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THE REGULATION OF PUBLIC PROCUREMENT IN THE  
EUROPEAN UNION: THE SIMULATED APPLICATION OF THE  
TRANSATLANTIC TRADE AND INVESTMENT PARTERSHIP

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## INTRODUCTION

The aim of this work is to analyze the potential changes that the Transatlantic Trade and Investment Partnership (TTIP), an agreement under negotiation between the European Union and the United States of America, will make to the European legislation on public procurement. When I chose this topic, the TTIP was expected to be a free trade agreement well started and with a close conclusion. This work, in fact, should have analyzed the official text of TTIP, as negotiated and signed by the parties, to study the changes that it would have made or was making to public procurement law. But this agreement resulted to be more complicated than expected, especially for the need to reach a lot of different compromises in various relevant sectors, and its gestation is still long, especially for political-institutional (more than legal) implications, which put in the agreement many forces and many different factors to consider. For these reasons, this thesis is the result of a “work in progress” which has followed the course of the negotiations; but, because of the fact that these negotiations are not complete yet, the work cannot be based on an official text of TTIP, but on the text proposals published by the Parties and on the differences in legislation between the two signatories.

I chose this topic because I was interested in the subject of public procurement and, at the same time, fascinated by an opening of markets between these two great powers, even in this area. This particular attention to the EU and US, comes to the chance that I have had to live both realities: I have been always connected to the European world thanks to my country of origin, Italy, one of the six founding members. Perhaps, however, the interest on the Union's own mechanisms was born just when I encountered, by choice, a country that was sharing the European Free Trade Association, the European Economic Area and was a member of the Schengen area but was not a Union member country: Norway. My Erasmus in Oslo, certainly the most European city in this non-member country, and the meeting with the Italian Consul in the Norwegian

capital, have led me to reflect on the characteristics of the Union and the importance of a territory without barriers.

I had a chance to get closer then to the American world thanks to my rather long stay in the city of Chicago, which has allowed me to carry out an internship, during which I was involved in direct marketing activities and activities promotion of Italian/American companies operating in the US or Italy, also through the organization, promotion and execution of conferences and events, at the Italian American Chamber of Commerce (IACC). It is thanks to this experience, contemporary with the birth of TTIP, that I "actively" decided to participate, even if in my small way, to this big step for world trade. The opening of markets, the total elimination of trade barriers and a possible unification of the rules (including those of the public procurement) between these two great powers, which then are the goals TTIP aims to, could potentially have a great global significance for the economic and cultural environment. The public procurement sector, then, is an important sector, is one of those fields in which the public interacts with the private, and it is necessary - in my opinion- that all that has been achieved to date, to guarantee the public and to protect the private, would not be lost, especially with TTIP. I chose, therefore, to try understanding how much and how this agreement could really affect those that are the five great pillars of procurement rules for me: the participants (with their requirements, the principles that must be met), the thresholds for application of European legislation, the so-called special sectors and other types of contracts (within which I talked about the public-private partnership, the *in house providing*) and, above all, the matter of appeals. I would like to show, for different reasons, that TTIP would not have a negative effect on the world of public procurement, if only the European Union could not give in to the most extreme demands of the United States, which, as we shall see, are affecting, above all, two sectors: appeals and special sectors.

To address this analysis, I used the tool of comparison and, in particular, I compared the current European rules (described by Directives n. 23, 24, 25 of 2014) with two types of sources: proposals of the TTIP text made by both parties and the American legislation on public procurement. I made this comparison

based on two considerations; the first of them, is that the proposals on the text of TTIP, although this must be negotiated with the other party, could form the basis of its content, and therefore may represent the outline of what could affect in the future the European discipline. The second consideration that I made, is the idea that many of the points that I analyzed by comparing the European and US regulations may be beyond the text of the Agreement, but may be significant when TTIP will be executed. If an opening of the market would really be realized and consequently the need to unify the rules, the differences between the two disciplines - even if at a later time than the negotiation of TTIP- would need to be eliminated or, at least, reduced, and therefore could represent a problem not in the negotiation stage, but at moment of the realization and concretization of the objectives.

The work, therefore, follow a logical sequence in its drafting.

In Chapter I, you will find a more detailed description of the Transatlantic Trade and Investment Partnership, including the story of his birth (the eleven rounds of negotiation), of his "predecessors", of the potential advantages and disadvantages that may bring, and also of the way this potential agreement is seen by the authorities and by the people.

I will move, then, in Chapter II, to examine the current European rules on public procurement, and, therefore, to analyze the above mentioned directives 23 (on concessions), 24 (on ordinary sectors) and 25 (on special sectors) of 2014, though dwelling in more detail on the procurement law in ordinary areas, which is what interests us most, and analyzing the previous directives to them, which are the basis of their preparation, and their main news.

Finally, in Chapter III, I tried to apply what said about the contents of TTIP in Chapter I to the European rules discussed in Chapter II. Even if less potential changes than expected came to light, I pointed out some relevant and interesting aspects, especially in light of the future negotiations.

## ***CHAPTER I***

### ***THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: HISTORY, EXPECTED CONTENT, BENEFITS, RISKS AND RELATED DOCTRINE.***

This first chapter aims to provide an overview of the Transatlantic Trade and Investment Partnership. In order to understand whether and how this agreement will affect the European procurement, it is necessary, first, to deeply analyze the TTIP. This agreement, however, already has some structural basis, deriving, in particular, from the "ancestors" agreements that inspired it, and of course from the various rounds of negotiation that took place from 2013. It is from this background that I started an analysis of the potential content of TTIP, especially related to the European official proposal, and to the advantages and the risks connected to it. In order to carry out this work I leveraged the various doctrines' opinions and also the different points of view of the institutions and the population related to this agreement.

#### ***1. THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP***

This section is intended to introduce, in a general way, the agreement that will be discussed by the entire chapter, the TTIP, with particular attention to the political situation in which it takes shape and the reasons why it is perceived as necessary by Union European and United States.

##### ***1.1 BACKGROUND OF TTIP***

The transatlantic trade and investment partnership (TTIP) is a proposed free trade agreement between the European Union and the United States, currently under negotiation, which aims to create a free market that includes 800 million people Europe and the United States.

To examine the ground on which TTIP was born and evolves, it is useful to refer to the analysis of Pierre Defraigne<sup>1</sup>, which explains very clearly the situation of the two great powers in recent years. Defraigne<sup>2</sup>, having to describe the United States, defines it as a great power "on the defensive". After the financial shock of 2008, which marked their economic decline, and after repeated failures on the external front (many defeats, such as the Korean War in 1950 and, mostly, the Vietnam War in 1975, which have discouraged the American people on supporting distant from their territory), the US decided to abandon their "imperial position." And, certainly, if in Washington really had been taken such a decision, it would be a significant innovation in the political world.

On the other hand, the European Union still has to face the effect of the sovereign debt crisis exploded in 2010 that in addition to the question of saving the euro, led the member States to split on crucial issues such as political unity, the social model, governance of the euro area, the eastern borders, a definitive institutional organization and the strategic autonomy from the United States. These internal differences have undermined - according to Defraigne - the unitary sentiment of the European Union and, added to the absence of a common defense, reduce the influence of the Eurozone in the world scenario. Pierre Defraigne goes on to say that, given the situation described, Brussels can act decisively only under the leadership of the United States (for example, seeing sanctions against Russia in the Ukrainian crisis). But if Europe is a follower who follows a leader, but that leader is currently facing economic, social and political grave, probably the only way that the two great powers might have to settle again, would rather fix their own problems. But while the United States, also helped by their "sense of unity", are working towards this path, the EU is still in danger of being unable to decide

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<sup>1</sup> Pierre Defraigne is an Executive Director at the Madariaga – College of Europe Foundation.

<sup>2</sup> Pierre Defraigne, *Departing from TTIP and going plurilateral*, Madariaga Paper – Vol. 7, No. 9, October 2014.

even if it wants to build a true European political community with its own model, its own currency, and its own defense, or simply be a subset of a larger Atlantic Alliance, in which his membership with the United States economy integrates the strategic partnership NATO, the North Atlantic Treaty Organization.<sup>3</sup>

## ***1.2 TOLD AND UNTOLD REASONS***

### ***1.2.1 SPECIFIC THEMES***

The importance of TTIP is dictated by two specific reasons: first of all because, as the two national powers incurred in a severe economic crisis, this agreement is seen as a "beacon of hope" to exit permanently from the crisis and the post-crisis' stagnation<sup>4</sup>. Secondly, since the United States and the EU form the largest economic cooperation in the world<sup>5</sup>, a free trade area between the two would represent potentially the largest free trade regional agreement history, which would cover 46% of the world's GDP<sup>6</sup>. Considering then that the United States and the European Union are the largest trading partners of most other countries of the world<sup>7</sup>, given that the tariff barriers between the two national powers are

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<sup>3</sup> International Organization for cooperation in defense, established in 1949 in Washington with the signing of the Atlantic Pact. NATO's essential purpose is to safeguard the freedom and security of its members through political (NATO promotes democratic values and encourages consultation on defense and security issues to build trust and, in the long run, prevent conflict) and military (NATO is committed to the peaceful resolution of disputes. If diplomatic efforts fail, it has the military capacity needed to undertake crisis management operations. These are carried out under Article 5 of the Washington Treaty- NATO's founding treaty- or under a UN mandate, alone or in cooperation with other countries and international organization) means. <http://www.nato.int/nato-welcome/index.html>, consulted October 14, 2015.

<sup>4</sup> Dr. Ania Skrzypek, *Dubito ergo cogito, cogito ergo sum: can the creation of quality employment for all become the main focus of TTIP?*, Seminar: The future of EU-US relations, Washington, October 2014, p.2.

<sup>5</sup> EU and US share, in fact, one trillion dollars in trade, 4,000 billion dollars in investment and 13 million workers on both sides of the Atlantic have their work to the transatlantic economic relationship (as evidenced from the Ambassador Michael Froman in his intervention in Rome in October 2014). The United States and the European Union together account for 60% of world GDP, 33% of world trade in goods and 42% of world trade in services. Both of them largely depend on the other's market. <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>, consulted October 14, 2015.

<sup>6</sup> World Economic Outlook Database, *Nominal 2012 GDP for the world and the European Union*, International Monetary Fund, October 2013.

<sup>7</sup> The number of US investment in the EU is three times higher than that of US investment throughout Asia and the number of European investment in the United States is eight times higher

already low (below 3%), to make a successful deal the goal is set to fully remove all non-tariff barriers<sup>8</sup> (rules and regulations that companies must comply with before they can access in their respective markets). According to a recent study ordered by the European Commission the European economy, thanks to this agreement, could grow up to 119 billion per year, favored especially by the possibility of having access to the American market of services and public procurement, due to the abolition of trade restrictions (dictated by the "Buy American Act"<sup>9</sup>), bringing with it many advantages for the small and medium European enterprises<sup>10</sup>.

### **1.2.2 HIDDEN REASONS**

In addition to the two purely economic drivers, someone wonders if there are also untold reasons that push for the creation of a free trade agreement between the US and EU. Many argue that there is an increasing concern around the area of the Asian countries and, in particular, around the increasing leadership that China is developing, through numerous agreements with other countries, including Kazakhstan and Tajikistan. This inspires fear that the two Western powers can gradually be excluded from the global commercial deals<sup>11</sup>. Although for the time being, also considering its colonial history, China has not shown to have any hegemonic ambition, it is still definitely a "player" to be taken into consideration even just for its own size: it is, in fact, responsible for 1.3 billion people, one-fifth of the world population. It would appear that the United States, supported by the

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than that of EU investment in India and China together. <http://ec.europa.eu/trade/policy/countries-and-regions/countries/united-states/>, consulted October 13, 2015.

<sup>8</sup> United States - Trade - European Commission, Ec.europa.eu. Retrieved February 2014.

<sup>9</sup> The Buy American Act is a law, enacted in 1933 by the US Congress under President Roosevelt and still in force, in order to protect the domestic manufacturing enterprises, limiting the purchase of finished products to foreign public procurement within the national territory. The *Buy American Act* applies to all U.S. federal government agency purchases of goods valued over the micropurchase threshold, but does not apply to services. Under the Act, all goods for public use (articles, materials, or supplies) must be produced in the U.S., and manufactured items must be manufactured in the U.S. from U.S. materials.

<sup>10</sup> Sergei Stanishev, President of the Party Of European Socialists and Member of the European Parliament, *TTIP and the European Values, Seminar: The future of EU-US relations*, Washington, October 2014.

<sup>11</sup> Mario Telo, Emeritus President Institute of European studies, *Four political challenges for the transatlantic trade negotiations TTIP; towards contested multilateralism or a multilayered multilateralism, Seminar: The future of EU-US relations*, Washington, October 2014.



European Union, are trying, through TTIP and TPP<sup>12</sup> to isolate China. If it were, most likely - as claimed by Pierre Defraigne<sup>13</sup> - it would be a serious strategic mistake because it would raise the risk of developing trade blocs, with the inherent risk of entering a military conflict because of the commercial rivalry, or to push this great power to an alternative strategy, namely the formation of a coalition of regional regulations with its neighbors. China is an increasingly important player on the world stage and it is too big to be isolated. So big that, according to Defraigne, TTIP could only be successful with its pluralization, that is, including it.

## ***2. THE ANCESTORS OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP***

This section wants to make an historical overview, retracing all the stages - expressed in agreements between the European Union and the United States - which have finally led to TTIP.

The European Union and the United States of America established diplomatic relations as early as 1953, when the US sent some observers to the European Coal and Steel Community (ECSC)<sup>14</sup> and then, three years later, established an official Mission in Luxembourg and in 1961 in Brussels. In the same period the European Commission opened a delegation in Washington DC.

### ***2.1 THE BEGINNING OF THE TRANSATLANTIC AGREEMENTS***

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<sup>12</sup> The Trans-Pacific Partnership (TPP) is a proposed trade agreement between several Pacific Rim countries concerning a variety of matters of economic policy. Among other things, the TPP seeks to lower trade barriers such as tariffs, establish a common framework for intellectual property, enforce standards for labor law and environmental law, and establish an investor-state dispute settlement mechanism.

<sup>13</sup> Pierre Defraigne, *op. cit.*

<sup>14</sup> The ECSC Treaty was signed in Paris in 1951 and brought France, Germany, Italy and the Benelux countries together in a Community with the aim of organizing free movement of coal and steel and free access to sources of production. In addition to this, a common High Authority supervised the market, respect for competition rules and price transparency. This treaty is the origin of the institutions as we know them today. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:xy0022>, consulted October 14, 2015.

But it was only in November 1990 that the cooperation was formalized for the first time with the Transatlantic Declaration. The agreement aimed to:

- support democracy, the rule of law and respect for human rights and individual liberty, and promote prosperity and social progress world- wide;
- safeguard peace and promote international security, by cooperating with other nations against aggression and coercion, by contributing to the settlement of conflicts in the world and by reinforcing the role of the United Nations and other international organizations;
- pursue policies aimed at achieving a sound world economy marked by sustained economic growth with low inflation, a high level of employment, equitable social conditions, in a framework of international stability;
- promote market principles, reject protectionism and expand, strengthen and further open the multilateral trading system;
- carry out their resolve to help developing countries by all appropriate means in their efforts towards political and economic reforms;
- provide adequate support, in cooperation with other states and organizations, to the nations of Eastern and Central Europe undertaking economic and political reforms and encourage their participation in the multilateral institutions of international trade and finance.

Both sides recognized the importance of strengthening the multilateral trading system and supporting further steps towards liberalization, transparency, and the implementation of GATT<sup>15</sup> and OECD<sup>16</sup> principles concerning both trade in goods and services and investment. Another important point was the development

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<sup>15</sup> See n. 17.

<sup>16</sup> Organization for Economic Cooperation and Development.

of a dialogue on other matters such as technical and non-tariff barriers to industrial and agricultural trade, services, competition policy, transportation policy, standards, telecommunications, high technology and other relevant areas. Just as important as broadening the scope of the U.S. – EC relationship, the Transatlantic Declaration formalized the existing routine of ad hoc meetings, specifying the number of sessions per year and the level at which they were to be held. These were:

- bi-annual consultations to be arranged in the United States and in Europe between, on the one side, the President of the European Council and President of the Commission, and on the other side, the President of the United States;
- bi-annual consultations between the European Community Foreign Ministers, with the Commission, and the US Secretary of State, alternately on either side of the Atlantic;
- ad hoc consultations between the Presidency Foreign Minister or the Troika and the US Secretary of State;
- bi-annual consultations between the Commission and the US Government at Cabinet level;
- briefings, as currently exist, by the Presidency to US Representatives on European Political Cooperation (EPC) meetings at the Ministerial level<sup>17</sup>.

This document opened a political dialogue on many levels, based on regular exchange of information and organization of periodic meetings focused on economic, science and cultural matters. However, the scheduled meetings were not particularly productive since many leaders were mainly focused on domestic priorities and specific problems. Slightly more than six months after the signing of

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<sup>17</sup> Transatlantic Declaration on EC-US Relations, :[http://eeas.europa.eu/us/index\\_en.htm](http://eeas.europa.eu/us/index_en.htm), 1990.

the Transatlantic Declaration, in the summer of 1991, Yugoslavia began to break apart. Despite initial EC activism and confidence in its own ability to manage the situation, internal European differences and a steadily worsening situation in the Balkans made it clear that an effective European foreign policy was still more of an ambition than a reality. This impression was only reinforced by the difficulties the member states encountered in securing the necessary ratifications for the Maastricht treaty in 1992<sup>18</sup>, which created the European Union and established the Common Foreign and Security Policy. At the same time, US – EC differences over trade policy became even more acute in the endgame to the Uruguay Round, which finally concluded in December 1993<sup>19</sup>. Under these circumstances, coupled with the change in the US administrations, it is hardly surprising that the meetings authorized by the Transatlantic Declaration did not measure up to expectations. Although most of them were held (except for the Cabinet level sessions), they produced few concrete accomplishments, and for a time, there was still little incentive on either side to make them more effective instruments toward attending a US – EU partnership<sup>20</sup>.

## **2.2 NEW TRANSATLANTIC AGENDA (NTA)**

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<sup>18</sup> The Treaty on European Union (TEU), signed in Maastricht on 7 February 1992, entered into force on 1 November 1993. This Treaty is the result of external and internal events. At external level, the collapse of communism in Eastern Europe and the outlook of German reunification led to a commitment to reinforce the Community's international position. At internal level, the Member States wished to supplement the progress achieved by the Single European Act with other reforms. The Treaty on European Union (TEU) represents a new stage in European integration since it opens the way to political integration. It creates a European Union consisting of three pillars: the European Communities, Common Foreign and Security Policy (CFSP), and police and judicial cooperation in criminal matters (JHA). The Treaty introduces the concept of European citizenship, reinforces the powers of the European Parliament and launches economic and monetary union (EMU). Besides, the EEC becomes the European Community (EC). <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:xy0026>, consulted October 14, 2015.

<sup>19</sup> The Uruguay Round was the 8th round of multilateral trade negotiations (MTN) conducted within the framework of the General Agreement on Tariffs and Trade (GATT), spanning from 1986 to 1994 and embracing 123 countries as "contracting parties". The Round led to the creation of the World Trade Organization, with GATT remaining as an integral part of the WTO agreements. The broad mandate of the Round had been to extend GATT trade rules to areas previously exempted as too difficult to liberalize (agriculture, textiles) and increasingly important new areas previously not included (trade in services, intellectual property, investment policy trade distortions). Cline, William (January 1995). "*Evaluating the Uruguay Round*". The World Economy.

<sup>20</sup> Frances G. Burwell, "*Rethinking the new transatlantic agenda*", Paper for the European Union Studies Association meeting, March 2003.

In response to the increasing concern and thanks to the positive disposition of Clinton administration towards the EU, in 1995 at the Madrid Summit was launched the New Transatlantic Agenda (NTA), which aimed at supplementing the 1990 Declaration in substance and in process. The NTA reaffirmed the importance of the transatlantic relationship to both parties and made clear the expanding scope of the relationship. No longer was this primarily an economic relationship; instead the NTA noted that “*our common security is further enhanced by strengthening and reaffirming the ties between the European Union and the United States within the existing network of relationships which join us together*”<sup>21</sup>. The NTA and its supporting Joint Action Plan outlined three substantive objectives:

- Promoting peace, stability and democracy and development around the world. In the Agenda, this focused primarily on Central and Eastern Europe (including the Balkans), as well as Russia and the newly independent states, although the Middle East and the more general issue of nonproliferation, human rights and development were noted;
- Responding to global challenges. This called for cooperation to fight international crime, drug-trafficking, and terrorism, as well as dealing with refugees, environmental protection and infectious disease;
- Contributing to the expansion of world trade and closer economic relations. Specific actions in this area were to be directed at both the multilateral trading system and bilateral economic relations.

In order to broaden the process of transatlantic relations, the NTA featured a fourth objective, “building bridges across the Atlantic”, which sought to enhance transatlantic connections in the business, educational and non-governmental sector. Specifically, it formalized the creation of dialogues between the European and US business communities and between the US Congress and the European Parliament. It also established separate transatlantic dialogues between labor

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<sup>21</sup> Presidency Conclusions, European Council of Madrid, 15-16 December 1995.

organizations, environmental organizations, and consumer group. The NTA also supplemented the government-to-government meeting established under the Transatlantic Declaration. A common criticism of these meetings, especially the summits, was that there was little preparation and thus little continuity from one session to the next. Clearly, if these meetings were to become consequential, they would have to be supported in a more effective and significant way. The NTA created the two additional forums, the Senior Level Group, conducted at the level of political directors, and the Task Force, just below that, to manage the growing range of issues and prepare the summits. In addition, there was the Transatlantic Economic Partnership Steering Group, which focuses specifically on economic and trade issues.

The NTA added to the already fixed objectives of promoting stability and democracy, the willingness to respond cooperatively to global challenges developing closer economic relations and facilitating world trade, in a broader and ambitious aim to build bridges across the Atlantic; moreover, for the first time, the agenda proposed the creation of a New Transatlantic Marketplace, with the aim to reduce and progressively eliminate tariff and non-tariff barriers. The NTA strengthened and institutionalized many already existing contacts and relations and led to the creation of sectorial Transatlantic Dialogues between consumer groups, environmental associations, labor associations like the Transatlantic Business Dialogue and a Transatlantic Legislators' Dialogue.

### ***2.3 THE TRANSATLANTIC BUSINESS DIALOGUE (TABD)***

The Trans-Atlantic Business Dialogue (TABD), in particular, was established by the US government and European Union in 1995 as the official business sector advisory group for EU and US officials on trade and investment issues. It consists in the Executive Council of the Trans-Atlantic Business Council and it brings together chief executive officers and C-Suite executives from leading American and European companies operating in the U.S., Europe, and globally who

advocate for a barrier-free transatlantic market that will contribute to growth, employment, innovation and sustainability in the global economy. The purpose of the TABD was to foster an ongoing dialogue between business and government at the highest levels. It had become clear to both governments that international business maintains a unique and indispensable perspective on trade liberalization, and that it was necessary to create an official forum that allowed these transatlantic businesses to come together in a single setting where they would be able to address their mutual concerns.

The first TABD conference was held in Seville, Spain in 1995 and concluded in the creation of working groups on standards and regulatory issues, trade liberalization, investment, and third country relations. As it was the first time that the private sector held an official role in determining EU/US public policy, the Seville conference signified a milestone in transatlantic trade relations. US Secretary for Commerce Ronald Brown convened the conference along with European Commission Vice President Sir Leon Brittan and Commissioner Dr. Martin Bangeman, and it was met with enthusiasm across the transatlantic business community. Throughout the years, the TABD continually provided input on a number of trade issues, including financial services, raw materials/recycling, and eMobility. Since 2007, the Transatlantic Economic Council (TEC)<sup>22</sup>, which is the primary plenary for economic dialogue between the US and EU, has served as an additional platform for the TABD to exercise its advisory role<sup>23</sup>.

#### ***2.4 NEW TRANSATLANTIC MARKETPLACE***

The drive for an ever-closer transatlantic economic relationship was revived in 1998 but, Despite the NTA and its institutions, high-profile trade disputes and extraterritorial sanctions continued, highlighting the need for further transatlantic sanctions to facilitate economic exchange and contain conflict. In that context, the European Commission took the initiative in April 1998, calling for negotiations

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<sup>22</sup> See paragraph 2.8.

<sup>23</sup> <http://www.transatlanticbusiness.org/> consulted October 14, 2015.

on a “single comprehensive agreement” to implement a “New Transatlantic Marketplace”. The Commission’s proposal had four central objectives:

- The removal of technical barriers to trade in goods through an extensive process of mutual recognition and/or harmonization;
- The elimination by 2010 of all industrial tariffs on a MFN basis;
- The formulation of a free trade area in services;
- Further liberalization in the areas of government procurement, intellectual property rights, and investment;

The United States failed to secure the support of the Council of Ministers.

## ***2.5 THE TRANSATLANTIC ECONOMIC PARTNERSHIP (TEP)***

In its place, the US and EU agreed in May 1998 to a somewhat less ambitious, the Transatlantic Economic Partnership (TEP), which aimed to tackle bilateral regulatory barriers to trade and to identify common positions with multilateral trade negotiations. In substantive terms, the TEP and its accompanying Action Plan focused more directly than the NTA on regulatory cooperation and on the possible harmonization of standards as a means of removing technical barriers to trade, and it committed both sides to negotiations in specific issues-areas including services, intellectual property, food safety and biotechnology. It was the first time the ambitious, yet ambiguous, concept of a New Transatlantic Marketplace (NTM)<sup>24</sup> was introduced within a summit document. The idea was to intensify regulatory cooperation in order to overcome regulatory

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<sup>24</sup> The NTM provided for action in four key areas: (a) the Widespread removal of technical barriers to trade through increased mutual product recognition and/or harmonisation; (b) a political commitment to eliminate all industrial tariffs by 2010, as long as a critical mass of other trading partners also agree to do so; (c) the creation of a free trade area in services; (d) and further liberalisation of investment, public procurement and intellectual property. Alberto ALEMANNI, Jean Monnet Professor of EU Law, HEC Paris, France, *The Transatlantic Trade and Investment Partnership and the Parliamentary Dimension of Regulatory Cooperation*, April 2014.



obstacles, mainly technical barriers to trade, the regulation of biotechnology and sanitary and phytosanitary regulation through the conclusion of mutual recognition agreements (MRAs), scientific and regulatory dialogue, and a higher degree of transparency and consultation”.

In addition, the TEP created a new set of institutions to manage the economic aspects of the relationship, including a “TEP Steering Group”, charged with monitoring, implementing and reviewing TEP objectives, as well as expert-level working groups. The TEP also emphasized the importance of early warning of potential trade and regulatory disputes, and fostered the creation of an institutionalized “early warning system” following the Bonn EU/US summit in June 1999. Finally, the TEP explicitly encouraged the participation of not only business but other civil society groups, which would lead in time to the creation of the transatlantic consumer, environment, and labour dialogues.

In 2001, when the European Commission reviewed the NTA system, it highlighted the existence of some evident weaknesses, especially linked to the demand for “deliverables” at six months intervals and the absence of medium or long-term priorities. However, despite the weaknesses of the system, which was not designated to create binding reciprocal obligations but rather to encourage a culture of cooperation and dialogue and to favor a progressive harmonization of the approaches between the US and the European policy makers, the Commission highlighted the utility of TEP in developing a cooperative agenda in the trade and investment areas and its importance as forum of discussion; nonetheless the need for adjustments was not hidden. A study directed by Eric Philippart<sup>25</sup> and Pascaline Winand<sup>26</sup> concludes that the TEP has been

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<sup>25</sup> Professor at the College of Europe since 1999 and associate professor at the Université Libre de Bruxelles. Former Senior Associate Fellow at the Centre for European Policy Studies (CEPS). Civil servant with the European Commission since 2003 (with the Secretariat General, as member of the Constitutional taskforce “Avenir de l’Union et questions institutionnelles”; lead pen of the 2005-6 European Commission’s Impact Assessment Guidelines; with DG Enterprises and Industry, as manager of the EU programme for the reduction of administrative burden from 2007 to 2009, deputy Head of Unit in charge of DG ENTR Impact Assessments and support to the Impact Assessment Board from 2010 to 2012, and deputy Head of Unit for Tourism and cultural instruments). Author of books and articles on new modes of EU governance (better regulation, flexibility and closer cooperation, open coordination, multi-level governance), EU external relations, Transatlantic relations, Euro-Mediterranean Partnership and theories of European integration. <http://whoswho.coleurope.eu/w/Eric.Philippart>, consulted October 13, 2015.

useful and successful in promoting the creation of a transatlantic marketplace, while it has failed to coordinate the EU and the US efforts in multilateral<sup>27</sup> fora such as the WTO<sup>28</sup>.

## **2.6 THE TRANSATLANTIC EARLY WARNING SYSTEM**

A further instrument for regulatory cooperation was added at the 1999 EU-US Summit in Berlin, which introduced the Transatlantic Early Warning System, which remains pivotal in the ongoing discussions surrounding the Horizontal Regulatory Coherence Chapter of TTIP<sup>29</sup>. According to both EU and US officials, this mechanism would have prevented the escalation of a dispute such as regarding hush kits. This revolved around the EU legislation banning the use of hush-kit outfitted aircraft in the EU, thus reducing the value of the

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<sup>26</sup> Professor Pascaline Winand is the Director of Studies of the College of Europe at Natolin. She is also an Adjunct Professor in the Faculty of Arts at Monash University in Melbourne, Australia and lectures at the Institut d'Etudes européennes of the Université Libre de Bruxelles (ULB). She is the author of the prize-winning book *Eisenhower, Kennedy and the United States of Europe* (Macmillan/St Martin's Press/Palgrave), of nine co-authored and co-edited volumes and of fifty-nine articles and chapters. Her areas of specialization include international history and international relations, with an emphasis on EU external relations, transatlantic relations, EU-Asia relations and the study of international and regional organizations. She has been awarded grants and fellowships by the European Commission, the Norwegian Nobel Institute, the European University Institute (EUI), the Belgian National Fund for Scientific Research, Yale University and the Belgian American Educational Foundation. She is the Series Editor of 'European Policy' at the Presses Interuniversitaires européennes/Peter Lang. Professor Winand was previously Director of the Monash European and EU Centre and Jean Monnet Chair in European integration and international relations at Monash University. Before coming to Monash she was Professor of Contemporary History at the EUI, Florence. She has also lectured at the ULB and was a Research Associate at the Belgian National Fund for Scientific Research. She was a Visiting Professor at the Institute of International Relations of Kijiv Taras Shevchenko University in Ukraine, at Tomsk State University in Russia, at the Pontificia Universidad Católica del Perú and at the University of Pittsburgh in the US. She has extensive experience in research supervision, having successfully directed many BA, MA and PhD theses over the years. <http://whoswho.coleurope.eu/w/Pascaline.Winand>, consulted October 13, 2015.

<sup>27</sup> Mark Pollack, *The Political Economy of the Transatlantic Partnership*, European University Institute, 2003.

<sup>28</sup> The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. The WTO was born out of negotiations, and everything the WTO does is the result of negotiations. The bulk of the WTO's current work comes from the 1986–94 negotiations called the Uruguay Round and earlier negotiations under the General Agreement on Tariffs and Trade (GATT). The WTO is currently the host to new negotiations, under the 'Doha Development Agenda' launched in 2001. [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm), consulted October 14, 2015.

<sup>29</sup> US-EU Summit Declaration, 1999. [http://europa.eu/rapid/press-release\\_MEMO-11-842\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-842_en.htm)

mostly American used airplanes so equipped and hurting the profits of American hush kit manufacturers. By the time the US authorities and relevant industries became aware of the potential trade consequences stemming from such a proposal, the text was already in second reading in the European Parliament<sup>30</sup>.

Although the EU and the US invited the different dialogues to contribute to this effort by identifying problems and offering proposals for resolution, only TABD followed that invitation. When the two TABD Chairmen, using the framework of the warning mechanism, brought eight issues to the heads of states at the annual EU-US Summits – six of them triggered by EU environmental and consumer regulations – the EU came under pressure to act. The ensuing politicization of the process questioned the viability of the mechanism.

## ***2.7 GUIDELINES FOR REGULATORY COOPERATION AND TRANSPARENCY***

In the meantime, an EU-US Summit in Washington D.C. in 2005, produced a set of Guidelines for Regulatory Cooperation and Transparency. These were followed by the publication of a Roadmap for EU-US Regulatory Cooperation and Transparency in 2004 and a second Roadmap for closer co-operation. The Administrator of the US Office of Information and Regulatory Affairs (OIRA) and its European Commission counterparts then launched the US-European Commission ‘High-Level Regulatory Cooperation Forum’ (HLRCF) in 2005, which engages EU and US administrations, regulatory authorities as well as stakeholders on both sides. The HLRCF meets approximately annually and conducts a variety of bilateral activities to share information and ideas on better regulatory approaches, methods of regulatory analysis, and priorities for reform<sup>31</sup>. The HLRCF played a role in sharing the ideas on regulatory impact assessment and oversight that

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<sup>30</sup> Abbott, K.W. ‘U.S.-EU Disputes Over Technical Barriers to Trade and the “Hushkit” Dispute’, in Petersmann, E.U. and Pollack, M.A. (eds.), *Transatlantic Economic Disputes*, Oxford University Press, Oxford, 2004, pp. 247-280.

<sup>31</sup> See <http://www.whitehouse.gov/omb/oira IRC europe>, consulted October 13, 2015.

led the European Commission to issue its Impact Assessment Guidelines (2005, 2006, and 2009) and to create its Impact Assessment Board (IAB) in 2006<sup>32</sup>. The establishment of the HLRCF has sanctioned the emergence of the phenomenon of “horizontal regulatory cooperation”<sup>33</sup> involving regulatory cooperation on crosscutting issues such as risk assessment, impact assessment, and cost-benefit analysis<sup>34</sup>. This innovative form of international cooperation is “horizontal” because it refers to the general analytical basis of regulation as opposed to “sector-specific” regulatory cooperation.

## **2.8 THE TRANSATLANTIC ECONOMIC COUNCIL (TEC)**

In order to monitor and facilitate progress in these areas and in taking stock of the limits of previous regulatory cooperation efforts<sup>35</sup>, the EU-US Summit of 30 April 2007 established a new institution, the Transatlantic Economic Council (TEC), to oversee, support and accelerate the accomplishment of common economic goals of the EU and the US in a variety of sectors<sup>36</sup>. This institution, an eminent

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<sup>32</sup> Wiener, J.B., and Alemanno A, ‘*Comparing Regulatory Oversight Bodies across the Atlantic: The Office of Information and Regulatory Affairs in the U.S. and the Impact Assessment Board in the EU*’, in Rose-Ackerman, S. and Lindseth, P. (eds.), *Comparative Administrative Law*, Edward Elgar, Cheltenham, 2010, pp. 309-33 (who argue that the IAB is now generally perceived – together with the EU Commission Secretariat General – the EU counterpart to US OIRA (created in 1980)). See also Alemanno, A. ‘*Quis Custodet Custodes dans le cadre de l’initiative “Mieux légiférer”?*’, p. 43.

<sup>33</sup> For an initial analysis of this phenomenon, see Meuwese, A ‘*EU-US Horizontal Regulatory Cooperation: Mutual Recognition of Impact Assessment?*’, in Vogel, D. and Swinnen, J (eds.), *Transatlantic Regulatory Cooperation: The Shifting Roles of the EU, the US and California*, Edward Elgar, Cheltenham, pp. 249-272; an Allio, L. and Jacobzone, S., ‘*Regulatory Policy at the Crossroads: the Role of the OECD in Mapping an Agenda for the Future*’, in Alemanno, A., den Butter, F., Nijssen, A., and Torriti, J., *Better Business Regulation in a Risk Society*, Springer, New York, 2012.

<sup>34</sup> These established principle are often referred to as “meta-regulation”; see, e.g., Morgan B., ‘*The Economization of Politics: Meta-regulation as a Form of Nonjudicial Legality*’, (2003) 12 *Social and Legal Studies*, pp. 489–523; and Radaelli, C. M., ‘*Whither Better Regulation for the Lisbon Agenda?*’, (2007) 14 *Journal of European Public Policy*, pp. 190–207.

<sup>35</sup> Commission of the European Communities, *Review of the Framework for Relations between the European Union and the United States, An Independent Study commissioned by the European Commission*, 2005, available on the Internet: <http://www.statewatch.org/news/2007/dec/eu-us-relations-study.pdf>.

<sup>36</sup> EU-US Summit, *Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union*, Section IV. Available at [http://ec.europa.eu/enterprise/policies/international/files/tec\\_framework-\\_en.pdf](http://ec.europa.eu/enterprise/policies/international/files/tec_framework-_en.pdf), accessed on 30 August 2013.

political body, was created within the Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union (FATEI). While all the agreements issued at EU-US summits since the adoption of the New Transatlantic Agenda in 1995 have essentially aimed at the identification and elimination of all non-tariff barriers to trade through a building-block approach – aiming at advancing on various fronts simultaneously, but independently –, FATEI complemented this building-block strategy with a new approach. This aimed at injecting much needed political momentum into the project, and at linking the various building blocks together under a new institutional superstructure – the Transatlantic Economic Council.

The TEC is composed of ministerial-level appointees who carry the political responsibility for the policy areas covered by the FATEI. However, since former TEC Co-Chair Mike Froman became USTR, no new co-chair has been appointed on the US side. The co-chairs jointly developed a set of working arrangements<sup>37</sup>. According to those, permanent Members of the TEC include the European Commissioners for External Relations, for Trade and for Internal Market and Services and the U.S. Secretaries of the Treasury and Commerce. TEC is assisted by a Group of Advisers, which is composed of the co-chairs of the three main transatlantic dialogues: the Transatlantic Business Dialogue, the Transatlantic Consumers' Dialogue, and the Transatlantic Legislators' Dialogue. The inclusion of the TLD on the advisory board might have raised the profile of the TLD but has failed to strengthen the ability of legislators to shape transatlantic economic arrangements.

Similar to many of the other initiatives that have been pursued since the early 1990s to advance the goal of achieving a barrier-free transatlantic market and deepen economic cooperation, TEC has received some results regarding EU-US regulatory cooperation in selected areas (including in the area of electric cars, ICT services, investment, mutual recognition of organic labelled products and of our respective trusted traders programs AEO and C-TPAT,

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<sup>37</sup> *Working Arrangements for the Transatlantic Economic Council*, available at [http://ec.europa.eu/enterprise/policies/international/files/tec\\_working\\_arrangements\\_en.pdf](http://ec.europa.eu/enterprise/policies/international/files/tec_working_arrangements_en.pdf), consulted October 14, 2015.

the common understanding on regulatory principles and best practices and the standards bridge building documents, reinforced cooperation in emerging areas such as nanotechnology and e-health). But results have clearly stayed below expectations<sup>38</sup>, above all, due to insufficient political will on both sides of the Atlantic.

It is against this backdrop that, following the publication of the final report of the High Level Working Group on Jobs and Growth of 11 February 2013, negotiations on an EU-US international agreement aimed at creating a free trade area between the two polities, commonly referred to as the Transatlantic Trade and Investment Partnership (TTIP), were initiated in July 2013<sup>39</sup>.

