 15% for 2015 and 2016, 10% for 2017 and 2018, and by 5% for 2019. "Domestic provider" is defined as a company registered in Bosnia and Herzegovina which, in the case of services provides, provides at least 50% of its services by using Bosnia and Herzegovina staff, and in the case of goods, having at least 50% of its goods originating in Bosnia and Herzegovina. This decision of the Bosnia and Herzegovina Council of Ministers as of 8 February 2014 shall be in effect until 1 January 2020. Note a new Decision on Obligatory Application of Domestic Preferences has been adopted by the Council of Ministries on 4 October 2016 (which entered into force eight days after the publication in the Official Gazette of BiH). The Decision regulates that domestic preference shall not apply in regards to suppliers from CEFTA countries.

It is recommended that there is no preferential treatment for domestic providers of goods and services for all EnC CPs. In case of harmonisation, the CPs' market participants from one CP, could, under reciprocity requirement, directly participate in energy procurement procedures in other CPs and directly provide services and goods to a contracting entity in such CP.

However, since the supply of energy, and often the trade of it, is licensed activity, the providers from one CP, trading or supplying energy in other CPs, are obliged to be licensed in the CP where there the goods or services are delivered. Currently, in some CPs a licence for energy trade is not required or even if it is required, there is no establishment requirement (on the condition that the entity establishes a subsidiary in the CP of procurement). The establishment may be requested by the procurement rules regardless of whether it is a condition of obtaining a licence or even if there is requirement to have licence for such activity. In all CPs, licences are required for the supply of energy and in all CPs a condition of obtaining a supply licence is to have an establishment (company seat) in that CP.

The establishment requirement discourages cross-border competition for two reasons: a) a cross-border competitor has the burden of establishment and operation of several companies - (special purpose vehicle company) (SPVs) in different CPs for the same activity; and b) a cross border competitor may be at a disadvantage compared with a domestic one, because a SPV would not have the respective references of the previous



experience as a domestic one, if the expertise and experience of the cross-border competitor are not recognised in the PP procedures.

The solution may be to a) abolish the establishment requirement as it is applicable in the EU (in which case a supplier or service provider may opt to have an establishment (including a branch office) in the other CP or not) or b) recognise references and experience of the cross-border competition. If the CPs chose the first option, the respective EU rules on freedom of establishment and freedom of provision of services would apply. The advantage of the first option in regard to PP is that the expenses of an interested provider are saved particularly in the period before a PP contract is awarded. In addition this is a less time consuming option which may be crucial for a decision on whether to participate in a PP procedure or not.

The alternative solution (under b) deals with the issue that if a company from a CP is obliged to establish a subsidiary in another CP in order to participate in public procurement in that CP, such newly established company may not have references of services earlier performed and would be disadvantaged in comparison to domestic entity, if such references are required in a public procurement procedure. If there is a requirement in a procurement procedure to provide references of good performance of earlier procurement contracts, in order not to disadvantage a new entrant from the other CP in comparison to a domestic company, the CP of procurement should recognise references of services performed by this provider (the parent company of the SPV) in other CPs, under the reciprocity condition.

It is understandable that economic entities that provide service in other CP have to apply the respective legislation in such CP (such as tax and energy market regulation).

### **3.2.2 Promotion of environmental and other criteria**

We have not taken into consideration the application of the Energy Efficiency Directive (2012/27/EU) and the fulfilment of the regulatory requirements in compliance with this Directive, as it is out of the scope of this Study.

Article 82(2) of the Utilities Directive provides that the most economically advantageous tender from the point of view of a contracting entity will be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject matter, such as quality which may include environmental and innovative characteristics conditions.

We have investigated whether the above possibility has been regulated in the CPs, and particularly whether their legislation regulates that environmental criteria and/or similar criteria may be included in PP procedure as contract award criteria.

In Albania, Article 55 of the PP Law provides that contracting authorities may use various criteria: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, cost effectiveness, etc. provided that they are closely linked to the subject-matter of the public contract to be awarded; objective, proportionate and non-discriminatory; clearly set out in the contract notice or in the tender documents and clearly set out in quantity and quality terms.

In Bosnia and Herzegovina, Articles 64 of the Law on Public Procurement provides that sub-criteria could include: the quality of provided products or/and services, price, technical ability of the subject matter of procurement, functional and environmental characteristics, operating costs, cost-effectiveness, service after sale and technical assistance, period of delivery or



period of execution, etc., with the obligation that precise methodology of each sub-criteria evaluation should be defined in the bidding documentation.

In FYR of Macedonia, the Public Procurement Law, Article 157 regulates the environmental management standards. Thus if a contracting authority requires the observation of certain environmental management standards, it shall refer to: the Eco-Management and Audit Scheme (EMAS) of the EU or the environmental protection standards based on the relevant European or international standards confirmed by accreditation institutions or attestation bodies or by relevant European or international bodies accredited for certification. Further on the Energy Agency adopted the “Guidelines for energy efficiency measures and energy saving in determining the characteristics of the goods and services which are subject to public procurements and implementation of the criteria relating to energy efficiency and energy savings when selecting the best Bidder”.

In Kosovo\* Article 31 of the Law on Public Procurement allows for including environmental criteria in awarding public contracts (e.g. labelling, energy efficiency etc.).

In Moldova such possibilities are not regulated.

Montenegro provides in Article 95(1) under point 7) of the relevant Law, that the sub-criteria may include the level of environmental protection or energy efficiency.

In Serbia there is a general principle in the Law on PP (Article 13), that the ordering entity is obliged to procure goods, services and works which do not or which minimally affect the environment or which secure energy efficiency and when justified include criteria related to the environment, energy efficiency or life-cycle costing in the criteria for the most economically advantageous offer.

In Ukraine Article 28 of the PP Law provides for the possibility to include different criteria, but do not explicitly mention environment or energy efficiency. It states that these criteria may include, in particular: payment conditions, time for performance, warranty maintenance, operating costs, technology transfer and training of administrative, scientific and operating personnel. Such criteria shall be specified in the tender documentation, including their value equivalent or specific weight in the general assessment of tender proposals.

Based on the above, our conclusion is that all CPs, except Moldova, have provided for the possibility to include environmental criteria. The next step is their actual implementation in the PP procedures. It is recommended to develop the secondary legislation and/or guidelines which would ensure that these criteria are implemented in practice.

### 3.2.3 Electronic self-declarations for bidders (ESPD)

**European Single Procurement Document (ESPD)** as regulated in compliance with Articles 59-61 of the Classic Directive and 80(3) of the Utilities Directive may be very useful, particularly for the energy sector in the CPs. The ESPD consists of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the exclusion and selection criteria. The European Commission issued a *Commission Implementing Regulation* on 5 January 2016 "establishing the standard form for the European Single Procurement Document"<sup>29</sup>. Annex 1 of the regulation provides instructions for the use of the ESPD, for

<sup>29</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0007>

example when it can be used, exclusions due to misrepresentation, and what information will be needed. Annex 2 contains a standard format for the form which can be used until the web-based system is online. A contracting authority may ask participants and candidates at any moment during the procedure to submit all or part of the supporting documents. Before awarding the contract only the selected participant shall submit the up-to-date supporting documents. Further on, a contracting entity will not require submission of documents which it may obtain from the MSs database and in case it is already in possession of these documents (e.g. from a previous procedure in which the economic operator participated).

Thus it is recommended to apply the same regime as described in the Commission Implementing Regulation, in the EnC. This instrument is particularly suitable and may significantly speed up and ease a PP procedure in the energy sector for the following reasons: a) there are a limited number of economic operators in electricity or gas sector in each CP providing the required service (e.g. supply, production or trade with electricity) thus contracting entities are in most cases already in possession of the required information and documents; b) all or most of these activities are licensed activities thus contracting entities may easily obtain certificates from the respective registers; c) most of these registers are on-line registers thus the information are available on the internet pages of registers.

In regard to cross-border collection of documents and all the issues related to issuing and recognition of documents issued by other CPs, there should be coordination and agreement on the EnC level in order to facilitate the cross border participation in tenders and to increase competition.

### **3.2.4 Purchase of electricity from power exchanges or other organised market**

This is a complex legal issue which has been only partly addressed in the PP Directives, thus an appropriate interpretation is required.

The first question is whether a specific power exchange allows direct participation of contracting authority/entity or only brokers/traders may participate. If the first is the case, a procedure applicable on power exchanges should be sufficient and no additional PP procedure would be required or possible. This is supported by a recital (61) third paragraph of the Utilities Directive which states “*Finally, a procurement procedure is not useful where supplies are purchased directly on a commodity market, including trading platforms for commodities such as agricultural products, raw materials and energy exchanges, where the regulated and supervised multilateral trading structure naturally guarantees market prices*”. However, there is no an explicit provision in the Utilities Directive in this respect.

On the other hand in case a contracting authority/entity procures from a trader the energy which was purchased on a power exchange, there may still be a difference among the offers of two or more traders to such contracting authority.

Article 50 of the Utilities Directive regulates the use of negotiated procedure without prior call for competition, limiting the cases in which this procedure may apply. One of the cases is “for supplies quoted and purchased on a commodity market”. Although this provision does not specify whether the procurement from a power exchange would be direct or indirect (through a broker) it should, in our view be interpreted to regulate indirect procurement only, as is the case with direct procurement there is no possibility for negotiation.

Subsequently, our interpretation of Article 50 is that in case of energy purchased on a power exchange by brokers, a contracting authority should at least apply the negotiated procedure

by inviting (even without publication) one or more brokers, depending to the circumstances, to provide an offer.

### **3.2.5 Timing for fulfilment of other international obligations for harmonisation of PP rules (SAA, GPA and DCFA)**

Six out of eight CPs have signed the Stabilisation and Association Agreement while Moldova and Ukraine have signed Association Agreements and DCFTA. The SAA agreements provide for harmonisation of the CPs' legislation with the EU PP regulations but the deadlines for such harmonisation are not specified and it is difficult to estimate such timing. On the other hand it is rather certain that the harmonisation will be in different period of times which would not assist coordinated liberalisation and harmonisation of energy markets within the EnC. In regard to AA and DCFTA, they provide implementation of the 2004 PP Directives with long deadlines. In Ukraine, according to the country's roadmap issued by the Ukrainian Government in compliance with these agreements, the basic elements of the 2004 PP Directives should be implemented until 2018; the full implementation of the 2004/18/EC Directive is planned until the end of 2019 while the full implementation of the 2004/17/EC Directive is agreed for the end of 2021. In Moldova the AA came into force on the 1 July 2016 and it provides for the similar deadlines for harmonisation; more precisely, the basic elements of the 2004 PP Directives should be implemented until 2020; the full implementation of the 2004/18/EC Directive is planned until the end of 2022 while the full implementation of the 2004/17/EC Directive is agreed for the end of 2024.

Five CPs have signed the World Trade Organisation Government Procurement Agreement (GPA). Due to the fact that GPA, although based on the same PP principles does not have identical rules with the PP Directives, we consider that the CPs should have as similar rules and procedures as possible in order to ease the cooperation and cross border participation. The text of the GPA establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Rather, the coverage schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction of a value exceeding specified threshold values are covered by the GPA. In addition, there is an agreement on delay of implementation for the developing CPs.

It is our conclusion that the best option for the immediate liberalisation of the EnC CPs energy markets is instant, simultaneous and harmonised (coordinated) implementation of the PP Directives in all CPs. The fact that some CPs have already planned to draft such laws in 2017 and 2018, as we have been informed during our meetings with the beneficiaries in the CPs, should help that the proposed implementation is in compliance with their legislative plans. On the other hand some CPs have planned the implementation of the 2004 PP Directives in steps until 2021. These two procedures may be overlapping and bring additional complexity. However, it is important to stress that substantially there is no confusion and discrepancies in implementing the 2004 and 2014 PP Directives. They both work on the exactly same legal basis and structure. In addition, the subject of this Study is limited to the implementation of the PP Directives in the energy sector. Still the details and planning of the implementation should be carefully examined and decided by the relevant authorities of each CP and after that coordinated between them.

### 3.2.6 Cooperation on the EnC level

Our conclusion is that cooperation on the EnC level for the coordination of simultaneous and harmonised implementation of the PP rules would be not only very useful but that in the given circumstances it is essential for the implementation of the PP rules in energy. Such coordinated and harmonised regulation and implementation of the PP rules in energy could have an immediate impact on the liberalisation of the energy markets in the CPs.

Minimum forms of such cooperation would be: i) on the level of regulation (harmonisation of legislation) such in case of agreed EnC level thresholds, coordination of the procedures, issuing, collection and recognition of documents issued by other CP; ii) on the implementation level, such as providing one portal on which all energy procurements above certain threshold would be published and harmonisation in implementation of procurement procedures; and iii) on monitoring level, by organising a coordination or monitoring authority, the Independent Procurement Authority (IPA) on the EnC level which would assist the CPs in harmonisation of their practices, but would also review the complaints of energy operators from other CPs participating in a cross-border energy procurement and would consult with the respective CP or its contracting entity. More details of this proposal are elaborated in Section 3.3 B below and Chapter 5 of this Report.