### **3. APPROVAL AND SUPERVISION OF NEGOTIATIONS**

This paragraph aims to highlight the role of the various institutions involved in the TTIP negotiations approval, both in the US and in the European Union.

The European Commission negotiates on behalf of all the 28 member states towards a TTIP agreement on the basis of a mandate issued by the EU Foreign Affairs Council, which gave guidelines to the Commission to follow and allowed the start of negotiations. The Council also placed some limits on the negotiations: for ex. introducing the “cultural exception”<sup>40</sup>. The Commission has a duty to keep

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<sup>38</sup> See, e.g., Commission of the European Communities, *Review of the Framework for Relations between the European Union and the United States*, An Independent Study commissioned by the European Commission, 2005, available on the Internet: <http://www.statewatch.org/news/2007/dec/eu-us-relations-study.pdf>, consulted October 13, 2015.

<sup>39</sup> See, e.g., Felbermayr G. et al, ‘*Transatlantic Trade and Investment Partnership (TTIP): Who Benefits from a Free Trade Deal?*’, Bertelsmann Stiftung (2013); Felbermayr, G. and Larch, M., ‘*The Transatlantic Trade and Investment Partnership (TTIP): Potentials, Problems and Perspectives*’, (2012) 14 CESifo Forum, pp. 49-60.

<sup>40</sup> The concept of “cultural exception” (or exemption) was introduced by France in the General Agreement on Tariffs and Trade (GATT) negotiations in 1993. The idea is that culture should be treated differently from other commercial products, and that cultural goods and services should be left out of international treaties and agreements. The goal is to protect and promote domestic artists and other elements of domestic culture, which in practice translates into protectionist measures limiting the diffusion of foreign artistic work (via quotas, e.g. French television channels) or into subventions to the cultural sector, e.g. cinema. The EP adopted a resolution asking for cultural and

the Parliament informed throughout the negotiations. Once negotiations are completed and the Council has given authorization for signature of the agreement, the Council is required to ask the European Parliament for its consent for ratification.

If TTIP takes the form of a 'mixed agreement' (i.e. covers areas of both EU and Member State competences), then the final text will also have to be ratified by each Member State in accordance with their national procedures. With a view to securing the Parliament's consent and complying with the reporting requirements, the Commission has regular dialogue with it and has published its position papers and textual proposals<sup>41</sup>.

On the European side, negotiations are led by the Directorate General (DG) for Trade under the leadership of the Chief Negotiator, Ignacio Garcia Bercero<sup>42</sup>,

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audiovisual services, including online ones, to be excluded from the TTIP negotiating mandate on 23 May 2013. On 14 June 2013 the Council agreed that audiovisual services would not be covered in the mandate, but this could be subject to revision. European Parliamentary Research Services, <http://epthinktank.eu/2014/08/29/ttip-and-the-cultural-exception/>, consulted October 13, 2015.

<sup>41</sup> Laura Puccio, “*EU-US Negotiations on TTIP, a survey of current issues*”, European Parliamentary Research Services.

<sup>42</sup> **Ignacio Garcia Bercero** is a director at the Directorate General for Trade of the European Commission (DG TRADE). He currently oversees activities related to the US, Canada and the EU Neighbouring Countries. Mr Garcia Bercero coordinated the work of the EU-US High Level Working Group on Growth and Jobs, which recommended the launch of the Transatlantic Trade and Investment Partnership (TTIP) negotiations. He now acts as the EU Chief Negotiator for this agreement. Mr Garcia Bercero joined the European Commission in 1987 and has thorough experience in a large number of trade-related policy areas. During the Uruguay Round of multilateral negotiations, he followed, inter alia, negotiations on trade safeguards, GATT articles, functioning of the GATT, as well as talks on trade and environment. In the period leading up to the launch of the WTO Doha Round, he served as coordinator of the EU WTO policy and led the negotiations on trade and competition. He was also posted in the EU Delegation to the United Nations in New York and worked in areas of WTO Dispute Settlement and Trade Barriers Regulation. More recently, between 2005 and 2011, Mr Garcia Bercero's field of responsibility included trade-related aspects of sustainable development, as well as bilateral trade relations with South and South-East Asia, Korea, EuroMed and the Middle East countries. As the Chief Negotiator, he led the negotiating process with South Korea and India. Mr Garcia Bercero authored several papers and publications on the subjects of Trade Laws, GATT and WTO System, Safeguard Measures, Trade and Competition, WTO Dispute Settlement Reform and bilateral dispute settlement rules in European Free Trade Agreements. Mr Garcia Bercero holds a Law Degree from the Faculty of Law of the Universidad Complutense, Madrid and a

with the support of experts from other parts of the Commission. Among them, nine other Directorates General, as well as the Secretariat General, are involved in the negotiations.

Negotiators are split into working groups (there were 24 groups in the first round), who discuss specific sectors and areas. The Commission consults the EU governments during the negotiations through the Trade Policy Committee, made up of senior officials from each Member State. EU Members are also consulted and informed via the Foreign Affairs Council, while the European Parliament is informed through its International Trade Committee. During their negotiations, the Commission will be required to adhere to the negotiating mandate approved by the Foreign Affairs Council on 14 June 2013<sup>43</sup>. Negotiators will also be guided by position papers covering particular areas (e.g. regulation) and sectors (e.g. raw materials and energy)<sup>44</sup>.

During negotiations, concerns have been raised over the lack of transparency of the TTIP negotiations. For example, in its report on TTIP, the House of Lords European Union Committee report said:

*“A number of witnesses drew our attention to their concerns that the TTIP negotiations were insufficiently transparent. Maria Eleni Koppa MEP told us that “the fact that we are totally in the dark about what happens and about the details of the negotiations is not helpful, at least for those of us who want to be supportive.” Corporate Europe Observatory expressed their concern that the agreement was being negotiated “in secrecy and under undue influence from corporate lobby groups”<sup>45</sup>.*

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Masters of Laws Degree (with Distinction) from University College, London (European Commission, official website).

<sup>43</sup> Council of the European Union, “*Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*”, Brussel, 2014.

<sup>44</sup> The treaty negotiation process is described in a Commission Directorate General for Trade publication, “*Trade Negotiations Step by Step*”, Brussel, September 2013.

<sup>45</sup> House of Lords European Union Committee, *The Transatlantic Trade and Investment Partnership*, 13 May 2014, HL 179, 2013-14, para 194.



Concerns about a lack of transparency led the European Ombudsman to investigate TTIP and ask the Commission to improve public access to important TTIP documents. To resolve these issues, the Commission has taken through time some steps to improve transparency such as making the negotiating mandate available to the public for the first time in October 2014. It has also published a range of fact sheets and negotiating texts on the 24 chapters which would make up the agreement<sup>46</sup>. On 7 January 2015, the Commission, for the first time in the history of European bilateral trade negotiations, has also published, as part of the transparency initiative launched by new Commissioner for trade Cecilia Malmström, elected after the 2014 European Elections, seven textual proposals the EU has tabled for discussion with US negotiators.

On the United States side, the negotiations are led by the Office of the U.S. Trade Representative (USTR), while Congress retains the constitutional power to regulate commerce with foreign countries. On 20 March 2013, the USTR notified to the Congress of President Obama's willingness to enter into the TTIP negotiations and obtained a bipartisan and unequivocal support. The United States then designated L. Daniel Mullaney<sup>47</sup> as T-TIP Chief Negotiator.

In the US legislation, the US Congress is mandated by the US Constitution to exercise a regulatory and oversight role in international trade. It also has a role to play in negotiating external trade agreements, exercising its oversight, legislative

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<sup>46</sup> Dominic Webb, *The Transatlantic Trade and Investment Partnership, Briefing Paper*, 2015.

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and advisory functions. To date, the Congress has played an active role in the negotiations on the Transatlantic Trade and Investment Partnership (TTIP), overseeing the negotiations, gathering the views of key stakeholders during hearings and events it has organized, and flagging issues it considered politically important.

One of the competences of the US Congress foreseen by the US Constitution is an oversight and regulatory role in external trade. Consequently, Congress plays a role in negotiating external trade agreements, exercising oversight, legislative and advisory functions. The relevant Congressional committees involved in the process are regularly debriefed by the US Trade Representative (USTR) Michael Froman and other high officials, enjoying access to at least some strategic documents related to the negotiations.

If the Congress grants the US president 'trade promotion authority' (TPA<sup>48</sup>, also called 'fast track negotiating authority'), the executive gains the authority to negotiate trade agreements, while keeping Congress in the loop. Congress retains the right to vote for or against the agreements or treaties negotiated by the president, without making amendments and without holding filibusters<sup>49</sup>.

On July 24, 2015 the 60-38 of favorable Congress' vote on TPA was the product of rare Republican-White House collaboration and granted President Obama the power for expedited action on the Transatlantic Trade and Investment Partnership (TTIP) which Obama has stated as one of top priorities of his administration.

### ***3.1 FROM WASHINGTON TO BRUSSEL: THE EXCURSUS OF THE FIRST TEN ROUNDS***

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<sup>48</sup> TPA is a legislative procedure, through which Congress defines negotiating objectives that should guide the President and his teams, while keeping for itself the right to approve or not the final text.

<sup>49</sup> Wanda Troszczyńska-Van Genderen and Elfriede Bierbrauer, *The Transatlantic Trade and Investment Partnership (TTIP); The US Congress's positions*, 2014.

From now, the paragraph will draw an excursus of the ten rounds of negotiations held so far, highlighting the main steps and aspects that characterized the talks around agreement together with the challenges and progresses seen so far.

### **3.1.1 THE FIRST ONE**

The First round of talks follows the official launch of the negotiations that was announced by U.S. President Barack Obama, President of the European Commission José Manuel Barroso, President of the European Council Herman Van Rompuy and UK Prime Minister David Cameron at the G8 Summit held on June 17, 2013. Beforehand, EU Member States agreed to give the European Commission “the green light” to start negotiations with the United States and defined their negotiating guidelines<sup>50</sup>.

In Washington, D.C., from July 8th to the 11th, the negotiations kicked off with the negotiating groups setting out respective approaches and ambitions in as much as twenty various areas that the TTIP is set to cover. They included: market access for agricultural and industrial goods, government procurement, investment, energy and raw materials, regulatory issues, sanitary and phytosanitary measures, services, intellectual property rights, sustainable development, small- and medium-sized enterprises, dispute settlement, competition, customs/trade facilitation, and state-owned enterprises.

### **3.1.2 THE SECOND ONE**

*"I am glad to see that we are now fully back on track with the EU-US trade talk. We are making good and steady progress across the broad range of issues we need to tackle to make our transatlantic business environment more efficient and effective whilst preserving the protections and rights already in place for*

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<sup>50</sup> Office of the United States Trade Representative (Executive office of the president).

*consumers. Let's keep our eye on the prize: more jobs for people in Europe, more growth for the European economy<sup>51</sup>".*

With these words, the EU Trade Commissioner Karel De Gucht, kicked off the Second round of talks held in Brussels on November 11 – 15, 2013. Negotiators discussed investment rules, trade in services, energy and raw materials, as well as a range of regulatory issues, including regulatory coherence, technical barriers to trade and sectorial approaches. Sensible progresses were made, especially in the following areas:

- On investment, discussions continued on comparing respective approaches to investment liberalization and protection. There was a good degree of agreement on getting an ambitious deal while confirming the Parties' regulatory freedom to legislate in the public interest.
- On services, the EU and US compared their respective approaches on cross-border services, financial services, telecommunications and e-commerce. They also began setting out their respective market access interests in various services sectors.
- On regulatory issues, both sides agreed on the importance of horizontal rules and specific commitments in sectors. Negotiators, including regulatory experts, had a solid discussion on regulatory coherence and on possible elements for a chapter on technical barriers to trade going beyond WTO disciplines (so-called "TBT plus"). They held detailed talks on a number of sectors in which both the EU and the US are keen to enhance regulatory compatibility: medical devices, cosmetics, pharmaceuticals, chemicals, pesticides, information and communication technologies (ICT) and automobiles.

### **3.1.3 THE THIRD ONE**

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<sup>51</sup> European Commission, Press Release Database, [http://europa.eu/rapid/press-release\\_IP-13-1091\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1091_en.htm), consulted October 13, 2015.

At the Third round in Washington, D.C., on December 16 – 20, 2013, while negotiators made progress on the three core parts of the TTIP – market access, regulatory aspects and rules, an interesting conference from the EU Trade Spokesman, John Clancy, was held on the investment protection provisions in Free Trade Agreements like TTIP.

*“The reason ISDS is needed in TTIP is that the US system does not allow companies to use international agreements like TTIP as a legal basis in national courts. So European companies – and especially SMEs - will only be able to enforce the agreement through an international arbitration system like ISDS. In short, yes we agree that ISDS needs to be improved and we would encourage the civil society to work with the European Commission to ensure that we create a system that satisfies the concerns of the civil society and the concerns of many businesses which seek a stable, legal and fair investment environment”*<sup>52</sup>, stated John Clancy in his speech to the negotiators. Specifically, four key aspects were highlighted by the EU Trade Spokesman:

- 1) TTIP should explicitly state that legitimate government public policy decisions cannot be over-ridden. The agreement will not limit the scope for governments to take decisions on, for example, the balance between public provision of healthcare and private services. For example, a company will not receive compensation merely because its profits drop due to health or environmental regulation.
- 2) The aim to crack down on cases where companies have used legalistic technicalities to build frivolous cases against governments. The need to define exactly what treatment investors can and cannot expect from host governments. The goal is to ban companies from simultaneously taking actions in domestic courts and under international investment agreements. The principle that “the loser pays the costs” will be applied, thereby deterring speculative challenges.

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<sup>52</sup>European Commission, News Archive <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1008>, consulted October 13, 2015.

- 3) Investment tribunals will be open to scrutiny. Documents will be public. Hearings will be open and interested parties - including NGOs and civil society groups - will be able to make submissions. Transparency will be set as the main principle.
- 4) Any risk of conflict of interests will be eliminated. The arbitrators who decide on EU cases must be above suspicion. The defending party will have a right to veto two of the three arbitrators appointed in any case. All of them will be required to sign up to a strict, enforceable, code of conduct.

On January 27, 2014, in the timeframe between the third and fourth round, the EU Commission launched a special Advisory Group of experts representing a broad range of interests (ex. environmental, health, consumer and workers' interests to different business sectors) to provide EU trade negotiators with high quality advice in the areas being negotiated in the Transatlantic Trade and Investment Partnership (TTIP) talks, in order to represent a common interest shared by stakeholders in a particular area, rather than merely individual organizations.

The group's advice was set up to help the European Commission to ensure that a future TTIP genuinely facilitates trade between the EU and the US, and benefits all citizens in Europe. The members' broad representation of interests was also intended to ensure that Europe's high standards in, for example, protection for consumers and the environment, were respected and upheld in the negotiations. The Advisory Group complemented transparency initiatives, such as stakeholder consultations during negotiating rounds and regular debriefing through the EU's Civil Society Dialogue (CSD)<sup>53</sup>.

### ***3.1.4 THE FOURTH ROUND***

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<sup>53</sup> European Commission, Press Release Database, [http://europa.eu/rapid/press-release\\_IP-14-79\\_en.htm](http://europa.eu/rapid/press-release_IP-14-79_en.htm), consulted October 13, 2015.

During the Fourth round in Brussel, on March 10 – 14, 2014, steady progresses were made in all the three main negotiating areas:

- Market access – here negotiators discussed three core elements - tariffs, trade in services and public procurement. On tariffs the EU and US already had an initial exchange of offers. On services and public procurement, negotiators examined how to move towards exchanging offers.
- Regulation - negotiators were joined by a broad cross-section of experts and regulators from both sides to discuss:
  - regulatory coherence and increasing regulatory compatibility;
  - technical barriers to trade (TBTs), on which both sides had already made written proposals;
  - sanitary and phytosanitary (SPS) measures – preparing the ground for written proposals in due course.

The EU and the US also continued to explore ways of achieving greater regulatory compatibility in certain key industries: pharmaceuticals, cosmetics, medical devices, automotive, and chemicals.

- Rules – discussions included three areas where negotiators are developing innovative approaches:
  - sustainable development, labour and the environment - to build on what is already covered by existing EU and US trade deals;
  - trade in energy and raw materials - an area in which the EU wishes to include an agreed framework in TTIP;
  - customs and trade facilitation - simplifying and streamlining procedures, especially important, since lengthy, complex customs clearance rules hit smaller firms the hardest and can deter entrepreneurs from selling overseas.

The EU's Chief Negotiator, Ignacio Garcia Bercero, has also shown, as confirmed in the document published by the European Union and the United States, like

most small businesses can benefit from the agreement, and as the two parties are planning to help those businesses to do so.

### ***3.1.5 THE FIFTH AND SIXTH ROUND***

The Fifth (19-23 May, 2014 Arlington, VA) and the Sixth round (14-18 July, 2014, Brussel) focused around three main areas: classic market access issues, regulatory agenda and engaging with stakeholders. The classic market access issues encompass the areas of tariffs, services and public procurement. Especially for the EU, procurement is one of the most fundamental elements of the negotiations and both sides set as objective to substantially improve access to government procurement opportunities at all levels of government on the basis of national treatment.

For regulatory agenda negotiators have continued to discuss how to ensure close regulatory cooperation between the respective regulators on different areas of regulations including standards and conformity assessment and, of course, on everything that has to do with sanitary and phytosanitary matters. On this specific area, the Chief Negotiator, Ignacio Garcia Bercero, underlined three important considerations:

1. An unequivocal and firm commitment to the main guiding principle in the negotiations to ensure that nothing will be done which could lower or endanger the protection of the environment, health, safety, consumers or any other public policy goals pursued by the EU and US regulators;
2. Enhanced regulatory cooperation as an essential element if the EU and the US wish to play a leading role in the development of international regulations and standards based on the highest levels of protection;
3. TTIP should deliver concrete results in terms of enhanced regulatory compatibility in sectors.



As a matter of engaging with stakeholders, the negotiators engaged intensively with over 400 representatives of civil society, from consumers to environmental NGOs, from trade unions to public health representatives as well as with businesses. The European Social and Economic Committee, especially, raised the point that transparency vis-à-vis stakeholders is not only important during the negotiating process but that negotiators should also reflect on how to ensure that civil society is engaged in the monitoring of the implementation of TTIP once the agreement is up and running.

Presentations were made also by representatives from SMEs such as the UK Federation of Small Businesses, Chamber of Commerce of Rhône-Alpes or the Association of German Chambers of Commerce and Industry. These presentations illustrated how TTIP could bring concrete benefits to SMEs, not only through the specific SME chapter, but also how other chapters of TTIP could be of relevance. Some of the points highlighted included the following:

- Rules of origin should be trade facilitating
- Unnecessary duplication of requirements can prevent SMEs from doing business across the Atlantic. Examples mentioned include the complexity of customs procedures, duplication of inspections of manufacturing facilities, duplication of certification requirements, need to present similar data to different regulatory agencies etc.
- Easy access to information on regulatory requirements and other conditions for export, through a web portal, is of crucial importance for SMEs<sup>54</sup>.

### ***3.1.6 THE SEVENTH ONE***

The Seventh round of EU - U.S. negotiations on the TTIP agreement took place in Chevy Chase, Maryland from September 29 – October 3, 2014.

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<sup>54</sup> European Union Delegation in Switzerland and to the Principality of Liechtenstein, [http://eeas.europa.eu/delegations/switzerland/press\\_corner/all\\_news/news/2014/20140721\\_it.htm](http://eeas.europa.eu/delegations/switzerland/press_corner/all_news/news/2014/20140721_it.htm), consulted October 13, 2015.

With respect to regulatory issues, all negotiating areas in this pillar with the exception of textiles were covered. Discussions were held on market access consisted of market access texts, services and investment offers and agricultural non-tariff barriers. As in previous rounds, there were no discussions on investment protection or investor-to-state dispute settlement (ISDS).

On services and investment, chief negotiators' level both sides reaffirmed their similar approach to public services – reserving policy choices in this area for governments. Discussions also took place on further consolidation of texts of trade in goods and on agricultural non-tariff barriers.

On the regulatory cluster, constructive discussions in most sectors with the heavy involvement of regulators. Both sides recognized the need to identify economically meaningful outcomes in sectors.

In the rules areas, discussions took place on customs and trade facilitation, energy and raw materials, IPR (including GIs), dispute settlement, SME's and legal and institutional issues. Progress was confirmed on customs, leaving the most difficult issues open. On Energy and Raw Materials, discussions continued with an exchange of information between regulators on energy transit and third party access issues. On IP, the focus was on the principles and co-operation elements of a future IP chapter. On GIs, the EU shared economic evidence to illustrate need for better protection of EU GIs in the US<sup>55</sup>.

### ***3.1.7 THE EIGHTH ROUND***

The Eighth round took place in Brussels from 2nd to 6th February 2015 and attained an important milestone in the horizontal regulatory cluster. Main areas covered in the round were regulatory cooperation, technical barriers to trade like standards and conformity assessment and sanitary and phyto-sanitary measures (SPS) (like food safety and animal and plant health).

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<sup>55</sup> European Commission, “*Report of the Seventh Round of Negotiations*”, 2014.

This was considered, in the words of the Chief Negotiator, Ignacio Garcia Bercero, “a significant step forward as has allowed negotiators to discuss in detail written proposals from both sides and to start finding common ground, where possible. This also means that as of next round, for these chapters our negotiators will work on the basis of what we call “consolidated” texts. These present, in a single text, the drafting proposals of each side on a given issue. This does not mean that agreement has been found on the different elements. Indeed significant work is still required. But this represents a turning point in the negotiations: as we enter into the phase where we move from presenting our objectives and own positions to trying to find a common ground<sup>56</sup>”.

### **3.1.8 THE NINTH ROUND**

The Ninth round of negotiations, 20-24 April 2015, New York saw specific progresses on energy and raw materials where teams have discussed this week, for example, how TTIP could contribute to ensuring non -discriminatory and transparent third-party access to transport infrastructures of energy goods (pipelines and electricity grids) or examined how to further increase regulatory cooperation in the area of energy efficiency.

On sectors, regulators have also continued their detailed discussions aimed at identifying the concrete areas where greater regulatory convergence needs to be achieved in a number of sectors like:

- On pharmaceutical sector regulators continued their exchanges on the potential recognition of good regulatory practices or on how to cooperate better to facilitate the approval of bio-similars.
- On cars, regulators continued their detailed discussions on methodology and test cases for equivalence of existing regulations, among others.

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<sup>56</sup> “TTIP Round 8 - final day press conference, *Comments by EU Chief Negotiator Ignacio Garcia Bercero*”, Brussel, 2015.

- On medical devices experts exchanged views on the potential mutual recognition of quality management system audits.

The round also saw progress in the rules area. In this case negotiators highlighted that an important element of TTIP should be the development of rules, not only to govern the bilateral trade relationship between US and EU, but also to contribute to global rules and standards in areas such as competition, energy and raw materials or sustainable development, to name a few<sup>57</sup>.

### **3.1.9 THE TENTH ROUND**

The Tenth, and last round so far, took place in Brussel on July 13-17, 2015. In this occasion, the most part of the round was dedicated to regulatory discussions. In particular, there was significant convergence among the EU and the US that under this pillar of the agreement negotiators should be able to achieve the following elements:

- Agreement on good regulatory practices;
- Chapters on technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) that strengthen and go beyond the existing cooperation in these areas in the WTO;
- A framework to facilitate regulatory cooperation in the future;
- Greater regulatory compatibility in the main sectors identified (like cars, medical devices, pharmaceuticals or textiles)<sup>58</sup>;

The tenth round closed the negotiation works for the summer with the expectations of a new one in the beginning of the fall 2015.

### **3.1.10 THE LAST ONE**

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<sup>57</sup> “TTIP Round 9 - final day press conference, *Comments by EU Chief Negotiator Ignacio Garcia Bercero*”, New York, 2015.

<sup>58</sup> “TTIP round 10, *Comments by EU Chief Negotiator Ignacio Garcia Bercero*”, Brussel, 2015.

The 11th TTIP negotiating round took place in Washington D. C. and Miami between 14 and 23 October 2015. Talks covered the full range of areas under discussion, with the exception of investment protection and an Investment Court System. On market access, second offers on tariffs were exchanged, covering 97% of tariff lines. The Parties also exchanged proposals for product-specific rules of origin. Progress was made in the negotiations on the general text on trade in goods. Discussions also took place on texts on agricultural market access. In addition, teams finished working through revised services and investment offers.

Both sides also intensified discussions on regulatory cooperation and rules areas. In terms of regulatory cooperation, the discussions are led by the regulators from the EU and the US. The Commission regulators met with a number of US regulatory agencies including National Highway Traffic Safety Administration, Federal Communication Commission, Food and Drug Administration, Occupational Health and Safety Administration and Environment Protection Agency. These meetings also provided an opportunity to clarify main principles of regulatory cooperation:

- Any cooperation is possible only if the level of protection for consumers stays the same or improves. This is not only true in TTIP, but for all other EU trade agreements, as announced in the new trade strategy by Commissioner Malmström;
- Any form of regulatory cooperation will not change or affect the EU regulatory and democratic process.

In line with a new, more responsible trade strategy, the EU also tabled its proposal for sustainable development, including labor and the environment and also discussed rules for trade facilitation, competition, energy and raw materials and others<sup>59</sup>.

The Parties also agreed to accelerate their work between negotiating rounds, in line with our objective of making significant progress in the current phase of the

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<sup>59</sup>European Commission, *Report of the eleventh round of negotiations for the Transatlantic Trade and Investment Partnership*, Miami, 19–23 October 2015, available at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153935.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf), consulted in January 2016.

negotiations. Several groups will meet again before the next round to be held in Brussels in February 2016.

When the talks started in June 2013 the aim was to reach an agreement within the end of 2014. This date was probably announced because former Commissioner for Trade De Gucht ended its mandate on October 2014 and Barack Obama had to face the mid-term elections in the same period: for these reasons, it possible to think that both politicians aspired to reach even a very basic agreement for that date.

Until October 2015, instead, there have been eleven rounds of negotiations and there is not a specific date set ahead for ratifying the Partnership. It is not unreasonable to think of a possible deadline for the end of 2017, when US President, Barack Obama, who is a strong supporter of the project and has launched the process at the beginning of his first mandate, will come to the end his second, and last, mandate. Looking at the US political scenario, in fact, the election of a Republican President in the US would risk, in fact, to further compromise the approval of the agreement or sensibly slow the process.

If we look at the current scenario, at their tenth meeting in June, the leaders of the G7, including Presidents Juncker, Tusk and Obama, gave the EU and US clear indications to intensify our discussions on TTIP and identify the way forward on all areas. Of key importance also, was the session of July 8th, when the European Parliament reinforced support to the negotiations.

Furthermore, on the US side, the US Congress has adopted the Trade Promotion Authority Bill<sup>60</sup> in June, which provides additional political impetus and support to trade negotiations.

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<sup>60</sup> The bill known as the Trade Promotion Authority (TPA), or more commonly "fast-track", makes it easier for presidents to negotiate trade deals. The authority means that Congress may only vote up or down on finalized trade agreements, not amend them. [www.bbc.com](http://www.bbc.com), consulted October 13, 2015.

On the other hand, there are still a lot of factors that can enlarge the timing of a closing or even threaten it. One of these is the complexity (and the number) of the sectors involved. According to Uri Dadush, Senior associate in Carnegie's International Economics Program, this complexity can generate several complicating factors that could even paralyze the deal. He is even skeptical on the positive conclusion of the process and argues that, even if the agreement was concluded, this would almost certainly happen within 2017 and the end of Obama's mandate. For Dadush, even though TTIP retains the determined support of the German and British governments as well as the administration of U.S. President Barack Obama, the partnership's prospects are increasingly cloudy. More than most other trade agreements, TTIP's motivation is geopolitical, and it is true that the deal has gained in relevance in the eyes of its proponents since Russia's invasion of Crimea, the latest jihadist insurgency in Iraq, and the electoral gains of isolationists on both sides of the Atlantic. But TTIP is a trade agreement, not an international defense treaty, and it is at risk of failing where it matters most.

Furthermore, Agencies such as the U.S. Federal Reserve, the U.S. Department of the Treasury, and the European Commission Directorate General for Agriculture appear to see TTIP as adding complexity without offering much in return. The absence of trade promotion authority—which allows the U.S. president to negotiate deals that Congress cannot amend—as well as the sheer scope and intricacy of the negotiations do not bode well for this well-intentioned initiative<sup>61</sup>.

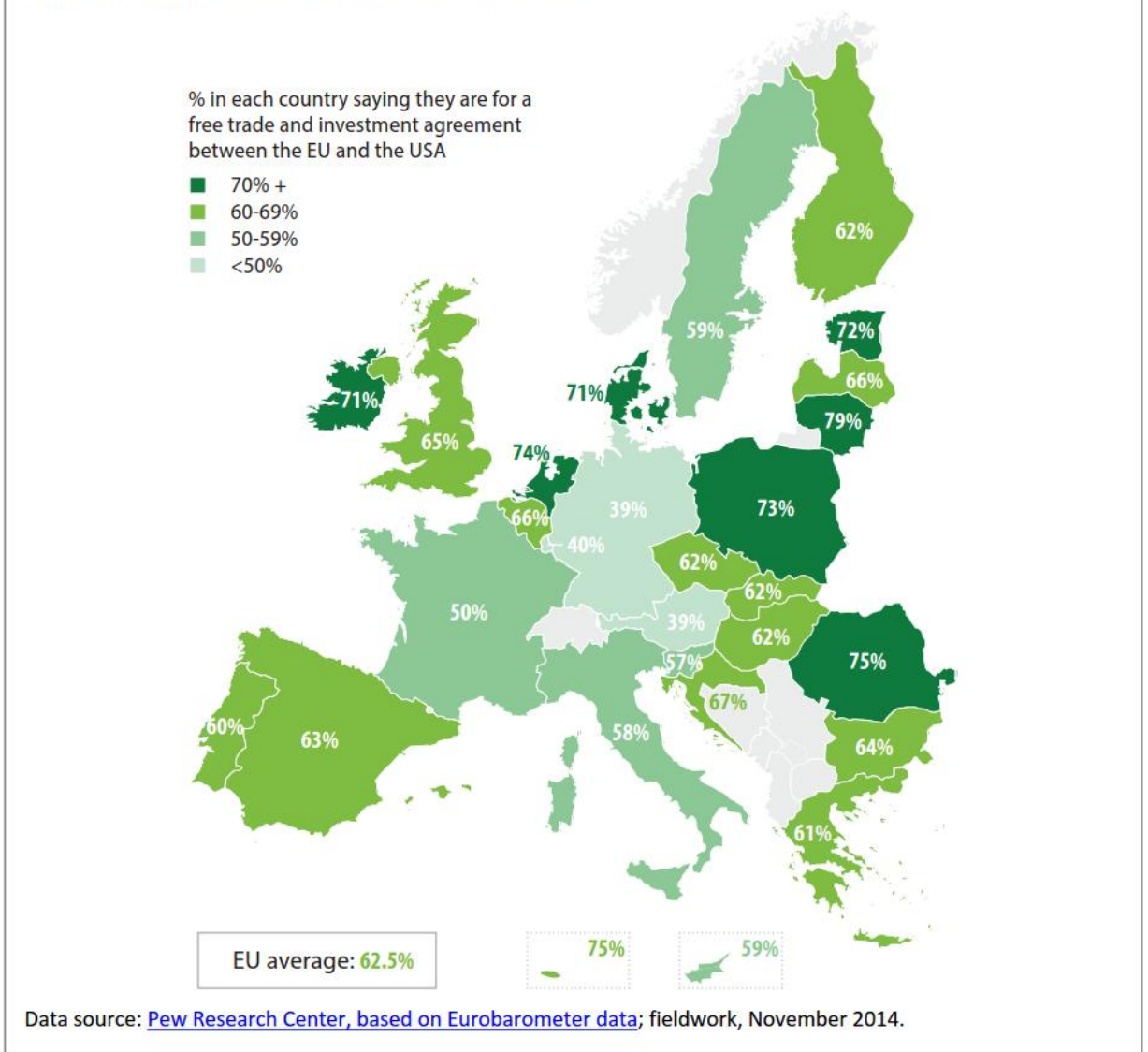
Another factor to be considered is the public support to the agreement, especially on the fragmented European side. Support for the TTIP negotiations varies greatly across EU countries (see figure X below). Germany and Austria see lowest public support for TTIP, where the political debate is focused on data protection, ISDS and regulatory cooperation (in particular with respect to food-safety regulations). The draft recommendations adopted by the INTA Committee on 28 May 2015 reflect these political sensitivities and differ substantially in tone from the Parliament's Recommendations of May 2013. They indicate precise directions in

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<sup>61</sup> “*Judy Asks: Is TTIP Dead in the Water?*” Carnegie Europe, 2014

which the institution would like to see future negotiations go. In particular, they give the opportunity to the Commission to submit further reforms on the ISDS mechanism and call for it to present a proposal for a permanent resolution mechanism<sup>62</sup>.

**Figure 2 – Support for TTIP in EU Member States**



**4. DIRECTIVES FOR THE NEGOTIATION OF TTIP: TTIP PURPOSE AND MACRO AREAS INDICATED BY THE EU COUNCIL**

<sup>62</sup> Laura Puccio, *op. cit.*



This section aims to analyze the possible content of the transatlantic partnership, seen from a European standpoint, considering the text proposals developed by the bodies of the EU institutions.

TTIP was created with the aim of harmonizing regulations and standards, to avoid duplicate provisions between European and US (which turned out to be a source no minimum spending) and, above all, to create the standards for many different sectors including agriculture, food, health, labor, environment, intellectual property, which could be followed by all countries in the world, in order for US and EU to be, even more than they already are, the creators of “highly exportable” rules.

The EU Council, in a text dated 17 June 2013 but published in October 2014<sup>63</sup>, specifies the main values that should inspire the agreement in question. The basis of the negotiations and the final treaty will always be respect for fundamental human rights, fundamental freedoms, democracy and rule of law. The two countries will support the efforts for a sustainable development of international trade. Same importance will have the parties' right to take the measures necessary to achieve legitimate public policy objectives on the basis of a level of protection of health, safety, labor, consumers, the environment and promotion of cultural diversity as outlined in the UNESCO<sup>64</sup> Convention on the Protection and promotion of diverse cultural expressions.

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<sup>63</sup> Council of the European Union, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, Brussels, October 2014.

<sup>64</sup> The United Nations Organization for Education, Science and Culture (UNESCO) was founded on 16 November 1945. UNESCO has 195 Members and eight Associate Members. It is governed by the General Conference and the [Executive Board](#). The Secretariat, headed by the [Director-General](#), implements the decisions of these two bodies. The Organization has more than 50 [field offices](#) around the world. Its [headquarters](#) are located at Place de Fontenoy in Paris, France. UNESCO works to create the conditions for dialogue among civilizations, cultures and peoples, based upon respect for commonly shared values. It is through this dialogue that the world can achieve global visions of sustainable development encompassing observance of human rights, mutual respect and the alleviation of poverty, all of which are at the heart of UNESCO'S mission and activities. UNESCO'S mission is to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information. <http://www.unesco.org/new/en/unesco/about-us/who-we-are/introducing-unesco/>, consulted October 14, 2015.

The agreement must be ambitious, comprehensive, balanced and fully consistent with the rules and obligations of the WTO. The purpose of the treaty is the reciprocal liberalization of trade in goods and services and rules on trade-related issues, with the ambition to go beyond the commitments of WTO. The shared objective is to take into account the specific changes of small and medium-sized enterprises for the development of trade and investment, together with the commitment of both signatories to communicate with all relevant parties, including the private sector and civil society organizations civil. The obligations of the agreement will be binding on all levels of government.

#### ***4.1 THE FOUR MACRO-AREAS***

In order to understand the features of the agreement is necessary to analyze it in the light of its key components<sup>65</sup>. The negotiations on the Treaty, in fact, are rotated around four principal main areas which are: market access, regulatory convergence, common rules and trade disputes, so it is interesting to analyze the European proposal around them. We hold to account, therefore, that for the creation of the text of the agreement the directives of the European Council will be the ones analyzed.

##### ***4.1.1 MARKET ACCESS***

The European proposal includes chapters on market access for goods and services (Articles 10-14), which aims to eliminate "duties on goods and restrictions on services, getting better access to public markets, and facilitating investments ". All those taxes or duties that are not explicitly justified by the agreement, will be abolished (Article 10). All this must be done through the creation of common standards in the EU and US, taking into account, however, the "Rules of Origin", like the rules of origin of the European Union and the interests of European manufacturers, with the aim of facilitating trade between the parties (Article 11).

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<sup>65</sup> Pierre Defraigne, *op. cit.*

Purpose that must surely be pursued as a priority, while giving each party the possibility, expressed by a clause in the agreement, not to proceed with the importation of a product on the other side if this could result in damage or threats to ' domestic industry (Article 14).

Within this macro-area of market access are the subcategory of Trade in Services and Establishment, whose standards express the goal to:

- reach a level equal to the liberalization achieved by the free trade agreements that already exist;
- ensure transparency, fairness and due process in the procedures for authorization and qualification;
- grant to companies of the other region an equal treatment;
- recognize all professional qualifications obtained in the territory of the other region;
- applying the agreement does not prevent the parties from applying their national law (i.e. Entry and residence) provided that, however, the application of the same does not compromise the benefits of the agreement.

The subcategory of the Investment Protection, is instead inspired by liberalization and investment protection (providing certainty for European investors in the US, promoting European standards of protection, granting an equal condition for both European and US investors).

Finally, in the subcategory of Public Procurement, the agreement aims at a better reciprocal access to public procurement markets at all levels of government (national, regional and local), and in the areas of public services, including the relevant operations of companies operating in this field and ensuring them a no less favorable treatment than the one accorded to locally-established suppliers.

#### ***4.1.2 REGULATORY CONVERGENCE***

Moving on to the second macro TTIP and Regulatory issues and non-tariff barriers, we find one of the basic rules of the agreement: to remove unnecessary barriers to trade and investments using instruments that can guarantee harmonization and cooperation, without prejudice to the possibility for each party to adjust the various sectors also in relation to diversity that characterize them. For this reason, the agreement also contains provisions relating to *Sanitary and phytosanitary measures (SPS)*, *Technical regulations, standards and conformity assessment procedures*, *Regulatory Coherence*, *Sectorial provisions*.

#### **4.1.3 COMMON RULES**

The third macro, Common Rules, focuses on the following areas: Intellectual Property Rights (the high value recognized by both parties to the protection of intellectual property), Trade and sustainable development (measures to facilitate and promote trade in environmentally friendly products and low-carbon, energy and resource efficiency of goods, services and technologies, including through green public procurement and to support purchasing decisions informed by consumers and to support the promotion of decent work through the effective implementation of national core labor standards of the International Labor Organization (ILO), *Customs and Trade Facilitation*, *Sectorial Trade Agreements* (agreement should supplement existing agreements), *Trade and Competition* (contain anti-trust, monopolies, competition, mergers and aid status), *Trade related energy and raw materials, provisions for Small and Medium-Sized Enterprises*, *Capital Movement and Payments*, *Transparency* (commitment to consult stakeholders before the introduction of measures with an impact on trade and investment; publication of general rules and measures with an impact on international trade and investment in goods and services; transparency regarding the application of measures that impact on international trade and investment in goods and services), with the possibility of including in the Treaty any provision resulting useful and necessary.