## 3.3 Necessary Changes in the CP Legislation

### A. Necessary Changes in Each Individual CP

#### 3.3.1 Albania

- (i) introducing the obligation to apply PP rules when contracting authorities purchase electricity for their own needs;
- (ii) introducing (finalising the procedure of regulation) the obligation to apply PP rules when granting the support scheme for RES;
- (iii) gradual introduction of the obligation to apply PP rules when procuring energy and capacity for specific balancing and ancillary services;
- (iv) introducing the following additional exclusions to the application of the PP rules: regarding the in-house contracts; for resale and lease; for pursuing covered activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition;
- (v) increasing the prescribed time limits to be in compliance with the Utilities Directive and introducing the remaining PP procedures not included yet (competitive dialogue and innovation partnership);
- (vi) introducing the following techniques and instruments: electronic catalogues;
- (vii) Specify and clarify in regulation the exclusion of the application of PP rules in contracts between contracting authorities or entities with their affiliated entities; and
- (viii) Introducing Electronic self-declaration for bidders (ESPD).

#### 3.3.2 Bosnia and Herzegovina

- (i) introducing competition for the selection of the PSO providers and/or a supplier of last resort, with an exception when it is justified in special situations when a PSO

- designed to achieve the objectives of public economic interest are imposed on all suppliers;
- (ii) introducing the obligation to apply PP rules when granting the support scheme for RES;
  - (iii) introducing the following additional exclusions to the application of the PP rules: procurements by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and for contracts directly exposed to competition;
  - (iv) to consider introducing the procedure: Innovation Partnership;
  - (v) introducing the following techniques and instruments: framework agreement and electronic catalogues;
  - (vi) derogating domestic preferential treatment (affecting currently bidders from Ukraine as this is the only CP country which is not part of CEFTA); and
  - (vii) Introducing Electronic self-declaration for bidders (ESPD);

### 3.3.3 FYR of Macedonia

- (i) introducing competition for the selection of PSO providers and/or a supplier of last resort, with an exception when it is justified in special situations when PSO designed to achieve the objectives of public economic interest are imposed all suppliers;
- (ii) introducing the obligation to apply PP rules when granting the support scheme for RES;
- (iii) Gradual introduction of the obligation to apply PP rules when procuring energy and capacity for specific balancing and ancillary services;
- (iv) Introducing the following additional exclusions to the application of the PP rules: service contracts awarded on the basis of an exclusive right; for resale and lease; regarding other than covered activity or for pursuing such activity in a third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition;
- (v) increasing of the prescribed time limits in the PP procedures to be in compliance with the Utilities Directive;
- (vi) introducing the following techniques and instruments: electronic catalogues and centralised purchasing bodies; and
- (vii) Introducing Electronic self-declaration for bidders (ESPD).

### 3.3.4 Kosovo\*

- (i) introducing the obligation to apply PP rules when contracting authorities purchase electricity for their own needs;
- (ii) implementing competition for the selection of the PSO providers and/or a supplier of last resort, with an exception when it is justified in special situations when some PSOs designed to achieve the objectives of public economic interest are imposed on particularly energy undertakings;



- (iii) introducing the obligation to apply PP rules when granting the support scheme for RES;
- (iv) Gradual introduction of the obligation to apply PP rules when procuring energy and capacity for specific balancing and ancillary services;
- (v) The deadlines should be significantly increased in both the procedures with low and high value; there should be no deadlines of 5 and 1 days;
- (vi) Introducing the following additional exclusions to the application of the PP rules: for service contracts awarded on the basis of an exclusive right; regarding the in-house contracts; for resale and lease; regarding other than covered activity or for pursuing such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition and abandoning the exclusion regarding the socially owned enterprises;
- (vii) Introducing possibility for the periodic indicative notice and electronic procurement in order to reduce the deadlines for the submission of offers; further diversification of procedures in compliance with the Utilities Directive;
- (viii) Introducing of electronic catalogues;
- (ix) Harmonising rules on exclusion of the application of PP rules to contracts between contracting authorities or to entities with their affiliated entities;
- (x) Increasing of deadlines for submission of appeal and deciding in remedies procedures in case of complex matters; and
- (xi) Introducing Electronic self-declaration for bidders (ESPD).

### 3.3.5 Moldova

- (i) Introducing the application of the PP law in energy sector or a separate energy PP law without delay;
- (ii) Introducing the obligation to apply PP rules when contracting authorities purchase electricity for their own needs;
- (iii) Introducing competition for the selection of the PSO providers and/or a supplier of last resort, with an exception when it is justified in special situations when a PSO designed to achieve the objectives of public economic interest are imposed on all suppliers;
- (iv) Develop secondary legislation on the obligation to apply PP rules when granting the support scheme for RES and implement it in practice;
- (v) Further development of rules regarding the application of the PP rules on procurement of energy and capacity by TSO for providing of balancing and ancillary services;
- (vi) Introducing the following additional exclusions to the application of the PP rules: In addition the following exclusions are missing: regarding the in-house contracts; regarding other than covered activity or for pursuing such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition;



- (vii) Increasing of the prescribed time limits to be in compliance with the Utilities Directive and introducing of PP procedures not yet included: innovation partnership;
- (viii) Introducing the following techniques and instruments: electronic catalogues and centralised purchasing bodies;
- (ix) Introducing of independent appeal body for the pre-judicial review (not to be subordinated to the Ministry);
- (x) Providing for the possibility that in case of the awarding criteria for the most economically advantageous offer includes environmental and other criteria in compliance with the Utilities Directive; and
- (xi) Introducing Electronic self-declaration for bidders (ESPD).

### 3.3.6 Montenegro

- (i) Introducing the obligation to apply PP rules when contracting authorities purchase electricity for their own needs;
- (ii) Provide for secondary legislation regarding the obligation to apply PP rules on the support scheme for RES and implement it in practice;
- (iii) Further development of the current rules so that the PP rules are gradually applied to procurement of energy and capacity for provision of additional balancing and ancillary services;
- (iv) Introducing the following additional exclusions to the application of the PP rules: service contracts awarded on the basis of an exclusive right; regarding other than covered activity or for pursuing such activity in third country; by contracting entities active in energy sector for the supply of energy; and contracts directly exposed to competition.
- (v) Increasing of the prescribed time limits to be in compliance with the Utilities Directive and introducing of PP procedures not yet included: competitive dialogue and innovation partnership;
- (vi) Introducing the following techniques and instruments: dynamic purchasing system, electronic auctions, electronic catalogues and centralised purchasing bodies;
- (vii) Regulating rights of parties to amend the concluded agreement as a result of a PP procedure; only minor and justified modifications of such agreement should be allowed; and
- (viii) Introducing Electronic self-declaration for bidders (ESPD).

### 3.3.7 Serbia

- (i) Introducing the obligation to apply PP rules when granting the support scheme for RES;
- (ii) Gradual introduction of the obligation to apply PP rules when procuring energy and capacity for specific balancing and ancillary services
- (iii) Increasing of the prescribed time limits to be in compliance with the Utilities Directive and introducing of PP procedures not yet included: innovation partnership;

- (iv) Introducing electronic catalogues;
- (v) Derogating domestic preferential treatment for all CPs; and
- (vi) Introducing Electronic self-declaration for bidders (ESPD).

### 3.3.8 Ukraine

- (i) Introducing competition for the selection of the PSO providers and/or a supplier of last resort, with an exception when it is justified in special situations when a PSO designed to achieve the objectives of general economic interest are imposed on particularly energy undertakings;
- (ii) Introducing the obligation to apply PP rules when granting the support scheme for RES;
- (iii) Gradual introduction of the obligation to apply PP rules when procuring energy and capacity for specific balancing and ancillary services;
- (iv) Introducing the following additional exclusions to the application of the PP rules: service contracts awarded on the basis of an exclusive right; regarding other than covered activity or for the pursue of such activity in third country; by contracting entities active in energy sector for the supply of energy and of fuels for energy production; and contracts directly exposed to competition; In addition the rules on collegial and other authorities exclusion should be replaced with the exclusion for the in-house contracts;
- (v) Introducing restricted procedure and innovation partnership; Introducing deadlines for negotiated procedures;
- (vi) Introducing the following techniques and instruments: dynamic purchasing system and electronic catalogues;
- (vii) Harmonising rules on exclusion of PP rules in contracts between contracting authorities or entities with their affiliated entities;
- (viii) Introducing provisions on excluding a participant for abnormally low tender;
- (ix) Regulating amendments of an awarded contract in line with the PP Directives. Only minor and justified modifications should be exceptionally allowed;
- (x) Harmonising of deadlines for the submission of the appeal and issuing decision in the pre-judicial review in compliance with Remedies Directives; and
- (xi) Introducing Electronic self-declaration for bidders (ESPD).

## B. Proposal for Harmonisation of Rules and Practices on the EnC level

### 3.3.9 General on harmonisation

We recommend harmonisation of the CPs legislation on the EnC level in order to enhance competition in each CP through facilitating cross-border entries. This is particularly important as most of the CPs are medium and small size where the energy market is dominated by one vertically integrated, usually state-owned, company. Subsequently the CPs have limited competition in trade and supply of energy. Although the energy laws have already been

harmonised (to significant extend in most CPs<sup>30</sup>) with the Electricity and Gas Directives for some time, competition has not been sufficiently developed and not many new players have entered the markets.

As we have presented in the Report, the PP rules in the energy markets of the CPs are not unified in any way. While some CPs apply PP rules in case of contracting authorities' procurement for own consumption or in case of acquiring of balancing and ancillary services, others do not. For the sake of reciprocity, it is recommended that they all apply the PP rules for the same type procurements / procurement of the same products.

For the sake of liberalisation of the energy market, it is recommended that the application of the harmonised PP rules is as wide as possible.

However, it is not sufficient to regulate compulsory PP procedures. If there is only one licensed supplier in a CP who can participate in such PP procedure, organisation of PP is pointless. In case of such small and medium size markets, there may be no significant economic justification for the second licensee unless there are potential agreements which may be obtained through a PP procedure. These procedures may be a good step to compete the incumbent company. One additional consequence of the size of energy markets in the CPs is that the most natural competition is the one coming from the neighbouring markets. This would present a basis of future competition, if enabled by the legislation.

Developed procurement rules applicable on procurement in network energy would establish framework to attract new entrants into the market of CPs. For example large or medium size procurements regularly announced and organised would attract attention those seeking for placement of products and services. Their participation would be conditioned with previous obtaining of licences in the CP in question, but not necessarily with an establishment requirement. Any undue barrier for their participation should be removed, as long as they comply with the applicable market and balancing rules, as well as taxation rules.

Thus there should be a quick licensing procedure, no national preference, unification of documents, single tender platform for big procurements, etc. The best way to achieve this is to harmonise the PP rules in the CPs.

Harmonisation of the CPs PP legislation, their implementation and monitoring, would provide adequate ground for development of such competition. In order to work, it would have to be implemented simultaneously in all CPs which would automatically secure reciprocity.

Successful implementation of such harmonised rules would require adequate announcing of procurements, sufficient time for preparation of documents, unified documents. Observing the principle of objectivity and impartiality is important for attracting new participants. Adequate remedies are essential for giving comfort to participants that their participation in PP procedures would not be wasting of their resources.

In regard to remedies procedures, in order to achieve reciprocity and harmonised implementation we recommend adaptation of Remedies Directives. Since the Remedies Directives have in most CPs been implemented to some degree, only additional harmonisation is needed for the harmonisation of each CP with these Directives. It should be noted that Remedies Directives provide for a significant discretion rights of MSs to choose

<sup>30</sup> Annual Implementation Report, Energy Community Secretariat 2016, 1 September 2016, [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/4332394/3D790302C9FD5024E053C92FA8C0D492.pdf](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/4332394/3D790302C9FD5024E053C92FA8C0D492.pdf)

different models and solutions. This leads to diversity of applicable remedies solutions, which was in the EU further harmonised in implementation during the years. In regard to EnC, we consider that uniform approach, agreed on the EnC level could be more efficient solution. Thus, an additional comfort to cross-border entrants may be provided by establishing identical or similar remedies procedures on the EnC level by adopting the same or similar solutions from the Remedies Directives in the CPs, if applicable.

### **3.3.10 Some Specific Issues**

#### **a) Harmonisation of legislation and regulation**

The best way for the CPs to harmonise their PP procedures in the energy sector is to adopt the Utilities Directive. It would not be cost-effective and would not make sense in the view of the process of becoming EU MS to develop different PP rules from those already developed by the EU. Thus, the quickest way to harmonise PP legislation on Energy (UD) would be that all CPs harmonise their legislation with the Utilities Directive.

Although trade and supply with energy are licensed activities the CPs could agree that there is no need to establish a company in the CP in which such service would be provided. Thus, similarly to how this issue is resolved in the EU, companies from other CPs could after obtaining of the respective energy licence, directly participate in PP procedures organised by other CPs. Alternatively, in case that this solution is not accepted, the CPs could retain the obligation that companies from other CPs should establish a company in order to obtain energy licence, but in case that references of good performance in previous procurement of services are requested in a PP procedure, such references from the parent company established in any other CP should be recognised (recognition on the EnC level).

Since currently the thresholds for application of certain PP procedures in the CPs are on different levels, but in most of them these thresholds are significantly lower than in the Utilities Directive, the CPs could opt either to adjust the thresholds to the EU level or to establish a lower threshold, harmonised on the level of EnC to the extent possible, which would be more suitable for the economic reality in the EnC CPs.

#### **b) Harmonisation of implementation**

Cooperation and exchange of information between the relevant CP authorities would also be necessary. The relevant authorities may include energy regulatory authorities as well as procurement monitoring authorities as explained in more details in Chapter 5 of this Report.

Development of a joint portal for energy procurements above certain threshold is one example of cooperation in implementation of PP rules in energy sector.

In case of harmonised regulation and implementation of PP rules in the CPs in energy sector, Article 58 of the Utilities Directive which regulates Procurement involving contracting entities from different Member States could also be applied in the EnC.

#### **c) Harmonisation on monitoring level**

Reliance of new cross-border entrants on domestic monitoring and court authorities may not provide sufficient comfort that justice and impartiality could be obtained quickly. Thus harmonisation in remedies should be a target. This may be achieved by delegating some

level of powers to a common (supranational) authority on the EnC level. The role of such authority would primarily be to monitor and harmonise the practice of the CPs in implementation of procurement procedures. It could also have a significant advisory role in regard to implementation of the Utilities Directive. Its authorities would depend on the will of the CPs and may be equivalent to the role the Commission played in the EU in implementation harmonisation of the PP Directives. This issue is further analysed in Chapter 5 of this Report.

### **3.4 Steps and Timeframe of Harmonisation**

On individual level, it is recommended that the harmonisation with the PP Directives is provided as soon as practicable. There is no reason for delay of its implementation. The CPs may only benefit from their introduction in the energy sector even if not harmonised between the CPs at the beginning. It is uncertain when the obligation of the CPs in regard to harmonisation of the PP Directives would be binding given the flexibility of obligations undertaken as part of the joining of the EU process and when they would be implemented.

For the benefit of the liberalisation of each CP's energy market it would be sufficient that the legislation complies with the PP Directives. However, in order to see the full effects it is recommended simultaneous harmonisation on the EnC level and cooperation in regard their implementation (by having joint monitoring as well as harmonised infringement rules).

In case that harmonisation on the EnC level is agreed by the CPs, it is recommended that it is coordinated and performed simultaneously in all CPs. In this way the full reciprocity of regulation in all CPs may be established. Otherwise there would be reciprocity only in some CPs while the rules would not apply to the other CPs.

Ideally, in this case the first step would be amendments of the ECT and establishment of the Independent Procurement Authority (IPA) on the EnC level. After that the CPs would proceed with harmonisation of the regulation while IPA would monitor, coordinate and assist the uniform and harmonised implementation of the PP rules. More on the role of the IPA is in Chapter 5.3 of this Final Report.

### **3.5 Assessment of the Costs and Benefits for the beneficiaries**

#### **3.5.1 Costs and Benefits of full harmonisation**

The full implementation of the UD rules in all CPs in the energy sector and their harmonisation between the CPs, shall bring to the customers and energy undertakings:

- a) Increasing / enabling the competition; with facilitating and attracting cross border entrants into the national markets;
- b) Impact on prices of electricity and natural gas charged to contracting entities (such as energy undertakings, SME and other entities governed by public law (contracting authorities) a result of competition;
- c) Market based prices for electricity and gas supplied under PSO; and
- d) Market based and competitive prices paid for energy from RES and subsequently reduction of the RES charges subsidies, borne by end consumers;

In the short run, it is expected that incumbent companies may lose part of the domestic market, but in the longer run they have to develop business strategies to compete and improve their market position in the integrated market.

Such harmonisation would enhance other regional efforts performed by other regional offices such as the SEE CAO Podgorica. The harmonised PP rules would provide general legal framework for the individual procedures and would supplement and secure them.

Further, such rules will promote the integration of the energy markets. This integration is a necessary precondition for the creation of deep and liquid energy markets. In order to illustrate this, we can use the electricity supply business as a case: according to data from the World Bank, in 2013, the six CPs from the Western Balkans had an electricity consumption of about 68 TWh. This will barely provide the basis for a liquid electricity market. Hence, if we want to have a liquid market, it is necessary to integrate the CPs' electricity markets – and integrate them with the electricity markets of the neighbouring CPs and EU MS. To do so, rules governing the retail markets in the EnC and the EU MS must be harmonised.

Full harmonisation and establishment of the IPA would have administrative burden regarding the amendments of legislation /regulation and costs of the establishment of such monitoring authority.

### **3.5.2 Harmonisation of specific provisions**

Harmonisation of only specific provisions of the CD and UD would require additional time for analysis of such specific provisions and for agreement of CPs on their implementation and the exact wording of these provisions. Additional difficulties may easily be encountered in implementation of such provisions without the legal framework provided in the PP Directives. The benefits may be reduced in comparison to the solution of introducing of the PP Directives, particularly the UD in the energy sector, depending on the selection of provisions. There would be increased costs due to prolonged time required and for duplication of efforts since the CPs will eventually have to harmonise with the PP Directives in their process of EU integration.

Our conclusion is that harmonisation of only specific provisions would have less effect for energy undertakings and for the customers, increased costs and delayed benefits in comparison to the full harmonisation.

### **3.5.3 In case that no harmonisation is performed**

This would mean significant delay in implementation of the PP rules in the CPs energy sector and delay in the above listed benefits.

Some of the CPs would develop and accept the PP Directive rules as part of their accession process to the EU, which might be much later than if agreed on the EnC level. Cross border competition with economic operators from other CPs would be developed only on an ad-hoc basis, not as a general rule. Cross-border competitors would face involvement in different burdensome administrative procedures and increasing costs. Administrative burden and associated costs to enter the market are simply passed through to the customers, making the bid of the new entrant less competitive in comparison with the local player.

The fact that some CPs have already planned to draft and to have adopted such laws in 2017 and 2018 should help that the proposed implementation is within their legislative plans.



The negative effect of not synchronised implementation of PP Directives, considering that all CPs would require reciprocity in dealing with operators from other CPs, would be that the respective PP rules in the energy sector will be harmonised for the whole EnC only when the last CP harmonises its legislation with the PP Directives. Only then the harmonised PP rules would be applied throughout the EnC and EU, ensuring full potential of cross-border competition.

## 4 Findings regarding the Concession regulation and Directive

### 4.1 Overview of the New EU Concession Directive

We aimed at providing an “assessment of the relevance of the Concession Directive for the gas and power market in the Energy Community”.

The CoD provides for the first time an express regulatory regime for concessions contracts within EU as part of a “legislative package” reforming the EU procurement rules. The deadline for the transposition of the CoD into national law expired on 18 April 2016.

Concessions are important instruments which can be used for achieving the long-term development of strategic infrastructure and services, *inter alia* in the energy sector. Where they are awarded through tender procedures, they contribute to the promotion of competition on the market as they give the opportunity to all potential investors to compete for the contract and thus allow the public sector and the provision of public services to benefit from private sector expertise, experience and resources, which in turn help achieve efficiency, technical progress and innovation and ultimately the improvement of services for the end users, the consumers.

Prior to the entry into force of the CoD, concessions were subject to the basic rules of the previously applicable Public Sector Directive (Directive 2004/18/EU) or merely subject to the principles of the TFEU<sup>31</sup>, such as the principles of equal treatment, non-discrimination and transparency<sup>32</sup>. In practice, this required contracting entities to put in place procedures broadly similar to those imposed under the PP Directives, when awarding service concession contracts.

The Commission has indicated that the rationale for a separate Directive on concessions is the specific nature of concessions, which would require more flexible award procedures<sup>33</sup>.

The harmonisation of the rules on the award of concessions by the CoD aims at setting clear rules at a EU level in this respect and thus (i) creating legal certainty; and (ii) fostering competition in the internal market in line with the freedom to provide services<sup>34</sup>. In addition, the rules set out within the CoD are intended to provide a minimum level of co-ordination of

<sup>31</sup> The previous Utilities Directive 2004/17/EU excluded from its scope both work concession and service concessions (see Art. 18 Utilities Directive 2004/17/EU).

<sup>32</sup> The European Commission provided further guidance on concession via the following communications: (i) “Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives” Brussels, July 31, 2006 (2006/C 179/02), (ii) “Commission interpretative communication on concessions under Community law” Brussels, April 29, 2000, (2000/C 121/02).

<sup>33</sup> See recitals 3 and 4 of the CoD.

<sup>34</sup> See recital 4 of the CoD.

national procedures for the award of concession contracts and to ensure adequate judicial protection of candidates and tenderers in concession award procedures.

The relevance of harmonising these rules in respect of the energy sector has been clearly identified by the Commission and as a result the CoD expressly applies to the award of concessions in the energy sector.

In particular, the CoD provides the requisite legal certainty as regards the award of concession contracts for potential investors in the energy sector, whether foreign or domestic. In addition, it clearly establishes that the principles of the free movement of goods, freedom of establishment and freedom to provide services, as well as the law principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency, apply in relation to the award of the concessions in the energy sector. Such application gives rise to (i) obligations for the public authorities that have to comply with certain procedural standards vis-à-vis all potential domestic and foreign investors; and (ii) rights for such potential investors participating in the award process for a concession in the energy sector.

Therefore, the rules on the award of concessions laid down in the CoD ensure the minimum level of co-ordination of national procedures for the award of concessions in the energy sector and the legal certainty that is required for the promotion of the liberalisation of the energy markets and the development of competition in the energy sector within the EU.

In this context and given that the award of concessions has only recently been regulated by the CoD, our review in this sub-task has focused on the rules on concessions that apply in the CPs, and the adequacy of the legal protection and level of transparency ensured on the basis of these rules, as compared with the standards introduced by the CoD in 2014 as far as the gas and electricity markets in the EnC are concerned.

We considered whether: (i) the CPs have introduced any legislation concerning concession regulation in the energy sector; and (ii) the scope and content of that legislation in comparison with the provisions of the CoD focusing on the energy sector via a list of questions.

## **4.2 Identification of diverging provisions regarding the regulation of concessions in the CPs, in comparison with the provisions of the CoD**

### **4.2.1 Is there a precise definition in the CPs' legislation of what constitutes "concession", "works concession" or "services concession" as in the CoD? Is there any definition in the CPs' legislation of what constitutes "mixed contracts"?**

The CoD defines "concessions" within Article 5 (1) as (i) works concessions; or (ii) services concessions. Works concessions and services concessions are respectively defined as:-

- (i) "a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works to one or more economic operators the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment"; and

- (ii) “a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works as defined above to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment”.

Article 5(1) of the CoD further clarifies the definition of concessions by stating that: “the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services, which are the subject-matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.”

The definition of concessions derives from the ECJ case law which emphasised the right of exploitation of the works or services by the concessionaire and a core element of that right of exploitation being the transfer of the economic risk to the concessionaire<sup>35</sup>. There was a need to provide greater legal certainty on the definition of concessions, taking into account the lighter regime applicable to concessions contracts versus the regime applicable to public procurement contracts under the Public Sector Directive (Directive 2004/18/EU).

Taking into account that the CoD is only applicable to higher value contracts and (still) procedurally more flexible than the CD/UD, the distinction between concessions contracts and procurement contracts remains important.

In addition, according to the CoD, mixed contracts are contracts which have as their subject-matter both works and services or contracts relating partly to activities covered by the CoD and partly to activities not covered by the CoD.

The CoD sets out specific rules on how to deal with mixed concession contracts, based on ECJ case law and the rules applicable to mixed contracts, as laid down in the CD and UD.

The general approach towards mixed concession contracts is set out in Article 20, whilst Article 22 contains different rules for certain concessions involving utility activities listed in Annex II of the CoD.

The applicable rules should be determined with respect to the main subject of the contract, if the different parts which constitute the contract are objectively not separable. According to Recital 29 of the CoD, how contracting authorities and contracting entities determine whether different parts are separable or not is determined by ECJ case-law. The distinction between services and works is in this regard still important, since there are other exclusions available to services concessions, while for work concessions different rules on subcontracting apply.