#### **4.1.4 TRADE DISPUTES**

The fourth and final macro, Trade Disputes, is the one that has created more problems. The agreement would be expected to create the so-called ISDS (Investor State Dispute Settlement), to enable investors, if they felt that the terms of the investment have been violated, to take legal action directly against the countries where they own investments and to bring their case not in front of a national body of the state involved, or to a US federal / European agency but in front of an arbitral tribunal created specifically for this dispute (including the same European Council defining it to be a tool desirable but not required, that must be added to any balance of the Agreement<sup>66</sup>). In fact this type of dispute resolution is not a new tool, indeed existed for more than 60 years but especially between 1995 and 2010 increased the number of agreements containing ISDS<sup>67</sup>. A specific paragraph is not devoted to this macro area but we find it addressed in Article 23 of the proposed European text of 2013, about investment protection that, first of all, indicates the principles on which the settlement of disputes should be based and appointment, among others: the principle of non-discrimination (i.e. equal treatment), the principle of a more favorable national treatment, protection against direct and indirect expropriation, including the right to request adequate compensation and effective compensation (thus the prohibition for governments to expropriate, directly or indirectly, unless it is for a public purpose and then compensated). The agreement should aim to provide an effective mechanism for dispute resolution, which provides transparency, independence of the arbitrators and the predictability of the agreement also by the possibility of binding interpretations of the same text by the parties. All this, however, should not interfere with the right of investors to resort to the mechanism of dispute resolution procedure.

#### ***4.2 TREATY RELATED ISSUES***

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<sup>66</sup> Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, March 2015.

<sup>67</sup> Sergei Stanishev, *op.cit.*

#### **4.2.1 TRANSPARENCY OF NEGOTIATIONS**

A first problem with TTIP, raised even before the protests relating to its content, concerns the manner of its negotiations. The lack of transparency with which these have been carried out, despite numerous requests to publish the negotiations from both parties, has affected the already negative public vision of TTIP. In July 2014 also the European Mediator, Ignacio Garcia Bercero, animated by the conviction that transparency is the only way to achieve a rational and informed public debate, in full respect of democracy, requested the Council the publication of the document concerning TTIP,<sup>68</sup>. Today, despite many protocols and summaries of public consultations are on the website of the European Commission, there is still the fear that many parts of the agreement are to be completed "in camera"<sup>69</sup>, despite the fact that the institutions, including the US Ambassador Michael Froman<sup>70</sup>, say that they have been setting up advisory committees, that there are more than 500 consultants representing small business, environment, health, agriculture, local and state officials and trade unions, consumers, and they are always looking for better ways, in addition to publications on the website, to engage the public. Karel De Gucht, European Commissioner for Trade, responded to criticism<sup>71</sup> about the transparency of trading in an article in the Guardian in December 2013 saying that "*The commission has regularly consulted, in writing and in person, a wide range of civil society organizations, and the most recent meeting had 350 participants from trade unions, NGOs and businesses*". However, the Corporate Europe Observatory<sup>72</sup> indicated that "*more than 93% of Commission meetings with stakeholders during the preparation of the negotiations were with big business*"

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<sup>68</sup> Ignacio Garcia Bercero, *speech at the TTIP sixth round*, Brussels, July 2014.

<sup>69</sup> Dr. Ania Skrzypek, *op.cit.*

<sup>70</sup> Ambassador Michael Froman in his speech in Rome in October 2014.

<sup>71</sup> George Monbiot, *The lies behind this transatlantic trade deal*, The Guardian, December 2013, Retrieved 1 January 2015.

<sup>72</sup> Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the privileged access and influence enjoyed by corporations and their lobby groups in EU policy making. This corporate capture of EU decision-making leads to policies that exacerbate social injustice and accelerate environmental destruction across the world. Rolling back corporate power and exposing greenwash are crucial in order to truly address global problems including poverty, climate change, social injustice, hunger and environmental degradation. <http://corporateeurope.org/about-ceo>, consulted October 13, 2015.

and that the consultation of civil society has been more an "*information session after talks had already been started*"<sup>73</sup>.

#### **4.2.2 IS IT TOO DIFFICULT TO OBTAIN CONSENT?**

The second issue is closely connected with its decision-making mechanisms of the European Union and the United States<sup>74</sup>. The TTIP agreement must be ratified fully respecting democracy, so it must obtain the consent of the European bodies, including national, and the consent of the organs US. As for Europe, the agreement must receive the consent of the European Parliament and the 28 national parliaments which, not being able to edit the text, can only decide whether to accept it, with the result that just that one element is not desired by individual, and here hangs the chain. From the US side also it requires the final approval of the US Congress, highly complex organ that embodies the often times conflicting wishes of the Federated States. That's why, in addition to the difficulties inherent in negotiating the content of the agreement, it will be difficult, then, to find a consensus.

#### **4.2.3 NEGOTIATIONS ARE ASYMMETRICAL?**

The third unknown factor of the agreement, although it would be better to call it a concern, is linked to a popular way to see the report of "our" Europe against the great American entity, an almost "arrogant" entity. And then, it is almost natural to ask ourselves: negotiations on all TTIP are unbalanced in favor of the United States or are conducted fairly (as far as we know)?<sup>75</sup> On the assumption, as predictable as important, that this is a bilateral agreement, to be signed by both parties in order to enter into force so that, if the EU was aware of not having a voice in the negotiations, could not sign, I would get to my conclusion following

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<sup>73</sup> Corporate Europe Observatory, *European Commission preparing for EU-US trade talks*, Retrieved 14 April 2015.

<sup>74</sup> Pierre Defraigne, *op. cit.*

<sup>75</sup> Mario Telo, *op. cit.*

this path. If the United States is a federal government that "make" laws, which become binding on the Federal States, in the European Union the situation is quite different: there are in fact so many states, each autonomous and independent, who has decided to join the union and accept its rules and regulations. An union, however, that is not a subject "external" to this system but, instead, the result of it. All European rules, regulations and standards arise from negotiations and agreements made between the member states themselves. All this to prove that the European standards, being the product of multilateral "internal" negotiations, are much more sophisticated, and are a major strength of the European Union that enables it to negotiate fully with another great power. So, if America can "raise its voice" thanks to its power, Europe can respond with the help of its principles and values.

On the other side we wonder if it could be an advantage for the US the theoretical "addiction", both on the energy and military resources, of the European Union towards the United States. Even if this represents a concrete risk, it would be difficult, perhaps, in a global context as well, thinking about total and complete hegemony of the United States. So we could say, again for all we know, that the negotiations are perfectly bilateral, certainly more fair and balanced than those of Bretton Woods<sup>76</sup> in 1944.

#### ***4.2.4 MORE DIFFERENCES THAN SIMILARITIES?***

It is true that United States and Europe share important values and interests, even dictated by a "common" history seeing them fight three times together against German imperialism, against the Nazis and against Soviet communism, and very

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<sup>76</sup> A landmark system for monetary and exchange rate management established in 1944. The Bretton Woods Agreement was developed at the United Nations Monetary and Financial Conference held in Bretton Woods, New Hampshire, from July 1 to July 22, 1944. Major outcomes of the Bretton Woods conference included the formation of the International Monetary Fund and the International Bank for Reconstruction and Development and, most importantly, the proposed introduction of an adjustable pegged foreign exchange rate system. Currencies were pegged to gold and the IMF was given the authority to intervene when an imbalance of payments arose.



often Europe was grateful to Americans for their help in these conflicts. They shared the New Deal<sup>77</sup>, the Bretton-Woods and the Marshall Plan<sup>78</sup>. Today, as I mentioned, there is a strong strategic alliance in place, NATO. But what and how important are the differences between the two powers? Europe is inspired by Kant and geared to multilateralism and America is inspired by Hobbes and is seen as a representative of unilateralism. The United States are a federal state characterized by unity in all areas: language, currency, the role of religion, working conditions, safety, pensions and health care, education, mobility. Across Europe, in which the true unity is just a "work in progress" there are different languages, different currencies (although the prevalence of the Euro), different economic conditions. And yet, although the history of the last century saw an approach of the US and EU, there are still considerable differences within their history: the United States have never been invaded and have never fought a war on their territory, unlike Union European. But then, in the light of the "heaviness" of these differences we wonder if it is possible to imagine a large transatlantic market in which there are two currencies. And will it be possible to reconcile some differences, such as energy and environmental strategies, that are central to competitiveness and consistency of a multilateral economic order?<sup>79</sup>

#### ***4.2.5 THE CONVERGENCE OF THE TWO ENTITIES DOES NOT REPRESENT A PARTNERSHIP***

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<sup>77</sup> The New Deal was a series of domestic programs enacted in the United States between 1933 and 1938, and a few that came later. They included both laws passed by Congress as well as presidential executive orders during the first term (1933–37) of President Franklin D. Roosevelt. The programs were in response to the Great Depression, and focused on what historians refer to as the "3 Rs": Relief, Recovery, and Reform. That is Relief for the unemployed and poor; Recovery of the economy to normal levels; and Reform of the financial system to prevent a repeat depression. Carol Berkin, *Making America, Volume 2: A History of the United States: Since 1865*. Cengage Learning, pp. 629–32. 2011.

<sup>78</sup> The Marshall Plan (officially the European Recovery Program, ERP) was an American initiative to aid Western Europe, in which the United States gave \$13 billion (approximately \$130 billion in current dollar value as of August 2015) in economic support to help rebuild Western European economies after the end of World War II. The plan was in operation for four years beginning in April 1948. The goals of the United States were to rebuild war-devastated regions, remove trade barriers, modernize industry, make Europe prosperous again, and prevent the spread of communism. Michael J. Hogan, "*The Marshall Plan: America, Britain and the reconstruction of Western Europe, 1947-1952*", Cambridge University Press, 1987.

<sup>79</sup> Pierre Defraigne, *op.cit.*

Two individual contributions on these issues within the project Transworld<sup>80</sup> have already shown that to adjust their policies to promote democracy, the EU and the United States responded to different types of triggers (Babayan<sup>81</sup> and Viviani<sup>82</sup> 2013, Babayan, 2013). While the European Union is more inclined to change its policies because of external developments, such as the Arab Spring, the United States respond primarily to domestic developments, as national security issues or changes of presidency. So much so that it speaks of a structural convergence, which does not necessarily have to result in a partnership. The document Transworld, by Nelli Babayan and Thomas Risse, argues that the concepts of convergence and cooperation must be differentiated. Although the proximity between the EU and the US is unlikely to disappear, especially thanks to a part of history that is similar, in terms of safety and other objectives of the common foreign policy, the two powers are still short of a real partnership, at least in the field of democracy promotion. In this field we see increased convergence but a low policy coordination and cooperation still exists between the two powers, as recent events in Ukraine have shown. In other words, the convergence policy does not lead necessarily to a partnership or cooperation. In many cases, the United States and the European Union have sought to promote democracy in the recipient countries, but rarely have coordinated their action. The analysis, however, shows that cooperation is possible, but so far it needs external pressures. While convergence is increasingly observed in the area of common interests and identity, absence of joint institutions to address the issue of promoting democracy indicates the lack of cooperation. The situation in the countries of the South Caucasus have shown that at least until the end of the 2000s the United States and the European Union have limited their coordination to short annual meetings, rather than deepen the discussion and share experiences in this field. To bring another example, just think of the fact that EU and US have implemented similar policies in the Middle

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<sup>80</sup> Nelli Babayan and Thomas Risse, *So close, but yet so far: European and American democracy promotion*, July 2014.

<sup>81</sup> Dr. Nelli Babayan is a Post-doctoral researcher within TRANSWORLD project at the Freie Universität Berlin. <http://www.transworld-fp7.eu/?p=590>, consulted October 13, 2015.

<sup>82</sup> Prof. Alessandra Viviani is associate professor of International Human Rights Protection, University of Siena, and a member and secretary of the Centre for Human Rights and Immigration Law, University of Siena. She has published articles and chapters on Human Rights. <http://www.transworld-fp7.eu/?p=222>, consulted October 13, 2015.

East and North Africa (MENA): the "Middle East Partnership Initiative"<sup>83</sup>, the "Greater Middle East"<sup>84</sup> and "North African Partnership Initiative"<sup>85</sup> for the United States, and the "Euro-Mediterranean partnership"<sup>86</sup>, "Union for the Mediterranean"<sup>87</sup> and "European Neighborhood Policy (ENP)"<sup>88</sup> for the EU. However, their approaches have stressed that their policies cannot really be harmonized

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<sup>83</sup> The U.S.-Middle East Partnership Initiative (MEPI) of the State Department offers assistance, training, and support to groups and individuals striving to create positive change in the society. MEPI works in 18 countries and territories, partnering with civil society organizations (CSOs), community leaders, youth and women activists, and private sector groups to advance their reform efforts. MEPI's approach is bottom-up and grassroots, responding directly to local interests and needs. MEPI has been active in the MENA region since 2002, contributing over \$600 million to more than 1,000 grant projects administered by our offices in Washington, D.C. and the region. <http://mepi.state.gov/about-us.html>, consulted October 13, 2015.

<sup>84</sup> The Bush administration in 2004, launched a "Greater Middle East Initiative" at the G-8 summit meeting in June. The plan was to bring the United States, Europe, and the Middle East together around a set of commitments to help transform the region politically and economically. Thomas Carothers and Marina Ottaway, *Greater Middle East Initiative: Off to a false start*, March 2004.

<sup>85</sup> The North Africa Partnership for Economic Opportunity (PNB-NAPEO) is a public-private partnership of US and North Africa business leaders, entrepreneurs, civil society leaders, and governments with a mission to foster job creation, entrepreneurship, and education with a focus on youth. PNB-NAPEO has created a network of stakeholders which is locally-owned and locally-driven. Chapters have been established in Algeria, Mauritania, Morocco, and Tunisia, and one is currently being formed in Libya. The network created by PNB-NAPEO is a vehicle for stakeholders in the United States and North Africa to identify, initiate and sustain projects at the Maghreb regional level to foster investment opportunities, entrepreneurship, and job creation, especially for youth. Over the next five years PNB-NAPEO is committed to positively impacting 100,000 people. <http://www.aspeninstitute.org/policy-work/new-beginning/us-north-africa-partnership-economic-opportunity>, consulted October 14, 2015.

<sup>86</sup> The Union for the Mediterranean promotes economic integration and democratic reform across 16 neighbors to the EU's south in North Africa and the Middle East. [http://eeas.europa.eu/euromed/index\\_en.htm](http://eeas.europa.eu/euromed/index_en.htm), consulted October 14, 2015.

<sup>87</sup> The Union for the Mediterranean (UfM) is a unique Mediterranean institution bringing together 43 countries (28 EU member states and 15 Southern & Eastern Mediterranean countries). It aims at enhancing cooperation and partnership in the Mediterranean through the implementation of specific regional cooperation projects. The Union for the Mediterranean operates from the UfM Secretariat, established in Barcelona in March 2010. More than 17 nationalities working in a multicultural environment that fosters cooperation and intercultural communication and exchange, form the staff of the Secretariat. We offer an interesting and dynamic workplace where people can achieve their professional goals. <http://ufmsecretariat.org/vacancies/>, consulted October 14, 2015.

<sup>88</sup> Through its European Neighborhood Policy (ENP), the EU works with its southern and eastern neighbors to achieve the closest possible political association and the greatest possible degree of economic integration. This goal builds on common interests and on values — democracy, the rule of law, respect for human rights, and social cohesion. The ENP is a key part of the European Union's foreign policy. [http://eeas.europa.eu/enp/about-us/index\\_en.htm](http://eeas.europa.eu/enp/about-us/index_en.htm), consulted October 14, 2015.

In some cases, such as MENA, this inability to cooperate was more visible. In addition, only 21% of US leaders and 13% of those interviewed by Transworld Europeans think that the EU and the US should cooperate in promoting democracy. However, especially in some countries where democracy promotion is particularly important and delicate, the activities of the promoters should be closely coordinated to avoid duplication or contradictory strategies. The Document Babayan and Risse argues, moreover, that the EU and the US only occasionally collaborate and that collaboration is stimulated only by a sense of emergency. The situation in Ukraine and, to some extent, Libya show that the EU and the US coordinate their actions and work together for the promotion of democracy only when they face economic crises or security problems at hand. Although Libya is not a real case of promotion of democracy, the activities carried out there shows that the two powers can cooperate even within existing institutions, in this case NATO. And although the intervention in Libya could not have had a lasting positive effect on the democratization (Hehir 2013, Kuperman 2013b) and is considered by some people as a successful "imperfect narrative" (Kuperman<sup>89</sup> 2013), the fact that EU and the United States have at least tried to respond quickly to what was perceived as a crisis indicates the potential for future cooperation.

Even the Ukrainian crisis has demonstrated that the EU and the US can perform coordinated action when they want, when such action is crucial, and it may cooperate in the context of existing institutions. However, these crises have also shown a lack of institutional cooperation that address the issue of the promotion of democracy even when there are no problems or imminent threats to safety.

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<sup>89</sup> Alan J. Kuperman is Associate Professor of Public Affairs at the Lyndon B. Johnson School of Public Affairs at the University of Texas, Austin. Prior to joining the LBJ School faculty in 2005, Kuperman was Resident Assistant Professor of International Relations at the Johns Hopkins University School of Advanced International Studies (SAIS) in Bologna, Italy. He also is the author of *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings, 2001) and co-editor of *Gambling on Humanitarian Intervention: Moral Hazard, Rebellion, and Civil War* (Routledge, 2006). In addition to his academic experience, Kuperman has been Legislative Director for Congressman Charles Schumer of New York, Legislative Assistant for U.S. House Speaker Thomas Foley, Chief of Staff for Congressman James Scheuer, Senior Policy Analyst for the nongovernmental Nuclear Control Institute, and fellow at the U.S. Agency for International Development. Scott Horton, *Scott Horton interviews Alan J. Kuperman*, April 2011.

As of today, the most likely course of action in support of democracy is cooperation on specific issues, as it was in Ukraine and Libya.

#### **4.2.6 TOO MUCH BILATERALISM?**

Another aspect to consider regarding TTIP, is the possible negative effect that might have excessive bilateralism of the agreement. In an increasingly globalized and in a political and economic landscape that also sees new countries as protagonists, would it really be advantageous to close in bilateralism and not take into account other players within similar deal with such a wide scope? The concept of "Contested multilateralism"<sup>90</sup>, which certainly highlights an important change in the international system, could be a winning game, and not only for the two major Western powers. Probably, as Mario Telo<sup>91</sup>, president emeritus of the Institute of European Studies at the University of Brussels, and J. Monnet, Professor of European Union institutions in Brussels ULB and Luiss in Rome, argue, TTIP could have happened if you would create three conditions: first, an opening to other countries. And it does not mean enlarging the agreement to other entities, but simply starting to see this agreement as something not solely on European Union and the United States but that, as signed and ratified only between them, can still bring benefits to other countries (Korea, Mexico, South America). An agreement where the two will have really reached their goal only if they manage to create the right standards and regulations for all countries and not only for the two powers. Second factor, the concept of "Western civilization" should be abandoned, as if it should be exported to a model of the West instead of just creating a new one in keeping with the new world situation, and reaching the conviction that the TPP agreement will not conflict with TTIP and that international relations between Europe and China, India, Brazil and other countries are important, so that they must be informed of any progress in the negotiations of TTIP.

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<sup>90</sup> Mario Telo, *op.cit.*

<sup>91</sup> Mario Telo, *op. cit.*

#### **4.2.7 TTIP AS A RISK OF DISTRACTION FOR EUROPE**

Given the many problems mentioned earlier, with which the EU had to deal in recent years, Pierre Defraigne<sup>92</sup> doubt creeps further problem, the whole European Union, which may be linked with TTIP: there is risk that too much attention is paid today to the agreement by the European institutions. These bodies might be distracted from much more important domestic difficulties. From the political point of view, as Pierre Defraigne argues, the EU should focus on the completion of the unity of the single market, the strengthening of the governance of the euro zone and remedy its dangerous drift toward deflation. The European Union should address the issue of the construction of its own strategic capability, which then follows a common foreign policy and effective in the promotion of European values and interests, other than those of the United States. Europe should re-evaluate this agreement in light of its long-term future, but is not yet very clear for most of the European states. However, regardless of the institutional form that the EU decides to adopt, and whatever the geographical territory it covers, it will have to deal with three challenges: the first is the choice of a social and environmental model that constitutes the common point of reference to all national domestic models, in order to reconcile the unity of the EU's single market with free movement of persons and the production of goods and services. The second is to achieve a sufficient degree of strategic autonomy in order to take responsibility for the defense of this model, which reflects not only a way of life, but deep and important values that make up European civilization. The third is climate change, a matter of life and death for some people who expect a drastic change in our habits of consumption and production. Once Europe has achieved these aims and rewritten in detail some key parts of his "being", then it should be ready to deal with that and conclude the transatlantic agreement in an advantageous way.

#### **4.2.8 THE TTIP AMBIVALENCE**

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<sup>92</sup> Pierre Defraigne, *op.cit.*

A question arises also from the legal point of view<sup>93</sup>. It is Article 207 of the Lisbon Treaty, the legal basis for the approximation of laws between the two continents?

*ART 207 TFUE:*

*1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*

*2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.*

*3. Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.*

*The Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.*

*The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.*

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<sup>93</sup> Pierre Defraigne, *ibid.*

*4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.*

*For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.*

*The Council shall also act unanimously for the negotiation and conclusion of agreements:*

*(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;*

*(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them.*

*5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.*

*6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization<sup>94</sup>.*

In my opinion, reading the first paragraph, we can guess that this article is actually regarding TTIP, a trade agreement is concerned also, and especially, the tariff changes covered by Article 207. Since, then, this article discipline dictated specially for trade policy within the EU, the second paragraph leaves to the Parliament and the Council the power to make the necessary arrangements. Subsequently, however, we have to be very interested to the third paragraph,

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<sup>94</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E207:en:HTML>, consulted October 14, 2015.



which provides for the possibility of trade agreements with third countries, like TTIP, and, in addition to consider applicable Article 218 TFEU (which describes in detail the process of negotiating with a third country), governs the procedures for negotiation: it is the Commission which, once approved by the Council, shall continue the negotiations, except for having to regularly report the results to the European Parliament and to a Committee appointed by the Council to assist the Commission; everything is planned, as is expressly mentioned by the third paragraph, to ensure compliance with policies and internal rules of the EU. The fourth paragraph sets the rules for the Council resolutions, generally requiring a qualified majority, except in special cases, indicated therein, where unanimity is required. It is fair to conclude this analysis in the same way it ended the sixth paragraph of Article 207, that is, by specifying that, as standards are dictated by a common commercial policy, these do not affect the delimitation of competences between the Union and the Member States.

After a textual analysis of Article 207 TFEU, and after noting that the article, together with 218 TFEU, constitutes a factual basis for the standardization of regulations between the two powers, we can reach the following conclusions: First we understand that, if the negotiations with third necessarily imply a degree of confidentiality, the setting of common rules and standards must be transparent and under the constant supervision of the European Parliament. Secondly, we realize how complicated the process of acceptance is: the ratification by the European Parliament and by the 28 national parliaments brings a big obligation which excludes the right to edit the text, and final approval by the US Congress shows all the risk to the unpredictability of the legislative body. These issues are the basis of the TTIP ambivalence: Europe is trying to create a single market with the United States, as the cornerstone of the system, or is trying to create two types of market, one with the Member States and the EU one with the United States?

#### ***4.2.9 CONTRADICTORY***

The US Trade Representative Ron Kirk said that "*The United States has been very clear about the desire to move forward in a comprehensive way. It means, therefore, that all sectors, including agriculture, are on the negotiating table. That is whether GMO or other problems, we want to address these non-tariff barriers that hinder our business*". The European Commissioner for Trade Karel De Gucht, however, contradicted what was said by Kirk because, in response to a specific question on agriculture, said that: "*It is true that Europe and the United States have different views on some key issues regarding, for example, food safety, but it is also true that a future agreement will not change the existing European legislation on GMOs. Let me repeat that – she concluded: there will be no change*". In addition, some EU member states including France are already trying to exclude some sensitive issues from the negotiations. For example, the French Trade Minister Nicole Bricq said that "*We want to be excluded from the negotiation everything relating to culture, because it is non-negotiable.*"<sup>95</sup> In light of these conflicting statements by leading representatives of the will of the two sides of the Atlantic, there is a certain perplexity tied to TTIP field: what TTIP will really address? Who will get the better, for example, in what looks like a tug of war in the issues of agriculture and food? Can a transatlantic agreement be ratified, even if Europe does not open the doors to GMOs, or Europe lowering his standards in that field will be a necessary condition for the agreement to be signed?

#### **4.2.10 TTIP AS A SECOND CHOICE FOR THE US?**

A survey conducted in May 2015 by the Pew Research Center<sup>96</sup> shows that in the Americans were in favor of a trade agreement with the EU (53% of Americans would find a profitable trade agreement between the EU and the US). However

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<sup>95</sup> Tyson Barker, director of Transatlantic Relations, Bertelsmann Foundation and Garrett Workman, associate director, Global Business and Economics Program, Atlantic Council, *The Transatlantic Trade and Investment Partnership: ambitious but achievable, a stakeholder survey and three scenarios*, April 2013.

<sup>96</sup> Pew Research Center is a nonpartisan fact tank that informs the public about the issues, attitudes and trends shaping America and the world. They conduct public opinion polling, demographic research, content analysis and other data-driven social science research. They do not take policy positions. <http://www.pewresearch.org/about/>, consulted October 13, 2015.

TTIP is not at the center of public debate because the American Trans-Pacific Partnership (TPP) is currently the controversial trade agreement for the US population, because of the fear of losing jobs. Consequently, TTIP come before the US Congress only after TPP, and perhaps even after the African Growth and Opportunity Act (AGOA)<sup>97</sup>. So, as outlined by Laura Puccio<sup>98</sup>, there is a risk that the US will not devote the required attention to the agreement with the EU, as committed to reflect on the problems of TPP, and instead Europe focuses on TTIP even more than required, perhaps leaving out, as I said above, some basic domestic issues, and that then Europe will find itself "isolated" from a stalemate, while the United States will have other treaties and, therefore, more opportunity to enhance trade? This concern, however, is only justified in part because, in any case, even the EU is pursuing treaties, especially bilateral, with other countries.

#### ***4.2.11 HOW TO DEAL WITH AN ADVERSE PUBLIC OPINION?***

In the opinion of Mario Telo<sup>99</sup> and J. Monnet, acceptance of TTIP by the public, certainly not helped by the performance of the negotiations so far, will only be possible to four conditions: first, that a critical position is also taken by the EU institutions with regard to sensitive transatlantic issues, like ISDS and the protection of personal data of EU citizens (by the NSA and the FISA); secondly, that TTIP must not weaken the internal cohesion of the euro area, which right now, after the sovereign debt crisis, is being strengthened under pressure from Merkel and the interests of Germany, France, Italy and other EU Member States who are willing for European integration. Third, that TTIP should not have

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<sup>97</sup> The African Growth and Opportunity Act ([AGOA](#)) was signed into law by President Clinton in May 2000 with the objective of expanding U.S. trade and investment with sub-Saharan Africa, to stimulate economic growth, to encourage economic integration, and to facilitate sub-Saharan Africa's integration into the global economy. The Act establishes the annual U.S.-sub-Saharan Africa Economic Cooperation Forum (known as the AGOA Forum) to promote a high-level dialogue on trade and investment-related issues. The U.S. Congress requires the President to determine annually whether sub-Saharan African countries are eligible for AGOA benefits based on progress in meeting certain criteria, including progress toward the establishment of a market-based economy, rule of law, economic policies to reduce poverty, protection of internationally recognized worker rights, and efforts to combat corruption. <https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa#>, October 13, 2015.

<sup>98</sup> Laura Puccio, *op. cit.*

<sup>99</sup> Mario Telo, *op. cit.*

military implications for transatlantic relations, especially with regard to burden sharing and military intervention. Fourth, that TTIP should not be presented as a 'civilization project' against developing countries, and particularly China, but as a concrete, open and potentially inclusive business agreement.

## ***5. POTENTIAL COMMON AND INDIVIDUAL BENEFITS FROM TTIP***

This paragraph aims to describe a situation where TTIP is already in force and tries to highlight all possible benefits that an agreement, with the contents described in the preceding paragraph, may bring to the two sides of the Atlantic.

If two major powers such as the US and EU agreed to negotiate a deal of this size, there should be some benefits from an economic (especially but not exclusively) for both sides of the Atlantic. Leaving to paragraph 6 the task of analyzing, through the eyes of experts and doctrine, if these will really become concrete and, if so, whether they will be in respect of all or only of a few individuals and institutions, here we set the goal to speculate, through the ' help of some data, the potential benefits that we can see by analyzing text and objectives of the Agreement. While both sides of the Atlantic have invested so much on TTIP that a failure, at least overall, seems to be excluded, on the other hand, however, it must be specified that it is not easy to predict the results of the free trade agreement; for this reason, many have imagined that a first objective will be to put in place an agreement which may contain only provisions for the reduction of tariffs, then leave the way open for future negotiations in other areas. For the moment, however, this does not look the way you want to be covered; therefore we analyze the agreement in its entirety.

### ***5.1 COMMON BENEFITS***

Many of the potential benefits from TTIP are common to both parties, then, in the first part, we will examine together and schematically the common benefits for the

US and EU and, only then, deep our analysis on each of the specific benefits for the two signatories.

### ***5.1.1 GOODS AND SERVICES EXPORT INCREASE***

The elimination of customs duties and harmonization of regulations, the main purposes of TTIP, bring with them an opening of the market (high expression of what is called globalization); and opening the door to European and American trade of the other party follows inevitably, brings with it a major export of goods and services on both sides of the Atlantic<sup>100</sup>. Both the US and EU have, for economic, geographical and environmental factors, something that the other part is missing and needs; and if now, before TTIP, this export is there but to a lesser extent because of tariff and non-tariff barriers, tomorrow, with TTIP, there may not be any obstacle to a continuous flow of goods and services between the two sides of the Atlantic.

### ***5.1.2 NEW JOBS CREATION***

The official study on which the EU<sup>101</sup> relies has shown that the just quoted "unconditional" opening markets would, as a first consequence, create higher paid jobs, driven by the exponential increase of trade and import / Exports of products. Examples are the jobs that could arise in relation to the proliferation of bureaucratic relations between the two powers, so that the public sector may need more resources to entertain the administrative and commercial relations with the public sectors of the other party; jobs arising from the need to transport (by land, sea, air) of the products to be exported, those resulting from the increased companies' sales that would need more and more resources to develop all areas related to trade itself ( warehouses, marketing campaigns, administration); and,

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<sup>100</sup> Center for Economic Policy Research, *Reducing Transatlantic barriers to trade and investment*, London 2013.

<sup>101</sup> Center for Economic Policy Research, *ibid.*

finally, those that may arise in relation to ISDS, the mechanism of dispute resolution but still much disputed provisions of TTIP.

### **5.1.3 GDP GROWTH**

Another consequence of the elimination of duties, and the increase of export products, is the growth of GDP (Gross Domestic Product). In March 2013, an economic evaluation made by the European Centre for Economic Policy Research<sup>102</sup> estimated that a comprehensive agreement would result in an annual growth of European GDP by 68 to 119 billion euro by 2027 and the annual growth of US GDP from 50 to 95 billion euro in the same period of time<sup>103</sup>. The 2013 report also estimates that a limited agreement, only focused on rates, would produce an annual growth of GDP in the EU 24 billion euro by 2027 and the annual growth of 9 billion Euros in the United States. If the increase in GDP was divided equally among the persons concerned, everything would result in an increase in disposable income of about 545 euro in the EU and about \$ 655 in the US, for a family of four<sup>104</sup>.

The same study, as reported by the European Commission, showed that TTIP, as well as boosting the economy of the two powers as mentioned above, would also increase of the GDP of the rest of world of 10 billion Euros.

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<sup>102</sup> The Centre for Economic Policy Research (CEPR) was founded in 1983 to enhance the quality of economic policy-making within Europe and beyond, by fostering high quality, policy-relevant economic research, and disseminating it widely to decision-makers in the public and private sectors. Drawing together the expertise of its Research Fellows and Affiliates, CEPR initiates, funds and coordinates research activities and communicates the results quickly and effectively to decision makers around the world. The Centre is an independent, non-profit organization and takes no institutional policy positions. CEPR is based on what was (in 1983) a new model of organization, a “thinknet”. It is a distributed network of economists, who are affiliated with but not employed by CEPR, and who collaborate through the Centre on a wide range of policy-related research projects and dissemination activities; One of CEPR’s main achievements has been to create a virtual “center of excellence” for European economics through an active community of dispersed individual researchers, working together across international boundaries to produce high-quality research for use by the policy community and the private sector. <http://www.cepr.org/about-cepr>, consulted October 13, 2015.

<sup>103</sup> Center for Economic Policy Research, *op.cit.*

<sup>104</sup> “*Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment*”. Trade.ec.europa.eu. Retrieved 2 February 2014.

#### **5.1.4 BENEFITS FOR SMALL MEDIUM ENTERPRISES**

In the US 90% of all exporters are small businesses, but only 1% of small business exports and most of them export to only one country; in Europe the situation is similar: in Italy, for example, small businesses represent more than 99% of all businesses. They provide more than half of workplaces in the US and, on average, 9 out of 10 in a European country, such as Italy<sup>105</sup>. The first objective to be achieved with TTIP is to boost the export for the small and medium enterprises, which are important players on both sides of the Atlantic. A further benefit for small and medium-sized enterprises would be, for example, to, not having to undergo checks for duplicate systems by harmonizing regulations, which at the same time would be a benefit for consumers because these checks could be more effective. The same Frances G. Burwell, Vice President of the Atlantic Council, insists that, even if there is a general perception that TTIP is only for large companies, is not taken account that they still have legions of lawyers to deal with the bureaucracy and therefore TTIP, with the possibility that a product tested and approved by the European Union, is sold, without further controls, including the United States and vice versa, actually meets the small and medium-sized enterprises that have a simplified structure.

#### **5.2 BENEFITS FOR THE EUROPEAN UNION**

##### **5.2.1 EXPORT OF STANDARD EUROPEAN VALUES**

An increase in the export of European products could be connected, for Sergei Stanishev<sup>106</sup>, Chairman of the Party of European Socialists and a member of the European Parliament, with an export of values related to such goods and services; standards, which, in many areas in the USA, are lower and of which, therefore, wide categories of people may benefit. We are talking about workers' rights, environmental protection and consumer protection, areas where it is crucial that

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<sup>105</sup> Ambassador Michael Froman in his speech in Rome in October 2014.

<sup>106</sup> Sergei Stanishev, *op.cit*

the European Union does not accept lower level of standards. Some examples, among many possible, are those related to food and, therefore, consumer protection, such as the prohibition of GMOs and hormones in beef (for which, however, the WTO declared the EU has failed to scientifically prove the damage caused by these hormones), or the obligation to indicate some geographical marks, some designations (i.e. PDO), who worried the US producers. Another example, demonstrating that the existence of higher European standards definitely concern American producers and sellers, is the presence of typical European restrictions on some pesticides, limitations that US negotiators are trying to delete.

This section wants to prove that, despite all the fact mentioned above should be seen as a possible benefit for the European Union, the situation depends on the negotiations and whether and how much the European negotiators will be able to maintain high certain standards and certain criteria. In fact, as the export of these high European standards could be a benefit, in the same way, if not met, it could instead be a big risk for the European Union and its citizens (not only as consumers, but also because workers).

### ***5.2.2 EUROPEAN ACCESS TO THE AMERICAN PUBLIC PROCUREMENT MARKET***

The American public procurement market certainly represents for the European Union an advantage, and certainly a new item, resulting from TTIP. The American public procurement market has always been "untouchable", it is impossible, as of today, for foreign companies to access it. European companies can certainly benefit from participating in American tenders because, by expanding their market, they may find more job opportunities<sup>107</sup>.

In contrast, however, with the preceding paragraph, this benefit is at the same time a risk for European companies, and this risk does not depend in any way on the progress of the negotiations, but is inherent in the idea of opening up markets. Open the US market to European companies means to expand their market, but it

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<sup>107</sup> *Factsheet on Public Procurement in TTIP*: [trade.ec.europa.eu/doclib/html/153000.htm](http://trade.ec.europa.eu/doclib/html/153000.htm).



means at the same time open the European market to American companies, with the risk for European companies of losing job opportunities related to European tenders. But, indeed, this is a risk closely connected with the concept of free market competition, which sees those who excel offers a better service at a lower cost. It opens the market for more job opportunities, but brings with it even more competitors.

### ***5.3 BENEFITS FOR THE US***

Among the benefits that TTIP could lead exclusively in the United States, it is necessary to mention, even if I can't go into, the greater access for American dairy and agricultural products to the European market and the ability to export in duty-free vehicles.

## ***6. PRAISE AND CRITICS OF TTIP***

Based on the analysis performed in the precedent paragraph, this closing one wants to bring attention on those who in the end may be, on the one hand, the positive aspects of the agreement and on what are the risks and concerns related to it.

### ***6.1 PRAISE***

As is easy to imagine, the TTIP is a very controversial agreement, mainly because of the problems mentioned in paragraph 4, both among the population, and it can be seen easily by the survey carried out by the institutions or by private companies, and between some personalities of the American and European landscape. But this agreement is as discussed as desired by the political leaders of the two sides of the Atlantic, so much so that President Barack Obama advertises summing it in simple terms: "*Two million new jobs, more choice and lower prices in our shops*". On the other hand, even the European leaders, as the first British

Ministers Cameron and Angela Merkel, look at the agreement in a positive way, so much so that the German Chancellor said that TTIP "*would provide an important impetus for the development of the economy world as a whole*", while former European Commissioner for Trade, Karel De Gucht, described it as "*the largest economic stimulus imaginable*".

### **6.1.1 OTHER SUPPORTERS: JOE KAESER**

In an article in the Wall Street Journal, the CEO of Siemens GmbH (whose workforce is 70% in Europe and 30% in the United States) said that the TTIP, reducing trade barriers, improving the protection of intellectual property and establishing new "rules of conduct" international, will strengthen global competitiveness<sup>108</sup>.

### **6.1.2 TTIP AS AN INTRODUCTION TO RESEARCH**

The Senior Research Fellow of FEPS<sup>109</sup> argues that TTIP could and should be viewed positively if it were a "preface to the research"<sup>110</sup>, i.e. if it helped to preserve the precious heritage of the twentieth century regarding social and labor rights. That's why, according to Dr. Ania Skrzypek, if TTIP should be a progressive project, which now is not, should look at issues arising in the digital economy, giving a new meaning to the 'knowledge economy', and to the processes that technological development leads to the labor market on the Atlantic.

## **6.2. CRITICS**

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<sup>108</sup> Kaeser, Joe, *Why a US-European trade deal is a win-win*, The Wall Street Journal, February 2014.

<sup>109</sup> FEPS is the European progressive political foundation. The only progressive think tank at European level establishes an intellectual crossroad between social democracy and the European project, putting fresh thinking at the core of its action. As a platform for ideas, FEPS works in close collaboration with social democratic organizations, and in particular national foundations and thinktanks across Europe, to tackle the challenges that Europe faces today. Close to the Party of European Socialists (PES) but nevertheless independent, FEPS embodies a new way of thinking on the social democratic, socialist and labour scene in Europe. <http://www.feps-europe.eu/en/about-feps>, consulted October 13, 2015.