<sup>35</sup> Case C-324/98, *Telaustria Verlags GmbH v Telekom Austria AG*, EU:C:2000:669; Case C-231/03, *Conorzio Aziende Metano (Coname) v Comune di Cingia de'Botti*, EU:C:2005:487; Case C-458/03, *Parking Brixen GmbH v Gemeinde Brixen*, EU:C:2005:605; Case C-360/96, *Gemeente Arnhem v. BFI Holding BV*, EU:C:1998:525; Case C-410/04, *Associazione Nazionale Autotrasporto Viaggiatori (ANAV) v Comune di Bari and AMTAB Servizio SpA*, EU:C:2006:237; Case C-382/05, *Commission v Italy*, EU:C:2007:445; and Case C-274/09, *Privater Rettungsdienst und Krankentransport Stadler v Zweckverband für Rettungsdienst und Feuerwehralarmierung Passau*, EU:C:2011:130.

For example, a concession which relates to the provision of both water and energy distribution should be qualified as a mixed contract. If the main subject consists of electricity distribution the CoD will apply. However, if the subject of the contract consists of water distribution it will not apply.

The CoD contains also specific rules in case of overlap with the Defense Directive<sup>36</sup> or Article 346 TFEU (Articles 21 and 23).

Level of compliance with the CoD	CPs	Comments
Full Compliance	Albania	Similar definition as in the CoD
	FYR of Macedonia	Similar definition as in the CoD
	Kosovo*	Similar definition as in the CoD – clarification of the definition of mixed contracts is required.
	Serbia	Similar definition as in the CoD – clarification on the rules applying to mixed contracts and introduction of a definition in the legislation on concessions is required.
	Ukraine	Similar definition as in the CoD – clarification on the definition of “mixed contracts” is required.
Partial Compliance	Bosnia and Herzegovina	The definitions of concessions are sufficiently precise and there is no definition of mixed concessions.
	Moldova	Clarification on the definitions of “works concession” and “services concession” and the introduction of the definition of “mixed contracts” is required.
	Montenegro	The introduction of the definition of “mixed contracts” and the determination of the rules applying to such contracts is required.

#### 4.2.2 Is there a precise definition in the CPs’ legislation of what constitutes “contracting authorities” and “contracting entities” as in the CoD?

The CoD applies to entities covered by the PP Directives<sup>37</sup>. The CoD adopts the definition of “contracting authorities” and “contracting entities”<sup>38</sup> laid down in the CD and the UD.

The notion of “contracting authorities” applies to the award of concession contracts by bodies governed by public law.

“Contracting entities” may be (i) state authorities, (ii) public undertakings, or (iii) exceptionally private undertakings operating on the basis of exclusive or special rights when involved in one of the activities listed in Annex II of the CoD.

However, if such exclusive or special rights have been granted to private undertakings by means of a procedure based on objective criteria, in particular pursuant to the EU legislation and for which adequate publicity has been ensured, they will not be considered “contracting entities”<sup>39</sup>.

<sup>36</sup> Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC.

<sup>37</sup> See Article 1 of the CoD.

<sup>38</sup> Respectively Articles 6 and 7 of the CoD.

<sup>39</sup> See recital 22 of the CoD.

Contrary to the applicable regime under the CD/UD, providers of a PSO or TSO under Directives 2009/73/EC and 2009/72/EC respectively, are not “contracting entities” under the CoD<sup>40</sup>.

Level of compliance with the CoD	CPs	Comments
Full Compliance	Kosovo*	Similar definition as in the CoD
	Montenegro	The definitions are similar to the CoD and clear.
	Serbia	The definitions are similar to the CoD and clear.
Partial Compliance	Albania	Narrow definition of contracting authorities and no definition of contracting entities.
	Bosnia and Herzegovina	The use of the term “conceding parties” is similar to the terms “contracting authorities” and “contracting entities”, but may be confusing for contracting parties within the EU. Narrow definition of contracting entities as it does not include public undertakings. Narrow definition of contracting entities as it does not include public undertakings.
	FYR of Macedonia	The definition of contracting authorities is similar to the definition of the CoD but narrower as it does not include public undertakings. The definition of contracting entities refers to the “concessionaire” as a recipient of concession and not to the “grantor” of a concession – divergence with the CoD which can be confusing for contracting parties within the EU.
	Ukraine	Narrow definition of State authorities as it seems not to include contracting entities.
Non Compliance	Moldova	Definitions of what constitutes “contracting authorities” and “contracting entities” should be introduced.

#### 4.2.3 Is there any specific reference in the CPs’ legislation to activities that are covered by the rules on concessions related to gas and/ or electricity?

Annex II of the CoD provides a list of utility activities similar to those under the Utilities Directive, namely (i) gas and heat, (ii) electricity, (iii) transport services, (iv) ports and airports, (v) postal services, (vi) extraction of oil and gas and exploration for, or extraction of, coal or other solid fuels<sup>41</sup>.

<sup>40</sup> See First assessment report.

<sup>41</sup> It is noted that water is not listed in the activities of Annex II of the CoD.

Level of compliance with the CoD	CPs	Comments
Full Compliance	Albania	Specific reference exists in the CP's legislation
	Kosovo*	Specific reference exists in the CP's legislation
	FYR of Macedonia	Specific reference exists in the CP's legislation
	Montenegro	Specific reference exists in the CP's legislation
	Serbia	Specific reference exists in the CP's legislation
	Ukraine	Specific reference exists in the CP's legislation – similar to Annex II of the CoD.
Partial Compliance	Bosnia and Herzegovina	Reference only to limited activities. It seems that there is no consistency between the different laws on concessions in Bosnia and Herzegovina.
Non Compliance	Moldova	No reference is laid down in the CP's legislation.

#### 4.2.4 Are the principles of equal treatment, non-discrimination and transparency in procurement proceedings expressly laid down in the CPs' legislation?

Article 3 of the CoD expressly recognises that contracting authorities and entities must comply with general principles of law, namely equal treatment, non-discrimination, transparency and proportionality when awarding concessions. The extent of the obligations flowing from these general principles of law has been made clear by the ECJ case-law and soft law instruments (in particular Communications) adopted by the Commission in an effort to clarify certain key concepts relating to concession contracts and to provide legal certainty to all stakeholders<sup>42</sup>.

Level of compliance with the CoD	CPs	Comments
Full Compliance	Albania	The above principles are laid down in the legislation of the CP.
	Bosnia and Herzegovina	The above principles are laid down in the legislation of the CP.
	FYR of Macedonia	The above principles are laid down in the legislation of the CP.
	Kosovo*	The above principles are laid down in the legislation of the CP.
	Montenegro	The above principles are laid down in the legislation of the CP.
	Serbia	The above principles are laid down in the legislation of the CP.
Partial Compliance	Ukraine	It seems that the principles apply with regard to concession but are not included in the Law on Concessions.
Non Compliance	Moldova	The principles of equal treatment, non-discrimination and transparency should be introduced in the legislation.

<sup>42</sup> See Case C-324/98, *Telaustria Verlags GmbH v Telekom Austria AG*, C-2000/669; C-231/03, *Conorzio Aziende Metano (Coname) v Comune di Cingia de'Botti*, C-2005/487; C-458/03, *Parking Brixen GmbH v Gemeinde Brixen*, C-2005/605; the "Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives" Brussels, July 31, 2006 (2006/C 179/02) and the "Commission interpretative communication on concessions under Community law" Brussels, April 29, 2000, (2000/C 121/02).



#### 4.2.5 Does the same threshold of EUR 5,225,000 as the one provided in the CoD apply and, if not, which threshold applies? Are there any rules in the CPs' legislation providing guidance as to the method of calculation of the value of a concession?

The CoD applies to work and services concessions which exceed the value of EUR 5,225,000 (Articles 8 and 9 of the latest consolidated version of the CoD), provided that the works or services are intended for the pursuit of one of the activities referred to in Annex II of the CoD, which includes a list of utility activities in the energy sector (gas-heat-electricity), namely generation/production, wholesale and retail sale.

The CoD gives EU Member States the freedom to structure the provision of works or services according to their own needs, by (i) using their own resources and co-operating with other contracting authorities; or (ii) outsourcing those tasks to third parties.

The high threshold of the CoD reflects the point at which procurements become sufficiently attractive for cross-border trade (see recital 23 of the CoD). This could also be taken as a sign that the ECJ should not be concerned about the award of concessions legitimately valued under the threshold of the CoD.

As regards the method of calculation of the value of a concession, a high degree of speculation is necessary when estimating the value of complex, long-term, concession arrangements, which often involve several variables. In this regard, the CoD requires an objective and transparent approach for the calculation and sets out appropriate considerations in Article 8(3).

In particular, these considerations include:-

- the value of any form of option and any extension of the duration of the concession;
- revenue from the payment of fees and fines by the users of the works or services other than those collected on behalf of the contracting authority or contracting entity;
- payments or any financial advantage in any form whatsoever made by the contracting authority or contracting entity or any other public authority to the concessionaire including compensation for compliance with a public service obligation and public investment subsidies;
- the value of grants or any other financial advantages, in any form, from third parties for the performance of the concession;
- revenue from sales of any assets which are part of the concession; and
- the value of all the supplies and services that are made available to the concessionaire by the contracting authorities or contracting entities, provided that they are necessary executing the works or providing the services.

Level of compliance with the CoD	CPs	Comments
Full Compliance	Albania	Much lower threshold than the one in the CoD.
	Serbia	
	Bosnia and Herzegovina	No threshold applies. The rules apply in respect of all contracts regardless of their value.
	FYR of Macedonia	
	Moldova	
Montenegro		
Ukraine		
Partial Compliance	Kosovo*	Certain requirements apply to concession with a high value.

**4.2.6 In case there are rules regulating the procedures for the award of concessions in the CPs, is there any specific exclusion from the scope of these rules laid down in the CPs' legislation? Do any of the following exclusions provided in the CoD apply:**

- concession awarded to a contracting entity on the basis of an exclusive right;
- concession awarded with the purpose to provide electronic communication services to the public by the authority;
- concession organised pursuant to international rules; or
- concession awarded by a contracting authority to another contracting authority, affiliate or joint venture concession concerning activities which are directly exposed to competition.

The exclusions set out in the CoD mostly coincide with those found in the CD (Articles 7-12) and UD (Articles 18-30). In particular, the CoD does not apply to:-

- certain services concessions awarded on the basis of an exclusive or special right applying to contracting entities and economic operators (Article 10 (1));
- concession awarded pursuant to international rules (Article 10 (4));
- contracting entity concessions awarded for the pursuit of activities in third countries (Article 10(10));
- certain service concessions (Article 10(8)), e.g. acquisition or rental of land, existing buildings or other immovable property; acquisition, development production or co-production of programme material intended for audio-visual or radio media services; arbitration and conciliation services; specific legal and financial services; loans, civil defence, civil protection and danger protection services provided through non-profit organisations; and political campaigns, etc. – these exclusions are broadly equivalent to Article 10 CD and Article 21 UD;
- concessions awarded on defence and security aspects (Articles 10 (5) and (6));
- concession awarded for activities directly exposed to competition (Article 16 and recital 41);
- concessions awarded on certain air transport and public passenger services (Article 10(3));
- service concessions awarded for lottery services granted on the basis of an exclusive right (Article 10(9));
- concessions awarded on electronic communications networks and services (Article 11);
- concessions awarded relating to certain activities in the field of water;
- concessions awarded between entities within the public sector – extending to both “in-house” procurement and “public-public” cooperation (see Article 17 and recitals 45-47).

For in-house concessions to be excluded, the contracting authority must:-

- exercise a control over the legal person awarded the concession that is similar to the control that the authority exercises over its own departments;
- more than 80% of the activities of the controlled legal person must be carried out in performance of tasks entrusted to it by the contracting entity; and

- there must not be any direct private capital participation in the controlled legal person, with the exception of non-controlling forms of such private capital participation, as required by national law in conformity with the TFEU.

For “public-public” cooperation (Article 17 (4)) to be excluded<sup>43</sup>:-

- the services must be concluded exclusively between contracting authorities or contracting entities ;
- the implementation of the cooperation is governed solely by considerations in the public interest; and
- no private service provider may be placed in an advantageous position vis-à-vis its competitors.

In addition, the most notable exclusions in relation to the areas of gas and/or electricity are:-

- (i) the exclusion in relation to exclusive or special rights; and
- (ii) the exclusion in relation to “in-house” and “public-public” procurement as described above.

Specifically as to the energy sector, the CoD is applicable to:-

- (i) services within the energy sector (unless exclusive or special rights have been granted in this respect, as for example foreseen in Directive 2009/72/EC in relation to electricity and Directive 2009/73/EC in relation to natural gas);
- (ii) the construction of new production facilities, and
- (iii) the construction of interconnections or extensions of grid, which meet the threshold of the CoD.