<sup>110</sup> Dr. Ania Skrzypek, *op. cit.*

Certainly the studies carried out up to now show us how difficult it is to predict the relationship between "output" and "input" regarding TTIP, but we also put the question that cannot be a "benefit without cost", so that many concerns have been raised about the growth that TTIP will bring, because indeed there is a risk that can lead to a growth, but the distribution of it and the cost / benefit can be inequitable (especially within the euro zone, perhaps benefiting certain countries and disadvantaging others, as claimed by Pierre Defraigne). This confusion seems very visible from the results of an online consultation conducted by the European Commission, which received 150,000 responses of which, according to the Commission, 97% were negative<sup>111</sup>.

Moreover, they were organized directly by the citizens major initiatives such as, among many demonstrations and protests, a petition against the treaties and TTIP CETA<sup>112</sup> which acquired more than 2.2 million signatures from May 2015<sup>113</sup>.

### **6.2.1 WOULD THIS GROWTH BE REALISTIC?**

In an article in the Guardian on July 15, 2013<sup>114</sup>, Dean Baker from the Center for Economic and Policy Research noted that with conventional trade barriers between the United States and the European Union already low, the operation should focus on unconventional barriers. He supports the idea that if the agreement is merely based on non-tariff barriers, the real and tangible economic benefits for the families will be mediocre because - says the cofounder of CEPR-

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<sup>111</sup> European Commission launches public online consultation on investor protection in TTIP, March 2014. Retrieved July 2015.

<sup>112</sup> The Comprehensive Economic and Trade Agreement (CETA) is a freshly negotiated EU-Canada treaty. Once applied, it will offer EU firms more and better business opportunities in Canada and support jobs in Europe. CETA will tackle a whole range of issues to make business with Canada easier. It will remove customs duties, end limitations in access to public contracts, open-up services' market, offer predictable conditions for investors and, last but not least, help prevent illegal copying of EU innovations and traditional products. The agreement contains also all the guarantees to make sure that the economic gains do not come on expense of democracy, environment or consumers' health and safety. <http://ec.europa.eu/trade/policy/in-focus/ceta/>, consulted October 13, 2015.

<sup>113</sup> "Home - Stop TTIP Stop TTIP", *Stop TTIP*.

<sup>114</sup> The Guardian, *The US-EU trade deal: Don't buy the hype*, July 2013, Retrieved 24 August 2013.

"If we apply the expected income gain of 0.21% by 2027, the average personal income, it is a bit 'more than \$ 50 a year, or a little less than 15 cents a day. "The study also gave the numbers, which he described as" less ambitious "and therefore" more realistic "of the agreement. Its projection on the growth of GDP by 2027 is, in this scenario, of 0.21%, which is roughly equal to the growth of a normal month. Since it will take 14 years to reach this objective gain, the growth momentum would be only 0.015 percentage points per year. There will be a modest growth between the US and the EU because there are few differences so the transformative impact will be minimal, because these two powers have already completed a massive level of integration in the goods sector with cross-investment, while in the service sector, which is less integrated, the benefits will be limited to imperfect competition (monopolies and oligopolies). Improvements in the area of health and education, however, will likely have little impact given privatization monopolized by shareholders of large companies. And just to be clear, this study was carried out by an organization in the UK, the Centre for Economic Policy Research (CEPR), which is mostly very favorable to commercial negotiation.

In addition, a study of October 2014 made by Jeronim Capaldo<sup>115</sup>, Senior Researcher at the Global Development and Environment Institute at Tufts University<sup>116</sup> in Boston, indicates that there will be losses in terms of net exports, net losses in terms of GDP, loss of employment income, loss of jobs and increased financial instability among European countries.

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<sup>115</sup> Capaldo Jeronim, *The Trans-Atlantic Trade and Investment Partnership: European Disintegration, Unemployment and Instability*, October 2014.

<sup>116</sup> The Global Development And Environment Institute (GDAE – pronounced "gee-day") was founded in 1993 to combine the research and curricular development activities of two Tufts programs: the Program for Sustainable Change and Development in the School of Arts and Sciences, and the **Center for Environmental and Resource Policy** at The Fletcher School of Law and Diplomacy. The combination creates a center of expertise in economics, policy, science and technology. The Institute has produced more than a dozen books and numerous articles, policy documents, and discussion papers. These materials are being used in academic settings, to enhance the teaching of economics and related subjects, and in policy circles, where GDAE researchers are recognized leaders in their fields. [http://www.ase.tufts.edu/gdae/about\\_us/gdae\\_overview.html](http://www.ase.tufts.edu/gdae/about_us/gdae_overview.html), consulted October 13, 2015.

Most likely, it should be added, in the opinion of Freya Baetens<sup>117</sup>, Associate Professor of Law at Leiden University, Visiting Professor at the World Trade Institute (WTI) at Berne University and Associate Lawyer with VVGB (Brussels Bar), that it is unlikely that TTIP would improve the condition of European investors in the United States, because, in general, the level of protection of foreign investors in the United States is already high, and TTIP does not offer much extra protection.

Finally, repeating what was anticipated by the study mentioned above, please refer to what Pierre Defraigne says in its document where even if TTIP was a so-called win-win game, it would be in the long run and, therefore, there would be some losers in the short term and, therefore, a problem in the distribution.

### ***6.2.2 ARE THE PROMISED NEW JOBS ON BOTH ATLANTIC SIDES REAL?***

Dr Ania Skrzypek cites the study of *Carrière, Grujovic and Nicoud Model*<sup>118</sup>, since they, by using some market data on specific areas, evaluated the potential effects of TTIP on employment and welfare on both US and EU. This model, however, predicts that trade liberalization will lead to a rise in unemployment, if it results in redistribution of work in different sectors; according to estimates, the EU and national governments will need to be prepared to support a significant number of people who will need to move between sectors, according to the estimate of Ania Skrzypek about 7 workers on 1000 would eventually move from one sector to another by 2027 due to TTIP, and this move could have a negative influence on the overall employment rate of the population.

### ***6.2.3 WHY ISDS?***

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<sup>117</sup> Freya Baetens, *Transatlantic Investment Treaty Protection – a response to Poulsen, Bonnitcho and Yackee*, Paper No. 4 in the CEPS-CTR project “TTIP in the balance” and CEPS Special Report No. 103, March 2015.

<sup>118</sup> C. Carrère, A.Grujovic, F.R. Nicoud, *Trade and long term unemployment: A quantitative assessment*, May 2014, Université de Genève.

About Investor-State Dispute Settlement, I have already spoken in paragraph 4, about the contents of the agreement TTIP, here instead I meant to highlight, through the observations of experts, the potential dangers of such a mechanism dispute resolution.

First of all, we wonder why there should be special courts can only be used by companies and investors and not by the normal people; a situation that totally violates the principle of equality before the law. The most important reason, alleged by the Commission and reported indicated by Freya Baetens<sup>119</sup> is the risk, certainly present in several EU Member States, of not obtaining, for the first, a fair trial in front of a national courts. According to a recent ranking of countries' juridical independence made by the World Economic Forum<sup>120</sup>, some EU countries are among the best in the world (Finland and Denmark are among the top five), but others are in very low ranking (Slovakia It ranks 130 instead of 140, Bulgaria to 126); to Number 30, the United States is still among the countries with which it expects to complete the insertion of 'ISDS, such as Canada (place number 9) and Singapore (20), or with which it can be expected to be concluded, as Uruguay (21) or Saudi Arabia (26). Furthermore, the extensive case law of the European Court of Human Rights shows that some EU Member States such as Italy, France and Germany have repeatedly violated Article 6 of the European Convention on Human Rights for their failure to provide hearing and / or a decision within a reasonable time, which is why investors might prefer international arbitration. In most cases, in fact, the final decision would be made sooner than the national judicial system.

#### **6.2.4 HOW MUCH DANGEROUS IS ISDS?**

Already at first glance, the risks associated to ISDS are visible, at least in small part. Many questions as well as the legitimacy due to the principle of equality recognized by both powers stipulating such Treaty arises: will the referees of

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<sup>119</sup> Freya Baetens, *op. cit.*

<sup>120</sup> See <http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/>, consulted October 13, 2015.

ISDS, being well paid, might want more and more cases? Will ISDS clauses, being generally of "broad interpretation", be dangerous tools in the hands of entrepreneurs? In addition to these easy doubts, but difficult to explain, there are many other profiles that have been brought to our attention by experts or different bodies, that are literally against this mechanism to settle controversial. From the consultation launched by the European Commission (the one I mentioned above, which received 150,000 responses, the vast majority of which are contrary to TTIP and, in particular, to ISDS), two main risks arose that were found as potential political costs of TTIP:

- i) the risk of a reduced political space (risk of cold-regulatory);<sup>121</sup>
- ii) the risk of disputed claims or unfavorable rulings (with discrimination of domestic investors)<sup>122</sup>.

The results of these consultations have indicated that one of the most common fears among respondents was the perception of the negative effects that the inclusion of ISDS in TTIP would have on national sovereignty<sup>123</sup>. Governments often, according to the people, wait to bring into force a new law until it emerged the result of a domestic case or the decision of the European Court, and the same, according to them could, happen, to most reason, with the mechanism ISDS a State may postpone some extent, pending the outcome of an arbitration award, making consequently depend on this. The greatest risk emerging from the consultation, the so-called "dangerous and chilling effect" mentioned by some economists such as Jeffrey Sachs<sup>124</sup> of Columbia University in New York, previously a strong supporter of globalization, and Joseph Stiglitz<sup>125</sup>, a Nobel

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<sup>121</sup> Prof. Dr. Christian Tietje, University Halle, Germany with the assistance of Trent Buatte, J.D. and Associate Prof. Dr. Freya Baetens, Leiden University with the assistance of Theodora N. Valkanou, L.L.M., *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, June 2014.

<sup>122</sup> Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, March 2015.

<sup>123</sup> C.Olivier, *Public Backlash Threatens EU Trade Deal with the US*, Financial Times, January 2015.

<sup>124</sup> Lise Johnson, Lisa Sachs, Jeffrey Sachs, *Investor State Dispute Settlement, Public Interest and U.S. Domestic Law*, Columbia Center on Sustainable Investment, CCSI Policy Paper, May 2015.

<sup>125</sup> Joseph Stiglitz, *Letter to Congress, Where Progressive and Conservatives Agree on Trade: Current Investor State Dispute Settlement Model is bad for the United States*, Roosevelt Institute, May 2015.

laureate the economy of 2001, is that countries think twice before introducing stricter rules to protect the public health or the environment, for example, for fear of being brought into an international arbitration case to have caused damage to an investor or a company.

The same fear is shared among other entities.

In December 2013, a coalition of more than 200 environmentalists, unions and advocacy organizations of consumers on both sides of the Atlantic has sent a letter to the USTR and the European Commission to ask ISDS to be eliminated from trade negotiations, arguing that it was "*a one-way street in which the companies will be able to challenge the government's policies.*"<sup>126</sup>

In the same period, Martti Koskenniemi, Professor of international law at the University of Helsinki, has warned that the system of protection of foreign investors provided for in the treaty, similar to the International Center of the World Bank Group for Settlement of Investment Disputes (ICSID), would threaten the sovereignty of States parties, granting to a small group of legal experts sitting in a foreign court of arbitration, the power to interpret and void the legislation of the signatory states.

According to George Monbiot<sup>127</sup>, this mechanism would allow "a circle of corporate lawyers to annul the will of Parliament and destroy our legal protections. Those judges are corporate lawyers, many of them work for companies similar to those whose cases should be decided. In this way sovereignty of Parliaments and rulings of the Supreme Courts can be subverted. In addition, there are no corresponding rights for citizens that can be used in these courts to ask the best safeguards for operations". From the answers collected then emerged a fear of endangering national sovereignty, and the power of our own state to protect citizens, and willingness to accommodate an unjustified inequality

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<sup>126</sup> Stangler, Cole, *The Next Corporate-Friendly Trade Pact*, In These Times, December 2013, Retrieved 2014-02-21.

<sup>127</sup> George Monbiot, *This transatlantic trade deal is a full-frontal assault on democracy*, The Guardian, November 2013.



between employers and citizens before the law, with the creation of mechanisms that can be used only by the first.

However, there is also to say, as Freya Baetens<sup>128</sup> reminds looking at several ISDS case studies of previous treaties, that looking at all ISDS disputes the states won in about 60% of cases and that there only few cases where complaints have been proposed against acts of law. The investor will almost inevitably end up on the losing side, because the courts have recognized and protected the political space and the right to regulate the respondent State. As for the threat to national sovereignty, we must always consider, continues Baetens, that an arbitral tribunal may take up to a state to pay damages to an investor, not forcing it to change its policy, especially remembering that the investor typically gets paid for damages a price much lower than what they had sought. As such, the inclusion of ISDS could not threaten or reduce the space policy, because most of the referee's decisions would not affect it.

An example of this was the case "Vattenfall / Germany" in arbitration: the government granted the first license to a coal plant and a nuclear power plant (of which the case is still in progress), and subsequently withdrew these licenses<sup>129</sup>. These cases have not had a measurable impact on the German environmental regulations but only on the procedures with regard to transparency in the decision-making process (benefiting from this not only investors but also other stakeholders), carrying - for example - to the fact that the 'disclaimer' are now incorporated in any licenses granted by the State, that such a development could hardly be seen as negative. Ultimately, continues Baetens, fear of "regulatory chill" expected from the inclusion of ISDS, has not been empirically established<sup>130</sup>.

#### **6.2.4.1 ISDS IMPROVEMENT AREAS**

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<sup>128</sup> Freya Baetens, *op. cit.*

<sup>129</sup> Tietje & Baetens, 2014.

<sup>130</sup> *Ibid.*

The group of the progressive alliance of socialists and democrats in the European parliament (S & D GROUP), although contrary to the mechanism of ISDS, noted, however, areas of potential improvement: inserting clause to enforce the "no parallel proceedings", a filter allowing the political parties to the agreement to block a request to proceed with ISDS, the creation of an appeal mechanism, the participation of the public, the appointment of independent judges not subject to conflicts of interest, a clause of "right to regulate in 'public interest', a clear statement to protect legitimate policy objectives (environment, health, safety), exclusion of the discipline of work and social legislation of the matters subject to arbitration ISDS, duty to exhaust the legal process before national courts before rushing to ISDS, and a specific clause enabling the parties to review their agreements.

If the intent of this chapter was to give an overview of the Transatlantic Trade and Investment Partnership, describing the land of its birth, the goals it intends to reach and highlighting potential benefits and risks, the aim of this entire thesis will be to examine a specific subject affected by this agreement: the Public Procurement. Therefore, before seeing what effects TTIP can generate within this area, we must make a historical overview of the changes made over time to the discipline of public contracts in Europe, to get to the highlights of today's legislation on "Public Procurement".

## ***CHAPTER II***

### ***EUROPEAN PUBLIC PROCUREMENT LAW: THE PATH TOWARDS PRESENT DISCIPLINE AND THE CORNERSTONES OF THE 2014 DIRECTIVES***

This chapter aims to synthesize and analyze the cornerstones of European rules on public procurement. The main objective of this section is to create a logical sequence from the first chapter on the Transatlantic Trade and Investment Partnership to the third one, which will analyze whether and how this transatlantic agreement will affect the European public procurement law. In order to define any changes made in this area by TTIP I will, first, summarize the definition of public procurement, then the birth and development over the years of procurement regulations, and finally the actual discipline. As I will explain below, the study of

the procurement law is focused on the analysis of the three Directives of 2014 (n. 23, 24 and 25) and, in particular, on the n. 24, that relates to procurement in the ordinary sectors.

## **1. EUROPEAN DEFINITION OF PUBLIC PROCUREMENT**

The following definition applies to public procurement as per art 2. of the directive 2014/24/EU of the European Parliament and of the Council: “*contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities (“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>131</sup>),<sup>132</sup> and having as their object the execution of works, the supply of products or the provision of services*”<sup>133</sup>.

Procurement within the meaning of this Directive represents “*the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting*

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<sup>131</sup> Article 2 number 1, Directive 2014/24/UE.

<sup>132</sup> Art. 2 no. 5 Directive 2014/24/UE.

<sup>133</sup> The concept of 'contracting authorities' and, in particular, that of 'public bodies' (for which, under Article 2 Directive 2014/24 / EU, means bodies which possess the following characteristics: they are established for the specific needs of general interest, not having an industrial or commercial character; have legal personality and are financed for the most part by the State, regional or local authorities or other bodies governed by public law; or their management is under the supervision of such authorities or bodies, or their body's administrative, management or supervisory body is made up of members more than half of which is designated by the State, regional or local authorities or other bodies governed by public law.) were tested repeatedly in the jurisprudence the Court of Justice of the European Union. To clarify that the scope of this Directive 'Persons covered' should remain unchanged is appropriate to keep the definitions on which it is based and the Court put some clarifications provided by that law as a key for reading the definitions themselves, without the intention to alter the understanding of this concept as developed by the case law. To this end, it should be stated that a body which operates in normal market conditions, aims to make a profit and bears the losses resulting from the exercise of its activities should not be considered a 'body governed by public law', as it is assumed to have been established for the purpose or with the task of meeting the needs in the general interest which are of an industrial or commercial nature. Similarly, the Court has also examined the condition relating to the financing of the body in question, stating, among other things, that 'financed for the most part' means more than half and that the cost may include payments from users who are imposed, calculated and collected according to rules of public law. Recital 10, Directive 2014/24 / EU.

*authorities*<sup>134</sup>, *whether or not the works, supplies or services are intended for a public purpose*<sup>135</sup>”.

Public procurement, to be such, must contain three different profiles: objective, subjective and quantitative.

## **1.1 OBJECTIVE PROFILE**

To locate an objective point of public procurement is necessary to identify precisely the object and, therefore, understand the meaning of certain terms contained in both the above definitions, namely those of "*public works*", "*supplies*" and "*services*".

### **1.1.1 PUBLIC WORKS**

The public procurements are identified by referring to an annex (II)<sup>136</sup>, which contains a list of construction works, as well as through the concept of "*work*", defined as "*the result of a set of building or civil engineering which in itself fulfill an economic or technical function*"<sup>137</sup>.

Essential for the qualification of the contract is the obligation of performance: the public procurement contract can have it for the execution and / or the design of the

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<sup>134</sup> The notion of acquisition should be understood broadly, namely that contracting authorities obtain the benefits of the works, supplies or services in question without a necessarily required transfer of ownership. Furthermore, the mere financing (particularly through grants, an activity that is often linked to the obligation to repay the amounts received if they are not used for their intended purpose, generally) do not fall within the scope of the rules governing public procurement. Similarly, situations where all operators who meet certain conditions are authorized to perform a given task without selectivity, such as systems based on customer choice and systems of good service, should not be considered procurement systems rather simple systems of authorization (for such licenses for medicines or medical services). (Considering art. 4 of Directive 2014/24 / EU).

<sup>135</sup> Article 1, Directive 2014/24/UE.

<sup>136</sup> The public service contracts, particularly in the field of property management services, may in certain circumstances include works. However, if such works are incidental to the principal object of the contract and therefore constitute a possible consequence thereof or a complement thereto, the fact that such works are included in the contract does not justify the qualification of public works contract for the 'public service contract. Considering the number 8, Directive 2014/24 / EU.

<sup>137</sup> Cfr. Art. 1 lett C, directive 93/37.

works set out in Annex II, as well as a work, as above defined, or the realization by whatever means of a work corresponding to the requirements<sup>138</sup> specified by the contracting authority. In particular, Directive 2014 defines these as public procurement relating to one of the following actions:

- (a) *the execution, or both the design and execution, of works related to one of the activities within the meaning of Annex II;*
- (b) *the execution, or both the design and execution, of a work;*
- (c) *the realization, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work*<sup>139</sup>;

Where a work means “*the outcome of building or civil engineering works taken as a whole which is sufficient in itself to fulfil an economic or technical function*”<sup>140</sup>.

### **1.1.2 SUPPLY CONTRACTS**

The concept of public procurements of supply contracts does not show particular application problems and is defined as: “*public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A public supply contract may include, as an incidental matter, siting and installation operations*”<sup>141</sup>.

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<sup>138</sup> For the realization of a work corresponding to the requirements specified by a contracting authority it is required that the administration concerned has taken measures to define the type of work or at least to have a decisive influence on its design. The possibility that the contractor realizes the work wholly or partially by their own means or ensures their implementation by other means should not change the classification of the contract as a works contract, provided that assumes the obligation, direct or indirect but legally binding, to ensure the realization of the work. Considering article number 9, Directive 2014/24 / EU.

<sup>139</sup> Article 2 par 1 number 6, Directive 2014/24/UE.

<sup>140</sup> Art 2 no. 7 Directive 2014/24/UE.

<sup>141</sup> Art 2 no. 8 Directive 2014/24/UE.

### **1.1.3 SERVICES**

As regards the determination of a public service contract, the guidelines use a residual criterion, the latter including contracts not related to works or supplies. In Directive 50/92 it was distinguished also between "priority services" (referred to Annex A) and "non-priority services" (Annex B of the Directive): the first will be applied to all the rules in the directive, the second only to certain provisions, in particular on advertising and technical specifications<sup>142</sup>.

### **1.2 SUBJECTIVE PROFILE<sup>143</sup>**

The EU rules apply to contracts awarded by the State, local authorities, bodies governed by public law<sup>144</sup> and associations formed by those institutions and bodies. The guidelines provide two cases of particular applicability to entities other than those mentioned above: the case of works contracts awarded by entities other than contracting authorities but these subsidized by at least 50%, and for service contracts subsidized by at least 50% by government and awarded in relation to contract work<sup>145</sup>.

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<sup>142</sup> Annex A: maintenance and repair services, land and air transport, mail transport, telecommunications, financial services, information technology, research and development, accounting, auditing and bookkeeping, search market and public opinion polling, management consulting, advertising, cleaning, property management, publishing, printing, elimination of sewage and waste management, pest control; Annex IB: hotel services and catering, transport by rail and water, support services and auxiliary transport sector; legal services, placement and supply of personnel, investigation and security, for education, health and social, recreational, cultural and sporting and other services.

<sup>143</sup>Stefano Girella, *Organismi di diritto pubblico e imprese pubbliche. L'ambito soggettivo nel sistema degli appalti europeo e nazionale*, 2010.

<sup>144</sup> The bodies that have all of the following characteristics:

- a) are established for the specific needs of general interest, not having an industrial or commercial;
- b) have legal personality;
- c) are financed for the most part by the State, regional or local authorities or other bodies governed by public law; or their management is placed under the supervision of those authorities or bodies; or their body's administrative, management or supervisory body is made up of members more than half of which is designated by the State, regional or local authorities or other bodies governed by public law;

<sup>145</sup> Please refer to art. 2 of directive 93/37 and art. 3, par 3 of directive 92/50.

As for the procurement of supplies, works and services by entities operating in the utilities sectors (the so-called excluded sectors), it should be noted that among the entities are also included public enterprises<sup>146</sup> as well as individuals who, while not public, operate in the areas in question by virtue of special or exclusive rights granted by the competent authority of a Member State<sup>147</sup>.

### ***1.3 QUANTITATIVE PROFILE***

To fall within the scope of Community directives, a public contract must satisfy a parameter<sup>148</sup>, so to speak, "quantity", or present value, net of VAT, equal to or greater than the minimum thresholds specified elsewhere. This prediction can be explained with the principle that only contracts of a certain size can be relevant at Community level and therefore deserve adequate protection in this area.

### ***1.4 MIXED PROCUREMENT***

A different type from those listed above, but characterized by elements common to all those just described, is the one of mixed procurements. When we talk about mixed procurements we refer to contracts for different types of procurement, all falling, however, among the types listed above (services, works, supplies).

There are cases, however, where the various constituent parts of the contract are objectively not separable, and others where these parts can be separated. It is necessary, therefore, to express the criterion by which the contracting authorities can determine whether the different parts of the contract can be severed or not and this criterion, according to Directive 2014/24 / EU, should be based on the

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<sup>146</sup> We refer to "Public Companies" as entities over which the public authorities may exercise directly or indirectly a dominant influence; see. art. 1 of Directive 93/38.

<sup>147</sup> Please refer to art. 2 of directive 93/38.

<sup>148</sup> Please see Paragraph 3.3.



relevant case law of the Court of Justice of 'European Union <sup>149</sup> : “*the determination should be made on a case by case basis and for this purpose the known or presumed intentions of the contracting authority to consider indivisible the various aspects that make up a mixed contract should not be sufficient, but should be confirmed by objective tests designed to justify and motivate the need to conclude a single contract. A justified need to conclude a single contract could be found for example in the event of the construction of a single building, part of which is to be used directly by the contracting authority and other interested parties should be managed on the basis of a concession, for example for car parks intended for the public. It should be specified that the need to conclude a single contract can be due to reasons of a technical and economic*”<sup>150</sup>. In the event that it is not possible to separate the component parts of the contract, the rules applicable should be determined on the basis of the main object of the contract in question<sup>151</sup>, for example in the case of mixed procurements consisting partly in services under Title III, Chapter I<sup>152</sup>, and partly in other services or in mixed contracts including services in part and partly supplies, the main object is determined based on the estimated value of the higher of the respective services or supplies.

In the case of mixed procurements that can be separated, contracting authorities they are always free to award separate contracts for each share of the mixture, and, therefore, apply to any part of the provisions relating to each of them.

## **2 EUROPEAN ACTION: REASONS FOR THE EUROPEAN COMMUNITY'S INTEREST TO THE MATTER OF PUBLIC PROCUREMENT**

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<sup>149</sup> European Court of Justice, *Case C-145/08 e C-149/08 – Club Hotel Loutraki AE against Ethniko Symvoulío*.

<sup>150</sup> Considering number 11, Directive 2014.

<sup>151</sup> Article 3 paragraph 2, Directive 2014/24/UE.

<sup>152</sup> Social services and other specific services, Directive 2014/24/UE.

Already in the early 90's, the European Commission estimated the total value of public procurement<sup>153</sup> to be about 400 billion ECU (estimated then at ECU 720 billion, i.e. about 11% of Community GDP, in the Framework Scoring 1997<sup>154</sup>). It was emphasized also that only a small percentage was allocated to enterprises and operators of a Member State other than the one that had failed to hold the contract itself. The public procurement was, in fact, the subject of discriminatory practices, to facilitate domestic companies, or even local ones. According to data provided by the Cecchini's Commission<sup>155</sup>, from an analysis of a sample of four contracts in five states<sup>156</sup>, it appeared that the level of imports of goods and services as a whole was much higher than that of imports which concerned public procurement.

In an economic system inspired by economic freedom, it was necessary to remedy this situation, or to try at least to reduce it<sup>157</sup>. Therefore, the community policy perceived even more "*this lack of competition*" as "*one of the posters and anachronistic obstacles to the completion of the single market.*"<sup>158</sup> It was necessary for strong action and the path chosen by the Union was to be coordinated with national procedures of the contracts, with the intention of seeing more and more companies involved in the tender.

## ***2.1 HISTORY OF CHANGES TO PUBLIC PROCUREMENT LAW***

The first steps of European intervention in procurement were, initially, in the 70s, followed by the adoption of four directives at the turn of 1992 and 1993, and then

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<sup>153</sup> U. Leanza, in F. Lauria, "*Appalti pubblici e mercato unico europeo.*" 1991 GIUFFRÉ'.

<sup>154</sup> Single Market Scoreboard, n° 1, November 1997, SEC 97/2196, in European Commission, *Communication: public procurement in the European Union*, Brussels, March 1998, available at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/green-papers/com-98-143\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/green-papers/com-98-143_en.pdf), consulted in January 2016.

<sup>155</sup> Commission of the European Communities, "*The cost of non-Europe in public sector procurement*" in *The cost of non-Europe - Basic Findings*", vol. 5 / a and b. - Study done by Atkins Management Consultance, Luxembourg 1988.

<sup>156</sup> Report that takes into account the year 1987, analyzing the situation in Belgium, Denmark, France, Italy and the United Kingdom.

<sup>157</sup> A. Bozzi, A. Marzanati, "*La disciplina concorsuale in materia di forniture e lavori pubblici.*" In "*Argomenti di diritto pubblico comunitario*", 1989 GIUFFRÉ' ed. pag. 207 e ss.

<sup>158</sup> M. Di Pace, "*Manuale di diritto comunitario dell'economia.*" 1995 CEDAM ed. page. 35 e ss.

continue through 2014, with major initiatives especially in 2004 and 2007. The aforementioned instructions were to adjust the fields of public works, supplies, services and contracts of entities operating in services in the telecommunications, transport, energy and water sector.

The primary objective of this project was to create a common regulatory framework characterized by transparency, and aiming to speed the process of the appeals and formalities relating to the publication of the notices.

In any case, the ratio of Community action was inspired by the control logic of only those contracts which, because of their economic importance, were deemed crucial; contracts below these amounts, classified as "Subthreshold" continued to be governed by the laws of individual Member States.

Moving on to explain, in broad terms, the actual content of the guidelines, it has to be highlighted that these have a very similar structure (general definitions, common rules in the technical field, common standards advertising and common rules on participation). The lodgings supranational intervention concerned, in particular, the modification of the "previous" directives, the introduction of appropriate remedies both administrative and judicial and the extension of the rules to previously excluded sectors such as water, telecommunications, energy, transport. In dictating this discipline, it was underlined the now achieved equality between the EU group, that is part of the EU Member States, and those which are part of third countries signatory to the Government Procurement Agreement concluded in the framework of the Uruguay Round.

### **2.1.1 FROM 1971 TO 2004<sup>159</sup>**

#### **2.1.1.1 THE SEVENTIES**

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<sup>159</sup> Doctoral Thesis of Angela Panagia, *L'attività contrattuale della Pubblica Amministrazione alla luce del Dlgs 163/2006*, A.A. 2008/2009, [http://dspace.unive.it/bitstream/handle/10579/926/Tesi\\_Panagia.pdf?sequence=1](http://dspace.unive.it/bitstream/handle/10579/926/Tesi_Panagia.pdf?sequence=1), consulted in November 22, 2015.

The first directives of the '70s were the n. 71/305 / EEC 4 on the subject of work and no. 77/62 / EEC 5 concerning supplies which were aimed at strengthening the commitments under the EU Treaty by establishing rules of conduct for government customers and the development of a set of rules for coordinating national procedures for the award. However, since not backed by effective sanctions instruments, and of the length of the permitted exceptions, the express exclusion of sectors of primary importance (water, energy, transport and telecommunications) and the elusive behavior of the Member States, the practical effectiveness of the provisions these Directives is very limited.

#### ***2.1.1.2 WHITE PAPER 1985***

In the White Paper<sup>160</sup> on the completion of the internal market to the Council in June 1985, the Commission stresses the need to proceed, then, to the revision of the directives mentioned above, proposing to extend its scope to include previously excluded sectors and services.

#### ***2.1.1.3 SECONDO HALF OF THE '80s AND EARLY '90s***

In this period other directives were issued to fulfill the desire of the Commission to expand the European directives also to sectors previously excluded, goal achieved by the Directive n. 90/531 / EEC. A few years earlier, with particular Directives. 89/440 / EEC and 88/295 / EEC, which included the expansion of the forms of advertising and greater transparency in the selection criteria and the definition of the methods of carrying out the procedures, were modified so consistent directives of the years 70. With the Directive. 92/50 / EEC is, then, dictated a Community framework for service contracts. Key directives on environmental protection, are then called. Remedies Directives, to no. 89/665 / EEC on public works contracts and supplies and no. 92/13 / EEC for the sectors

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<sup>160</sup> Act that aims to complete the Single Market and to specify the expected benefits obtained from its implementation and that sets out the stages of the integration process since 1985 when the times are scanned and procedures that essentially lead in 1993 the completion of the Single Market and the start of the preparation phase of the Economic and Monetary Union, the construction of the single currency (euro) and then the new enlargement countries.

cd. Excluded, aimed at equipping participants in tendering, damaged by the contracting authorities can justify measures taken in breach of Community rules, appropriate legal remedies.

#### ***2.1.1.4 YEAR 1993***

1993 is the year of the framework directives of the reorganization of legislation: the Directive. 93/37 / EEC with regard to jobs, no. 93/36 / EEC for supplies and n. 93/38 / EEC in the utilities sectors.

Among the three, the really innovative one was the Directive. 93/36 / EEC which, in order to align the rules on supplies to the works and services, introduces an innovative definition of "contracting authority" and abandons the priority given to the open procedure, equating to it the restricted one.

#### ***2.1.1.5 END OF THE '90s***

With the end of the 90 directives are issued, no. 97/52 / EC15 (amending Directives Nos. 92/50 / EEC on services, 93/36 / EEC on supplies, and 93/37 / EEC on the work), and n. 98/4 / EC 16 (amendment of Directive 93/38 on the excluded sectors), in order to adapt Community procurement on Government Procurement<sup>161</sup> to the International Agreement concluded under the Uruguay Round. That agreement, signed by the European Community, establishes the conditions that the contracting entities should apply to businesses of States that were part of the Agreement, providing in some cases more favorable rules in awarding contracts for non-EU companies to those established by the Directives for Community businesses.

#### ***2.1.1.6 GREEN PAPER 1996***

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<sup>161</sup> It is the International Agreement on Government Procurement known as GPA (Agreement on Government Procurement) concluded in its trade negotiations (Uruguay Round) opened under the General Agreement on Tariffs and Trade (GATT), which led to the birth of 'World Trade Organization (WTO), signed in Marrakesh on 15 April 1994 and approved by Council decision No. 94/800 / EEC of 22.12.1994.

Given the fragmented nature of the regulatory measures in place until that time in the matter of public procurement, the Commission, on a proposal from the Market Commissioner Mario

Monti, 27 November 1996<sup>162</sup> adopted a Green Paper<sup>163</sup> on public procurement, which follows the Communication of 11 March 1998<sup>164</sup>, in which the Commission undertakes to submit the amendments to the existing directives, highlighting, among other things, the opportunity to harmonize the rules governing public procurement with other Community policies, such as environmental protection, labor and consumers, and working toward a more open procurement of third countries in order to achieve the goal of adopting a multilateral code on procurement public under the World Trade Organization (WTO). To this end, as specified by the EU, it will require a commitment of particular intensity by all concerned: Commission, Member States and the private sector.

#### ***2.1.1.7 DIRECTIVES 2004***

In light of the achievement of the new objectives of the Union, the approval of two further Directives was reached: the Directive. 2004/18 / EC for the coordination of procedures for the award of public works, services and supplies and the Directive. 2004/17 / EC coordinating the procurement procedures in the utilities sectors (water, energy, transport, postal services).

With the new guidelines, the EU has essentially intended to provide a "Consolidated text" of the Community rules on classic procurements, as well as modernize the regulation of utilities.

This intervention has three primary goals: to streamline the previous simplification provisions sometimes too detailed; flexibility to meet the needs of public procurers who criticize an excessive rigidity of procedures; modernization to take account of new technologies.

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<sup>162</sup> COM (96) 583 final. of 27 November 1996, entitled "*Public Procurement in the European Union - Exploring the future.*"

<sup>163</sup> Green Paper on "*Public Procurement in the European Union: Exploring the Way Forward*", COM (96) 583 final., 27.11.1996.

<sup>164</sup> COM (98) 143 final. 11 March 1998, entitled "*Public Procurement in the European Union*".

About foregoing, precisely the Directive no. 18 is the perfect combination of procedural unification and correction of what was already provided in the previous directives (for example, by the increased protection in order to exclusions from tenders) and experimental introduction of new functional institutions to those aims (possibility of recourse to electronic auctions, introduction of framework agreements, governing dynamic purchasing systems)<sup>165</sup>.

One of the peculiarities of those directives, as well as in order to contribute to the promotion of sustainable development in commencing and execution of public contracts, and to contribute to the environmental and social needs, in accordance with the provisions of Art. 6 of the Treaty<sup>166</sup>, it is also the greatest respect for the rules of equal treatment, transparency and competition from contracting. On this side is the fundamental express reference contained in the first recital of the Directive. 2004/18 / EC<sup>167</sup> to the decisions of the Court of Justice<sup>168</sup> as the basis for the European legislator in the preparation of the new discipline, demonstrating the centrality of case law in the identification of the principles and rules, as well as interpretation.

As for the scope of the European regulations, the thresholds above the which contracts become relevant Community, it is expressed in euro and issued by the Commission Regulation n. 1874 of 28 October 2004<sup>169</sup> to adjust the thresholds in the directive to the euro.

Here it should be noted that, as repeatedly stressed by the Community<sup>170</sup> courts, public administrations in the procedures for awarding contracts below the

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<sup>165</sup> Thanks to the Directive's innovations, we can see the first difference from the previous one: an extension of the subject, due to the framework agreements' inclusion. Sofia Bandini Zanigni, *Appalti pubblici di forniture e servizi*, Torino, 2006.

<sup>166</sup> As established by the Treaty of Amsterdam in 1997, in fact the protection of the environment cannot be qualified as a secondary objective of the European Union. Environmental protection is expressly provided for by art. 2 of the Treaty between the tasks to be pursued, according to the statement art. 6, in all policies and activities of the Union.

<sup>167</sup> *This Directive is based on Court of Justice, in particular the law relating to the award criteria* ", considering the number 1, Directive 2004/18 / EC

<sup>168</sup> Court of Justice, order of 3 December 2001 C-59/2000 on Foro it., 2000, IV, 67, and the circular of the Department for Community Policies April 29, 2004 in OJ July 12, 2004.

<sup>169</sup> Commission Regulation No. 1874 of 28 October 2004.

<sup>170</sup> See. Court of Justice, order of 3 December 2001, n. C-59/2000, Riv. swore. and, in 2002, I, p. 857; Court of Justice, 7 December 2000, n. C-324/98, in Corr. He swore., 2001, p. 489; in

threshold, although not obliged to apply Community directives, are nonetheless required to comply with the fundamental principles of the EU Treaty, to guarantee the single market. Another merit of the 2004 directives is that they have shown, in the first part on general provisions, principles or definitions that apply to the public procurement law very clearly in order to make the interpretation of the Community rules as much unique as possible. A special feature of the Directives in question is, moreover, the rules that dictate new institutions such as framework agreement<sup>171</sup> (it is attached to the discipline of the central purchasing body<sup>172</sup>, the establishment of which derives from the consideration that centralization leads to a significant reduction in operating costs through the concentration of demand, and greater ability to control and coordination of procurement policies) and competitive dialogue<sup>173</sup>.

The purpose of modernization of the procurement procedure, in the sense of adapting the procurement law to the technological evolution of the market, on the assumption that it is the electronic procurement that can result in greater cost-effectiveness and speed of the tenders, meet other two institutions: the auction mail<sup>174</sup>, which is by some described as a place of bargaining virtual, where focus and exchange a variety of information, such as progressive reductions on offers of participants and notices sent by the contracting authorities, happen in real time thanks to the use of electronic technologies, so as to increase the competitiveness between operators in respect of competition, and dynamic purchasing systems<sup>175</sup>,

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conformity v. the Commission's interpretative communication in the Official Gazette, 29 April 2000 C 121 and more recently, the Commission interpretative communication n. 2006 / C 179/02.