Level of compliance with the CoD	CPs	Comments
Full Compliance	Albania	Similar exclusions as in the CoD.
	Kosovo*	Similar exclusions as in the CoD.
Partial Compliance	FYR of Macedonia	It seems that the scope of application is determined but the exclusions are not clearly set out in the concession legislation.
	Ukraine	Limited exclusions to the case of the application of international rules.
	Bosnia and Herzegovina	Limited exclusions laid down in the RS Law on Concessions.
Non Compliance	Moldova	No exclusions apply.
	Montenegro	No exclusions apply.
	Serbia	No exclusions apply.

#### 4.2.7 Is there any specific rule in the CPs’ legislation limiting the duration of concessions? Does the limit of five years provided in the Concessions Directive apply and, if not, which?

The CoD stipulates that the duration of a concession must be limited, but does not lay down a maximum duration (Article 18(1)).

The duration of the concession must be estimated at some point prior to award. However, the CoD does not specify at which point.

<sup>43</sup> Case C-480/06, *Stadreinigung Hamburg*, C-2009/357.

The duration of a concession must not be “*unduly lengthy*” so as to prevent market foreclosure and restriction of competition (see recital 52)<sup>44</sup>.

For concessions extending beyond five years the maximum duration cannot exceed the length of time a concessionaire could reasonably be expected to recoup the full investment made and a return on invested capital required to achieve the specific contractual objectives (the extent of which is left reasonably open (Article 18 (2))). The investments taken into account for the purposes of the calculation shall include both initial investments and investments during the life of the concession.

Level of compliance with the CoD	CPs	Comments
Partial Compliance	Albania	Maximum duration of 35 years – justification of such duration seems to apply.
	Bosnia and Herzegovina	Duration of 30 – 50 years – justification depending on the object of the concession and investments.
	FYR of Macedonia	Maximum duration of 35 years – justification on the basis of a feasibility study.
	Kosovo*	No maximum duration, but justification of the duration on a case by case basis.
	Montenegro	Duration of 30 – 60 years – justification on the basis of a feasibility study.
	Serbia	Duration of 5 – 50 years – justification of the duration and existence of the concept of “reasonable time”.
	Ukraine	Duration of 10 – 50 years – three years in specific cases – no justification on the duration.
Non Compliance	Moldova	No maximum duration applies and no justification is provided.

#### 4.2.8 Does the CPs’ legislation lay down specific time limits regarding:

- **the submission of an application or of a tender?**
- **the duration of the procurement procedure?**
- **Are there any rules on the selection of candidates and the award criteria laid down in the CPs’ legislation?**

The minimum time limit for receipt of applications (or tenders) is 30 days.

Where the procedure takes place in successive stages the minimum time limit for receipt of initial tenders must be 22 days. The time limit for receipt of tenders may be reduced by five days through the use of electronic communication.

Despite these minimum stipulations, authorities/entities are told to take account of the complexity of the concession and the expected time needed.

Following the award of a concession, authorities/entities have 48 days in which to send a concession award notice to the Publications Office of the European Union.

In accordance with Article 40 of the CoD an authority/entity must “*as soon as possible*” inform candidates or tenderers of award decisions, and, if a tenderer puts in a request for

<sup>44</sup> Concessions of a very long duration are likely to result in the foreclosure of the market and may thereby hinder the free movement of services and the freedom of establishment. However, a very long duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital (see recital 52).

information, must respond to the request with detail on the characteristics and advantages of the successful tender within 15 days. These information requirements tie in with the extension of the Remedies Directives to concessions and support the standard 10 days standstill requirements.

As regards the award criteria, unlike the CD, the CoD does not set out specific procedures to be followed when awarding a concession<sup>45</sup>.

The CoD establishes a basic framework reflecting the general principles and procedural guarantees. From the view of the EU legislator, minimum coordination appears to be sufficient to achieve the objectives pursued by the CoD.

Irrespective of the way or form which contracting authorities or contracting entities choose in order to organise the procedure leading to the choice of the concessionaire, they are bound to respect at all times the principles of equal treatment, non-discrimination and transparency vis-à-vis economic operators. Only a relatively high-level outline of the award process to be followed is provided within the CoD, with no specific award procedures identified<sup>46</sup>.

Nevertheless, at some point the authority/entity must commit to a specific organisation of the procedure and communicate this organisation, as well as an indicative completion deadline, to the participants of the procedure. The precision and detail to which such information must be provided to the participants is not clear from the text of the CoD.

The standard formal starting point is envisaged to be by way of publication of a concession notice in the Official Journal. The rules in relation to this mirror the rules of the CD and the UD.

In addition, the rules on mandatory and discretionary exclusion of economic operators mirror the rules of the CD.

As is the case under the CD and UD, authorities/entities may set qualification standards based on professional and technical ability and financial and economic standing.

The Directive does not prescribe a minimum number of participants. The number of participants must merely be sufficient to ensure genuine competition.

The rules governing award of concessions, the assessment of the tenders (Article 41) are also considerably less developed than those found in Article 67 CD and Article 82 UD.

Objective criteria must be used to identify the tender providing an “overall economic advantage” for the contracting authority or contracting entity. No illustrative criteria are provided. However, criteria must be linked to the subject matter of the concession and it is expressly stated that award criteria may be environmental, social or innovation related.

Article 41 does not mention any need to attribute different weight to the award criteria. Award criteria must merely be listed in descending order of importance (Article 41(3)).

There is scope to vary the order in exceptional circumstances to take into account innovative solutions which could not have been foreseen by a diligent authority/entity (Article 41 (3)).

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<sup>45</sup> See first assessment report.

<sup>46</sup> Articles 36-41 of the CoD.

Level of compliance with the EU Directives	CPs	Comments
Full Compliance	Albania	Similar provisions apply as in the CoD.
	Bosnia and Herzegovina	Similar provisions apply as in the CoD.
	FYR of Macedonia	Similar provisions apply as in the CoD.
	Kosovo*	Similar provisions apply as in the CoD.
	Serbia	Similar provisions apply as in the CoD.
	Ukraine	Similar provisions apply as in the CoD.
Partial Compliance	Montenegro	No time limits are set in the legislation.
Non Compliance	Moldova	No time limits, no set selection criteria apply.

#### 4.2.9 Are there any rules on the performance of concessions laid down in the CPs' legislation, in particular

- rules on subcontracting?
- rules on the possible modification of the contract during the contract term?
- rules on the termination of concessions?
- rules on monitoring and reporting of the application of rules for the award of concessions contracts?

##### General: Performance

The provisions on the performance of concessions of the CoD are similar to the rules contained in the CD and the UD, namely (i) subcontracting (Article 42 CoD, Article 71 CD and Article 88 UD), modification (Article 43 CoD, Article 72 CD and Article 89 UD), termination (Article 44 CoD, Article 73 CD and Article 90 UD) and monitoring and reporting (Article 45, Article 83 CD and Article 99 UD). The relevant articles of the three Directives mirror each other and to a large extent reflect ECJ case law.

##### Subcontracting (Article 42 CoD)

The concessionaire is required to provide information concerning the subcontractor (name, contact details, legal representative) and of any changes in subcontractors working at a facility under the direct oversight of the contracting authority.

Contracting authorities have discretion to extend these requirements, for example to subcontractors further down the subcontracting chain.

##### Modification (Article 43 CoD)<sup>47</sup>

The detailed rules on modification are important with respect to concessions in view of the long term and complex nature of these procurements. Concessions contracts are often subject to changing circumstances. The following circumstances allow for a modification of the contract without having to undertake a new concession award procedure:-

<sup>47</sup> Annex XI of the CoD contains the information to be included in the notices of modifications of the concession in accordance to Article 43 of the CoD.



- When the modification is provided in a clear, precise and unequivocal manner within the initial concession documents. The modification may include value revision clauses or options, as well as the conditions under which they may be used;
- In case of additional works or services by the original concessionaire, which were not included in the initial concession, but have become necessary, and a change of concessionaire cannot be made due to either:-
  - economic or technical reasons, such as requirements of interchangeability or interoperability with existing equipment or services; or
  - significant inconvenience or substantial duplication of costs that such a change would cause for the contracting authority, subject to the condition that any increase in value must not exceed 50% of the value of the initial concession (where several successive modifications are made, that limitation applies to the value of each modification);
- When the required modification:-
  - has been brought about by external circumstances that a diligent contracting authority could not foresee;
  - does not alter the overall nature of the concession; and
  - involves an increase in value that does not exceed 50 per cent of the value of the initial concession (where several successive modifications are made, that limitation applies to the value of each modification);
- When a new concessionaire is replacing the initial concessionaire as a consequence of:-
  - an unequivocal, precise and clear review clause or option; or
  - a universal or partial succession into the position of the initial concessionaire; or
  - the assumption by the contracting authority itself of the concessionaire's obligations towards its subcontractors;
- When the modifications are insubstantial; and
- When the value of the modification is below both of the following values: the threshold for concessions (currently 5.186,00 EUR) and 10 per cent of the value of the initial concession.

#### Termination (Article 44 CoD)

The EU Member States must ensure that contracting authorities have the possibility of terminating a concession during its term, in accordance with the conditions determined by national law, where one or more of the following conditions are fulfilled:-

- a substantial modification of the concession has been made, which would have required a new concession award procedure;
- the concessionaire should have been excluded from the concession award procedure at the time of the concession award, due to mandatory grounds for exclusion (e.g. final conviction for a criminal offence);
- the ECJ finds in an infringement procedure, that the contracting authority has awarded a concession in breach of the obligations under the TFEU and under the CoD.

#### Monitoring (Article 45 CoD)

The EU Member States must also ensure that one or more national authorities monitor the application of the rules for the award of concession contracts.

This new requirement for the monitoring of the implementation and functioning of the rules on the award of concession contracts should ensure the efficient and uniform application of EU law in the EU Member States.

Level of compliance with the CoD	CPs	Comments
Full Compliance	Albania	Similar provisions as in the CoD apply.
	Kosovo*	Similar provisions as in the CoD apply.
	Serbia	Similar provisions as in the CoD apply.
	Ukraine	Similar provisions as in the CoD apply.
Partial Compliance	Bosnia and Herzegovina	No rules on subcontracting apply –harmonisation of the rules at different levels of administration may be required.
	FYR of Macedonia	No rules on subcontracting apply.
	Montenegro	No rules on modification apply.
Non Compliance	Moldova	No specific rules apply.

#### 4.2.10 Are there any specific rules in the CPs' legislation on the judicial review of the decisions of the contracting authorities and/ or the judicial protection of unsuccessful bidders? Does the CPs' legislation or decisional practice make any reference to the Remedies Directives?

Articles 46 and 47 of the CoD expressly refer to the Remedies Directives. The Remedies Directives are fully applicable to utilities and public sector works and services concessions when governed by the CoD. This means that the rules on standstill and rules putting an immediate halt to the procurement process following a judicial challenge are also applicable to concessions.

Unsuccessful bidders must be given the opportunity to challenge any decision taken by contracting authorities or contracting entities during a concession award procedure, and they enjoy the minimum guarantees set out in the Remedies Directives.

Level of compliance with the CoD	CPs	Comments
Full Compliance	Albania	Similar provisions as in the CoD apply.
	Bosnia and Herzegovina	Similar provisions as in the CoD apply.
	FYR of Macedonia	The Remedies Directives have been transposed into national law.
	Kosovo*	Similar provisions as in the CoD apply.
	Montenegro	Similar provisions as in the CoD apply.
	Serbia	There are references to the Remedies Directives in the CP's legislation.
	Ukraine	Similar provisions as in the CoD apply.
Non Compliance	Moldova	No rules apply.

### 4.3 Concluding remarks of this Chapter

Following the comparison and analysis of the applicable legislation in each CP in the context of the above assessment, we have drawn the following conclusions with regard to:-

1. the rules on concessions which reflect the standards introduced by the CoD<sup>48</sup>; and
2. the main inconsistencies between the rules of certain CPs and the CoD<sup>49</sup>.

#### 4.3.1 Rules on concessions which reflect the standards introduced by the CoD

The majority of CPs has clearly defined the scope of the rules on concessions and have expressly provided for the application of the general principles of equal treatment, non-discrimination and transparency. In particular:-

- a) the vast majority of the CPs (i.e. 5 out of 8 CPs) has defined the scope of concessions in an adequate and clear manner and in line with the definitions of concessions set out in the CoD. This allows concessions to be clearly distinguished from public contracts or authorisations and licences. We consider it advisable to clarify further the concept of “*works concessions*” and “*services concessions*” in the CPs’ legislation where missing. The introduction of a definition of “*mixed contracts*” would also further help to determine with clarity and legal certainty the rules applying to such contracts.
- b) In this respect, it is also noted that the rules on concessions of most CPs expressly apply in relation to activities in the gas and electricity sectors. It is very important for each CP to determine clearly in its legislation the scope of application of the concession rules to such activities in order to ensure legal certainty for stakeholders established both within the CP concerned and in other countries, particularly in the EnC and the EU;
- c) almost all CPs (i.e. 6 out of 8 CPs) have included in their legislation the general principles applicable in relation to the award of concession contracts. This could be regarded as the initial step towards the harmonisation of the application of these principles within the EnC. Ensuring that these principles are upheld and applied by contracting authorities in accordance with the established case law of the EU Courts is the next step for ensuring the participation of foreign investment into the energy sector of the EnC;
- d) the vast majority of the CPs (i.e. 7 out of 8 CPs) apply the concession rules to all contracts regardless of their value, including in particular two CPs (Albania and Serbia) that apply such rules to contracts whose monetary value is equal to or greater than a certain threshold (although the threshold in these CPs has been set at a much lower level than the threshold of EUR 5,225,000 set out in the CoD). As concessions to economic operators within the EU and the EnC have in most cases a cross-border interest, all CPs should ensure consistency and legal certainty to economic operators, by applying the minimum harmonised rules on concessions to tenders which fall above at least a certain monetary value (if not to all tenders). In any event, CPs must ensure that even with regard to concession contracts of lower value, the general principles of

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<sup>48</sup> Section 5.5 of the Second Assessment Report.

<sup>49</sup> Section 5.7 of the Second Assessment Report.

EU law apply. This also means that the method of calculating the estimated value of a concession needs to be set out and applied in a consistent manner. The CoD provides useful guidance in this regard;

- e) as regards the procedure for the award of concession contracts, almost all CPs apply specific time limits for the award procedure, which enable the tenderers to submit an application within a clearly defined framework. In addition, the general rules on administrative procedures seem to apply with respect to the duration of the procurement procedure in all CPs. CPs also apply specific criteria for the selection of candidates which are laid down in each CP's legislation or in the procurement documents, including economic criteria as well as criteria in relation to environmental protection and social issues. This means that the discretion of the contracting authorities and entities in the CPs is limited with regard to the selection of candidates and this can be viewed as a procedural guarantee for stakeholders; and
- f) in all CPs judicial guarantees apply in relation to concession contracts, although there are procedural differences as to the available remedies in the CPs' respective legislation.

#### 4.3.2 Rules on concessions of CPs diverging from the CoD

Most CPs have introduced at least some basic legislation in relation to concessions, as explained above. However, several inconsistencies have been observed in relation to certain key issues:-

- a) some CPs (i.e. 2 out of 8 CPs) have narrowed the definition of "*public authorities*" so that it does not include public undertakings. The inclusion of a definition of "*contracting entities*" is an important step for the implementation of the concession rules, whilst the definition of "*contracting authorities*" and "*contracting entities*" should be clearly designed in order to include all entities that are allowed to award concessions, including public undertakings. For example, divergence in the definitions might cause confusion for contracting parties within the EU (as, for example, might be the case in FYR of Macedonia, where the term "*contracting entities*" refers to concessionaires);
- b) with regard to the scope of application and the exclusions set out in the CoD, most CPs (i.e. 6 of 8 of CPs) either lay down very limited exclusions or do not lay down such exclusions at all. CPs are advised to consider whether or not it is appropriate to exclude from the scope of their concession rules certain concession contracts, bearing in mind the potential for distortion of competition. For example, in case of a service concession awarded on the basis of an exclusive right which an operator enjoys under the relevant national law, it would be practically impossible to follow a competitive procedure for the concession award. Upon this basis, the introduction of exclusions in the legislation of CPs would clarify the scope of application of the national rules on concessions and would provide legal certainty in relation to the activities which fall under the rules on concessions;
- c) the vast majority of CPs (i.e. 6 out of 8 CPs) has set a maximum duration for concession contracts (which falls within the range of 30-60 years). The CoD does not lay down a maximum duration for concession contracts, but requires that contracts which are longer than five years be limited to the period in which the concessionaire

could reasonably be expected to recoup the investment made for operating the works and services together with a reasonable return on invested capital under normal operating conditions. Although the legislation of most CPs seems to require that the contracting authorities justify the duration of the concession, a duration of between 30 and 60 years could hardly be considered to be as “*limited in time*” so as to prevent possible market foreclosure and restriction of competition or breach of the principles of free movement of services and freedom of establishment; and

- d) as regards the performance of concessions, it is noted that most CPs apply specific rules with regard to subcontracting, the possible modification of the contract during the contract term, the termination of contracts and monitoring mechanisms. However, there are several aspects in the legislation of certain CPs that could be improved, as illustrated in the comparative table above. In addition, CPs are required to ensure that the monitoring mechanisms that have been put in place ensure the impartiality of the decisions adopted by the public authorities, regardless of whether economic operators take part in tendering procedures at home or abroad.

Given that, as illustrated in the above tables, most of the CPs have already adopted some form of legislation regulating the award of concession contracts in relation to the energy sector, it would be necessary to ensure the consistency and uniformity of such legislation within the EnC, so as to effectively promote the liberalisation of the gas and electricity markets of the CPs and to develop cross-border competition.

The remaining elements requiring alignment with the CoD are listed above and identified for each CP in the overview presented in the Section 4.2. To this effect, it would be desirable for the CPs to implement the provisions of the CoD in their respective legal order.

## 5 EnC Treaty amendments and their implementation

Building upon the findings set in Chapters 2, 3 and 4 of this Study, our general conclusion is that a) all CPs have implemented at a certain level the PP and Concession rules, thus any legislative amendment(s) would consist of their upgrade; b) harmonisation of these rules between the CPs (and eventually with the EU MSs) is important for the development of competition between other CPs and the EU MSs; and c) ensuring the implementation of the PP and Concession rules in practice may be of even greater importance than the introduction of mere legislative amendments.

Our recommendation is presented in three steps: (a) following a summary of our conclusions from the previous tasks, we examine three available options concerning the implementation of the PP and Concession Directives (Section 5.1 of this Report); (b) we propose which steps should be performed and prioritise these steps (Section 5.2 of this Report); and (c) we set out the regulatory proposals and solutions for the implementation of the recommendation (Section 5.3 of this Report).

## 5.1 Recommendations regarding the adoption of the Directives

### 5.1.1 Summary of our Conclusions from the Chapters 2, 3 and 4

#### 1) Implementation of PP and Concession rules may contribute to development of competition in electricity and gas markets

Our conclusion is that all CPs have to some extent transposed and applied into their legislation the EU rules on PP and concessions. However, they do not apply them to all energy related procedures (as it would be in compliance with the EU Directives) and such application often differs from one CP to another, although there are groups of CPs that already have, to a certain extent, similar rules.

Based on the initial findings of our research of the CPs' regulations, we have examined in particular whether or not the PP and Concession rules apply on certain example procedures (listed in the Report in Chapter 2) such as when the CPs' authorities purchase energy for their own consumption or in case of PSO supply. Our conclusions were that the PP rules do not always apply to these procedures, even though their application would positively affect the competition in the CPs, having in mind also the market structure of the CPs (i.e. in cases where there is one incumbent mostly state-owned or where the state is a majority shareholder and there are several small independent competitors). All provisions of the PP Directives and the Concession Directive that have not been already transposed into the national laws of the CPs should be harmonised as well in order to have a complete legislative framework.

Our assessment covers the compliance of the CPs with both the Classic Directive and the Utilities Directive. It should be clarified that the Utilities Directive is directly relevant for competition in the electricity and gas markets and in particular in relation to the procurement of energy (electricity and gas) in the CPs when performed by contracting entities pursuing energy activities. However, the Utilities Directive would not apply to other contracting authorities and public undertakings (not active in the energy sector) when procuring electricity or gas. Please see the relevant clarification in Section 2.1 of this Report.

#### 2) An immediate practical effect on competition in the CPs could be achieved by applying their current PP and Concession rules at least (but not limited to) on the selected energy related procedures pointed out in this Study. The application of the PP and Concession rules in the CPs' energy sector should be as wide as possible.

If the CPs applied their pre-existing PP rules on all (or some) of the selected procedures (which are set out in Chapters 2 and 3 above), this could have an immediate effect on competition, under the condition that they are correctly applied in practice (the monitoring and improvement of the procedures and decisions is discussed further below). Chapters 2 and 3 of this Study include in particular an assessment of the impact on competition of the implementation of the PP procedures for procurement of electricity by contracting entities for their own consumption, for granting of RES support, for procurement by TSOs of balancing and ancillary services, for selection of a PSO provider (or if appointed for its procurement of energy). **However, these situations ought not to be considered as an exhaustive list but merely as examples, as the PP Directives should be applied as wide as possible.**



Certain public procurement procedures in the energy sector may be regulated by other EU acts (including soft law instruments), such as the Guidelines on State aid for environmental protection and energy 2014-2020, the Electricity Directive and the Gas Directive. These cover specific issues, such as State aid or public service obligations. As the PP Directives regulate procurement procedures in a more complete and detailed way, from the initiation of such a procedure to the award of a contract and its implementation (also giving sufficient flexibility as regards the choice between the different types of procedure, technique and instrument, whilst other specific legislative instruments usually focus on the respective specific issue), the PP Directives ought to be used for supplementing such specific procedures in issues not explicitly regulated by the sector-specific provisions, thus also simplifying the task of the legislator with regard to all the specific rules. It should be noted that, given that the EU MSs have already transposed the PP Directives in their national legislation, when a new specific procurement procedure is enacted at EU level, it can be implemented uniformly in all MSs, upon the basis of the PP Directives' provisions.

**3) Main obstacles for development of competition in CPs and on the EnC level, addressed in the Report, would be removed through harmonisation with the PP and Concession Directives. They include: significant exclusions from application of the PP rules; low thresholds and short time limits; limited diversity of procedures, techniques and instruments applied in practice; broad exclusion in case of in-house contracts; non-compliance in regard to the award criteria (including the environmental standards); broad grounds for the amendments of a PP agreement; and insufficient remedies.**

We have analysed each of the above issues in Sections 3.1 and 4.2 in this Report and have in Sections 3.3 and 3.4 provided specific recommendations as regards the necessary amendments in the rules of each CP. We have also pointed out and explained what amendment should be introduced in relation to each of the PP provisions and the impact of such amendment on the local and cross-border competition.

**4) The following additional issues have been analysed and necessary amendments were recommended:** a) prioritising of domestic economic providers; b) promotion of environmental and other criteria; c) electronic self-declarations for bidders (ESPD); d) applicability of PP rules in case of purchase of electricity from the power exchange or other organised markets; e) timing for fulfilment of other international obligations for harmonisation of PP rules (SAA, GPA and DCFA) and f) cooperation on the EnC CPs level.

In order for the competition in the relevant markets to be developed, it is essential for any cross-border procurement to exclude the prioritisation of domestic suppliers. We have analysed the international obligations of the CPs, such as those regulated in the Stabilisation and Association Agreements, that require the CPs to introduce provisions for the PP and the Concession Directives in their legislation and have reached the following conclusions: a) it is recommended to establish harmonised rules between the CPs in order to promote cross border competition in procurement; and b) it is recommended that the CPs permit the participation of economic entities from other CPs, under reciprocity requirement. The best

way to achieve such reciprocity is to establish unified rules simultaneously in all CPs. There is no need for the CPs to invent new unified PP rules, as the simplest way would be to adopt the PP and Concession Directives in unified way. It is noted that only the PP and Concession Directives would secure the unity of harmonisation, compared to other international treaties. In addition, as the Stabilisation and Association Agreements do not provide for strict deadlines, it is not certain when these rules would actually be transposed and enter into force in the CPs. It is thus clear that these rules would not be in practice implemented simultaneously in all CPs, and, as such there would be no reciprocity in their implementation.

CPs should be encouraged to adopt and use different types of procurement procedure, as well as the diverse techniques and instruments provided in the PP Directives in order to be able to tailor their respective procurement procedures according to the particular each time circumstances and needs. The same applies to the applicable award criteria. We have particularly examined how to achieve the promotion of the environmental criteria and found that whilst all CPs (except Moldova), have included such criteria in their legislation, they should be further supported by specific secondary legislation and be implemented in practice.

**5) Based on these conclusions, our recommendation is to aim for the full harmonisation at EnC level of all PP and Concession rules as set out in the respective Directives. Such harmonisation would enhance cross-border competition and could automatically resolve the issues of reciprocity and close cooperation in procurement procedures.**

This is particularly important as most of the CPs are medium and small sized and in all of them the energy market is dominated by one vertically integrated, usually state-owned, company. As a result, the CPs' markets are characterised by limited competition in the sectors of trade and supply of energy. Although the provisions of the Electricity and Gas Directives have already been transposed into the CPs national energy laws (in most CPs to a significant extent<sup>50</sup>), competition has not been sufficiently developed and few new players have entered these markets.

As explained in the Report, the application of PP rules in the energy markets of the CPs is not unified in any aspect. While some CPs apply PP rules in case of contracting parties' procurement for own consumption or in case of obtaining energy or capacity for provision of balancing and ancillary services, others do not. With regard to reciprocity, it is recommended that all CPs apply the PP rules for the same type of procurements. With regard to the liberalisation of the energy market, it is recommended that the application of the PP rules is as wide as possible.