<sup>171</sup> Article 33 Directive 2014/24: "agreement between one or more contracting authorities and one or more economic operators in order to define the terms governing contracts to be awarded during a given period, in particular with regard to price and, if the appropriate, the quantity envisaged.

<sup>172</sup> Article. 1, paragraph 10 of the Directive n. 2004/18 / EC, define this organization as "a contracting authority which acquires supplies and / or services, and entrusts works contracts, including the conclusion of a framework agreement, intended to satisfy the needs of a number of administrations."

<sup>173</sup> Please refer to paragraph 3.6.1.3.2.

<sup>174</sup> According to Article 1 of the Directive in the electronic auction is "a process in stages, based on an electronic device for the presentation of new prices, editable downward and / or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the same, allowing their classification according to automatic processing.

<sup>175</sup> Article 1, paragraph 6 of the Directive. 2004/18 / EC is "a completely electronic process for making commonly used purchases, generally available on the market, with limited in time and open throughout its duration to entry for new businesses that meet the selection criteria and it has submitted an indicative tender that complies with the specification".



and also the provision to general use of electronic communication and submission of tenders.

#### ***2.1.1.8 DIRECTIVE 2007/66/CE***

The so-called "Remedies" Directive contains a review of the previous legislation of litigation in public procurement; in particular, it provides a particular system of protection that applies to contracts covered by Directives 2004/17/EC and 2004/18/EC and includes a series of specific devices aimed at improving the effectiveness of appeals in the pre-contract. We will talk later about the Directive 2007/66/CE<sup>176</sup>, in the paragraph about the appeals in public procurement.

#### ***2.1.1.9 YEAR 2009***

In 2009, on a proposal from the Commission, it has adopted a specific Directive (2009/81 / EC) to public procurements awarded in the fields of defense and security, with the goal of opening these markets to competition and make them more efficient. The directive, with a content as special as the sectors disciplined, sets the rules for purchases of arms, munitions and war material for military purposes, but also for supplies, works and services with "sensitive", acquired for security purposes<sup>177</sup>.

### ***3. DIRECTIVES 2014***

Public procurement plays a key role in the European 2020 strategy, as outlined in the Commission Communication of 3 March 2010 entitled 'Europe 2020 - A strategy for smart growth (developing an economy based on knowledge and innovation<sup>178</sup>), sustainable ( promoting a more resource-efficient, more

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<sup>176</sup> See paragraph 4.3.

<sup>177</sup> Cit. infra.

<sup>178</sup> Nicoletta Torchio, "*Le nuove direttive europee in materia di appalti e concessioni*", Lecture given to the training course on public contracts for the staff of the judiciary of the Court of Auditors, 12-13 May 2014.

environmentally friendly and more competitive economy<sup>179</sup>) and inclusive (promotion of a high employment rate that favors the social and territorial cohesion<sup>180</sup>), "in order to constitute one of the market-based instruments necessary to achieve smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. To this end, the public procurement rules adopted pursuant to Directive 2004/17 / EC of the European Parliament and of the Council (4) and Directive 2004/18 / EC of the European Parliament and of the Council (5) should be revised and updated in so as to enhance the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement and to enable procurers to make better use to support the achievement of common societal goals. There is also the need to clarify some concepts and basics in order to ensure legal certainty and to incorporate certain aspects of the judgments of the Court of Justice of the European Union on the subject<sup>181</sup>.

On 20 December 2011 the European Commission adopted and submitted to the Council and Parliament three proposals for a directive aimed at a modernization of public procurement in the European Union. Two of these replace the current directives on public contracts in the ordinary and special sectors (2004/17 / EC and 2004/18 / EC replaced by 2014/24 / EU and 2014/25 / EU); the third governs the area of concessions (2014/23 / EU), to date only partially regulated at European level. The reform aims at the simplification and streamlining of existing procedures and introduces a number of measures to promote the market access of small and medium-sized enterprises, while making the procurement law more compatible with environmental sustainability, the promotion of social policy considerations and support innovation. The negotiations on the three directives was long but it was closed for the month of June 2013 with an agreement reached between the Council and the European Parliament, after which the guidelines were published in the Official Journal of the European Union (L 94 of 28 March 2014) and entered into force on 17 April 2014. The implementation in each Member State will have to be completed within the next 24 months. In view of the

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<sup>179</sup> Cit. infra.

<sup>180</sup> Cit. infra.

<sup>181</sup> Considering no. 2 Directive 2014/24/UE.

process of national adoption, the Department has launched a consultation with all the authorities and operators involved in the field covered by the new directives<sup>182</sup>. As for the main objective of the directives can be summarized as:

A) more simplification, increased flexibility in procedures, and implement proper procedures;

B) procurement market opened at EU level;

C) promote innovation, environmental protection and social responsibility.

The challenges are to achieve a more advantageous quality / price ratio in public acquisitions and major environmental and economic benefits for society<sup>183</sup>.

Despite the fact that in the following paragraphs will be examined in more detail only one of the three directives mentioned above, the n. 24, it is necessary to first make a small summary of all three, listing also the main novelties<sup>184</sup> introduced by these, in the European public procurement.

### ***3.0.1 DIRECTIVE 2014/23/EU***

Of the three Directives of 2014, no doubt this is the most innovative, primarily because governing a sector, such as concessions, never covered before in Europe. The primary objective is that once it is undoubtedly that of legal certainty, resulting in the desire to eliminate the differences in the interpretation of the principles and provisions, by promoting equal access and equal participation, including for SMEs, the award of concessions. This goal is expressed in the creation of more detailed legal definitions to clarify the scope of some institutions, because, having missed so far regulations have in this matter, the concessions have always been governed by the basic rules on procurement (to date, Directive 2004/18 / EC) and the rules of the Treaty on the Functioning of the EU (TFEU), but this has led to different interpretations of the principles and huge disparities

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<sup>182</sup> <http://www.politicheeuropee.it/attivita/18804/appalti-pubblici>, consulted November 12, 2015.

<sup>183</sup> Nicoletta Torchio, op. cit.

<sup>184</sup> See Sergio Gallo, *Le nuove direttive europee in materia di appalti pubblici e concessioni*, 2014.

between the laws of the Member States, as they have found in the Court of Justice.

A good part of the discipline of concessions is still modeled on the basis of the contracts, such as the so called thresholds (the European regulations apply to those concessions, thresholds, whose value exceeds a limit that, in this specific case, corresponds to the value of 5.186 million Euros and *that reflects the value of cross-border concessions for economic operators established in Member States other than that in which the contracting authority or entity*<sup>185</sup>), and mixed concessions legislation in force, judicial protection, the need for prior publication of a contract, and many other elements. For this reason, here we would like to dwell on the changes made by the Guidelines and, therefore, elements characterizing exclusively the area of concessions. The main characteristics, and then the changes introduced by Directive 23, the adjustment of the concessions are as follows:

- The more precise definition of the concession contract, given that the previous definition was causing a great legal uncertainty especially for the failure to specify the level of legislation and of the types of risk management assumed by the concessionaire. In fact, the Directive of the ordinary sectors, called the works concessions and services with cross-references to the definition of the contract, particularly as other contracts with the same type as a public works contract or services, except that the consideration for the works or services, consists solely in the right to exploit the work or service or in this right together with payment. The directive, however, defines the concession contract as *a contract for pecuniary interest concluded between one or more economic operators and one or more contracting authorities or entities, which have as their object the execution of works or the provision of services where the consideration consists solely in the right to exploit the works or services in the contract or in that right together with payment*<sup>186</sup>.

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<sup>185</sup> Considering 18, Directive 23.

<sup>186</sup> Considering 11, Directive 23.

- The transfer to the concessionaire of an operational risk of an economic nature, generally a factor outside the control of the parties, which implies the possibility of being unable to recover the investments made and the costs incurred in operating the works or services awarded under normal operating conditions, also if part of the risk is borne by the contracting authority or contracting entity<sup>187</sup>.
- Freedom by the contracting authority, to organize the procedure aimed at selection of the concessionaire, provided this is done in compliance with the directive. The Directive recognizes the principle that the national, regional and local authorities can freely organize the execution of their works or the provision of its services in accordance with national law and Union. In fact, it is said in the article 2 paragraph 1, that these authorities are free to decide how best to manage the execution of the work and provide services in particular to ensure a high level of quality, safety and affordability, equal treatment and the promotion of universal access and user rights in public services.
- Award criteria: even if specified that these should be based on objective criteria which are consistent with the principles of equal treatment, non-discrimination, transparency and proportionality, any default criteria is indicated<sup>188</sup>.
- The identification, made by Article 43, of such changes to be made to a concession during its execution, should lead to a new award procedure. And in particular what happens when changes are made (the so called substantial initial grant).

### ***3.0.2 DIRECTIVE 2014/24/EU***

As for a more detailed analysis of the content of the Directive # 24, as I said above, refer to the following paragraphs. At this time we do not want to dwell much on the general framework that provides for public procurement, but on the

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<sup>187</sup> Considering 18, Directive 23.

<sup>188</sup> Article 41, Directive 23.

main changes made by this than the previous directive, the 2004/18 / EC, which replaces. It is necessary to bring them back now in a summary form because most of them will be analyzed at the most in-depth study on the content of the Directive, as this will still be aimed at the identification of the main leaders of the governing contracts. The major developments are as follows:

- The Directive also refers to the execution of the Public Procurement (subcontracting, resolution and substantial changes that require renewing the tender process), stating provisions concerning the possibility of changing the conditions of the contract and, in particular, the prohibition to make objective or subjective changes to the contract concluded, or at least in progress (in this case would require a new award).
- The elimination of the distinction between traditional and non-priority services, although it is clear that certain categories of services related to the person (i.e. Certain social, health and education), by their very nature, will continue to have a limited cross-border dimension, highlighting, therefore, the need to establish a specific regime for public contracts involving such services, with a higher threshold than the one applied to others.
- The criterion for evaluating bids: always were believed to exist two different criteria for the evaluation of tenders, the criterion of the lowest price and the most economically advantageous. The Directive no. 24, however, indicates among the criteria used only the most economically advantageous, and is willing to make a distinction calling it “best value for money”,<sup>189</sup>.
- Along with the traditional procedures provided in paragraph 3.6, the range of the tools of detection of the contractor expands with changes made to the negotiated procedure with prior publication of a contract, now defined competitive procedure with negotiation with publication, whose conditions are equivalent to those of competitive dialogue, and with the so-called innovation partnership, a new form of procedure for innovative

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<sup>189</sup> See paragraph 3.8.

procurement, for contracts whose object is not available on the market. While it remains subject to certain conditions, the negotiated procedure without prior publication of a contract.

- Strong boost to electronic communication, as regards the transmission of tenders, the exchange of information and the development of electronic procurement.
- A broader definition of central purchasing, in particular a more detailed than that in the previous Directive, as the contracting authority defines as that "provides centralized purchasing activities" and also "ancillary purchasing activities".
- Introduced the ability for two or more contracting authorities to "carry out" some specific procurements jointly.
- New rules on cross-border joint procurement, determining in particular the conditions for the cross-border use of central purchasing bodies and the law applicable to contracts in the case of joint cross-border procedures.
- Reduction of the time limits for submission of bids by companies
- Possibility for the contracting authorities, in open procedures, to examine tenders before verifying the absence of grounds for exclusion.
- Dining contracting authorities may conduct market consultations in order to prepare their tenders and to inform economic operators of their procurement plans and requirements for the latter. To this end, contracting authorities may seek or accept advice from experts or independent authorities, by other authorities or market participants.
- The tender document Single European Act (DGUE): Self-declaration having the nature of documentary evidence for the purpose of participating in the preliminary competition, through which traders can participate in tenders in the single market by declaring the possession of the requirements for participation.
- Additional provisions for the fight against corruption.
- Provisions to support SME participation in tenders (e.g. Splitting the contract into lots, the illegality of criteria setting, without adequate

justification, limits access to race-related business revenue, and mechanisms for payment direct subcontractors).

- One of the main changes is the introduction of the new European legislation, including the general principles, the obligation for Member States to take appropriate measures to ensure the integration of environmental requirements, social and labor in tendering and the implementation of the contracts, and to ensure that traders comply with the obligations established by Union law, national law, collective agreements or international law.
- The Partnership for innovation: a special procedure for the research, development and subsequent purchase or supply of products, works and innovative services, not available on the market, subject to performance and cost with agreed procedure in several stages, with negotiations aimed at finding the best solution and with the award criterion of the best quality / price ratio.

### ***3.0.3 DIRECTIVE 2014/25/EU***

Directive 2014/25 / EU regards the procurement procedures of the so-called special sectors, i.e. of entities operating in the sectors of water, energy, transport and postal services and, for this, repealing the previous Directive 2004/17 / EC. In these sectors, a unified regulation is needed to ensure an open competition, but this is only guaranteed for contracts above a certain threshold, while for those whose value below the threshold<sup>190</sup> for the application of coordination rules at Union level, it is appropriate to refer to the case law of the Court of Justice of the European Union on the correct application of the rules and principles of the TFEU<sup>191</sup>.

In reference to the special sectors, we have to specify one thing: their discipline is based on that procurement of ordinary sectors, and therefore go hand in hand the new features, such as the revolution in the criteria for evaluating bids, being

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<sup>190</sup> Considering n. 2, Directive 25.

<sup>191</sup> Considering n.3, Directive 25.



extended to them the "new" criterion of the best value for money, and much of the applicable rules, just think of the mixed contracts, the criteria for determining whether the different parts can be severed or not, and the rules applicable in both cases, the notion "wide" economic operators, not the necessity of a particular legal form, and the obligation of prior publication of a contract (except in exceptional circumstances).

The only particular features of the Directive n. 25 are stated, of course, from the specialty of the sectors covered therein, and what will change, among other things, is the scope of the case and the parties to whom it is applicable. For the definition of the scope of the Directive it is essential to the notion of special or exclusive rights, since entities which are neither contracting authorities nor public undertakings are subject to the application of it only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that the rights granted by means of a procedure based on objective criteria, in particular in accordance with Union law, and based on which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive<sup>192</sup>.

As for the subject to which it applies, these are different and there are included, first of all, the contracting authorities, public undertakings and private companies operating in the field of heating, although, in the case of private companies, with the additional condition to operate under special or exclusive rights<sup>193</sup>; secondly, there are subjects that deal with production, wholesale and retail of electricity. There are, then, contracting entities operating in the water management sector, which must be able to apply the procurement procedures provided for in this Directive to all the activities carried out by them concerning the management of water and that are part of any stage of the "water cycle."<sup>194</sup>

### ***3.1 DIRECTIVE 2014/24: FOUNDATION PRINCIPLES***

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<sup>192</sup> Considering n.20, Directive 25.

<sup>193</sup> Considering n. 21, Directive 25.

<sup>194</sup> Considering n. 24, Directive 25.

*"The contract must be awarded basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment and ensure that tenders are assessed in conditions of effective competition."*<sup>195</sup>

Despite that the award of public contracts, like any economic activity carried out in Europe, must respect many of the general principles set by the EU Treaty, including the prohibition of discrimination on grounds of nationality (Art. 12), the free movement of goods (Art. 28), freedom of establishment (Art. 43), the freedom to provide services (Art. 49) and free competition (Art. 81), I would like to dwell, however, on the fundamental principles, also expressed by Directive 2014, and in particular, therefore, the principle of publicity, according to which it is necessary that the potentially interested parties are given the opportunity to present their offer based on the principle of non-discrimination that goes along with the principle of equal treatment, which prohibits to prepare invitations and conditions of participation which would cause the exclusion of potential competitors not justified by public tender.

### **3.1.1 PRINCIPLE OF TRANSPARENCY**

Transparency is primarily the result of specific obligations regarding information according to which all economic operators concerned may obtain all the necessary data in order to take part in the procedure and to know the results. There are some acts that are an expression of the principle of transparency and they are, for example, the contract award notice or the decision of not to award the contract, including the reasons. After receiving the acts mentioned above, rejected applicants may inquiry for the reasons of the rejection of their application and each tenderer ("economic operator who has submitted a tender"<sup>196</sup>) has a right to know the differences between the chosen offer and the one presented. There are some acts that must be sent to recipients, while there are many other that have to be made available, through publication in the Official Journal of the European Union, which can also be accessed via a computer portal.

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<sup>195</sup> Considering number 46, Directive.

<sup>196</sup> Article 2 paragraph 1 number 11ca, Directive 2014/24/UE.

Information and documents can also be requested through electronic portal, documents, or people can take vision of some standard documents. Definitely a big step forward in place with the 2014 Guidelines is the increased attention to these procedures (giving the opportunity to perform the entire procedure so computerized, and therefore faster), although should always be allowed operators to choose between this way and the traditional one.

Closely linked to the principle of transparency there is, then, the recognition of the importance of the written form of the acts of a tender procedure (tender documents, application forms, confirmations of interest and offers), with the possibility, however, by contracting authorities, of any oral communication with traders, provided that the content is sufficiently documented. This is necessary, in fact, to ensure an adequate level of transparency needed to demonstrate whether the application complies with the principle of equal treatment. In particular, it is essential that oral communications with bidders, which could influence the content and evaluation of tenders, are adequately documented and by appropriate means, such as written or audiovisual recordings or summaries of the main elements of communication<sup>197</sup>.

### ***3.1.2 NON DISCRIMINATION PRINCIPLE***

Where the contracting authority provides to hold a contract, obviously it has to identify the type of product it wants, with all the elements that it expects to receive. When the administration goes on to examine the offers received, it has to select them impartially, based exclusively on objective criteria (e.g. Environmental performance, safety, quality assurance and production methods), which have to appear in the contract documentation (as contract notice), in order to ensure the no discrimination and in order to avoid creating unjustified obstacles to competition and the economic advantage, and based on economic advantage.

### ***3.1.3 EQUALITY OF TREATMENT PRINCIPLE***

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<sup>197</sup> Considering number 58, Directive 2014.

The analysis should be completed with the reading of Recital 29 of the Directive which states that, in order to allow entry in tendering of alternative technical solutions, "*it must be possible to submit bids which reflect the diversity of possible technical solutions for a certain result*". For this purpose, "*technical specifications must be able to be fixed in terms of performance and functional requirements (...) the contracting authorities must take into account tenders based on other equivalent arrangements which meet the requirements of the contracting authorities*".

It is therefore evident the effort, when defining the European Directive, to ensure that all potential competitors from entering a competition on an equal footing. This without the contracting authority may introduce artificial limits on the participation of the individual competitor by establishing technical requirements that only one, or only a few, are able to offer. We have seen that the standard goal is to expand to the maximum participation in tender procedures, through:

- The definition of technical specifications in terms of functionality;
- The use of objective criteria for the award;
- The admission of equivalent offers.

### **3.1.4 EXCEPTIONS**

The legislation, however, considers specific cases where the principle of maximum participation is not applicable.

These are exceptions, therefore, that can be taken only under certain conditions that justify them: "*Contracting authorities, if they decide that in a given case equivalence does not exist, must be able to justify this decision.*"

This statement in Recital 29 of the European Directive, actually contains the general principle that allows the contracting stations, compared to a real and expressed motivation, to provide technical requirements mandatory excluding, in fact, a part of eligible employees from participation tender. It is in fact allowed for them to claim certain performance characteristics to be acquired, determining these in their entirety, to the limit and also locate the supplier, notwithstanding the principles of competition and maximum participation in public tenders when they

are not "equivalent" on the market, with the sole obligation to provide adequate reasons for this lack of equivalence.

### **3.2 ENTITIES ENTITLED TO PUBLIC PROCUREMENT<sup>198</sup>:**

The Community framework does not provide, like the Italian law, a list of subjects which may be entitled to public procurement; it merely indicates the figure of "trader"<sup>199</sup>, as "*a natural or legal person or public entity or consortium of such persons and / or entities, including any temporary joint venture, which offers to the creation of jobs and / or a work, the supply of products or the provision of services*"<sup>200</sup>.

Therefore, participation in tenders must be allowed also for individuals who "do not pursue an overriding profit, do not have the organizational structure of a company and do not grant a regular presence on the market."

The consequences on the "European" structure are obvious: entities that are structurally different from the usual competitors can be found competing in the bid with public companies, such as government agencies, associations, foundations, who have not as a specific purpose for gain and can fulfill their activities also not systematically, but only occasionally.

On the other hand, the opening of Community allows a private trader to participate in public tenders along with non-commercial parties, such as the University, thus acquiring expertise and knowledge. The EU directive 2014 states that "*Groupings of economic operators, including joint ventures, are allowed to participate in procurement procedures. They cannot be forced by the contracting authorities to have a specific legal form in order to submit a tender or a request to participate.*"<sup>201</sup>. Economic operators are chosen primarily for their technical skills

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<sup>198</sup> Mauro Crosato and Sandro Storelli, "*Innovazione Organizzativa: manuale pratico per le procedure di gara*", CNA Padova, 2014.

<sup>199</sup> It should be noted that the term 'economic operators' should be interpreted broadly, to include any person and / or entity that offers the market the execution of works, the supply of products or the provision of services, regardless of the legal form under which it chose to. Therefore companies, subsidiaries, affiliates, partnerships, cooperatives, limited liability company, public or private universities and other forms of entities other than natural persons should fall within the concept of economic operator, regardless of whether they are 'legal persons' or less all circumstances. Please refer to art 14, Directive 2014/24 / EU

<sup>200</sup> Art. 2 no. 10 Directive 2014/24/UE.

<sup>201</sup> Art. 19 Directive 2014/24/UE.

and the economic capacity. Any economic operator may be excluded if it is in a state of bankruptcy, liquidation, cessation of trading, controlled administration; who has been convicted of an offense concerning his professional conduct; who has committed serious professional misconduct. The non-fulfillment of obligations relating to the payment of social security contributions, taxes and fees may be cause for exclusion, as well as having made false representations to the contracting authority<sup>202</sup>. While it is mandatory to exclude from public contracts traders guilty of participating in a criminal organization or of corruption, fraud and money laundering of the proceeds of illegal activities. Administrations may ask tenderers to provide documentary proof of their professional conduct and / or their economic situation. In case of doubt, to obtain this information, a reference can be made to national authorities or to those of another Member State. As for a better analysis of the exclusion of economic operators, please refer to paragraph 3.8.3.

### **3.3 THRESHOLDS**

The procurement law is, therefore, part of the objectives of the internal market. It is intended to ensure that all traders have the opportunity to participate in tenders managed according to uniform criteria and in a transparent way. This transparency has been made for example through the creation of a special "dictionary" European Procurement<sup>203</sup>, which has established a system of single classification to describe the subject of the contract.

But not all public contracts are subject to the regulations of the EU. For works contracts, supply and services in the public sector there are specific thresholds, regularly reviewed by the Commission<sup>204</sup>; so much so that a classical distinction of public tenders is based on the value of the contract to be awarded, distinguishing the procedures in "above threshold" and "below threshold": the

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<sup>202</sup> Article 57, Directive 2014.

<sup>203</sup> Common Public Procurement Vocabulary (CPV), adopted by EC Regulation number 2195/2002 of the European Parliament and the Council.

<sup>204</sup> "Every two years from 30 June 2013, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the World Trade Organisation Agreement on Government Procurement (GPA) and shall, where necessary, revise them in accordance with this Article." Article 6 par 1, Directive 2014/24/UE.

"threshold" is, in fact, the value established by an EU Regulation, to above which public contracts are fully subject to European standards, and therefore, by extension, to the discipline of national implementation.

The 2014 Directive applies to procurements with a value exclusive of value added tax (VAT), less than the following thresholds<sup>205</sup>:

- (a) EUR 5 186 000 for public works contracts;
- (b) EUR 134 000 for public supply and service contracts awarded by central government authorities and design contests organized by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defense, that threshold shall apply only to contracts concerning products covered by Annex III;
- (c) EUR 207 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organized by such authorities; that threshold shall also apply to public supply contracts awarded by central government authorities that operate in the field of defense, where those contracts involve products not covered by Annex III;
- (d) EUR 750 000 for public service contracts for social and other specific services listed in Annex XIV.<sup>206</sup>

To understand what the method of calculating the estimated value of the contract, in order to place it among the so called above or below the threshold, just refer to the same Directive in so far as it provides that: *“The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents. Where the contracting authority provides for prizes or payments to candidates or*

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<sup>205</sup> The thresholds laid down in this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds specified in the GPA (Agreement on Government Procurement concluded within the World Trade Organization). Considering the number 18, Directive 2014/24 / EU.

<sup>206</sup> Art. 4 Directive 2014/24/UE.

tenderers it shall take them into account when calculating the estimated value of the procurement.<sup>207</sup>” and that “where a contracting authority is comprised of separate operational units, account shall be taken of the total estimated value for all the individual operational units. Notwithstanding the first subparagraph, where a separate operational unit is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question<sup>208</sup>”<sup>209</sup>.

Finally, although there is a distinction based on thresholds as just reported, we have to specify that the Commission of the European Union, recalling the jurisprudence of the EU Court of Justice<sup>210</sup> has, on several occasions, clarified that the so called procedures "Under threshold" are subject to the principles of public tender, not existing public procurement subtracted to them, irrespective of tender.

### **3.4 DUTIES**

#### **3.4.1 DUTIES OF MEMBER STATES**

Under the same directive of 2014, which establishes the legislative framework on public procurement, the same Member States are the ones who should strive for such discipline not only to be incorporated into every national law, but to have it

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<sup>207</sup> Article 5 paragraph 1, Directive 2014.

<sup>208</sup> “For the purposes of estimating the value of a given procurement, it should be clarified that it should be allowed to base the estimation of the value on a subdivision of the procurement only where justified by objective reasons. For instance, it could be justified to estimate contract values at the level of a separate operational unit of the contracting authority, such as for instance schools or kindergartens, provided that the unit in question is independently responsible for its procurement. This can be assumed where the separate operational unit independently runs the procurement procedures and makes the buying decisions, has a separate budget line at its disposal for the procurements concerned, concludes the contract independently and finances it from a budget which it has at its disposal. A subdivision is not justified where the contracting authority merely organises a procurement in a decentralised way.”. Considering number 20, Directive 2014/24/UE.

<sup>209</sup> Article 5 paragraph 2, Directive 2014.

<sup>210</sup> Court of Justice of the European Union, Order of 3 December 2001 in Case C-59/00, paragraph 19, stated that "procurement of low value are not excluded from the scope of Community law" and Judgment of 7 December 2000 in Case C-324/98 *Telaustria v. Post & Telekom Austria* [2000] *Rac.I-10745*, paragraph 60 in which he stressed the need to respect the principle of transparency with regard to procurement that do not fall specifically within the scope of the directives concerned.



applied in practice, which is why there are some set obligations. Member States, in particular, should:

- take appropriate measures to ensure that in the performance of public contracts economic operators comply with 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 listed in Annex X<sup>211</sup>.
- Member States shall ensure that all communication and information exchange under this Directive, in particular electronic submission, are performed using electronic means of communication in accordance with the requirements of this Article. The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators' access to the procurement procedure.<sup>212</sup>.
- Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.<sup>213</sup>

### **3.4.2 OBLIGATIONS OF THE AUTHORITIES**

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<sup>211</sup> Article 18, par 2, Directive 2014/24.

<sup>212</sup> Article 22 par 1, Directive 2014/24.

<sup>213</sup> Article 24, Directive 2014.

As for the Member States, so the Directive also states obligations that must be respected by the contracting authorities, and in particular says As for the Member States, so the Directive also states obligations that must be respected by the contracting authorities, and in particular says:

*"The authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate."*<sup>214</sup> First of all, then, we see a further reference to those that the same directive lists as fundamental principles of public procurement, which we have already been discussed above. And the specific obligations related general obligation of compliance with these general principles are, for example, the provision that the notice is published in the Official Journal of the European Communities ("S") to be made knowable to all interested companies regardless of the Member State of origin<sup>215</sup>; the obligation to include, in general or contractual documents relating to each contract, the set of requirements defining the characteristics of a work, a material, a product or service so that they conform to their intended use. To respect the principle of transparency is also necessary that the contracting authorities indicate in the published notice, the criteria (cost and quality) according to who shall be awarded the contract and the relative weighting of each of them, so that they can then motivate the choices and exclusions in a fair and clear way.

The contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.<sup>216</sup>

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<sup>214</sup> Article 18 par 1, Directive 2014/24/UE.

<sup>215</sup> Cfr. Art. 9 of Directive 93/36, Art. 11 of Directive 93/37, Art. 17 of Directive 92/50, Art. 21 of Directive 93/38. The rules on advertising concerning the obligation to publish so called "annual indicative notice" containing a summary of the work programs of the government for the next year, as well as notices of the award of contracts

<sup>216</sup> Article 21, Directive 2014.

In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired<sup>217</sup>.

Lastly, it must be remarked that “*contracting authorities shall take appropriate measures to ensure compliance with the obligations<sup>218</sup> in the field of environmental law, social and labor that apply in the place where the work is performed or services provided and arising from laws, regulations, decrees and decisions adopted at both national and EU level, and by collective agreements provided that such rules, and their application, comply with Union law<sup>219</sup>”.*

Obviously, the obligation of contracting authorities to "enforce", corresponds to the obligation of economic operators to "respect", so that the non-compliance of its obligations may be considered a serious misconduct by the economic operator in question and could result the exclusion<sup>220</sup> of that of the procedure for the award of a public contract<sup>221</sup>.

### **3.5 CONTRACT PRE-INFORMATION AND PROCUREMENT NOTICE**

In order to observe the principle of transparency and publicity, the contracting authority must, and in certain cases can publish two specific actions: the contract forecast and the procurement notice<sup>222</sup>. The first is a notice to announce the possible publication of an invitation to tender for a contract, it is published by the

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<sup>217</sup> Article 22 par 3, Directive 2014.

<sup>218</sup> *Control of the observance of the environmental, social and labour law provisions should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the choice of participants and the award of contracts, when applying the exclusion criteria and when applying the provisions concerning abnormally low tenders. The necessary verification for that purpose should be carried out in accordance with the relevant provisions of this Directive, in particular those governing means of proof and self-declarations.* Considering number 40, Directive 2014/24/UE.

<sup>219</sup> Considering number 37, Directive 2014/24/UE.

<sup>220</sup> Please see paragraph 3.8.3.

<sup>221</sup> Considering number 39, Directive 2014/24/UE.

<sup>222</sup> Article 48, Directive 2014/24/UE.

Publications Office of the European Union or by the contracting authorities on their buyer profile, giving information to the EU Office of Publications. The period covered in the notice of the prior information notice can take up to twelve months from the date of dispatch of the publication, however, in the case of public contracts for social services and other specific services, may also cover a longer period. The second<sup>223</sup> is the actual act by which the administration launches a call for tenders with a particular object. The contracting authority may publish the notice on a national level, but should also send it to the Publications Office of the EU; the notice is published in full in an official language of the EU, while only a summary is translated into all the other languages. When the publication of the notice follows a prior information notice, the deadline for the submission and receipt of tenders may be reduced (another possible opportunity to reduce the terms it is to publish the notice electronically). The important difference between these two acts is the fact that while the notice is always due, existing only exceptions where it can be omitted, the contract forecast is optional<sup>224</sup>, so the choice is reserved exclusively to the contracting authority.

### ***3.6 PROCEDURES FOR THE AWARD OF PROCUREMENTS***

As for the method of procurement in the Community dimension is necessary to distinguish two stages of the procedure: first, the identification of possible contracting (stage "pre-selection" and verification of the requirements that contractors must meet to be admitted to the bid), then, when finalized, the stage of selection of the successful contractor (under "evaluation of tenders").

#### ***3.6.1 PRE-SELECTION***

There are four types of pre-selection procedure: the open procedure, the restricted, negotiated and the competitive dialogue.

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<sup>223</sup> Article 49, Directive 2014.

<sup>224</sup> "Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice". Article 48, par 1, first part, Directive 2014.

### **3.6.1.1. OPEN PROCEDURE**

In the *open procedure* any interested economic operator may submit a tender in response to a notice of a call for competition: in this way it was defined by the Article 27 of the Directive 2014/24/EU; article built along the lines of the Article 1 (a) of the Directive 2004/18/CE<sup>225</sup>. In this case there is not a real pre-selection phase but only the phase of admission of the subjects, which is carried out immediately before the step of evaluation of the offers.

### **3.6.1.2 RESTRICTED PROCEDURE**

The *restricted procedure* is a procedure in which any economic operator may submit a request to participate in response to a notice of call for competition but only those economic operators invited by the contracting authority may submit tenders<sup>226</sup>. Administrations invite then, simultaneously and in writing, the selected candidates to submit their tenders. Applicants must be at least five, except in cases where there is a sufficient number of suitable candidates to the contract.

### **3.6.1.3 NEGOTIATED PROCEDURE AND COMPETITIVE DIALOGUE**

In the *competitive procedure* or in the *dialogue with negotiation*, Member States shall provide that contracting authorities may apply a competitive procedure with negotiation or a competitive dialogue in the following situations:

- (a) with regard to works, supplies or services fulfilling one or more of the following criteria:
  - (i) the needs of the contracting authority cannot be met without adaptation of readily available solutions;

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<sup>225</sup> R. De Nictolis, “Le procedure aperte e ristrette” in R. Garofoli-M.A. Sandullo, “Il nuovo diritto degli appalti pubblici nella direttiva 2004/18/CE e nella legge comunitaria n. 62/2005”, Milano, 2005.

<sup>226</sup> Article 28, Directive 2014/24/UE.

(ii) they include design or innovative solutions;

(iii) the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them;

(iv) the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference within the meaning of points 2 to 5 of Annex VII;

(b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted<sup>227</sup>. In such situations contracting authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in Articles 57 to 64 and which, during the prior open or restricted procedure, submitted tenders in accordance with the formal requirements of the procurement procedure<sup>228</sup>.

In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular. In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.

Therefore, despite the fact that the circumstances in which it can be allowed in the latter mode are absolutely exceptional and categorically laid down, according to the European Parliament and the Council, *“There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded*

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<sup>227</sup> Article 26, Paragraph 4, Directive 2014.

<sup>228</sup> *Cit. infra.*

*by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue<sup>229</sup>, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values over the past years. It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Where relevant, contracting authorities should be encouraged to appoint a project leader to ensure good cooperation between the economic operators and the contracting authority during the award procedure<sup>230</sup>.*

### **3.6.1.3.1 NEGOTIATED PROCEDURE**

The *negotiated procedure*, defined by the Article 29 of the Directive 2014/24/EU, is a procedure in which the authorities consult economic operators of their choice and negotiate with one or more of them the contract conditions. In this phase can participate only candidates chosen by the contracting entity. The pre-selection phase in this case is whether the verification of the requirements, both in discretionary choice about which of eligible subjects should be consulted. The negotiated procedure is limited to exceptional cases and presents some very special features, as the selection was not based on a formal offer but through negotiation between the applicants and the administration. There are two methods of completing the negotiated procedure, depending on whether or not this is preceded by the publication of the notice. In the first case<sup>231</sup> all the undertakings

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<sup>229</sup> Please refer to the following paragraph.

<sup>230</sup> Considering number 42, Directive 2014/24/UE.

<sup>231</sup> Article 29 Directive 2014.

concerned have the opportunity to participate in the procedure and the contracting entity's decision not to invite certain applicants should be based on impartial and transparent assessments; in the second case<sup>232</sup>, which has to be used in very exceptional circumstances<sup>233</sup>, the participating companies are directly chosen by the administration, while other businesses are not even able to know if you have launched a procedure for the award.

### **3.6.1.3.2 COMPETITIVE DIALOGUE**

Finally there is the competitive dialogue, which can be used in two specific cases, namely where the award is particularly complex (i.e. Large infrastructure projects) and when the normal tender procedures are inappropriate to meet the needs of the contracting authority<sup>234</sup>. The procedure consists of three phases: an initial term when the administration publishes a contract notice that includes the award criteria of the contract. Any economic operator may request to participate in response to the call for competition by providing the information required by the contracting authority for qualitative selection, but only those economic operators invited by the contracting authority following their assessment of the information provided can participate in the dialogue. A middle phase, when the administration invites, simultaneously and in writing, the selected candidates (at least three) to conduct a dialogue, which may take place in stages and continues until the definition of solutions. The final phase coincides with the conclusion of the dialogue, in which participants presented their final offer, which can be specified, but without changing the basic elements. Following the evaluation of tenders on the basis of the award criteria set out in the notice and the choice of the most economically advantageous.

It must be specified that the competitive dialogue is not used in the water, energy, transportation and postal services.

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<sup>232</sup> Article 32 Directive 2014.

<sup>233</sup> Considering n.50 Directive 2014/24/UE.

<sup>234</sup> Considering 31, Directive 2004/18 / EC provides for the use of the competitive dialogue for the authorities who are objectively unable to define the means to meet their needs and to assess what the market can offer in terms of technical solutions and / or legal and financial solutions.



### 3.7 VALUATION OF THE OFFERS

The pre-selection stage is followed by the stage of admission of the candidates, which is done through the verification of certain expressly stated requirements and governed by the Community directives. These are requirements of a moral nature<sup>235</sup>, relating to the formal validity of the professional situation of the candidates<sup>236</sup> and their technical capability<sup>237</sup> and financial condition<sup>238</sup>. For each of these requirements are set out the ways in which the fulfillment of these criteria can be demonstrated<sup>239</sup>. For contracts in the former excluded sectors that stage of assessment is not required since there is a qualification system under which

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<sup>235</sup>In particular, it is envisaged the exclusion of those who is in a state of bankruptcy, liquidation or other equivalent situation, who have reported a conviction by a court for any offense concerning professional conduct, who has committed an error in his profession serious, who is not in compliance with its obligations contributions and tax and who is guilty of misrepresentation in relation to the above circumstances: see. art. 20 of Directive 93/36, Art. and Article 24 of Directive 93/37. 29 of Directive 92/50.

<sup>236</sup> “With regard to suitability to pursue the professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as described in Annex XI, or to comply with any other request set out in that Annex. In procurement procedures for services, in so far as economic operators have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership”. Article 58 par 2, Directive 2014.

<sup>237</sup> With regard to technical and professional ability, contracting authorities may impose requirements to ensure that economic operators possess the necessary human and technical resources and experience to perform the contract with an appropriate quality standard. Contracting authorities may require, in particular, that economic operators have a sufficient level of expertise demonstrated by appropriate references for contracts carried out earlier. A contracting authority may consider that a trader does not have the skills required when it is satisfied that the applicant has conflicts of interest that may affect the implementation of the contract. In procurement procedures for supplies requiring siting or installation work, services or works, the professional capacity of economic operators to provide the service or to execute the installation or the work may be evaluated with regard to their skills, efficiency, experience and reliability.

<sup>238</sup> “With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract. In addition, contracting authorities may require that economic operators provide information on their annual accounts showing the ratios, for instance, between assets and liabilities. They may also require an appropriate level of professional risk indemnity insurance”. Article 58 par 3, Directive 2014.

<sup>239</sup> See. Court of Justice, 10.2.1982, owing 76/81 Transporoute and travaux against the Ministry of Public Works, which states that a Member State cannot claim to be an agent established in another Member State the evidence that he meets the conditions set out in Directive 71/305 and on its good reputation and its qualification with means, such as the authorization of establishment, other than those set out in the directive.

governments authorities have the opportunity to draw up a preliminary register of suppliers and service providers to draw from to identify the participants in the procedures, without the need for additional checks and selections<sup>240</sup>.