It is not sufficient to impose compulsory PP procedures. If in one CP there is only one licensed supplier who can participate in such PP procedure, organisation of PP procedures is pointless. In case of such small and medium size markets, there may be no significant economic justification for a second licensee unless there are potential agreements which may be obtained through a PP procedure. These procedures may be a good step to

<sup>50</sup> Annual Implementation Report, Energy Community Secretariat 2016, 1 September 2016, [https://www.energy-community.org/portal/page/portal/ENC\\_HOME/DOCS/4332394/3D790302C9FD5024E053C92FA8C0D492.pdf](https://www.energy-community.org/portal/page/portal/ENC_HOME/DOCS/4332394/3D790302C9FD5024E053C92FA8C0D492.pdf)

compete with the incumbent company. Another consequence of the size of energy markets in the CPs is that it would be more possible for any potential competitor to come from neighbouring countries. This would create a basis for the future further development of competition, if accepted by the CPs. Alternatively, it should be regulated that, as soon as a second potential competitor is licensed in a specific CP, an obligation to apply the PP procedures is triggered.

The development of procurement rules applicable on procurement procedures in energy would establish an appropriate framework to attract new entrants into the market of CPs. For example large or medium size procurements regularly announced and organised would attract attention from those seeking a placement of their products and services. Their participation would be under the condition that licences in the CP in question are obtained, but not necessarily with an establishment requirement. Any barrier for their participation in PP procedures should be removed. In this sense, there should be a quick licensing procedure, no national discriminations, standardisation of documents, single tender platform for high-value procurements, etc. The best way to achieve this is to harmonise the PP rules in the CPs.

Harmonisation of the CPs PP legislation, their implementation and monitoring, would provide adequate ground for development of competition in such markets. In order to work, it would have to be implemented simultaneously in all CPs, which would in turn automatically secure reciprocity.

The successful implementation of such harmonised rules would require adequate announcing of procurements, sufficient time for preparation of documents and standardised documentation. Securing the application of the principle of objectivity and impartiality is important for attracting new participants. Adequate remedies are also essential in order to ensure the participants that their participation in PP procedures would not be a waste of their resources.

**6) We also recommend the implementation of the Remedies Directives, in order to provide comfort to new entrants with respect to the application of fair treatment and transparent and impartial implementation of procurement procedure. Securing of proper implementation of the PP rules is of most importance**

In regard to remedies procedures, in order to achieve reciprocity and harmonised implementation we recommend the necessary adaptation of the CPs national laws transposing the Remedies Directives. Since the Remedies Directives have in most CPs been implemented to some degree, only some additional harmonisation is needed for the total transposition into each CP of these Directives. It should be noted that Remedies Directives provide for a significant amount of discretion to MSs to choose different models and solutions. This leads to diversity of applicable remedies solutions, which was in the EU further harmonised through their implementation during the years. In regard to EnC, we consider that a uniform approach, agreed on the EnC level could be a more efficient solution. In this case the CPs would harmonise to some degree the national provisions transposing the Remedies Directives not only with the Directives themselves but also between the CPs. This would provide additional comfort to cross-border entrants.

**7) Thus, we recommend: a) full harmonisation of legislation and regulation, b) harmonisation in implementation and c) harmonisation of monitoring.****a) Harmonisation of legislation and regulation**

The best way for the CPs to harmonise their PP procedures in the energy sector is to adopt the PP and Concession Directives. It would not be cost-effective and would not make sense in the view of the process of becoming an EU MS to develop different PP rules from those already developed by the EU.

Although trade and supply of energy are licensed activities the CPs could agree that there is no need to establish a company in the CP through which such a service would be provided in order for an undertaking established and licensed in another CP to participate in a PP procedure. Thus, similarly to how this issue is resolved in the EU, companies from other CPs could after obtaining the respective energy licence in the CP in which the procurement is organised, directly participate in such PP procedure. Alternatively, in case this solution is not accepted, the CPs could maintain the obligation for economic operators from other CPs to establish a company in order to obtain an energy licence and/or participate in a PP procedure, but where references of good performance in the (parent) company's previous procurement of services are requested in a PP procedure, such references concerning the (parent) company established in another CP should be recognised as covering the local entity as well.

Since, currently the thresholds for application of certain PP procedures in the CPs are on different levels, but in most of them these thresholds are significantly lower than in the PP Directives, the CPs could opt either to adjust the thresholds to the EU level or to establish a lower, common in all CPs, threshold which would be more suitable for the economic reality in the CPs.

**b) Harmonisation of implementation**

Cooperation and exchange of information between the competent CP authorities would also be necessary in order to ensure that the PP rules are applied properly and uniformly in all CPs. The competent authorities may include energy regulatory authorities as well as procurement monitoring authorities.

Development of a joint portal for energy procurements above a certain threshold is one example of cooperation in implementation of PP rules in energy sector.

**c) Harmonisation on monitoring level**

Reliance of new cross-border entrants on domestic monitoring and court authorities may not provide sufficient comfort that justice and impartiality could be obtained quickly. Thus harmonisation in remedies should be a target. This may be achieved by delegating some level of power to a common (supranational) authority on the EnC level. The role of such authority would primarily be to monitor and harmonise the practice of the CPs in the implementation of procurement procedures. It could also have a significant advisory role in regard to implementation of the PP Directives. Its powers would depend on the will of the CPs. We recommend that it is equivalent to the role the European Commission in the context of implementation harmonisation of the PP Directives in the EU.

If the CPs agree to establish such Independent Procurement Authority the respective amendments of the ECT would be required. The IPA may be established within the EnC Secretariat. It should have the authority to: suspend the contracting procedure, advise on the application of the PP rules in the EnC, monitor the amendments of the respective regulation, initiate infringement procedures, and collect reports and data on the implementation of the PP rules. Its goal would be to ensure harmonised application of the PP rules, removing obstacles for cross-border participation in PP procedures and in general the protection of economic entities' rights in PP procedures. It would also play the role of the Commission in implementation of Articles 34 – 35 of the Utilities Directive approving the exemptions to the application of the PP rules after establishing of the sufficient level of competition in a certain energy market. The procedure applied by the Commission and the level of evidence required for such exemption are provided in the Commission Implementing Decision (EU) 2016/1804<sup>51</sup>.

### 5.1.2 Regarding incorporation of the PP and Concession Directives (Options)

We have assessed three options: a) that the CPs undertake the obligation to implement the Directives in their entirety; b) that certain provisions of the Directives are incorporated in the ECT; and c) that the ECT is not amended in regard to the Directives.

- a) As presented above, **our conclusion is that the full implementation of the PP and Concession Directives in the energy sector would positively and immediately affect competition in the network energies in the CPs** by establishing solid conditions for participation of new economic entities in the procurement procedures. It would secure the simultaneous implementation which would further establish a basis for reciprocity and cooperation between the CPs (joint platform, recognition of documents, even the exception to the obligation of establishment). As explained above, relying on harmonisation of the CPs' national laws with the Directives within the framework of their other international obligations may lead to the adoption of different rules (GPA vs. the Directives). Furthermore, it is certain that the harmonisation under these obligations would take place at different times, fact that would not enable the coordinated liberalisation of the energy markets. The transposition of the PP and Concession Directives is not a precondition for the liberalisation of energy markets as such, however, as analysed in previous Chapters of this Report and keeping in mind the CPs' energy market structures, it would enhance their liberalisation and develop competition in them. We should keep in mind that the MSs started the development and harmonisation of rules on public procurement a long time ago and that the liberalisation of their energy markets was performed in the context of that legal framework. The synchronised adoption of the Directives in all CPs would be essential for developing cross-border competition. Moreover, the targeted implementation of the PP and Concession Directives within the structure of the EnC would secure its focused implementation on electricity and gas procurements, which does not necessarily have

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<sup>51</sup> Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (notified under document C(2016) 6351).

to be case if they are implemented as part of general harmonisation with the EU acquis.

- b) **Incorporating only certain provisions of the Directives is not practicable** because the Directives were developed to work as a whole, providing the contracting entities a range of possibilities as regards the procedure, techniques and instruments which would best suit the specific procedure. All the provisions are correlated, e.g. one type of procedure requires certain deadlines, which may be reduced if electronic submission, as regulated in another provision is accepted. In addition to the Directives, in order to secure the proper implementation of the PP rules, we also recommend the implementation of the Remedies Directives. Their harmonised and coordinated implementation would be of assistance for creating a secure business climate which would provide comfort for economic entities from other CPs to participate.
- c) **We do not recommend status quo.** Our recommendation is the incorporation of the entirety of the PP and Concession Directives and the Remedies Directives in the ECT, based on all the above reasons and particularly in order to ensure coordinated implementation which would provide necessary regulatory climate to attract business which would develop competition.

Below is a table summarising the pros and cons of the three options



Solutions	Pros	Cons
<b>Full implementation of the Directives</b>	<p>Benefits for customers and undertakings:</p> <ul style="list-style-type: none"> <li>- Increasing / enabling the competition; by facilitating and attracting cross border entrants into the national markets</li> <li>- Impact on prices of electricity and natural gas charged to contracting entities (such as energy undertakings, SME and other entities governed by public law (contracting authorities)) as a result of competition</li> <li>- Market based prices for electricity and gas supplied under PSO;</li> <li>- Market based and competitive prices paid for energy from RES and subsequently reduction of the RES charges subsidies borne by end consumers;</li> </ul> <p>Regional markets would be supporting of other regional efforts such as SEE CAO and promote the integration of the energy markets It would enhance liberalisation of the markets though integration with the neighbouring markets and the EU market.</p>	<ul style="list-style-type: none"> <li>- incumbent companies would initially lose part of the domestic market but in the longer run would gain part of the other CPs' markets</li> <li>- administrative burden of introduction of the new regulation and its implementation</li> </ul>
<b>Incorporation of certain provisions</b>	<ul style="list-style-type: none"> <li>- there are no real benefits, any benefit would be delayed and even put at risk</li> </ul>	<ul style="list-style-type: none"> <li>- Directives were developed to work as a whole; any selection to apply only some provisions requires additional time for assessment and agreement between CPs on specific provisions; also the different parts may work differently in different CPs;</li> <li>- significant difficulties for simplification of complex legal texts in order to partially transpose such rules</li> <li>- risk of failure to properly transpose some rules or provisions which would be necessary to the correct implementation</li> <li>- duplication of efforts as the Directives would be transposed in full eventually</li> <li>- increase of costs for the delay of implementation</li> <li>- increased administrative costs for complex harmonisation</li> </ul>
<b>No incorporation</b>	<ul style="list-style-type: none"> <li>- there are no real benefits, any benefit would be delayed and there would be no harmonisation between CPs</li> <li>- no administrative or other costs</li> </ul>	<ul style="list-style-type: none"> <li>- significant delay in implementation of the PP rules in the CPs' energy sector and delay in the above listed benefits;</li> <li>- no harmonisation between the CPs as each may choose a different level of application and options</li> <li>- no simultaneous harmonisation and no reciprocity between CPs;</li> <li>- certain (even significant) level of harmonisation of legislation with the Directives has already been achieved in the CPs</li> </ul>

Below we propose amendments to the ECT, which we consider are required as a first step of harmonisation of the CPs regulation with the PP and Concession Directives. If these are adopted by the CPs, we have recommended the timings and priorities necessary to incorporate the Directives for the EnC.

### 5.1.3 Proposed text of the amendments of the EnC Treaty

#### The following articles of the EnC Treaty would be amended

1) Article 3 of the Treaty should be amended so that the words “and public procurement in the Network Energy” are added in the first paragraph, after the word “renewables”.

Under TITLE II - The extension of the *acquis communautaire*, at the end, a new chapter should be added as follows:

#### 2) CHAPTER VI - THE ACQUIS FOR PUBLIC PROCUREMENT RULES IN NETWORK ENERGY

##### Article [•]

Each Contracting Party shall implement the Directives listed in Annex IV of this Treaty in regard to Network Energy.

In order to establish the necessary consistency in the implementation of public procurement rules in the Network Energy, an Independent Procurement Authority shall be established within the Secretariat at the Energy Community level. The purpose is to facilitate the harmonisation of the Directives listed in the Annex IV and to ensure their implementation in the CPs in a harmonised and unified manner, with the aim to enhance cross-border competition.