Once the pre-selection stage is ended, after exclusion of certain unsuitable categories of service providers or suppliers, and after checking their candidates than the economic and financial capacity and the competence and technical capacity, contracting authorities will have to go to the actual phase evaluation of bids and awarding the contract to the entity who, according to an objective and impartial evaluation, offers the best conditions.<sup>241</sup>

### **3.8 PROCUREMENT AWARD CRITERIA**

The Community directives on public procurement, in force before 2014, provided for two methods for the award:

- *The method of the lowest price*, in which the only factor to consider is the asking price and the contract must be awarded to the bidder requiring the lower price in absolute terms, regardless of the technical work, the product or service offered;
- *The method of the most economically advantageous*, in which the contract is awarded to the candidate who offers the best conditions considered following a comparative economic and qualitative<sup>242</sup>. Contracting authorities may be based on various criteria, according to the contract in question, such as price, delivery, performance, quality, aesthetic and functional characteristics, technical merit, maintenance services to sales and technical support. The list should not be considered exhaustive and yet the elements therein are united by the fact of being objective, closely linked to the object of the contract and the quality of performance rather than the supplier. The more discretion related to the use of this

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<sup>240</sup> See art. 30 directive 93/38.

<sup>241</sup> See. Case Beentjes., Which states that "*the suitability of the contractors to carry out the work to be given in contract and awarding the contract are two different operations in the procedure for the conclusion of a contract public works contract.*"

<sup>242</sup> "An economic operator that has sought an invitation or has been invited to take part in a restricted procedure, in a competitive procedure with negotiation, in a negotiated procedure without prior publication, in a competitive dialogue or in an innovation partnership", Article 2 par 1 number 12, Directive 2014/24/UE.

criterion for the award involves the administration is obliged to state in the contract documents or contract notice all the elements on which it intends to make its assessment, along with the relative score to each of them, as established by the Court of Justice from case Lianakis, in 2008<sup>243</sup>. It is not enough in order simply by referring to the provisions of national law<sup>244</sup>. In Community directives it has not given any indication of the criteria for choosing between the two methods for the award: it must therefore be held that the contracts of works, services and supplies of a value above the EU threshold are awarded with either one of two methods, leaving wide discretion to the national administration. There is not even a close correlation between the procurement method chosen and the pre-selection stage: in fact, regardless of the procedure used (open, restricted, negotiated), the contract can be awarded regardless of whether the tender with the lowest price is to the most economically advantageous. Obviously, however, the choice between one or the other criterion affects the structure of the tender process: the first one will only need to open the offers at the established moment and, in a completely automatic way (for impartiality and transparency<sup>245</sup>), see which tenders offered the lowest price. In the second case, the valuation is committed to a Commission, composed by experts nominated by the administration. Moreover, if, at the beginning, these two criteria had a strong correlation to the procurement's object, now they are completely autonomous, with the result that there's an equal status between the two ways to selection<sup>246</sup> and any other criteria are not allowed<sup>247</sup>.

### **3.8.1 LOWEST PRICE CRITERIA**

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<sup>243</sup> Carlo Emanuele Gallo, *"Autorità e consenso nei contratti pubblici alla luce delle direttive 2014"*, Torino, 2014.

<sup>244</sup> Please refer to. Case C-31/87, Gebroeders Beentjes BV v Netherlands, paragraph 35: the Court held that where the authorities "are based on various criteria to award the contract to the most economically advantageous, are required to state those criteria in the contract notice or in the specifications and that, accordingly, a general reference to a provision of national legislation cannot satisfy the publicity requirement. "

<sup>245</sup> M. Clarich, *"Manuale di Diritto Amministrativo"*, Bologna, 2013.

<sup>246</sup> Carlo Emanuele Gallo, op. cit.

<sup>247</sup> R. De Nictolis, *"Il nuovo diritto degli appalti pubblici"*, 2005.

The criterion for the award at the lowest price, characterized by extreme rigidity and lack of discretion in the hands of the administration, while not placing big dilemmas of interpretation, presents the risk of so-called "abnormal tenders."

### **3.8.1.1 ABNORMAL TENDERS**

An offer is considered abnormal when it has a price too low compared to the performance required and cannot be profitable for the candidate who. The risk of anomalous tenders is the possible distortion of competition; therefore, to solve this problem, the Community legal system has stated that these offers may be rejected by the contracting authority: however, the exclusion is not automatic, but the contracting authority has to verify (with a contradictory between the contracting authority and the candidate) from time to time the actual existence of the anomaly. The administration can decide whether or not verify the offer's congruity<sup>248</sup> and, if it decides to proceed with the verification, it has to request, in the form of a written notification, to the supplier to provide details of the constituent elements of the offer (i.e. Economics of the construction, condition favorable than available to the tenderer) and it has to take into account, then, the explanations received. The Court of Justice<sup>249</sup> has held that this list is not exhaustive and that the candidate should be given the option to try the most extensive and complete seriousness and reliability of its offer citing any reasons it deems appropriate, taking into account the characteristics and nature of the contract, and without any limitation. Is therefore incompatible with Community law, the exclusion of explanations relating to all those elements for which minimum values are laid

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<sup>248</sup> Court of Justice in regard to the final judgment of 27.11.2001 in Joined Cases C-285/99 and C-286/99 Lombardini Spa and Enterprise Ing. Mantovani S.p.A. against ANAS SpA (hereinafter "sent. Lombardini"), in which the Court ruled that "*Community law does not object, in principle, to a mathematical criterion is used to determine which tenders appear to be abnormally low, however, as long as the result to which the application of this criterion is not beyond challenge, and the requirement for inter partes examination of those tenders*": see. paragraph 73 of the felt. Lombardini.

<sup>249</sup> Court of Justice of the European Communities (sixth section), Joined Cases C-285/99 and C-286/99), 27 November 2001.

down by laws, regulations or administrative provisions, or for which values are ascertained from official data such as price lists, mercurial, stock quotes and similar. According to the Court, such a limitation would result in a barrier to competition between Community companies which could see their bids excluded because they are justified by considerations other than those provided by the national standards.

### **3.8.2 THE METHOD OF THE MOST ECONOMICALLY ADVANTAGEOUS**

The criterion of the most economically advantageous presents major problems of implementation as it involves a discretionary judgment of the administration carried out to determine the best offer not only economically but also in terms of technology and quality. For the identification of the best solution quality / price, Directive 2014 indicates some criteria:

- a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;*
- b) organization, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or*
- c) after-sales service and technical assistance, delivery conditions such as delivery dates, delivery process and delivery period or period of completion<sup>250</sup>.*

In the work program for the year 2000, presented during the course of that year<sup>251</sup> and brought before the Parliament and the European Council, the Commission announced the preparation of a proposal to amend the directives on public works, services and supplies and one of the issues on which he focused the modification work is concerning the criteria for the award of contracts, in respect of which the

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<sup>250</sup> Article 67 par 2, Directive 2014

<sup>251</sup> See. COM (2000) 275 of 30.8.2000, Coordination of procedures for the award of public supply, services and works.

new proposals, on the one hand, reiterate how they can be only the lowest price and the offer The most economically advantageous, on the other hand, include, among the examples of criteria used for the purpose of identifying the most advantageous offer from an economic, environmental characteristics, specifying, however, that they (like other criteria) must be "directly related to the object of the procurement<sup>252</sup>". Another important innovation is the fact that contracting authorities will have to indicate from the outset of the procedure the relative weighting given to each of the criteria mentioned<sup>253</sup>, not enough more an indication of simple descending order of importance of the criteria. The aim is of course to increase the transparency of the evaluation phase and avoid as much as possible arbitrary decisions by the contracting entities.

### **3.8.2.1 VARIABLES**

EU directives, as well as point out some of the elements that may be considered by the Administration, provide for the possibility for contracting entities to indicate in the notice the configurability of the so-called "variants"<sup>254</sup>. This is an important incentive for economic operators and for research into new technologies and solutions, and is the possibility that it is submitted tenders which, while deviating from the technical specifications set out by the administration, nevertheless satisfy the requirements. The admission of variants is envisaged only if the allotment most advantageous tender, as the assessment of a variant and its comparison with offers spec can be carried out fairly only if the judgment involves different criteria evaluation and not just the price. The administration has the right to decide whether to ban or authorize variants: if it bans it, it is required to indicate it in the contract notice, if it agrees, this can even not be mentioned in

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<sup>252</sup> See. Art. 33 of the proposal contained in COM (2000) 275, cit. and art. 54 of the proposal contained in COM (2000) 276, cit.

<sup>253</sup> See. Recital 41 of the proposal contained in COM (2000) 275

<sup>254</sup> Refer to. Art. 16 of Directive 93/36, Art. 19 of Directive 93/37, Art. 24 of Directive 92/50, Art. 34 of Directive 93/38, Art. 45 Directive 2014/24 / EU.

the announcement, but has the burden of state in the contract documents the minimum conditions which they must satisfy, and the manner of presentation by bidders. Naturally variants will be evaluated only if they meet the minimum requirements by the technical documents. The possibility of taking into account the submission of variants is a valid excuse to introduce criteria so-called "sustainable" in the award of contracts as it allows contracting authorities to choose the option that, in compliance with the minimum requirements, better respond to needs both financial and either social or environmental<sup>255</sup>.

### **3.8.2.2 OFFERS ABNORMALLY LOW**

If tenders appear to be abnormally low in relation to the works, supplies or services, the contracting authority must immediately ask the reasons for this cost. Explanations could include:

- (a) the economics of the manufacturing process, of the services provided or of the construction method;*
- (b) the technical solutions chosen or any exceptionally favorable conditions available to the tenderer for the supply of the products or services or for the execution of the work;*
- (c) the originality of the work, supplies or services proposed by the tenderer;*
- (d) compliance with obligations referred to in Article 18(2);*
- (e) compliance with obligations referred to in Article 71;*
- (f) the possibility of the tenderer obtaining State aid<sup>256</sup>.*

Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low

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<sup>255</sup> Cfr. *infra*.

<sup>256</sup> Articolo 69 Direttiva 2014/24/UE.

price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions.<sup>257</sup>

### **3.8.3 REASONS FOR EXCLUSION**

In addition to the grounds for exclusion stated above, because, that is, of missing explanations on an abnormally low price of the offer, the contracting authorities can exclude economic operators which have proven to be unreliable (violations of environmental or social obligations, serious violation professional misconduct, such as violations of competition rules or of intellectual property rights). The unreliability of the operator can be assessed by any breach of important obligations as a serious professional misconduct may put into question the integrity of a trader and thus make the latter unfit to secure the award of a public contract regardless of whether it has for the rest of the technical and economic capacity to perform the contract. Contracting authorities may conclude that there has been serious professional misconduct even if they can demonstrate, by any means, that the applicant has violated its obligations, including those relating to the payment of taxes or social security contributions, unless otherwise provided by national law. They should also be able to exclude candidates or tenderers that for the execution of previous public procurement has shown significant shortcomings regarding the substantive obligations (non-delivery or performance, significant deficiencies of the product or service provided, making it unusable for its intended purpose or misbehavior). While applying optional grounds of exclusion, contracting authorities should pay particular attention to the principle of proportionality. Small irregularities should lead to the exclusion of an economic operator only in exceptional circumstances. However, repeated instances of minor irregularities may give rise to doubts about the reliability of economic operators that could justify their exclusion<sup>258</sup>.

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<sup>257</sup> *Considering* 103, Directive 2014.

<sup>258</sup> *Considering* 101, Directive 2014.



Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehavior. Those measures might consist in particular of personnel and organizational measures such as the severance of all links with persons or organizations involved in the misbehavior, appropriate staff reorganization measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. Where such measures offer sufficient guarantees, the economic operator in question should no longer be excluded on those grounds alone. Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases. They should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralized level with that task<sup>259</sup>.

A further reason for exclusion is the fact that the economic operator has been convicted by final judgment for one of the reasons mentioned in Article 57 paragraph 1 (i.e. Participation in a criminal organization, corruption, fraud, crime or terrorist-related activities terrorist, laundering proceeds of crime or financing of terrorism, child labor and other forms of trafficking in human beings). The same Article 57, listing all the possible causes of exclusion, which also specifies the duration of the exclusion itself should be limited in time, indicating the maximum period: if the exclusion period has not been fixed by final judgment, which shall not exceed five years from the date of conviction by final judgment and three years after the fact in question<sup>260</sup>.

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<sup>259</sup> *Considering* 102, Directive 2014.

<sup>260</sup> Article 57 par 7, Directive 2014.

### **3.8.4 RELEVANT NOVELTIES OF 2014 DIRECTIVES REGARDING AWARD CRITERIA**

The peculiarity of the Guidelines of 2014 is represented by overcoming of the alternative of the two criteria for the award of tenders, overcoming that leads to the recognition of a single criterion: the most economically advantageous tender (Article 67 Directive 24/2014). Of course, as we know, this does not mean it will not be held to account the economic element, criterion more efficient and relevant in the award of a contract, but this is no longer an independent criterion for selection of the contractor. Certainly, however, as someone noticed<sup>261</sup>, the reference to the only economic criterion reappears often in the text of the Directive, that hints at some relief element money, enough to make us think that it has maintained, as it is no longer an item alternative, a role of competitor. As indicated above, the same Directive 2014 talks about the criterion of the best value for money, just to differentiate it from that defined most economically advantageous tender in the earlier directives, just to form a new and unique award criterion. Now, the only award criterion provides two ways of finding the best offer: economic (cost-effectiveness) and qualitative (quality aspects, environmental and social issues related to the object of the contract), as expressly stated in Article 67 the above-mentioned Directive.

### **3.9 CONTRACT AWARD NOTICE<sup>262</sup>**

To answer the same need for advertising that also answers the call for tenders, the contracting authority, once the contract has been awarded (within thirty days of that), expresses its choice in the award notice. In particular, by this notice, the administration makes it known to all participants the trader awarding the contract and the reasons that led to prefer that economic than the other. If the tender had been made by means of a pre-notice and the contracting authority has decided not win more contracts in the period covered by pre-notice, the award notice shall

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<sup>261</sup> R. Caranta e D.C. Dragos, “*La Mini-rivoluzione del diritto europeo dei contratti pubblici*”, in *Urbanistica e appalti*”, 2014.

<sup>262</sup> Article 50 Directive 2014.

contain a specific indication about it. Just by virtue of the principle of transparency, this document has to be sent by the contracting authorities to economic operators, also excluded, even without their request; it is also expected that the operators themselves, once received such an act, can ask more detailed explanations and that the authorities are obliged to disclose.

#### **4. APPEALS IN PUBLIC PROCUREMENT**

To ensure that there is a regular application of Community law even in matters of public contracts, there is a need for mechanisms of supervision and control of the conduct of both contracting authorities and contracting entities, together with the strengthening of the means of existing intervention, to ensure that they are quick to re-establish a situation consistent with Community law. This is not just that contracting authorities and Member States (including by providing specific penalties) fulfill the obligations set out above, but it is important that both the Commission itself to supervise the Member States.

The rules on appeals in public procurement was dictated, in part, by Directives 1989/665 / EEC and 1992/13 / EEC, both later amended by Directive 2007/66 / EU.

There are some principles and institutions that are common, as modified over time, in all three Directives, because existing in the first of 1989, so it is necessary to consider them together, while there are institutions that were introduced only by more recent directives, and those ones will be indicated.

##### **4.1 APPEALS' REGULATION FROM 1989 TO 2007**

According to the Directive of 2007, Directive 89/665 / EEC and 92/13 / EEC apply only to procedures for the award of contracts covered by Directives 2004/18 / EC and 2004/17 / EC irrespective of the public procedure used and the means by

which the call for competition. According to the Directive of 1989, and confirmed by subsequent, Member States shall take necessary measures to ensure that there are accessible means of effective and rapid remedies against decisions taken by contracting authorities and entities that have infringed Community law on the award public procurement or national rules implementing that law<sup>263</sup>, on the question whether a particular contract falls within the scope of Directives 2004/18 / EC and 2004/17 / EC<sup>264</sup>.

#### ***4.1.1 ENTITIES THAT CAN FILE AN APPEAL***

Member States shall ensure that the review procedures are available, under detailed rules which Member States themselves can determine, to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged violation. The only condition that Member States may require is that the person wishing to use a review procedure to inform, before offering it, the contracting authority of the alleged infringement and of his intention to seek review, provided that this does not affect the standstill period; or they may require that the same subject propose firstly a review with the contracting authority itself, and in this case, the submission of such an application entails the immediate suspension of the possibility to conclude the contract<sup>265</sup>.

#### ***4.1.2 THE RECIPIENT AUTHORITY OF THE APPEAL***

The powers to decide on the appeal may be conferred on separate bodies responsible for different aspects of the review procedure. This body may be judicial or not, except that if the bodies responsible for review procedures are not judicial, their decisions shall always be given in writing. In this case, moreover, they must be adopted by Member States through arrangements which each

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<sup>263</sup> Article 1 par 1, Directive 2007/66.

<sup>264</sup> *Considering* 2, Directive 2007/66.

<sup>265</sup> Article 1, Directive 2007/66.

allegedly illegal measure or decision taken by the competent appeal or any alleged defect in the exercise of the powers conferred on it can be the subject of a judicial review<sup>266</sup> or a review by another body which is a court within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body. The body independent, responsible for review procedures, has two different characteristics: it has not to be necessarily different from the courts<sup>267</sup>, but at the same time it has to be different from the administrative bodies responsible for any administrative appeals<sup>268</sup>. The appointment of the members of this independent body and the termination of their office fall under the same conditions as the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications of a judge. The independent body shall take its decisions following a contradictory procedure and its decisions shall, by means determined by each Member State, be legally binding<sup>269</sup>.

#### **4.1.3 APPEAL PROCEDURE<sup>270</sup>**

The person in question to make the application, after informing the contracting authority of the will to make this appeal and motivation, offers the same front organ specific. Member States shall ensure that the measures taken concerning the review procedures include provision for the powers to:

- a) take, at the earliest opportunity and by emergency procedure measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to

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<sup>266</sup> For this reason, the procedure in front of this independent body is not an alternative to judicial review, see Mario Pilade Chiti, “Le misteriose “sanzioni alternative” nella direttiva ricorsi appalti ed i limiti dell’ingerenza dell’Unione europea nel diritto processuale”, in Guido Greco, “Il sistema della giustizia amministrativa negli appalti pubblici in Europa”, Milano, 2010.

<sup>267</sup> Article 2, Directive 2007.

<sup>268</sup> Mario Pilade Chiti, *op.cit.*

<sup>269</sup> Article 2, par 2 e par 9 Directive 2007.

<sup>270</sup> See. *infra*.

ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authorities;

b) set aside or ensure the setting aside of decisions taken unlawfully, including the removal of technical, economic or financial discriminatory in the tender documents, the contract documents or in any other document relating to the contract award procedure in question;

c) award damages to persons harmed by infringement<sup>271</sup>.

The body in question, independent of the contracting authority, decides on the appeal but Member States may provide that such a body, having assessed all relevant aspects, to decide whether the contract should be considered ineffective or whether should be imposed alternatives penalties, but we will talk about this alternative sanctions later<sup>272</sup>. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, including the public interest, and decide not to grant such measures when their negative consequences could exceed their benefits. When a body of first instance receives a complaint about a decision to award a contract, Member States shall ensure that the contracting authority cannot conclude the contract before the review body has taken a decision on the application for interim measures or on the merits of the appeal. The suspension shall end no earlier than the expiry of the standstill. Apart from this case, review procedures need not to necessarily have an automatic suspensive effect on the contract award procedures to which they relate. Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

#### ***4.1.4 CORRECTING MECHANISM***

This institute was, yes, introduced by Directive 1989 but better regulated, then, from that of 1992, and finally recovered by the Directive of 2007. If the Commission, prior to signing a contract, believed to have been committed a

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<sup>271</sup> Article 2, Directive 2007.

<sup>272</sup> Paragrah 4.3.3.

serious breach of Community law on public procurement in a procedure for awarding a contract covered by Directive 2004/18 / EC, may use the correction procedure. The Commission shall notify the Member State concerned of the reasons why it considers that there has been a serious violation and request its correction by appropriate means. Within twenty days of receipt of such notification, the Member State concerned shall inform the Commission or the confirmation that the infringement has been corrected or a reasoned submission as to why no correction has been made (which may, among other things, rely on the alleged infringement is already the subject of judicial review proceedings or otherwise or an appeal, in which case it shall inform the Commission of the result of those proceedings as soon as it becomes known) or a notification that the award procedure the contract in question was suspended by the contracting authority on its own initiative. If it has been notified by a Member State that a procedure for the award of contract has been suspended, the State must notify the Commission of the suspension is lifted or start another procedure for the award of the contract in whole or part the previous procedure, confirming that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

#### ***4.1.5 NEW ELEMENTS INTRODUCED BY 1992 DIRECTIVE, THE CONCILIATION PROCEDURE***

The application of the conciliation procedure may be requested by any person having or having had an interest in obtaining a particular contract and, in relation to the procedure for the award of that contract, considered to be or being at risk to be harmed by an alleged breach of Community law in the field of procurement or national rules implementing that law. The request must be made in writing to the Commission or to the national authorities of the Member States and the latter shall forward it to the Commission as soon as possible. If the Commission considers that the dispute concerns the correct application of Community law, ask the contracting entity to declare its readiness to participate in the conciliation

procedure. If the contracting entity declines to take part, the Commission shall inform the person who made the request that the procedure cannot be started. If the contracting entity gives its agreement, it continues with this procedure. At this point, the Commission proposes a conciliator drawn from a list of independent persons accredited for this purpose (a list established by the Commission after consulting the Advisory Committee for Public Contracts or the Advisory Committee for contracts in the telecommunications sector). Each party to the conciliation procedure shall declare whether it accepts the conciliator, and shall designate an additional conciliator. The conciliators may invite a maximum of two other persons as experts to advise them in their work. Parts of the procedure and the Commission may reject any expert invited by the conciliators. The conciliators shall give the person requesting the application of the conciliation procedure, the contracting entity and any other candidate or tenderer participating in the procurement procedure in question, the opportunity to make oral or written observations. The conciliators shall endeavor to find early agreement between the parties, in accordance with Community law and the Commission on their findings and on any result arrived

The person requesting the application of the conciliation procedure and the contracting entity shall have the right at any time to end the procedure. Unless the parties decide otherwise, the person requesting the application of the conciliation procedure and the contracting entity shall bear their own costs and, in addition, they shall each bear the costs of the procedure, in equal parts, excluding the costs of parts interveners. If, in relation to a particular contract award procedure, an interested person other than the person who makes use of the conciliation procedure, introduced a judicial or other proceedings, the contracting entity shall inform the conciliators who, in turn, must inform that person that has been applied for the application of the conciliation procedure, inviting them to indicate within a given time limit, whether it will accept or not to participate in the conciliation procedure. If that person refuses to participate, the conciliators may decide, possibly a majority, to terminate the conciliation procedure if they consider that the participation of the person required to resolve the dispute. They shall notify their decision to the Commission, stating the reasons.



## ***4.2 THE COMMISSION'S POINT OF VIEW: THE GREEN BOOK OF 1996<sup>273</sup>***

Before analyzing the changes introduced by the last appeals Directive, namely that of 2007, I would do an overview of possible actions, seen until now, available in the case of breaches of Community law, helping with what the Commission expressed in the Book 1996 Green.

### ***4.2.1 ACTIONS AGAINST THE COMMUNITY LAW VIOLATION***

According to the Commission, ways to deal with violations or failures are manifold: first of all there is the opportunity to report violations directly to the institution that has put in place, which could correct them immediately. In the event that this does not happen, there must be the possibility of resorting to formal safeguards such as legal proceedings. There is the possibility, indeed, for economic operators (i.e. those who best can oversee the implementation of Community obligations) of each Member State's right to appeal before the national court or to an instance whose decisions may be subject to judicial review. Is also provided, for instances just mentioned (the same as the national court), that they have the power to order provisional measures (i.e. Suspension of the procedure for the award of the contract), to rule on the compatibility of procurement procedures with rules and, where appropriate, to annul or to have annulled the unlawful decisions, to order the removal of certain conditions contained in the contract notices and to award damages.

Another way to respond to a possible infringement of Community law on public procurement are complaints. The Commission, in its role as guardian of the Treaty, investigates complaints from workers who are aggrieved and seeks to reach a solution of the problems, in many cases, solving, preventing appeals to

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<sup>273</sup> See paragraph 2.3.1.6.

court. However, when the Commission is in the position of having to apply to the Court, experience shows that the infringement procedure does not guarantee a quick and effective solution. While the Commission is committed to speeding up its internal procedures, the different stages of the procedure culminating in a judgment of the Court (which includes, first, sending a letter of formal notice to the authorities of the Member State concerned and then, a reasoned opinion) can last up to three years and sometimes even longer because of the difficulty of obtaining the necessary information on time. In the area of public procurement procedures so long may often be ineffective. Accordingly, the Commission highlighted the need to strengthen the role of the Court of Justice and, in this perspective, some argued the need to give the Commission more effective investigative powers than those available to it; others suggested to extend to public procurement procedures and the means of control provided for in Regulation (Euratom, EC) n ° 2185/9620 for the protection of the financial interests of the European Communities (which applied to public contracts which involved EU funding) .

About this method of resolution of disputes is, however, to clarify that it is certainly a useful method in cases where the Commission is to be notified immediately by others or she has a chance to realize promptly the violation in question. When the violation takes place at national level it is clearly more difficult for the Commission to identify any infringements of Community rules for which most of these should be regulated and settled into domestic law, although, of course, the Commission will not hesitate to intervene whenever necessary to the compliance with EU law. To solve this problem, the Commission itself is the one reporting, in the aforementioned Green Paper, as the case of Sweden, which has entrusted the supervision of its contracting authorities to an independent authority. The authorities not only deals with complaints, but also has the merit of preventing any circumstance likely to give rise to complaints, thereby reducing the potential workload for the national courts and the Community institutions. These authorities, which for the Commission could be created ad hoc by the Member but could also be used for this purpose an authority already exists (such as, for example, the organ in which all States shall perform such functions of the

Court of Auditors) if it appeared truly independent, could play a very important role, for example by providing useful advice to contracting entities, or by checking the practice of awarding contracts in terms of effectiveness. It would also be useful to provide for a regular exchange of information between all bodies of this kind of all Member States. If remotely, then, of conflict between the Commission and those authorities, this should be resolved by the EU Court of Justice ensuring, in any case, the uniform interpretation and proper application of Community law.

There are also two additional instruments for settling disputes: attestation and conciliation, both foreseen by the Directive for utilities and, until 1996, but as we shall see, at least, even after that date, unused. The first is the possibility that an independent attest (to be precise, independent, qualified and authorized for that purpose) is responsible for verifying compliance with the EU directive for the award procedure used by a particular entity and the rational use of money public by the institution itself, to release it, then, a certificate (subsequently published in the Official Gazette) of good practice in procurement. To obtain this certificate, entities must demonstrate compliance procedures that have proven, in the light of experience, the Community standards. This is expected in view that the contracting entities that adopt the best practices in procurement and establish regular procedures have a better chance to take full advantage of the Community system in force. In accordance with the mandate given by the Commission to the European standardization bodies CEN and CENELEC, in June 1995<sup>274</sup> it was approved a European standard for attestation. Member States would then have to take the steps necessary to ensure that they were designated as attestors.

The second mode is the reconciliation<sup>275</sup>, that is, the resolution of disputes by non-contentious, provided for by Directive Appeals for Utilities, which provides that suppliers and contracting entities may agree to review and adjust the disputes occurring between them on the application of Community law by recourse to independent conciliators.

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<sup>274</sup> Law EN 45503: 1996, published by CEN/CENELEC il 24.1.1996.

<sup>275</sup> See paragraph 4.3.2.

#### **4.2.2 APPLICABLE SANCTIONS: THE COMMISSION'S APPREHENSION**

As for the penalties for breaches of Community law, in its communication to the Council and the European Parliament, the Commission has already indicated public procurement as one of the areas in which a system of sanctions can be established to ensure the integrity of the legislation by virtue of differences (i.e. in the obligation borne by the actor to provide proof of the failure to get the repair or amount of damages granted) that are present especially in the area of sanctions between Member States. The same is noted that the application of the directives "Appeals" may vary considerably from one Member State to another and, sometimes, even within the same Member State. The Board, in its resolution of 29 June 1995 on penalties applicable to infringements of Community law<sup>276</sup>, has encouraged the Commission to remedy this problem.

#### **4.3 NEW ELEMENTS IN THE DIRECTIVE 2007/66**

*“Consultations of the interested parties<sup>277</sup> and the case law of the Court of Justice have revealed a certain number of weaknesses in the review mechanisms in the Member States. As a result of these weaknesses, the mechanisms established by Directives 89/665/EEC and 92/13/EEC do not always make it possible to ensure compliance with Community law, especially at a time when infringements can still be corrected. Consequently, the guarantees of transparency and non-discrimination sought by those Directives should be strengthened to ensure that the Community as a whole fully benefit from the positive effects of the modernization and simplification of the rules on public procurement achieved by Directives 2004/18/EC and 2004/17/EC. Directives 89/665/EEC and 92/13/EEC should therefore be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained.”<sup>278</sup>*

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<sup>276</sup> GUCE n° C 188 del 22.7.95 pag. 1.

<sup>277</sup> Actually, the debate has been very limited

<sup>278</sup> Considering 3, Directive 2007/66.

#### **4.3.1 MINIMAL SUSPENSION TERM**

Among the shortcomings noted in previous directives, from which is derived a commitment to strengthen the effectiveness of national reviews by the directive of 2007, is included in particular the absence of a period allowing an effective review between the decision and the award of a contract and the conclusion of the relevant contract<sup>279</sup>. This sometimes results in contracting authorities and contracting entities wishing to make irreversible the consequences of the disputed award decision, to proceed very quickly to the signature of the contract. To remedy this weakness, which is a serious obstacle to effective judicial protection for the tenderers concerned, namely those who have not yet been definitively excluded, it is appropriate to provide for a minimum standstill period<sup>280</sup> during which the conclusion of the contract in question is suspended, regardless of whether this occurs or not at the time of signing the contract. This type of minimum standstill period is not intended to apply if Directive 2004/18 / EC or Directive 2004/17 / EC does not require prior publication of a contract notice in the Official Journal of the European Union, that is, in all cases of extreme urgency. In such cases it is sufficient to provide for effective review procedures after the conclusion of the contract. Similarly, a standstill period is not necessary if the only tenderer concerned is the one who is awarded the contract and there are no candidates concerned. In this case there are no other participants in the tendering procedure with an interest in receiving the notification and in benefiting from a standstill period to allow them to seek an effective appeal<sup>281</sup>. The application for review shortly before the end of the standstill period should not deprive the body responsible for review procedures of the minimum time needed to act, especially to extend the standstill period for the conclusion of the contract. It is therefore necessary to provide for an independent minimum standstill period that should not end before the review body has taken a decision on the application. This should not prevent the review body to make a preliminary

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<sup>279</sup> *Considering 4*, Directive 2007.

<sup>280</sup> The standstill period should give to the interested tenders enough time to analyze the contract award decision and to consider if it is appropriate to appeal it.

<sup>281</sup> *Considering 8*, Directive 2007.

assessment as to the admissibility of the application as such. Member States may decide that this period shall end when the review body has taken a decision on the application for interim measures, including on a further suspension of the conclusion of the contract, or when the review body has made a decision about the matter.

#### **4.3.2 ABOLITION OF MECHANISMS OF SETTLEMENT**

The conciliation mechanism provided in Directive 92/13 / EEC has not elicited real interest from economic operators. This is due not only to the fact that it does not allow to obtain binding interim measures likely to prevent in time the illegal conclusion of a contract, but also to its nature readily compatible with observance of the particularly short deadlines applicable to reviews seeking the interim measures and the setting aside of unlawful decisions. The potential effectiveness of the conciliation mechanism has been weakened further by the difficulties encountered in establishing a complete and sufficiently wide list of independent conciliators in each Member State, available at any time and capable of dealing with conciliation requests at very short notice. For these reasons, the conciliation mechanism should be abolished<sup>282</sup>.

#### **4.3.3. ALTERNATIVE SANCTIONS<sup>283</sup>**

These penalties are provided by the Directive of 2007 for "minor" violations, i.e. those for which the principle of deprivation of the effects of the contract could not be proportional, and these "minor" violations include, for example, breach of certain formal requirements (different than violation of the term suspension or automatic suspension, which are considered "serious" violations). The alternative sanctions may consist or in fines on the contracting authority or by a reduction of duration of the contract, however they have to be always effective, proportionate and dissuasive. The damages is not a part of the alternative sanctions because it has a different purpose, ensure compensation to the person, unlike the sanctions in

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<sup>282</sup> *Considering* 30, Directive 2007.

<sup>283</sup> Mario Pilade Chiti, *op. cit.*

question because they want to hit the contracting authority responsible for the violation.

#### ***4.4 THE 2014 DIRECTIVE***

The most recent directive on public procurement does not speak of appeals in this regard specific fact; “*arbitration and conciliation services and other similar forms of alternative dispute resolution are usually provided by bodies or individuals which are agreed on, or selected, in a manner which cannot be governed by procurement rules.*”<sup>284</sup>.

### ***5. MEMBER STATES: ENGLISH AND ITALIAN PUBLIC PROCUREMENT’S DISCIPLINE***

Despite the European Union member States are numerous, we would like to dwell on the public procurement’s discipline available in two different countries: Great Britain and Italy. In relation to the first one, it is important to analyze, even if briefly, the main points of the public procurement law in England because this State is at the same time a country which is part the European Union and, as such, an entity which must comply with certain principles and certain Community standards, but also the European country inspired by American principles, as exporter in the colonies of the principles of the common law. Concerning the second one, it was decided to analyze Italy because it’s the writer’s country and because it’s a country which adopts civil law.

#### ***5.1 PUBLIC PROCUREMENT’S DISCIPLINE IN THE UK***

Having looked over the regulation of public procurement as stated by the European Directives in 2014, and having regard to the provisions specify that

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<sup>284</sup> *Considering 24*, Directive 2014/24/UE.

English is called "transposition photocopy", given the full transposition of the Directives into national law (after several important decisions<sup>285</sup> of the past by the Court of Justice), our aim in this section will be pretty to point out the peculiarities of the English discipline<sup>286</sup> compared to the one analyzed above. Public procurement in the United Kingdom is regulated by the Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006.

### **5.1.1. TYPES OF CONTRACTS**

Although other types of public procurement not expressly stated for and governed by European legislation exist in UK in addition to the "classical" forms (corresponding to the types defined in the EU guidelines, and contracts for works, services, supplies, concessions), any contract is still subject to the European provisions and their principles, such as free circulation and the obligations of equal treatment, transparency, proportionality and mutual recognition established by the treaties.

### **5.1.2 FUNDAMENTAL PRINCIPLES**

Britain, too, just like Italy and all other European Union member states, must respect the principles laid down by the directives issued by the Council, such as that of public evidence (to inform the public of all contracts exceeding a specific value so that all interested parties, such as suppliers, service providers, etc., can participate in the race), non-discrimination (prohibiting technical specifications in contracts that favor particular suppliers), and competition (the application of objective criteria in conducting the procedure and the awarding of the contract). The need for each Member State, including the UK, to meet the same basic principles is the fact that each company is part of one of the EU Member States that may participate in tenders conducted in other Member States.

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<sup>285</sup> For Ex. *Factortame* case, Court of Justice, 1990, C-213/89.

<sup>286</sup> Concerning this subject, please refer to Istituto Nazionale per il Commercio Estero, *Regno Unito – Normativa sugli appalti pubblici*, 2008.



### ***5.1.3 CONTRACTS BELOW AND ABOVE THE THRESHOLD AND THE DIFFERENCES IN ADVERTISING***

Of course even in Britain there is a distinction, first made, including contracts below and above the threshold, and this difference is also based on the difference in treatment at the level of advertising: if the Contracting Authority wants to contract out a service (or a work or supply) that is within the scope of the procurement rules (for example, because a value above the established threshold), this entity will send notification to the Official Gazette, to make sure that each company of each Member State may have effective knowledge; with respect, however, the contracts below the EU thresholds, despite also meet the duties of publication, such obligations may be fulfilled by government using local newspapers, national and sector; Finally, as regards the contracts of small entity, these may also be awarded without publication, since it does not consider eligible to distort competition.

### ***5.1.4 SUBJECT COVERED BY THE REGULATION OF CONTRACTS***

As for the subjects, there are the local and central government departments, state-owned companies and, finally, agencies and other bodies. The same rules as those just mentioned, also apply to the public service sector (i.e. Suppliers of water, energy, transport and telecommunications) and, sometimes, even to private sector companies that fall in procurement contracts in the industry public services. Surely the greater acquiring entity is the central government, but there are also local governments often resort to the private sector, so that a specific law of 1998 Local Government makes it mandatory that the tender for a number of services and products, and is binding on local authorities to auction contracts in certain key areas (such as construction, maintenance of buildings and roads, collection and disposal of waste). The third type of subjects, the state-owned companies, were highly developed in the past but today have been greatly reduced due to the privatization of the 90s.

#### **5.1.4.1 SUBJECT INVOLVED IN THE MANAGEMENT: OGC**

The person involved in the management of public procurement, however, is an independent office of the Minister of the British Treasury, the Office of Government Commerce (OGC). OGC is responsible for coordinating the transposition of EU Directives on Public Procurement into UK law, it can put in place guidance, it is established to help Government deliver best value from its spending. Moreover, the OGC is responsible for the Government's procurement policy and for the legislative framework and it represents the UK in the UE Advisory Committee, provides the UK delegate at international meetings and handles procurement infraction cases which are raised by the European Commission<sup>287</sup>.

#### **5.1.4.2 BODIES RESPONSIBLE FOR APPEALS**

As for the bodies responsible for appeals, we can say that in England, over the courts, there are bodies responsible for the examination and judgment of appeals relating to public procurement procedures. Damaged bodies may choose to bring your complaint to the relevant contracting authority in first instance (about this institution, the Directive n.66 said that it was a possible mechanism to bring before the court proceedings, but the UK did not want to put constraints prior to action in court, expecting it only as optional<sup>288</sup>) as all contracting authorities are the most responsible for the compliance of their contracts with government regulations, or, alternatively, may submit their application directly to the national courts. In the first case, if the request involves further clarification or advice, the contracting authority may decide to seek advice from a government department to find out whether or not the case constitutes an incorrect application of the rules. In this case, the state department or ministry or the contracting authority may consult the OGC to know the opinion and know if this second office, the alleged failure to comply with EU rules is really a specific irregularity. In the second case, we have

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<sup>287</sup> Tiziana Bianchi and Valentina Guidi, *"The comparative survey on the national public procurement system across the PPN"*, Authority for the Supervision of Public Contracts, Rome, 2010.

<sup>288</sup> Guido Greco, *"Il sistema della giustizia amministrativa negli appalti pubblici in Europa"*, Milano, 2010.

to distinguish: disputes relating to public contracts fall into the civil jurisdiction of the *civil and commercial division* of the *High Court*, while the cancellation of administrative acts, for example, falls into the administrative jurisdiction of the *Queen's Bench Division* of the *High Court*. All this because the contractual activity of the public authorities is qualified as private persons, so it is not subject to judicial review. Today, this distinction is not so clear, especially in light of the EU Directives and their need for protection of competition that also make the public procurement's discipline belonging to "public law", in fact doctrine now think that the judicial review is always applicable even for them (except in exceptional cases in which it was demonstrated the absence of the public law element). In any case, until now the civil jurisdiction was operated only by economic operators concerned and not by third parties (which, if they show an interest, institute judicial review), but there have been rulings to the contrary<sup>289</sup>.

#### **5.1.5 THE SELECTION PROCEDURE**

The British Public Administration procedures for the selection process are not dissimilar from the procedures applied in the EU countries: the publicity of the tender prior to the pre-qualification phase and, once concluded any process of pre-qualification, the contracting authority invites some companies to participate in the tender and verify quality standards. The departmental units for purchases using their database of suppliers (to be inserted within these books businesses must please turn to the contact points of the various departmental units) or invite all companies to submit their tenders through an advertisement in the Official Gazette the European Community. The government, in order to speed up the tendering, promotes the creation of centralized registers providers and available on line to all the administrations of the state. Membership to these books is in some cases a real preselection.

To overcome the processes of preselection and the need to provide information about the company and products, financial conditions, contractual relationships with other PA, list procurement obtained and executed previously, quality certifications, measures taken for environmental protection. For contracts, all

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<sup>289</sup> Guido Greco, *ibid.*

British contracting entities should send a Prior Information Notice (PIN), corresponding to the tender information, to the EU immediately after the approval of the projects of the work supplies or services. The timing is different depending on the procedure used (if open, restricted, negotiated). After the award, public entities should indicate the tender chosen and the reasons of the award (unlike the English discipline before the Directive no. 66 of 2007, when the administration has not to indicate any reason to support its decision)<sup>290</sup>.

#### ***5.1.6 UTILIZATION OF THE RULES ON PROCUREMENT***

When a contractor has a recurring need of a particular good or service, it is required each time to observe legislation relating to contracts, but if the same contract contains provisions which are necessary for the further performance, for their execution will not be must use the provisions governing contracts could not be necessary for their execution.

#### ***5.1.7 TECHNICAL INSTRUCTIONS***

When a contractor wishes to impart technical instructions, which must be observed in the execution of the contract, these instructions should only be those allowed in so they do not discriminate against contractors or suppliers of the EU Member States other than those of the state contractor. English law provides for these technical instructions that are defined in accordance with the "European Specifications."

Exceptionally some technical requirements can also be used outside of those provided by European standards such as the respect of laws and regulations or, if it is not possible (because of the technical characteristics of the product), establish compliance with European standards.

#### ***5.1.8 CONTRACTOR SELECTION PROCEDURES***

Even in England we find different types of contractor selection procedures: open, restricted, negotiated, have the same characteristics described previously.

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<sup>290</sup> Guido Greco, *op.cit.*

A further tender procedure existing in Britain (introduced in 2002) and aimed for large projects of the PA is the so-called "gateway process", which has the twin aims of modernization and more streamlined government action in the management of large multi-year contracts, and at the same time generate substantial savings for the state budget. This procedure is based on an analysis of five key steps: the preliminary economic assessment of the project design, the selection of the method of the tender procedure, the contract award, the verification during the construction, the subsequent evaluation of the benefits achieved. The peculiarity is that almost all of the tenders are held in the form of restricted procedure and the increasing importance that has taken, since 2004, the figure of the competitive dialogue<sup>291</sup>. Now, in a country that has banned the open procedure and the lowest bid is replaced by the generalization of the most economically advantageous (even legally mandatory for local authorities), restricted tenders with 3/5 candidates are similar to procedures traded preceded by advertising, and are fine as well for complex contracts and concessions (usually nominal toll), without having to resort to the "too complicated" EU procedure of the competitive dialogue. The fact is that, for a unanimous judgment, the UK market is considered the most open and competitive in the EU.

#### **5.1.9 PROJECT PFI**

A major development in the field of public procurement it was in Britain with the so-called PFI (Private Finance Initiative). The Private Finance Initiative was born in '92, following the abolition of a law limiting the use of private resources to finance public services. With PFI projects the government will no longer finance the construction of a motorway but will buy from the private sector the motorway services, including maintenance. The private operator participates in the various phases of the project and creates the conditions for a better use of state property. The entry of private PFI projects can lead to a better use of production factors. PFI projects are configured into two categories: projects which are self-financed "Financially free-standing projects" in which the private sector designs, builds,

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<sup>291</sup> Guido Greco, *op. cit.*

finances and operates autonomously from the public service. The PA has a limited role in the initiation and regulation of the concession.

The state does not subsidize, directly or indirectly, the public service and the user pay the total cost of the service provided. The state is financially involved with subsidies to make interesting and profitable management of certain public services. The priority sectors for PFI programs are health, public infrastructure, transport, school, municipal, public building, urbanization, defense.

The executive believes that the PFI formula for success must meet certain characteristics:

- The PA buys from private sector services in the long term, usually 30 years, but not the activities that underlie them. The operator receives a fee in exchange for providing quality service in the period stipulated in the contract.
- The private operator assumes a large part of the risks connected to the granting of public service. The risk transferred to the private operator must be measurable by a commercial point of view.
- The distribution of risk tends to favor the party more suited to manage it (Public or private) to ensure the best price / quality.
- The operator participates in collaborations PFI if he manages to identify innovative measures of Management services that are the most efficient and less risky.
- The PA does not state the solutions to potential bidders, but only defines in detail

characteristics of the services requested. The companies interested in acquiring the multi-year contract are free to suggest and offer the best solution in respect of the requirements (quality, safety, frequency, etc.).

- The formula of collaboration PFI is not an end in itself, it should ensure a very good

price-quality in relation to other potential solutions.

The PFI partnership applies to all branches of government including the British Ministry of Defense.

The process for awarding a PFI project is longer than a tender (on average takes 15 months after publication in the Official Gazette) and the participation in these PFI bids is rather expensive and only companies / consortia with strong capital position can deal with it<sup>292</sup>.

## **5.2 PUBLIC PROCUREMENT'S DISCIPLINE IN ITALY**

Italian discipline of public procurement can be found in the Public Contracts Code (Legislative Decree 163 of 2006), and issued as a result of European directives of 2004, which collects in an organic way the whole discipline on contracts.

### **5.2.1 PRINCIPLES TO BE RESPECTED**

The principles which inspired the procurement law in Italy, have been shot from two important sources for the same Italian law: the Constitution, on the one hand, and in particular Article 97 which sets out the principles that should inspire the activity of the Public Administration, Community law, on the other, since most important foundations of the law of the Member States were generated in the European institutions framework. Just referring to these two sources mentioned above, the Procurement Code cites some key principles: taking inspiration from the first source, refer to the principles of economy, efficiency, timeliness, fairness and, specifically with regard to custody and calling the second source cited above, it recalls the principles of free competition, equal treatment, non-discrimination, transparency, proportionality and advertising "in the manner indicated by the code".

As regards, in particular, the protection of competition, is generally considered the basic principle, that is prevalent in case of conflict with the application of other principles<sup>293</sup>; and it is from this significance that arise, then, some corollaries such as, for example, the so-called principle of substantial connection (the provision prohibiting the participation in the competition from competitors who are together

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<sup>292</sup> Istituto Nazionale per il Commercio Estero, *op.cit.*

<sup>293</sup> Matteo Baldi and Roberto Tomei, "*La disciplina dei contratti pubblici, Commentario al Codice Appalti*", 2009, II edition.

in a relationship of control or those whose offers are attributable to a single decision-making).

## **5.2.2 SUBJECT**

Those policyholders: the demand side and the supply side.

### **5.2.2.1 ON THE DEMAND SIDE**

Obviously from the so-called "demand-side"<sup>294</sup> are the contracting authorities (based on the Code): state administration, local authorities, other public entities not economic, public bodies, associations, unions and consortia of any description made from these subjects. A body governed by public law mean anybody, even as a company established for the specific needs of general interest, not having an industrial or commercial character, with legal personality and whose activities are financed, for the most part by the state, by its local authorities, other bodies governed by public law, or whose management is under the control of the latter. In any case, the United Chambers of the Supreme Court dictated three requirements to qualify an entity governed by public law entity with legal personality, the activities financed for the most part or subject to control or supervision by the state or other public body territorial or public body; this must be established to meet general interest not having an industrial or commercial nature<sup>295</sup>. But, despite this clarification from the Supreme Court, the concept of public body is very complex, so that the same Directive 2014/23 / EU, in recital 21 specifies that the notion has been repeatedly considered by the Court of Justice of EU that has provided specific and essential details about. The code recognizes the great macro-category from the demand side including: entities, which include contracting authorities and public enterprises; the awarding authorities including contracting authorities, contracting entities as well as other public or private; contracting authorities, including the contracting authorities and entities referred

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<sup>294</sup> *Ibid.*

<sup>295</sup> SU case 8225 2010.



to in Article 32 of the Code; Finally, the "other contracting parties" that refer to private entities required to comply with the provisions of the code.

#### ***5.2.2.2 THE "SUPPLY SIDE": SUBJECTS ALLOWED TO PARTICIPATE IN TENDERS***

Allowed to participate in procedures for the award of public contracts are the entities expressly stated in Article 34 of the Procurement Code and, among these, are mentioned: individual entrepreneurs, commercial companies, cooperatives, consortia of cooperatives, temporary consortia, groupings of competitors, consortia of bidders and, finally, economic operators already established in other Member States.

#### ***5.2.3 SEVERAL SUBJECT: AUTHORITY FOR THE SUPERVISION OF PUBLIC CONTRACTS OBSERVATORY, ATM, PROCEDURES SUPERVISOR***

##### ***5.2.3.1 AUTHORITY FOR THE SUPERVISION OF CONTRACTS FOR PUBLIC WORKS, SERVICES AND SUPPLIES<sup>296</sup>***

This body has the following characteristics: first, it is an independent authority, characterized, then, by functional independence, judgment and assessment and organizational autonomy; it is based in Rome, and it is, then, a collective body, that is made up of seven members, remaining in office for seven years from among experts in the technical, economic and legal relationship recognized expertise are appointed in consultation with determination adopted by the Presidents of the Chamber of Deputies and the Senate. Its main task is to control on public contracts, also of regional interest, of works, services and supplies in the fields of ordinary and special sectors, in order to ensure compliance with the

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<sup>296</sup> Article 6, dlgs 163/2006.

fundamental principles and, in particular, the principles of fairness and transparency of procedures for the selection of the contractor, the protection of small and medium-sized enterprises and efficient execution of contracts and compliance with competition rules in individual tendering procedures. Also, it has a number of specific tasks set out in Article 6 of the Code, including: ensuring the applicable legal and regulatory regulations, compliance with economic efficiency of execution of public contracts, supervision of enforcement of contracts, so that this does not result in harm to the exchequer; reporting to the Government and Parliament of particularly serious phenomena of non-compliance or distorted application of the law on public contracts; formulation of proposals to the Government regarding amendments required in connection with the procurement law, sent to the Government and Parliament of an annual report which highlights any problems found in the field of public contracts, the superintendent of the Observatory; exercise of sanctioning powers conferred upon it (the fines should be proportionate to the value of the contract) and, at the initiative of the contracting authority and one or more of the other parties, expressing non-binding opinion regarding issues that arose during the course of the tender procedures, possibly formulating a solution.

To conclude these tasks in the best way, the Authority may order inspections and expert reports, request documents, information and explanations and use the Guardia di Finanza, carrying out audits and inspections required by it.

#### ***5.2.3.2 OBSERVATORY OF PUBLIC CONTRACTS FOR WORKS, SERVICES AND SUPPLIES<sup>297</sup>***

The Observatory is a body working under the Authority for the Supervision and consists of a central section and regional sections domiciled in the regions and autonomous provinces. The middle section uses the regional sections to acquire the information necessary to perform certain tasks on its own, such as: collection

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<sup>297</sup> Article 7, dlgs 163/2006.

and processing of information data concerning public contracts throughout the country, determining annual cost standardized by type work, service and supply in relation to specific geographical areas, promotion of a computer link with the contracting and the regions in order to acquire real-time information on public contracts and fulfillment of the obligations of advertising required by the Authority.

Even stations and contracting entities have obligations towards the Centre, being required to communicate to it, for contracts above € 50,000, the details of the contents of the calls, the beginning, the progress reports and the completion of works, services, supplies, carrying out the test and the final amount. At the observatory is, in turn, set up another subject: computer record of public contracts for works, services and supplies at the Observatory.

### ***5.2.3.3 THE DESK OF THE CONTRACTS FOR PUBLIC WORKS, SERVICES AND SUPPLIES<sup>298</sup>***

Contracting authorities may establish, without additional cost to the budget of the contracting authorities or entities, this type of office, or leave his duties to an existing office noted in the notice or in the specifications for stakeholders to know where to turn. The specific functions of the ATM are specified in Article 9 of the Code, which includes *the task of providing candidates and tenderers, and persons wishing to submit a bid or an offer, information (they can be also provided electronically) to the rules in force in the place of custody and execution of the contract, in connection with tax obligations, environmental protection, the provisions on safety and working conditions, as well as to all other rules to be observed in the execution of contract; and give candidates documentation for submission of applications and tenders in accordance with the provisions of this Code.*

In the case of irregularities or of missing or incomplete elements and statements mentioned above (the essential ones, because for the other there is no

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<sup>298</sup> Article 9, dlgs 163/2006.

consequence), the competitor is ordered to pay, in favor of the contracting authority, the sanction a fine determined by the invitation to tender and, in conjunction with this, it is given a deadline to submit additional information or further documents required, course without response, the competitor is excluded from the race.

#### ***5.2.3.4 PROCEDURES SUPERVISOR<sup>299</sup>***

Administrations nominate this subject, indicating the name in the notice or in the invitation to tender in the absence of notice, in order to entrust all the tasks relating to procurement procedures and, in particular, the formulation of proposals, care for the correct and constant progress of procedures, reporting of malfunctions, impediments, delays in its implementation. Maybe, then, the Regulation to identify any other duties of the head of the procedure.

#### ***5.2.4 GENERAL REQUIREMENTS FOR PARTICIPATION IN TENDERS<sup>300</sup>***

The Procurement Code uses the technique of the negative list, indicating that those individuals or those who are exclusions from participation in procedures for awarding grants and contracts. Among these subjects "excluded", are include: those who are in a state of bankruptcy, compulsory liquidation or composition with creditors, those against whom proceedings are pending for the application of one of the measures of prevention or against whom was pronounced final judgment or decree irrevocable criminal conviction or judgment of application of the penalty at the request of the parties, for serious offenses against the State or the Community 'affecting morality' professional (including, of course, taking part in a criminal organization, corruption, fraud, money laundering), who have committed serious breaches of the rules of safety and every other obligation arising under employment or gross negligence or bad faith in carrying out the

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<sup>299</sup> Article 10, dlgs 163/2006.

<sup>300</sup> Article 38, dlgs 163/2006.

tasks assigned by the contracting banning race or , still, serious error in the exercise of their professional activity. Finally, those who are, with regard to another participant in the same award procedure, in a situation of control, even de facto, if the control situation or the relationship implies that the tenders are attributable to a single decision-making.

After the identification of the entities who cannot participate in tenders, it is necessary to find the way to attest that candidates who participate to the tenders have the rights for: the candidates themselves or competitors will present a substitute declaration in which they certify the presence of positive requirements and the absence of negative ones. Candidates should also include a declaration that they are not in any position of control with respect to any entity, that the offer was made autonomously, the statement of not being aware of the participation in the same procedure of persons who are, compared to the competitor, in a relationship of control; or a declaration that they are aware of the participation in the same procedure of persons who are, compared to the competitor in situations of control, and that they made the offer themselves.

In the case of irregularities or if missing or incomplete elements and statements mentioned above (the essential ones, because for the other there is no consequence), the competitor is ordered to pay, in favor of the contracting authority, the sanction a fine determined by the invitation to tender and, in conjunction with this, it is given a deadline to submit additional information or further documents required, course without response, the competitor is excluded from the race.

#### ***5.2.5 CONTROLS ON THE POSSESSION OF THE REQUIRIMENTS<sup>301</sup>***

Contracting authorities before the opening of the envelopes of the tenders submitted, require bidders to a number of not less than 10 percent of the tenders submitted, selected by public draw, to prove, within ten days from the date of the request itself, possession of the requirements of economic-financial and technical-

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<sup>301</sup> Article 48, dlgs 163/2006.

organizational capacity, possibly required in the tender, submitting the documentation indicated in the notice or in the invitation letter. Contracting authorities, during the audit, certify that they possess the requisite qualifications to perform the work. When such evidence is not provided, or not confirm the statements contained in the application form or in the offer, the contracting authorities shall exclude the competitor from the race.

### **5.2.6 ITER AWARD**

Generally the first act to be implemented is the so-called resolution or determination to bargain, act by which the administration decides to provide for the care of a particular interest through the signing of a contract with a third party, *identifying the essential elements of the contract and selection criteria for economic operators and tenders*<sup>302</sup>. Furthermore the contracting authorities, generally by 31 December of each year, make known by means of a prior information notice the estimated total value of the contracts or the framework agreements that intend to award over the following twelve months. Then, Contracting authorities who wish to award a public contract or a framework agreement by open, restricted, negotiated with publication of a contract notice or competitive dialogue, shall make known their intention by means of a notice, which contains the specific elements indicated in the Code, and any other information deemed useful by the station. For the identification of economic operators that may tender for the award of a public contract, the contracting authorities using open, restricted, negotiated (with or without a call), or competitive dialogue (in terms expressly provided). The selection of participants, then, is by one of the systems provided for in this code for the identification of the bidders. Come into play at that point the procurement procedures that select the best offer by one of the criteria in this code. However, the two criteria provided by the Code for choosing best bidder is the criterion of the lowest price and the most economically advantageous. The choice between the two criteria, which must be indicated in the notice, is made on the basis of the adequacy of either the

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<sup>302</sup> Article 11, Dlgs 163/2006.

characteristics of the object of the contract, so that it can happen that the contracting authorities decide not to proceed with its award, when no offer is convenient or appropriate for the subject matter of the contract. When the procedure is declared the provisional award in favor of the highest bidder. Then, after verification of the provisional, it provides the final award. Once the awarding entities have awarded a public contract or concluded a framework agreement, a contract award notice should be published and sent to the other participants not selected.

#### ***5.2.7 SIMILARITIES WITH THE EUROPEAN UNION OR THE ENGLISH DISCIPLINE ANALYZED ABOVE***

It was necessary to call in more or less detail some characteristics of the discipline of Italian contracts, while it is right to make only a brief mention in all the other aspects that have already been described above on the occasion of the analysis of European regulations and the English ones. Short mention in this paragraph goes to the Public Private partnership (PPP cd), which we talked about for the UK, but which is also found in our country, with the benefits linked to it. The Italian law also recognizes the so-called thresholds, the value of the contract net of VAT above which are applicable Community directives that we talked about previously. That said, sometimes a contract below the threshold can justify an intervention unit by the state legislature, as stated in the same recital 8 of Directive 2014/23 / EU on the subject of concessions<sup>303</sup>. The method of calculating the value of the contract is described in detail by the Code (Article 29), taking up the provisions in a general way by the directives. From contracts subject to this "value judgment" only a few are subtracted, determined specifically by the Code (i.e. Contracts on production and trade in arms, munitions and war material).

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<sup>303</sup> S. Baccarini, G. Chinè, R. Proietti, “*Codice dell’appalto public*”, II edition, Milano, 2015.

## **5.2.8 LITIGATION IN PUBLIC PROCUREMENT<sup>304</sup>**

### **5.2.8.1 JUDICIAL REVIEW**

Judicial review is governed by articles 243 bis and 244 of the Procurement Code, which indicates that those who intend to seek judicial remedy must inform the contracting of the alleged infringement and of planning to seek judicial remedies. This information, direct to the head of the procedure, is made by written (or oral, if it takes place during a public session of the tender commission) and signed by the owner, or the owner's representative, containing a concise summary and display alleged vices of illegality and the grounds of appeal which are intended to articulate in court, save in any case the right to bring to trial different reasons or more. Such notice may be submitted until the person has not notified a judicial review and does not prevent the proceedings or the time limit for the conclusion of the contract or for bringing proceedings. The contracting authority, within fifteen days of such communication, communicate its determinations regarding the reasons given by the person concerned, and shall decide whether or not to intervene in self-defense. The inertia is tantamount to denial of self-defense. It is then the code of the administrative process to identify disputes devolved to the exclusive jurisdiction of the administrative courts in matters of public contracts.

### **5.2.8.2 EXPEDITED**

Concerning tenders for public works, services or supplies it is necessary to define the process quickly, not only in the interest of the parties involved (contractor and client) but also in the interest of citizens, who have the right to get the asset to the dispute as future users of that work or that service or customer administration. The summary procedure appears to refer only to measures and only if is put into question the stability of the measure because it is applied for annulment (not in

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<sup>304</sup> Fabio Saitta, *Il contenzioso sui contratti pubblici un anno dopo il recepimento della direttiva ricorsi*, Atti del Convegno di Catanzaro 29-30 Aprile 2011, 2011.



case when, taking for granted the effectiveness of the measure is not intended to remove, only the illegality is disputed). Summary procedure differs from the ordinary one in three respects: time trial (halved, in particular halved the deadline for filing the appeal and additional reasons, act of intervention, documents, memories, time limits for notification and appeal filing, revocation , opposition, and not those of notification, appeal, main appeal and additional grounds), the relationship between injunction and an action (when applicable conditions which prima and a judgment of seriousness and irreparable harm, the TAR does not just fix the merit but must secure the first hearing after the period of 30 days from the filing of the order and, therefore, seen the early date of the credit, the measures may be granted only in cases of extreme gravity and urgency) and the possible splitting between device and judgment with respect to the anticipation of the first deposit of the second (subject to the request of at least one of the parties and the executive device unless the losing party has requested and get the suspension by the Council of State). As for the procedures for awarding public works services and supplies actually Article 120 provides for a variation of the variant (expedited), and in particular provides for further changes.

### ***5.2.9 ALTERNATIVE METHODS OF DISPUTE RESOLUTION***

In recent years, in the light of European legal, we have attempted to introduce in the Italian legal framework instruments of dispute resolution alternatives to the courts, in order to reduce litigation and ensure the effectiveness of the protection within a reasonable timeframe. These institutions are, for example, that of mediation, introduced as preliminary activities to the commencement of proceedings before the ordinary courts, the court systems of protection provided by the Code of public contracts, transaction, arbitration or amicable settlement or conciliation and arbitration before Authority for Electricity and Gas (here the independent authority acts as para jurisdictional). About the latter, it must be specified that the authority for electricity and gas plays a more important role than that of the conciliators or mediators as may also adopt measures of temporary nature intended to ensure the continuity of the service.

### **5.2.9.1 ARBITRATION<sup>305</sup>**

Among the means tested and mentioned above it is necessary to dwell on arbitration, given the resonance that has had and still has nowadays also internationally. In Italy we have moved from compulsory arbitration to ban arbitration (with a whole series of intermediate formulas and several types of arbitration passed) in a short amount of time then the arbitration is a very tormented figure of administrative law, to the point that was forced to intervene several times to the Constitutional Court. In favor of arbitration is the incredible slowness of civil lawsuits and the need, in certain circumstances, of specialized knowledge, useful for deciding the dispute in question.

A disadvantage of arbitration is the fact that the cause in front of these referees does not see hardly ever unsuccessful contractor that promotes it (because the contractor has the "merit" of having them promoted, so this factor, combined with the fact that the ordinary trial, unlike the arbitration, lasts very long, give rise to an interest for the contractor to promote them). The dispute procurement has always had a special discipline: initially there were courts of administrative litigation, which lapsed for devolve the causes to the ordinary courts, and, subsequently, to the arbitration (Although the Constitutional Court specified that it should be possible for the parties to bring proceedings before the ordinary even if there was the possibility of arbitration).

With Law 109/94 arbitration was banned but actually that of prohibitions was never implemented due to a number of by-laws which, repeated, suspended the application of the provisions. With subsequent law 101/95 veins instituted compulsory arbitration. With 98 415 became, instead, thanks to the optional formula "may be referred to arbitration (...)". With Law. 166 2002 was limited to the objective scope of the PA's arbitration. With the Public Procurement Code (Legislative Decree 163 of 2006) the provisions on arbitration does not concern only the most disputes relating to public works but also those involving individual rights arising from the public contracts for supplies, services, work, design contests and ideas, including those resulting from the failure to reach agreement natured. The arbitration panel, as currently planned, is made up of three members,

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<sup>305</sup> See Article 241 and following.

including two appointed by each party, and the third is selected or chosen by the parties or the arbitrators appointed by them, except in the case where there is a disagreement between these (in that case it has to be appointed by the Arbitration Chamber). It shall be subject of arbitration of the Criminal Procedure Code, and is not required because there may be introduced only if expressly provided for by a clause. Two important innovations to the discipline appeals are challenged; the award, as well as for reasons of nullity (as required by the Criminal Procedure Code), for violation of the rules of law relating to the merits of the dispute, and the prediction that on application the appellate court may by order suspend the effectiveness of the award if there are serious and compelling reasons.

#### ***5.2.9.2 PRELIMINARY PROCEEDINGS BEFORE THE SUPERVISORY AUTHORITY FOR CONTRACTS OF WORKS, SERVICES AND SUPPLIES***

Article 6 of the Public Procurement Code has introduced a pre-litigation procedure before the Authority for contracts of works, services and supplies for the resolution of legal and procedural issues raised during the course of the race in order to limit the onset of controversial judicial between the players in the competition and contracting. In these matters, the Authority may issue a not binding opinion or formulate possible solutions to the dispute (procedure regulated by the Authority by regulation). The procedure shall start at the instigation of one of the parties involved, and the initial act must contain all the elements capable of deciding to allow the parties to assess the reasons (if not be declared inadmissible), after which the office of the litigation starts investigation encouraging broader participation. If, when the investigation is pending, an appealed was presented to the courts, the procedure is declared declined. Completion of the investigation will be, then, the pronouncement of the supervisory authority. The opinion is an expression of the power of the supervisory consultative call to resolve doubts arose during the journalism race and it is important to give guidance functions in law enforcement. The doctrine distinguishes between mandatory and optional opinion, which differ in that the first can and the second must be requested by the proceeding. There are also cases in which the mandatory opinion may be binding, such as when the legislation

provides that the administration cannot depart from deciding the content of the advisory, but generally is not binding and therefore the administration can freely assess whether follow that opinion even if it exists for the requirement to justify explicitly the reasons for the differences of the measure with respect to the content of the opinion.

Only if necessary, the Authority may indicate the instants how to solve a dispute (for example, when the decision of the administration may determine the dissent of one or more parties involved in the tender that can turn to the administrative court) and the act results is a proposal that is an expression of will and judgment on the part of a person who, when asked about a possible issue, calls the moment to settle the matter also indicating the means by which to achieve this objective. So in this case the Authority suggests the adoption of a particular measure, indicating also the content that this should take, and this is the exercise of an administrative task.

After describing, in summary fashion and focusing only on the main points, the European rules on public contracts, we have to analyze in the next chapter, those rules in the light of any future agreement TTIP, to understand if and how this partnership could affect the above subject.

### ***CHAPTER III***

## ***TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP ON THE EUROPEAN PUBLIC PROCUREMENT LAW: CONSIDERATIONS ON POTENTIAL CHANGES***

### ***1. CHAPTER INTRODUCTION***

Generally transatlantic agreements, rather than amending existing regulations in the countries that concern them, simply create limitations or exceptions to them. But this does not always happen and, therefore, the Transatlantic Trade and Investment Partnership we are analyzing, may make changes to the disciplines of the sectors it concerns. For this reason, the purpose of this chapter is to analyze whether, and how, the TTIP and its characteristics may affect the regulation of public procurement in Europe, already presented in the second chapter. To carry out this analysis, I decided to focus on specific macro-areas of interest, that I felt the great foundations of the discipline that, if changed, would represent the most decisive phase of change: the persons who may participate in tenders for the award of a contract; the area of so-called thresholds, useful to define, to date, the applicability of the discipline; the area of procurement in the utilities sectors; the area of judicial remedies; and, finally, a large area covering different methods and procurement and contracting. Inside these macro-areas, then, I will analyze specific micro-topics that may be impacted by the agreement.

### ***2. EUROPEAN AND US REQUESTS ON CONTRACTS IN TTIP***

Before analyzing any changes made by the agreement, we need to summarize requests, in public procurement, from both sides of the ocean. There is a need to focus, albeit briefly, on possible claims of the parties because these are the ones, once negotiated and accepted by the other party, that may constitute provisions of TTIP or bases for themselves.

## ***2.1 EUROPEAN REQUESTS ON PUBLIC PROCUREMENT***

The European Commission, through its website<sup>306</sup>, has released both the official texts of the proposals presented to the United States and the fact sheets summarizing the European proposals in all areas covered by TTIP. With specific regard to public procurement, it describes the current situation and what they, through the agreement, the EU would like to get. Today we have two markets, Europe and the US, with similar rules, based on consistent basis, but which are not entirely open to one another. We need to think about the fact that European companies very often are not allowed to bid in the US market and, when they are, they face many obstacles: first, the fact of being treated differently than local US companies. The EU, with TTIP, wants to create rules to make possible the following items:

- The full opening of the US market to European companies (and vice versa);
- An opening of the contracts to US companies in Europe not only at central level but also at the state level, federal and local level (and vice versa);
- The creation of common rules that apply to US and European procurement above threshold, as in the United States there is a body of uniform rules only for procurement at the federal level<sup>307</sup>, while at the sub-federal arrangements vary from city to city<sup>308</sup>;
- The removal of the many existing obstacles (primarily legal) for the award of contracts in the US (and vice versa), including the Buy American Act<sup>309</sup>;

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<sup>306</sup> [trade.ec.europa.eu](http://trade.ec.europa.eu)

<sup>307</sup> For those entities that meet the rules of the GPA (a plurilateral agreement Within the framework of the WTO; The fundamental aim of the GPA is to mutually open government procurement markets among its parties, see [www.wto.org](http://www.wto.org)) the problem does not arise because based on those rules, which are equivalent to those in Europe.

<sup>308</sup> It is important to establish a uniform set of standards for small and medium enterprises participating in tenders does not have the means, especially economic, in order to monitor and comply with different procedures.

<sup>309</sup> A law enacted in 1933 by the US Congress. See paragraph 2.2.

- A fair deal for European companies (and US), through the principle, referred to several times, the so-called national treatment;
- Greater transparency<sup>310</sup> in order to ensure that European companies (and the US) are aware of the opportunities existing in the territory of the other party<sup>311</sup>.

It is evident, therefore, that the European Union has as main purpose to be achieved, to ensure its companies the opportunity to access to the markets of all administrative levels of the US market, and to have access on an equal footing compared to American companies; of course, to achieve this, the EU should be prepared to grant the same treatment to American companies in the European territory, as it was already prepared before, during other types of agreement, to open up the procurement market, even at local level.

## ***2.2 AMERICAN REQUESTS ON PUBLIC PROCUREMENT***

The United States has, without doubt, less interest, compared to the EU, to put the matter of contracts as a priority objective of TTIP. This is because the US companies can already operate in much of the European public procurement market, thanks to the rules on national treatment and transparency recognized by the world community at the same time opening up to Europe only a small part of their market, the federal one. At present, therefore, it is still in force on the Buy American Act, which contains provisions relating to the limitation, for the federal government, to acquire foreign products, favoring, therefore, local businesses; then even considering the issuance in 1979 of the TAA (Trade Agreements Act)<sup>312</sup>, authorizing the President of the United States to make exceptions to the provisions of the Buy American Act in favor of the signatory states of the GPA<sup>313</sup>, if such restrictions indent products of these were less favorably in respect to American products, the reality is still different. True, the TAA provides for the

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<sup>310</sup> In the US there is only with regard to federal government procurement, the site [www.fbo.gov](http://www.fbo.gov)

<sup>311</sup> In the European Union this transparency already exists, in America it should be set up from scratch, as was done in Canada.

<sup>312</sup> A law enacted by the US Congress, which regulates the trade agreements negotiated by the United States and other countries.

<sup>313</sup> The GPA is a pluri-lateral agreement Within the framework of the WTO and its fundamental aim is to mutually open government procurement markets among its parties.

prohibition of discrimination solely because of foreign-owned businesses and provides accurate procedures for the management of contracts in order to ensure the necessary equal treatment between foreign and domestic companies. In particular, the TAA fixes some thresholds and it is sufficient that the value of a contract is equal to or exceeds the thresholds set for the restrictions to laid down the application of the Buy American Act. Indeed, the TAA is not even the only agreement that limits the provisions of the Buy American, there are others, but these agreements are, however, excluding certain categories of contracts. The fact remains, therefore, that in most areas, the US government procurement market has many closures and too many barriers to access for European companies; Response, as the only "penalty" for their excessive closure, is the impossibility for American companies to enter the market of utilities, as we shall see in detail later. Given the above situation, the American demands in the field of procurement are, without doubt, numerically lower than in Europe, but from a qualitative point of view are very important: just considering the US demand to open their businesses on market contracts in the so called utilities.

### ***3. MODIFICATIONS TO THE EUROPEAN DISCIPLINE***

We move now to examine in detail the potential changes in the transatlantic framework agreement in the European procurement. As described above, we will analyze with four major macro-areas within which it will be often necessary to examine some specific micro-areas. Before starting, however, I would like to specify that the Transatlantic Trade and Investment Partnership does not yet have its own text, not even a draft of it, so all subsequent observations will be based on two sources: the texts of the European proposals officially submitted to the United States and published, then, the Commission's website, and on the differences on the regulation of public procurement, observed by the writer, including the European Directives of 2014 and the regulations of the US FAR (Federal Acquisition Regulation<sup>314</sup>),

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<sup>314</sup> It is the main system of rules that regulates the system of federal takeover, that the acquisition process by which the executive agencies of the federal government of the United States acquire goods and services from abroad.



differences that may need to be attenuated in the preparation a text or TTIP, however, after a possible entry into force of this Treaty, and therefore could lead to a change in the provisions of the Union.

### ***3.1 PARTIES INVOLVED***

The first macro I want to analyze is the one concerning the persons who may participate in tenders for the award of a contract. Within this large topic, however, there are different sectors to be taken into account.

#### ***3.1.1 FUNDAMENTAL PRINCIPLES***

When we talk about the subject, we need to make a reference to the fundamental principles that must comply with the same subjects, to protect the rights and those of others. From this point of view, respect to the principles set respectively in the Directive of 2014 for the EU, and FAR for the US, we notice a difference in approach: the first one is focused on protecting economic operators more than anything else; the second one, instead, aims to grant traders, but with a logic that enables the objectives of the economic policy. This can be seen from mentioned principles: transparency, non-discrimination and equal treatment, for the European Union; these are with no doubt aimed to protect economic operators, who could suffer an injustice if one of the following principles is not respected:

- Transparency: it is transparency in the conduct of the contracting authorities, who have to make knowable any act or decision, providing reasons;
- the principle of non-discrimination must be, once again, respected by governments who must choose bidders and subsequently award the contract solely on the basis of objective criteria indicated in advance in the tender notice, thereby avoiding to favor one or the other trader; Finally,

- the principle of equal treatment: the administration can not in any way introduce artificial limits on the participation of the individual competitor by establishing technical requirements that only one, or only a few, are able to offer.

The purpose is to ensure a fair bidding process and fair treatment of bidders, on the assumption that the only person who has the power to distort competition is the contracting authority; the characterizing feature of European principles, is therefore the only apparent concern about the fairness of the bidding process and for justice of choice, unlike the United States.

The US, in fact, in the section on basic principles<sup>315</sup>, lists not only principles but also the goals to which they must strive for, which are:

- Providing the best products and services in a timely manner, while maintaining public confidence and meet the policy objectives;
- Maximizing the use of commercial products and services;
- Using contractors who have a proven record of superior past performance;
- Promoting competition;
- Conducting procurement with integrity, fairness and transparency;
- Achieving the objectives of public policy (such as the promotion of small business and maximizing the use of products from the United States and countries eligible with which the United States has trade agreements open);
- Exercising sound business judgment.

It is using this list of objectives set by FAR that the difference with Europe can be seen; for the USA is fair, of course, to ensure the fairness of the competition, by promoting competition, and the authenticity of the contract, by the principles of integrity, fairness and transparency, but they do always being projected to the end result: a realization the public policy objectives, such as the use of US products, and the main objective to provide the best products and quality services.

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<sup>315</sup> FAR, 1.102.

In any case, despite the differences from a literal point of view, I think that from a substantive standpoint the two systems do not differ in such a way to suggest changes to the fundamental principles arising from the European TTIP or even later. It should be underlined, in fact, that the two great powers are signatories to many agreements that dictate the common basic principles. Therefore, even though I deemed necessary to point out this difference in focus in the drafting of the provisions on fundamental principles, I believe that this cannot in any way affect the European discipline.

### ***3.1.2 LIST OF THE ENTITIES***

As part of the participating entities, the European regulations and the US do not appear to be inconsistent and as a consequence, the regulation possibly arising from TTIP, should not make important changes to European legislation. This especially for one reason: the peculiarity of the Community framework is to not provide an exhaustive list of subjects that can be awarded a contract, but to make a single reference to the overall shape of the economic operator. This is a very elastic discipline and, therefore, it is improbable that it can be modified by an agreement with the United States.

### ***3.1.3 REQUIREMENTS AND REASONS OF EXCLUSION FOR BIDDERS***

In the case of the requirements for participants in a procedure for awarding a contract, the situation is slightly different: we do not know if TTIP address in detail the rules, but we know that, in any case, from this point of view the regulation European and American are different and that, therefore, if the goal is to arrive at the opening of the markets, it will be necessary to dictate a unique discipline also with reference to the requirements to gain access to tenders. The European rules, as discussed in Chapter II<sup>316</sup>, is based essentially on four different

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<sup>316</sup> Paragraph 3.7.

types of requirements: a moral, professional, technical, financial-economical<sup>317</sup>. As for the second category of requirements, they relate to pursue the professional qualification and, in this regard, the contracting authorities *may require economic operators to be enrolled on a professional or trade register, kept in their Member State of establishment*. As for the economic and financial requirements, contracting authorities *may require that economic operators have a certain minimum yearly turnover, or that economic operators provide information about their annual accounts*. With regard to the technical capabilities, contracting authorities *may impose requirements to ensure that economic operators possess the necessary human and technical resources and experience (maybe that they have a sufficient level of expertise demonstrated by appropriate references for contracts carried out earlier) for perform the contract with an appropriate quality standard*.

Finally, I decided to deal with the last first category of requirements that I mentioned, that is, those of a moral nature, because they have a close connection with the reason for exclusion of economic operators. Analyzing the Directive. 24 of 2014, should be excluded those bidders who have completed certain types of activity which may affect their professional conduct and, in particular, those which:

- are in a state of bankruptcy, liquidation or other equivalent situation;
- have been convicted by final judgment of an offense that affects, in some way, professional conduct;
- have signed agreements with other operators intended to distort competition;
- have been guilty of serious professional misconduct or a serious breach of their obligations;
- are not in compliance with its obligations contributions and tax (generally regarding an compulsory exclusion that Member

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<sup>317</sup>From here on, we refer to in Articles 57 and 58 of Directive 2014/24/EU.