The Independent Procurement Authority shall:

- a) Monitor the harmonisation of the CPs' legislation with the Directives listed in Annex IV, provide recommendations and initiate infringement procedures in compliance with this Treaty; Within this task its shall provide prior opinion and guidelines to CPs in regard to amendment of their national public procurement regulation.
- b) Monitor and coordinate the implementation of the Directives listed in Annex IV. In this regard it shall, within reasonable time limit to be provided in a respective Procedural Act, upon request, provide technical assistance and advice CPs' competent authorities regarding obscure public procurement issues;
- c) Act upon the complaints of an interested economic entity and issue a binding decision, which may be judicially contested. It will have the authority to suspend the contracting procedure as well as to set aside decisions of contracting authorities.
- d) Approves the exceptions to the application of the public procurement rules upon examine the level of competition in certain market in compliance with Articles 34-35 of the Utilities Directive. For fulfillment of this task it may require respective technical support of the European Commission; and

- e) Carry out any other tasks conferred to it under this Treaty or by means of a Procedural Act of the Ministerial Council, with the aim to fulfill its purposes.

4) A new Annex IV shall be added as follows:

#### ANNEX IV

#### LIST OF ACTS INCLUDED IN THE “ACQUIS COMMUNAUTAIRE ON PUBLIC PROCUREMENT RULES ON ENERGY”

- 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;
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing the Directive 2004/18/EC;
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts;
- Directive 92/13/EEC of 25 February 1992 of the Council coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors;
- Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and
- Directive 2007/66/EC of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

#### 5.2 Plan for implementation of legislative changes

This Report refers to the Independent Procurement Authority in several sections of the Chapter 5, defining its role and main authorities (Section 5.1.1, point 7, c), proposing the exact wording of the ECT in regard to the IPA (Section 5.1.3), and further analyzing some aspects or issues of its involvement (Section 5.3). We believe that the IPA should play significant role in transposing of the Directives into the CPs legislation. For this, we recommend that it is established as soon as practicable in order to undertake the task and organize and monitor the transposition.

We recommend that the following steps are performed in this order: i) amendments of the Treaty, ii) establishment of the Independent Procurement Authority; iii) amendments of the respective CPs' legislation and regulation.

For better communication and cooperation between the CPs and the IPA, we recommend that the CPs appoint a procurement monitoring authority, preferable within their energy regulatory authorities. These CPs procurement monitoring authorities specialized in energy sector which would be the main addressing point for the IPA in its work.

### 5.3 Proposed adaptations of the respective provisions of the Directives

#### 5.3.1 Difficulties in applying EU law by the CPs

The implementation of the European Directives by non-EU member states may encounter difficulties for the following reasons:

- a) the Directives are not directly applicable, as the EU Regulations, but contain mainly guidelines for the Member States, granting them the discretion to choose among several option and binding them with respect to the aim the directives intend to achieve;
- b) the non-EU Member States are not under the jurisdiction of the legal framework of European institutions (European Commission, Publications Office of the EU, European Court of Justice etc.); and
- c) the non-EU Member States are not familiar with European legal texts and their interpretation through the case-law of the European Court of Justice.

#### 5.3.2 Transfer of the Directives to the EnC legal framework

With that in mind, the following adaptations are being proposed, in order for the current legal text of the Directives to be transferred immediately and smoothly into the legal order of the CPs:

##### Scope of Application

Should the procedural obligations, provided by the PP and Concession Directives, be applied only to procurements with a value (net of VAT) estimated to be equal or greater than a certain threshold? The use of thresholds could be a first smooth step towards the implementation of the Directives by the CPs. Thresholds could be harmonised with the Directives (as amended by the Regulation 2015/2171 in case of UD) or agreed by the CPs. The CPs may also authorise the IPA, if established, to assess the suitable thresholds.

##### Information sent to the European Commission

The European Commission constitutes the guardian of EU law and for this reason receives a series of notices addressed to it and provided by the Directives. In the case of the EnC all these notices can be sent to the ENS/IPA and all related articles of the Directive (i.e. Article 18(2), Article 19 (2) (2) and Article 31 UD) should be read under the light of this explication. On the contrary, the replacement of the term “Commission” in the text of the Directive with the term “Secretariat”/“IPA” will not take place in the articles providing the Commission’s obligation to publish standardized e-notices. Contracting parties of EnC will use the currently existing e-notices as the rest of the EU member states do.

##### Replacement of terms

Wherever in the text of the Directives “Member States” are mentioned, these will be replaced by the EnC “Contracting Parties”. Wherever in the text of the Directives, the EU “Commission” is being mentioned, it will mean the ECS/IPA, with the exception of articles referring to the obligation of producing the standardised e-notices (i.e. Article 41(2)).

### Articles of the Directives excluded from application

There are some articles in the Utilities Directive which should not be used at all, because they mostly refer to the relations between EU Member States or with the EU institutions, or because they are not related with the energy sector. Therefore, Articles 33 (Contracts in specific status) and 99-109 (Governing) should be excluded from application.

### Subsequent application of some articles

The articles of the Directives introducing the e-procurement (Articles 40 and 73 UD) could be initially implemented with the clarification that the use of electronic means will take place alongside the conventional means, so that the economic operators may choose between the two methods of submission, as was the case in the Directive 2014/17.

### No activation of the discretion awarded in EU Member States

Many articles of the Directives award discretion of choice to the MSs or their contracting authorities. This same discretion can be awarded to the CPs, meaning that the CPs would obviously have the ability to set something different in their national legislation. It is preferable that the CPs do not use these discretion rights but apply the Directives without having the possibility to diverge from their provisions.

### Publicity

A special provision is needed to establish extensive publicity of all EnC public procurement contracts in the energy sector. Given the difficulties to use the EU Publications Office (and the data base of SIMAP), such official publication can be realised through a specific webpage administered by the IPA.

### European Single Procurement Document

Last but not least, a decision is needed on the voluntary use within the framework of EnC of European Single Procurement Document, as standardised by the Regulation 7/2016. It consists of an updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the selection criteria.

### **5.3.3 Existing compliance mechanisms in the field of Public Procurement**

The substantive procurement rules are backed up by: a) two Directives specifically dealing with remedies (collectively "the Remedies Directives") and establishing a compliance mechanism; b) the general right to complain before the European Commission for any alleged infringement of the applicable PP rules; and last but not least, c) all national courts, which have the right to request a preliminary ruling from the European Court of Justice, i.e. request for clarification when the interpretation or validity of an EU law provision is in question. The same mechanism can be used to determine whether a national law or practice is compatible with EU law.

### a) Remedies Directives

Directive 89/665 applies in relation to public procurement covered by the Directive 2014/24, while Directive 92/13, applies to procurement by utilities under Directive 2014/25. We are specifically interested in the Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of EU rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

The Remedies Directives have required each Member State to ensure national effective remedies and means of enforcement are made available to suppliers, contractors and service providers who believe that they have been harmed by an infringement of the substantive procurement rules. This has usually been achieved through the enactment of legislation at national level, incorporating into national law the rights and remedies of complainants under the procurement rules. The available remedies include the suspension of procedures, the setting aside of decisions, the award of damages and ineffectiveness of concluded contracts.

However, the Remedies Directives have not required each MS to ensure a specific enforcement system: bodies responsible for review procedures may be judicial or administrative in character, provided that their decisions can be effectively enforced. Subsequently, it is for each MS to choose the organisation of the national remedies system, which can be either administrative or judicial (principle of practical effectiveness of Directives (ECJ C-15/04, *Koppensteiner*, th.33).

Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, certain procedures and guarantees must be established whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred to it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent from both the contracting authority and the review body. The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this such independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding (Article 2(9) of Directive 89/665).

Within this context some MSs have chosen from the very beginning a judicial remedies system, while other member states (Cyprus, Bulgaria, Germany, Denmark, Estonia, Croatia, Hungary, Latvia, Malta, the Netherlands, Poland, Romania, Slovakia) have opted for an administrative remedies system. The study entitled «The comparative survey on the national public procurement systems across the PPN» adds Czech Republic (Office for the Protection of Competition), Spain, Finland, FYR of Macedonia and Slovenia into this latter category.

Within this framework independent single administrative bodies have been created in each MS to deal with procurement complaints.

The procedure before them is sometimes informal, that is a mediation procedure designed to reach an amicable settlement between the tenderer and the contracting authority. If no



settlement can be reached within a certain period of time, the body may make a non-binding recommendation. However, the procedure before the single procurement remedies authorities may also be formal (relatively informal compared to procedures before the courts) and their decisions mandatory. The compliance of contracting authorities with such decisions is safeguarded by special government orders and disciplinary actions which are applicable to public authorities. In addition, private contracting entities in the utilities sectors may be penalised for failing to supply requested information or to comply with the decisions.

#### *b) Right to complain before the European Commission*

Any contractor may refer the alleged infringement of the Directives before the European Commission. The Commission is responsible for overseeing compliance with the procurement Directives and is used to handling complaints from individuals and firms.

When the Commission considers that a clear and manifest infringement of EU PP rules has been committed, it notifies the contracting authority and the relevant Member State's Government of the circumstances of the alleged infringement. The Commission will set a time limit within which the national government has to respond. In practice the contracting authority, through the medium of government, is called upon to justify its conduct, rectify the infringement or suspend the award procedure. In cases where the Commission is not satisfied with the explanations or actions of the contracting authority or the MS's government, it may commence formal proceedings against the latter. Such an action may ultimately result in the Court of Justice of the European Union issuing a ruling which condemns the government in question for failing to fulfill its EU law obligations (infringement proceedings).

While complainants are an important source of information for detection of possible infringement cases, the Commission is not bound to open the formal infringement procedure, even in cases where a complaint reveals the presence of an infringement. The Commission enjoys discretionary power to decide if and when to commence infringement proceedings.

Moreover, if the Commission refers a Member State to the CJEU and wins the case, the Member State will have to take all actions to remedy the violations. However, this does not mean that complainants are directly entitled to compensation or damages. To seek compensation, complainants must still take their case to a national court within the time limit and according to the applicable provisions set out in national law.

#### *c) Preliminary rulings*

Preliminary rulings form part of the procedure which may be exercised before the CJEU by all Member States' national judges. National courts may (and under certain conditions are obliged to) refer a case already underway to the CJEU in order to question it on the interpretation or validity of the relevant EU law provisions. Given that preliminary rulings are always granted in connection with the interpretation and the application of EU law, this procedure has promoted the active cooperation between the national courts and the CJEU, as well as aiding the uniform application of EU law throughout the EU.

### **5.3.4 Establishing a compliance PP mechanism within the framework of EnC**

Given the heavy caseload of the CPs national courts, the need to harmonise the practice when implementing the procurement rules among the CPs and the need to utilise the

experience and the case law acquired in the EU, the establishment of a single Independent Procurement Authority on the EnC level is highly recommended.

In regard to its remedial activities, we propose that this review body have the authority to suspend the contracting procedure (interim measures) and set aside decisions of contracting authorities. In this case, its decisions would be compulsory for the CPs, while the individual competitors would have the right to contest them judicially.

In addition, it may act as an advisory body to which the CPs would turn in order to clarify obscure public procurement issues. The answers to similar written questions will be exclusively advisory and in no case will predetermine the national authority's final decision about the arising dispute. This advisory section can be staffed by citizens of other EU Member States, already experienced in the field of EU PP law and the relevant jurisprudence of the Court of Justice of the EU.

Such IPA would also monitor the amendments to the respective PP regulation and their implementation in general (through reporting mechanisms, individual complaints) and would provide respective recommendations or even initiate an infringement procedure (as currently regulated in the ECT).

We recommend that the CPs establish a network of officials in charge for the PP in the energy sector with task to coordinate the harmonisation and implementation of the Directives as well as to coordinate the work with and to report to the IPA. It would be suitable that these PP experts are established within the national energy regulatory authority in order to achieve the required expertise in procurement in the energy sector and to focus on this particular segment of procurement law.

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- Resolution of the National Energy and Utilities Regulatory Commission No. 176 of 12 February 2015 on Approval of Rules for Conducting Electronic Auctions for Allocation of Transfer Capacity of Interstate Electric Grids;
- Resolution of the National Energy and Utilities Regulatory Commission No. 2493 of 30 September 2015 on Approval of the Gas Transmission System Code;
- Resolution of the National Energy and Utilities Regulatory Commission No. 2494 of 30 September 2015 on Approval of the Gas Distribution System Code;
- Order of the Ministry of Economic Development and Trade of Ukraine No. 504 of 24 April 2012 on Particularities of the Conclusion of Framework Agreements;
- Order of the Ministry of Economic Development and Trade of Ukraine No. 503 of 24 April 2012 on Approval of the List of Goods and Services Which May be Purchased under Framework Agreements;
- Order of the Cabinet of Ministers of Ukraine No. 175-r of 24 February 2016 on the Strategy for the Public Procurement System Reform («Roadmap»);

- Government Procurement Agreement (GPA), ratified by the Law of Ukraine No. 1029-VIII of 16 March 2016;
- EU-Ukraine Association Agreement concluded between the European Union and the European Atomic Energy Community and their Member States of the one part, and Ukraine, of the other part, including the Deep and Comprehensive Free Trade Area (DCFTA), ratified by the Law of Ukraine No. 1678-VII of 16 September 2014.