States may derogate in minor cases, where the exclusion might seem excessive punishment);

- are in a situation of conflict of interest that cannot be resolved in a different way;
- have shown significant or persistent deficiencies in the performance of a substantive requirement under a previous contract public contract or concession;
- attempted to unduly influence the decision-making process of the contracting authority or obtain confidential information that may confer undue advantages in the procurement procedure, or who have provided negligently misleading information that may have a material influence on decisions concerning exclusion, selection or award;
- are guilty of misrepresentation on the situations described above.

But the discipline of the exclusions required by Article 57 of the Directive of 2014 does not end here. It provides for other reasons vitiating the same morality of economic, even if the convicted person is a member of the board, management or supervisory bodies of that economic operator or is a person with powers of representation, decision-making or control; in particular, it is provided for the exclusion even in cases of:

- participation in a criminal organization;
- fraud;
- corruption;
- terrorist offenses or offenses linked to terrorist activities;
- laundering of proceeds from criminal activities or financing of terrorism;
- child labor and other forms of human trafficking.

After exposing summarily the requirements and the reasons for the exclusion of economic operators participating in tenders in Europe, it is necessary to describe briefly the situation regarding the same matter in the United States<sup>318</sup>.

The peculiarity of US laws, is the fact that they are established at the federal level of the objective requirements that participants must always respect, but is left wide discretion to individual governments to decide what criteria will be used to select the bidders, exception made for the duty, to them, to show that there is a reasonable relationship between the requirement and the chosen delivery item or service, and the prohibition for agencies to request technical specifications so as to favor unduly a manufacturer or supplier of services with respect to other. It is this diversity in requirements definition that makes us think that in TTIP, or after it, will be a choice of two ways: either the total discretion of the US or the European limited discretion, characterized, on the one hand, by the possibility of contracting authority to decide each time a group of requirements closely related to the nature of a specific contract that the related operators will have to meet specifically, on the other, by four groups of the objective requirements, described above, which must be respected by every operator involved regardless of the type of ordinary contract.

As regards, however, the reasons for exclusion of US law, some of them are common to European regulations, and are:

- People who are in a state of bankruptcy;
- Violation of relevant rules (i.e. The federal criminal law);
- Conflict of interest;
- Corruption.

Other reasons for exclusion, specifically in the US, are the following:

- Condemnation of the entrepreneur or civil judgment for fraud or crime aimed at obtaining or groped to obtain or perform a public contract or a subcontract;
- Violation of federal statutes or state antitrust concerning the presentation of the offers;

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<sup>318</sup> For this analysis, please see Federal Acquisition Regulation (FAR).

- Conviction for crimes of embezzlement, theft, forgery, bribery, falsification or destruction of documents, false statements, tax evasion, violation of federal criminal tax laws, or receiving stolen property;
- Intentionally affixing a label bearing the words "Made in America" to a product sold or delivered in the United States but not made in the US;
- Commission of any other offense indicating a lack of professional integrity and professional honesty.

Or when there are many elements of proof against the entrepreneur, for one of the following cases:

- Serious violation of the terms of a previous contract, such as a default or an unsatisfactory fulfillment of performance of one or more contracts;
- Violations of the provisions concerning anti-drugs in the workplace;
- The intentional affix of a label bearing the words "Made in America" for a product not trained in America;
- Have in place an unfair commercial practice;
- Do not have paid federal taxes, if that non-payment is established definitively, so it will be until a pending court case;
- When not granted to the contractor compliance with the provisions on immigration and employment;
- Any other cause so serious about the responsibility of the contractor.

The American peculiarity is that, within their jurisdiction, disqualification and suspension (causes of the economic operator), as governed by the code in quite some detail, are absolutely discretionary by the US administrations and should only be made for public interest and not for punishment. However, once the disqualification or suspension of business is declared, then they are excluded from

the competition and their offers are not eligible, unless it is considered that the exclusion of a tender is a too excessive solution.

As for the reasons for exclusion, I think that the United States simply possess a discipline more detailed but not different than in Europe. The FAR indicates very carefully all the situations which are contrary to the law that may arise and that may then be a reason for exclusion, while the European Union has a broader discipline that broadly indicates the causes of exclusion, but in a quite extended way, so that different hypothesis can fall within the same category of causes. In my opinion the European method is preferable for the reason that, with the advance of time and technology, there may be more and new causes of exclusion. These new causes, certainly could not fit in any way in the very detailed US regulations so that - in that case - would need to be modified at the federal level to regulate new situations; while the broader Europe one may already encompass new grounds for exclusion, always considering is correct interpretation.

### **3.1.4 CONFLICT OF INTERESTS**

Also in respect to the area of conflict of interests, the European regulations and the US showed some difference, such that we suggest a possible impact on the TTIP Community rules. *The concept of conflict of interest covers at least the cases in which the staff of the contracting authority or by a service that on behalf of the contracting authority involved in carrying out the procedure for the award of contracts or can influence the outcome of this procedure has, directly or indirectly, a financial interest, financial or other interest that could be perceived as a threat to his impartiality and independence in the context of the procurement*<sup>319</sup>. In the European Directive, there are only two references to the issue of conflict of interest: the first time it is mentioned, it is done by inserting it in the causes of exclusion of economic operators; the second reference can be found in a warning to the contracting authority; these authorities, in fact, must do everything possible to avoid this risk but, as regards the ways in which it is

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<sup>319</sup> Article 24, Directive 2014/24/EU.



possible to prevent such a conflict, the directive is on hold, entrusting the regulation of this activity with national law<sup>320</sup>.

In the US federal law, however, the conflict of interest seems to be perceived as a higher risk, which would necessitate more detailed rules, especially with regard to prevention. In particular, specific obligations are expected for specific people who may be subject, more than others, to conflicts of interest - the so called covered employees - and also head to the contracting authorities. The FAR, in fact, expressly requires to identify and prevent conflicts of interest of so-called covered employees, and to ban them, who have access to non-public information as a result of performance under a contract with the government, to use such information for personal gain. First of all, therefore, the contracting officer must require each contractor whose employees perform acquisition functions closely associated with the functions of government, to have procedures for screening of potential conflicts of interests of employees covered and to obtain and maintain from all covered employees<sup>321</sup>, when the employee is initially assigned to the task on the basis of the contract, a communication concerning the interests that may be subject under the contract task. It requires the following attentions: a disclosure statement whenever the employee's personal or financial circumstances change so that there may be a new personal conflict of interest, the non-assignment of employees covered to a task for which the contractor has identified a potential conflicts of interest that cannot otherwise be eliminated or mitigated, prohibit the use for personal non-public information which has been learned by running a government contract, obtain the signature of an agreement not to disclose of information, and inform employees of their obligations covered. The FAR also requires contracting authorities to maintain effective supervision to prevent conflicts, to take appropriate disciplinary action in case of covered employees who do not comply with the section on conflicts of interest, and to send a report to the head of bargaining indicating any conflict of interest (and, in particular, a description of

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<sup>320</sup> *Ibid.*

<sup>321</sup> 3.1102 FAR.

the violation of the employee covered and the actions proposed to be implemented in response to the infringement), as soon as identified.

The above provisions refer to the "prevention" of the problem in question, but the FAR is also concerned to determine the duties of the administration once the conflict of interest has arisen. In this case, the contracting officer must first check if the contractor has put in place the right actions to eliminate this problem and, only if these actions are not considered satisfactory, intervene by applying any appropriate measures to eliminate this situation. In special cases it agrees that it cannot put in place appropriate measures for the prevention or elimination of a conflict of interest, the contractor may submit to the administration a request to be exempted from the requirement to prevent conflict of interest and create, by mutual agreement, a plan to mitigate potential conflicts of interest.

These rules relating to conflicts of interest and, in particular, prevention, are included in the contract through a clause. This clause, however, is not included in all contracts, but only those that exceed the simplified acquisition threshold or those that include a requirement for services by contractor employee That involves performance of acquisition functions closely associated with inherently governmental functions for, or on Behalf of, a Federal agency or department.

Once done the overview of the participation requirements, the grounds for exclusion and an overview of the issue of conflicts of interest, we wonder how can these two disciplines, similar but not identical, meet in TTIP. The issue may be resolved by an appeal to the decision of the European Council of December 2nd, 2013, on the conclusion of the Protocol amending the Agreement on Government Procurement<sup>322</sup>, which informs<sup>323</sup> that the procuring entity shall limit the participation procurement to those conditions considered essential to ensure that suppliers boast:

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<sup>322</sup> Agreement on Public Procurement was signed in Marrakesh in 1994, and subsequently amended, is one of the "multilateral" agreements included in Annex 4 to the agreement establishing the WTO, but not all WTO Members are bound, Ake both the US and the EU are.

<sup>323</sup> Article VIII.

- Legal capacity;
- Financial capacity;
- Commercial competence and technical performance of the contract;
- Previous experience, but this condition is required only where it is essential to meet the requirements of the contract (and may never be requested from the supplier has obtained the award of a previous contract).

To assess whether a supplier meets the above requirements, and that should be specifically mentioned in the tender documentation, the contracting authority examines the business conducted by these hitherto, both inside and outside the territory of State to which the institution belongs.

The same article states also of the exclusion of suppliers and, in particular, for the following reasons:

- Bankruptcy;
- Misrepresentation;
- Serious or persistent failure to comply with any requirement or obligation substantial in relation to earlier contracts;
- Final judgments for serious crimes or other serious crimes;
- Serious professional misconduct, acts or omissions with negative repercussions on the integrity of the commercial supplier;
- Tax evasion.

Finally, as regards to conflicts of interest, the Agreement on Government Procurement mentions only this problem, prescribing to avoid it even using international instruments such as the UN Convention against Corruption. In addition, the agreement requires the contracting to always act with transparency in the optic of preventing the risk of conflicts of interest<sup>324</sup>.

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<sup>324</sup> Article IV, about General Principles.

The decision is important because it is a solution that the EU has found, to respond to changes in an agreement that has as a signatory to the United States also. Consequently, since it is possible that the disciplines related to requirements, grounds for exclusion and conflict of interest, need to be aligned in the near future, there is a chance that Procurement Agreement mentioned above and also the Council's decision could be used as a basis.

### ***3.2 THRESHOLDS***

As specified in Chapter II, in European law the so-called thresholds are functional to find contracts that are compliant in all respects to the Community framework and, therefore, only those contracts which exceed a certain threshold have significance for the comprehensive application of European law. In US law, the area of so-called threshold becomes much more composite, since there are different types of thresholds:

- The thresholds that are used to identify the contracts to be "reserved" to small and medium-sized enterprises, characterized by simplified procedures for the award, and it comes to contracts that are below a certain threshold;
- The thresholds designed to identify whether or not contractors should submit official data of cost or price of the contract, and this is only for contracts exceeding the threshold expressly indicated;
- Finally, the FAR contains indications of thresholds that, if exceeded, identify Federal contracts amenable to the rules of the WTO GPA.

As we can see, there is a big difference in the matter of so-called thresholds between the EU and US. In case TTIP enters into force, unless this discipline was not dictated by the agreement from scratch, how could these rules be reconciled?

Perhaps, in this case, a possible answer to the question can be found in the Council Decision mentioned above. In the section related to the final offer concerning the appendix presented by the United States, it is determined that the

discipline of the Agreement will be applied to the award of public contracts subject to the thresholds set out therein:

- SDR 130 000 Goods and services and 50 million SDRs Building services (for central government authorities)
- Goods and services 355 000 SDRs and 5 million SDRs Building services (for public institutions decentralized)
- USD 250 000 or 400 000 SDR for different goods and services and 5,000,000 DSP Building services (to other agencies)

In a possible post TTIP situation, if, following the EU's goal, the standards common to both sides of the Atlantic also in the matter of public procurement were created, there would be the need to also dictate thresholds uniform, to conclude on objectively to such contracts it would be applicable in a particular field. Perhaps, as regards contracts in the ordinary sectors, the TTIP could take as a basis the agreement analyzed.

### ***3.3 THE SO CALLED SPECIAL SECTORS***

Contracts called special, as we know, are those relating to specific sectors such as water, energy, transport, health or education. To date, these areas have been differentiated from ordinary sectors and were regulated by their particular discipline, although this was inspired by the one of the ordinary sectors, taking into account their particularities. It is not difficult to understand how TTIP could affect these sectors. The TTIP, in his - mostly good - mutually open the European and US markets, could risk to open more "critical" fields to the other party. Opening up markets certainly means giving the opportunity for European companies to gain access to US procurement, but at the same time means ensuring the same opportunity to the United States and, in the areas mentioned, the differences between the two great powers are still enormous. Taking as an example the health system: entirely private for the United States while public for Europe. If American companies get through TTIP the right to access to public health systems in Europe, this would revolutionize the world of this "special"

sector, privatizing it; and for the individual States, as we know, it would be almost impossible to restore as a public service that has been privatized, because it should reintroduce a trade barrier greater than the situation existing at that time. Despite the fact that the European Commission (spurred on by many of the member countries) is showing willingness to exclude such services from the agreement (with the exception of energy), just as France has announced to exclude audiovisual threatening, otherwise, the start of negotiations, there is a risk that, in order to obtain relevant openings (for example, the opening, we spoke of earlier, to the markets of sub-federal levels) in US trade, the EU would be forced to give in this request. In addition, there is to consider that in TTIP will use the method called negative list, under which all service sectors fall under the provisions of the Agreement, except those specifically listed as exceptions in a list. This mode is special in that it completely reverses what until now (with the exception of the agreement with Canada) was used as the primary method by the EU: the positive list, for example the decision to include in the agreement only sectors specifically placed in a list.

### ***3.4 APPEALS ON PUBLIC PROCUREMENT***

As for the legal proceedings, to the last round (for now), held in October 2015, it was proposed a special mechanism of dispute resolution: ISDS (Investor-state dispute settlement), characterized by the fact that investors, if they felt violated the terms of the investment, could take legal action directly against the countries which have their own investments and to bring their case going in front of an arbitral tribunal created for this litigation. Without a doubt, the provision of this mechanism in the TTIP agreement would have engraved on European methods of dispute resolution. And, in particular, would have scratched: the principle of impartiality of the judicial body (reflected in the legal jurisdiction of equal treatment of the parties) and the traditional list of parties involved in the appeals.

### ***3.4.1 PERSONS RESPONSIBLE FOR THE ACTIONS: BODY INDEPENDENT***

As we saw in Chapter II <sup>325</sup>, there are two types of organisms to propose an appeal to in the European procurement: a juridical and a not juridical body. In case non-judicial organ, this was created by the "Remedies" Directives, a so called independent body. If the mechanism was introduced in ISDS TTIP and, therefore, also with regard to the matter of public procurement, it would upset the camp of those responsible for appeals. It would be certainly the opportunity to request a judicial review but would be expected to arbitration clause. In addition to affecting the shape of arbitration itself, this could affect some basic rules currently in force for non-judicial bodies: just think of the provision requiring that any measure or decision taken allegedly illegal by the competent appeal or any alleged exercising the powers conferred on it can be the subject of a judicial review or a review by another body which is independent of the contracting authority and the review body. This provision refers to a kind of mechanism to appeal decisions of non-judicial, that element in the ISDS case, for now, it would not be expected to be even more parts required. Another element that would differentiate this independent organ above, is certainly - as both governing bodies - the rules regarding the appointment of the members of the college: they meet the requirements stated by the judges, members of the independent body; appointed by the parties themselves, who choose them from a list of private lawyers, judges of the second mechanism.

Even with this difference, we see the disproportionality of the mechanism of ISDS: arbitrators appointed by the parties themselves and "grateful" the party which has presented the appeal, since their salary depends on the number of cases and proposed. There is an additional element closely related to the distinction just made: as reported in Chapter II, the independent body that I am using as a comparison tool has to be different from mandatory administrative bodies for homonyms appeals, but not necessarily different bodies courts; regarding the arbitration of ISDS, as there is no express provision, this will be very different

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<sup>325</sup> Chapter II, Paragraph 4.1.2.

from the court, also by virtue of the reasons that we have just seen. A further element to be examined in relation to the arbitration of ISDS, is the fact that it can be seized of the matter immediately, as soon as it is being envisaged. If it was a national arbitration and the action concerned national issues, there would be no problem, but we cannot forget that it is still an international arbitral tribunal and, as such, according to the traditional rules of the European Union, should be brought only a once all grades national courts have been concluded. We need to not forget also that are the principles and provisions on remedies within the European Union and the United States, and for this specific mechanism, there are no rules and regulations, and existing ones are not clear; all this makes the umpires to use the standards in a very broad way and can even lead them to change their interpretation and undermining, consequently, the principle of legal certainty. The last item needs to be taken in consideration, is the possibility provided for these referees that decisions are taken in secret hearing, thus not open to the public, element that, in addition to the risks of irregularities of form and substance, is in itself contrary to the fundamental principle of transparency.

### ***3.4.2 IMPARTIALITY PRINCIPLE***

Being established the appointment of the members of the arbitration by the parties and, as we mentioned, is made dependent on the salary of the arbitrators by the individual cases that are assigned to them, it is obvious that a kind of gratitude from the referees towards their party who brought the appeal is established. And if the judge tries a similar feeling towards one of the parties, of course, it is scratched the principle of impartiality, which is a cardinal principle of the bodies responsible for appeals in all European jurisdictions, which requires the judge to be third than the two parts and because it is equidistant from both, to be able to decide objectively. In addition, we must add one more element, that is, that generally only one of the two parties to its award, economic operators and contracting authority, may have interest in bringing proceedings before an arbitration board rather than an ordinary court: the operator economic enterprise. And this for two reasons: first because usually those who are appointed as



referees, as we mentioned before, names are chosen from a list of corporate lawyers, and the people closest to the business rather than the government, so that could happen that same person must be a lawyer in a case of a company, and in a subsequent case is one of the referees; the second reason is that this method of dispute resolution is much faster than the courts, and the company has an interest in obtaining a decision faster and in a less expensive way.

In conclusion, we can bring up the following question: the European directives from 89 onwards demand that they be provided mechanisms for an effective and rapid dispute resolution; surely the arbitration ISDS is a fast-track mechanism, but, after the examination we have just done, we are sure that it is really effective?

To be fair, we must, however, specify that the Commission, also relying on the public consultation held in Europe, relating to ISDS, which highlighted the lack of trust in the system, has officially proposed to the US<sup>326</sup> a new mechanism of dispute resolution. Or better, proposes to resume such mechanism, but with further expedients, including:

- Referees chosen were among people with high qualifications, just as those required for the international courts such as the Court of Justice of the WTO;
- Referees chosen beforehand and not after the fact, to give a greater guarantee of transparency, impartiality and fairness;
- Acts transparent and based on clear principles similar to existing ones;
- Public hearings and published online;
- Possibility of a review of the decision of the board, thanks to the formation of a court of appeal;
- Allowing investors to launch a lawsuit against the states only in specific cases (e.g., discrimination based on sex, nationality, race, religion) and claims based on different reasons will be declared inadmissible.

Finally, it seems that the European Commission intends to create, with the help of the United States, a permanent International Tribunal for Investment, so that, over

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<sup>326</sup> In November 2015.

time, replace all the mechanisms of dispute settlement provided for in the agreements of investment, EU member states with third countries and in the treaties concluded with non-EU countries, to improve efficiency and consistency.

In conclusion, we could say that the mechanism of the ISDS as had been outlined before the last European proposal, in addition to significantly influence the European regulations, would engrave - in my opinion – in a disadvantageous way. It is true, however, that the European Union, with the recent proposal, seems to have wanted to solve all those negative points discussed above, and create a mechanism for dispute resolution fully compliant with European principles described.

### ***3.5 DIFFERENT TYPES OF PROCUREMENT***

#### ***3.5.1 CONCESSIONS***

Even in relation to the area of concessions, the EU and the US are different. The first, with the Directive. 23 of 2014, has for the first time covered the entire area of concessions, never regulated at European level before; as modeled by the procurement law in the ordinary, this legislation strongly affects the regulation of service concessions<sup>327</sup>. The big difference with the United States is this: a detailed regulation at EU level which is faced with a complete lack of discipline at the federal level in the US. The only rules applicable to concessions, in America, fall within the regulations of the agencies, and each may have different rules. The reason why the concessions do not fall, for example, within the FAR, is that for which they do not, generally, perform the purchase of goods or services for the benefit of the US government.

#### ***3.5.2 PUBLIC-PRIVATE PARTNERSHIP (PPP)***

Connected to the discipline of the concessions, is the public-private partnership, which is a cooperation that is established between a public and a private one, in

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<sup>327</sup> For the highlights of this discipline, see paragraph 3.0.1 in the Chapter II.

order to manage and finance services of public interest. In fact, this is characterized by the participation of the private entities in the various phases of the project (for example, both the financing of the service, and the risks that may result from this service). As for the European Union, this form of organization (that cannot be defined as an institution<sup>328</sup>) is recognized both at EU level and at the state level of the member countries. The first Community act to close interest in the subject, was the Green Paper on the "Public-Private Partnerships and Community law on public contracts and concessions" of 2004<sup>329</sup>, which created the distinction between contractual cooperation, that is expressed through a contract signed by both sides in which their collaboration is adjusted, and the institutionalized<sup>330</sup>, which occurs when the cooperation between the public and private sectors will result in the creation of a new legal entity (or entrusting this cooperation to a subject already existing) generally a capital participation in the joint enterprise; the Green Paper also identified the four requirements of the PPP:

- relatively long duration of the collaboration;
- project financing by the private sector;
- economic operator participating in the different project phases (design, construction, implementation);
- Distribution of risks between private and public partners.

Nevertheless, it must be specified that very different institutions fall within the PPP and that only rarely all four requirements set by the Commission were found together<sup>331</sup>. The latest regulations in the field of procurement, namely the directives of 2014, and particularly, of course, no. 23 of 2014 relating to concessions, led the news, which also impact on this partnership. The news that affect the subject we are dealing with concern, in particular: the possibility that

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<sup>328</sup> Some studies, of which Marco Dugato, *"Il partenariato pubblico-privato: origine dell'istituto e sua evoluzione"*, in *"La collaborazione pubblico-privato e l'ordinamento amministrativo"*, Torino, 2011.

<sup>329</sup> Which links to the partnership "those forms of cooperation between public authorities and the world of business which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service".

<sup>330</sup> On the subject, please see Claudia Marcolungo, *"Il partenariato pubblico privato istituzionalizzato: un tentativo di ricostruzione"*, in *"Il partenariato Pubblico-Privato"* di Mario Pilade Chiti, Napoli, 2009.

<sup>331</sup> Mario Pilade Chiti, *ibid.*

there is an aggregation of a plurality of subjects on both the demand and the supply side and the clarification of what is involved in the award of a concession, that is, among other things, the transfer to the concessionaire of an operational risk associated with the management of works or services.

In any case, in the EU the use of this partnership is possible thanks to the fact that, as noted by the EU Court of Justice, Community law does not require public authorities to a particular legal form for the performance of public service functions, provided that it is safeguarded the principle of equal treatment<sup>332</sup>. In conclusion, we can say that the public-private partnership can unfold in many different modes of cooperation, some of which - the provision of works or services - has been regulated in some detail by Directive 23 of 2014, others, however, have not been regulated at Community level. As regards, however, the US legal system, there is an act that such a unified framework on PPPs at the federal level, because this institution is best developed at the state level or local level for public projects particularly complex, it is controlled by regulations of these different levels of government.

Since, in fact, the American discipline is dictated locally, it is unlikely that this will affect that part of the discipline that deals with the European PPP, so we think that this regulation cannot be subject to significant changes, even after TTIP. In any case, this partnership is a mode of organization which, if regulated in detail, could bring benefits on both sides of the Atlantic, therefore it is desirable, especially if the TTIP were to go through, that a common framework for make it usable in the relations between the two powers is established.

### ***3.5.3 GREEN PUBLIC PROCUREMENT***

The concept of green public procurement refers mostly to the attention reserved by government in the awarding of a contract, the environmental issue: it is given priority in the award to those goods or services that have an impact benevolent or, at most, that have the least negative impact on the surrounding environment. It is therefore important, in this perspective, that the administration takes into account

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<sup>332</sup> Court of Justice of the European Union, Judgment n. 480/2009.

what will be the effects on the environment of the contract. In particular, in referring to the green public procurement, is the ability to insert, among the characteristics that the product desired by the administration must contain and among the criteria used for choosing the best offer, the environmental criterion. In the European Union, the first thing that made reference to this practice was the "Green Paper on Integrated Product Policy" in 1996, followed by others<sup>333</sup>. But it was only Directive 2004/18 / EC to recognize first, at regulatory level, the ability to insert the environmental variable as a measurement criterion of the offer, the road followed - then- the new directives of 2014. In 24 of the 2014 Directive, in fact, we see the reference to the promotion of sustainable development and, therefore, the reference to Article 11 TFEU, and the will of the directive to clarify how contracting authorities can help to protect the environment and promote the sustainable development, ensuring they get for their contracts the best value price<sup>334</sup>.

The EU then recognizes the problem of pollution, recognizes the objective of environmental protection and sustainable development, and is committed to promoting this course of action through sensitization of the EU population to environmental issues. The European approach, however, is to allow Member States to determine the ways of achieving the same and the limits to human action, to protect the environment.

In the American, things are a bit different. The act governing the subject of the federal green procurement, the only ones to have a uniform regulation, is the Executive Order<sup>335</sup>, which requires federal agencies aims to buy sustainable products, environmentally. In particular, in Section II, it is requested that each agency:

- implement environmental management systems;

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<sup>333</sup> *Sixth Environment Action Programme of the European Community and the Green Paper on Integrated Product Policy*, 2001.

<sup>334</sup> Considering 91, Directive 2014/24/EU.

<sup>335</sup> See INSTRUCTIONS FOR IMPLEMENTING EXECUTIVE ORDER 13423, "Strengthening Federal Environmental, Energy, and Transportation Management", 2007.

- set objectives and targets to be achieved, to ensure the implementation of those provisions;
- collect, analyze and communicate information to measure performance in the implementation of these provisions;

Is required, therefore, for each agency to develop, implement and maintain a management system (EMS), useful for the Agency to address environmental issues. The management system, which must be frequently updated, in particular, will allow agencies to:

- identify and manage sustainable practices;
- identify and collect information to measure performance;
- support compliance of environmental regulations and energy;
- define the objectives and develop plans to achieve them.

In addition to the above, the Executive Order has a further section, the n. VII, right related to green product. This section indicates that agencies, in response to the federal program green purchasing, will give preference, in any program of contract, among other things, to:

- products made from recycled material;
- Renewable energy sources;
- products and services preferred by an environmental perspective;
- alternative fuel vehicles;
- products without or with low toxic components.

The agencies themselves have to commit to the identification of green products and buy them, but in doing so will be helped and directed by the EPA<sup>336</sup> that, by providing technical assistance, will also help to coordinate the activities of all federal agencies.

After making a comparison between the two ways of seeing green procurement in the two sides of the Atlantic, the result summary is this: in the EU, is recognized as a significant and primary result of sustainable development and, in this regard,

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<sup>336</sup> *Environmental Protection Agency*

are cited also green procurement; about them, in fact, a wide number of documents has been issued, but all with the primary aim of sensitizing the recipients, not dictate specific rules that must be followed in detail, so that even in the directives governing procurement, in addition to the reference to this procedure, it is not stated a particular discipline. As regards, however, to the United States, the situation is different: both the FAR, document dictating the rules of public procurement federal and Executive Order 13423 which, as we have seen, is a document dedicated to the environment, dictate the precise rules that federal agencies must follow to achieve the environmental objective: they indicate the materials to be used or preferred to others, the environmental objectives that the agencies must be achieved and the ways in which agencies must organize to get those results. This detailed regulation has the only limit to be directed exclusively to federal agencies and not to all those existing in the US territory.

The way to approach this environmental issue seems quite different: the EU stating the result and leaving to the states the decision regarding the application modalities, the US stating also some procedural rules. I think that differences in methodology are simply the result of the diversity of countries and, above all, an additional relevant fact. Europe would be more difficult to dictate rules because, if they were dictated at EU level, these would be binding on all countries that are part of the Union, with the result that each of them - although different from the others for pollution levels, causes of pollution, economic and territorial availability for the use of instruments to protect the environment - would be forced to follow the course of action determined at Community level. The risks associated with this system would be multiple:

- the EU would be obliged to dictate a discipline extremely detailed but at the same time to express it in such a way as to be applicable to all of its different Member States;
- each State would be bound by the rules laid down at EU level, with the risk-however - that some of them would not be able to put in place the action plan due to lack of availability, or other - even putting it into practice - would not get any benefit for the environment, as plagued by

environmental problems that are different from the ones forecasted by the Union.

Given the situation, it is probably more effective for the EU to leave each State free to define ways of action, each according to its own territory and its own capabilities and issues.

In the United States the situation is not very different, because the discipline described above will go into detail, but only in relation to federal contracts, for which it is easier to dictate a uniform regulation, while every federal state remains subject to his discipline and its rules. So, although in appearance it may seem a difference of approach, deep in the end situations are the same: a specific goal, the environmental one, is stated at the level of Union and Federation, and must be achieved first and foremost at Community and Federal, to encourage member states and the Federal States to do everything possible to achieve the same result, each one with their own resources.

Based on the considerations made above, I do not think that the European rules can be affected - either with TTIP or later - in the field of green procurement.

#### ***3.5.4 IN HOUSE PROVIDING***

The in-house operation is characterized by the fact that the Administration entrusts a particular benefit not to an internal department but to a person, made in the form of company, formally outside the administration itself, but over which it exercises control as to exclude any autonomous decision-making for the Entity<sup>337</sup>. The characteristic of the company in-house is that separate entity by the administration is created a in the formal sense but not substantially, since it cannot be considered "third party" in relation to it<sup>338</sup>, but has to be considered one of their own services of the administration itself, reason for which the public tender for

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<sup>337</sup> Enrico Michetti, *"In house providing. Modalità, requisiti, limiti. Evoluzione legislativa e giurisprudenziale interna ed europea anche alla luce del referendum del 12-13 Giugno 2011"*, 2011.

<sup>338</sup> *Ibid.*



the contract award is not required. The in-house is, therefore, designed as a possibility for the administration, to mandate a contract directly, apart from the public evidence; the consequence of this, is that this institute is an exception to the principle of competition.

After making a brief mention of the company's in-house, we analyze the rules laid down for it in the two jurisdictions that we are examining, European and US markets. As for the European legal order, it is clear that within the In-house operation<sup>339</sup> there is a collision of two cornerstones of the procurement system, the freedom of governments to self-organize, always recognized by the Court of Justice, and the Protection of Competition, the cardinal principle of all treaties. There is, for this reason, the need to coordinate these two principles, and the key to doing so is art. 106, paragraph 2 TFEU stipulating that, in the operation of services of general economic interest, meaning public services of economic importance, the rules of competition are generally observed, except where the application of these obstacles is the performance of the particular mission entrusted to those in charge of the management of services, then it is allowed not to apply the competition rules, and then assign the contract to the person directly in house.

Considering the particular role played, Community law stresses that the in-house company, to be such, must have - firstly three, today two- characteristics<sup>340</sup> (cumulative, not alternative), which are:

- The similar control: meaning any public entity participating in the share capital of the company must have the same control similar to what they have on their services. About this requirement the EU Court of Justice has repeatedly expressed, ruling that:
  - The similar control is the ability to determine the strategic objectives and significant decisions of the person in house that must have no managerial autonomy;

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<sup>339</sup> Expression used for the first time in the White Paper Procurement, 1998.

<sup>340</sup> Requirements of the Court of Justice of the European Union in Teckal (C-107/98), then further defined by subsequent case law.

- The control in question must be effective, structural and functional.
- To have a similar control, it is necessary that there is not the opening of the share capital to a private subject. European directives of 2014 also stated this fundamental requirement, in terms of contracts and concessions, which have regulated the matter in more detail, stating that:
  - There is also the so-called in-house fractioning or pluri-participated, namely the case of participation of various public, believing that in this case the control can be carried out jointly and not necessarily by the same body, provided that the authority is to take part in both the capital deciding organs;
  - As expressed by the Court of Justice, the condition of similar control is satisfied if the contracting authority (or the entity, for concessions) exercises a decisive influence over both strategic objectives and significant decisions of the in-house custodial;
  - Likewise it confirmed the existence of the so-called similar indirect control<sup>341</sup>, meaning the control exercised by a different legal entity, which is controlled in the same way by the contracting authority.
- Prevalence of the entrusting body: the person in-house has to play the most important part of its activities with the public entity or entities that control it. This is not to say that the subject must carry out the activity in-house exclusively with controlling parties, but that the different activities carried out must be ancillary marginal and residual<sup>342</sup>. Even with regard to this requirement, the Guidelines of 2014 on the subject of contracts and concessions have led the news, including the greater is to have defined the minimum threshold necessary for the identification of the requirement of the prevalence of (prevalence is, if more than 80% of the assets of the contractor who has in-house are carried out in the performance of tasks

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<sup>341</sup> See *Carbotermo*.

<sup>342</sup> *Ibid.*

entrusted to it by the parent company or other legal persons controlled by the parent).

After the analysis of the requirements, however, it must be specified that, as I mentioned above, the initial requirements to set up a company in house were three because, besides the two just discussed, there was one more: the public shareholders. Obviously, this was a cumulative requirement respect to other, so not all companies in total public participation could be defined in-house, if the other two elements are missing<sup>343</sup>. Also with regard to this feature, the Guidelines of 2014 have been innovative, since they were the first to not list this characteristic among the primary requirements of In house; in particular, this element, even if still required, is no longer necessary in exclusive way, because it was expected that it is equally possible to configure the in-house even in the presence of forms of participation of private capital, if through these it is not possible to exert any decisive influence on the contractor who has in-house, and as long as this does not involve a control or a veto power. Despite this change, the in-house still has to be kept separate from the public-private partnership, which is characterized by the participation of both public and private capital to the company.

To conclude the analysis on the "European" side, we can outline the rules laid down in this way: despite the directives of 2014 do not expressly talk about "in house", they regulate this phenomenon and with regard to contracts<sup>344</sup>, both with respect to the concessions<sup>345</sup>, both with reference to the special sectors<sup>346</sup>, first of all specifying the requirements, then pointing to the exclusion of in-house companies from the application of the directives in question. So, despite the European rules of contract talk, as we have seen, the in-house company, actually it indicates the discipline that should not be given to them, that is stated for procurement and concessions. About this, in fact, the Directive n. 24 is clear: in reference to the public to public cooperation, it indicates that, generally, the

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<sup>343</sup> See, in particular, the judgment of the Court of Justice of the EU, *Carbotermo*, C-340/04, 2006.

<sup>344</sup> Article 12, Directive 2014/24/EU.

<sup>345</sup> Article 17, Directive 2014/23/EU.

<sup>346</sup> Article 28, Directive 2014/25/EU.

provisions of the Directive itself do not apply when contracts are awarded to legal person controlled by, if the control is similar to that which the administration has on its services; the only exception that the directive provides, is the case of a direct participation of private capital in the controlled legal person (unless the private participation is not required by law<sup>347</sup>), there the Guidelines of 2014 must be applied because the award of the contract without a competitive procedure would offer a private economic operator an unfair advantage over its competitors.

From the US perspective, there is a conception of rules similar to the European Union. In the US, if a contracting authority buys goods or services in the US federal system, its contracts will generally be subject to US federal procurement rules, without exception even for in-house.

So the difference between the two systems is the applicable rules foreseen: not that common procurement for Europe, those unified federal procurement in the US. Precisely because of this, TTIP will not affect the European regulations relating to custody in the house because they are not subject to the discipline of public procurement, the only one potentially modifiable by the transatlantic agreement.

### **3.6. GLOBAL LAW**

After analyzing the main differences and similarities of the European and American regulations in public procurement, and how those differences might affect, not least through the Transatlantic Trade and Investment Partnership, the European framework, I would like to conclude with a brief reference to what , from a more general point of view, also the same TTIP could help to create. I am referring to the so called global law, a notion discussed for years, on which much has been written<sup>348</sup>, and many of which are at odds with each other. Think of the single market rules more uniform, international tribunals and transatlantic

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<sup>347</sup> Considering 32, Directive 2014.

<sup>348</sup> Among others, please see: Maria Rosaria Ferrarese, “*Prima lezione di diritto globale*”, Roma, 2012; Gianluigi Palombella, “*È possibile una legalità globale?: il Rule of law e la governance del mondo*”, 2012; Sabino Cassese, “*Il Diritto Globale*” e “*Globalizzazione del diritto*”, 2009; Giuliana Ziccardi Capaldo, “*Diritto globale*”, 2010.

agreements; all this can really create a global law. This right is the transition from state law, the individual states, the law of humanity, foreshadowing the emergence of a global society founded on the progressive integration of the various systems of organization<sup>349</sup>. The starting point of the global law was, of course, globalization: a term coined to describe an economic situation, today refers to the interactions that exist in the world, also from a cultural point of view and social, that make all the diversity of situations, connected between them.

Globalization has caused changes not only to the size of the right but also the dynamics of decision-making and the way legal systems operating at different orders of scale interact (global, interstate, regional<sup>350</sup>). It is a phenomenon that affected all areas: human rights, culture, the environment, trade and the economy, the military and many other activities<sup>351</sup>.

Globalization, however, as all the "revolutions" in the world, has its positive and negative aspects. The global law, born thanks to it, could serve to make the situation "positive", providing it with rules. From the perspective of "normative", however, a good starting point for the creation of a truly global law is the policy objective set out by the General Assembly of the United Nations, expressing the desire to build *a legal universal system that recognizes the humanity in all its diversity, and that guarantees to every individual and every people human rights and the right to obtain a fair and democratic international order and a sustainable environment*.

After identifying the basics, real and regulations, the global law, let us look at the essence of this right, stating what is and its fundamental principles.

First of all, the particularity of global law that differentiates it from all other rights - including international ones - although it is their product, it is the new interest reserved to the figure of the individual, so as to increase the attention given to human rights, to environment in which people live, but also to individual responsibility for the environment itself and of the other (e.g. the principle that "the polluter pays").

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<sup>349</sup> Giuliana Ziccardi Capaldo, *"Diritto Globale"*, Milano, 2010.

<sup>350</sup> *Ibid.*

<sup>351</sup> See Sabino Cassese, *"Il Diritto Globale. Giustizia e democrazia oltre lo Stato"*, 2009.

Secondly, it must specify that the global law could be comparable to the constitutional law, as it deals with all stages of creation and implementation of the law itself. It states, in fact, the founding principles of the community, puts in place security instruments, creates institutions and procedures regulating the basic functions of creation and implementation of the law<sup>352</sup>.

All the above can be summarized by indicating the four pillars of global law, which are:

- Verticality: global law organizes social fundamental functions, creates structures and decision-making processes of production, assessment and implementation of the rules set up in defense of the general interests, introduces multilateral democratic decision-making processes for the sharing of responsibilities in the management of social and economic development, the protection of health and environment;
- Legality: the global legal system is based on general rules and principles of constitutional law binding identifying supreme values of all humanity and propose obligations *erga omnes* (for example the current law requires that governments are legitimate and the legality is entrusted to international bodies which use universal standards);
- Integration: global law promotes the integration between jurisdictions within international organizations and their interaction, develops general principles of international law, and coordination between the regional and state and the fact that there are minimum standards for the implementation of obligations assumed by the state at the international level, causes the creation of a global legal system, and achieve the adherence to its values and principles; cooperation both at the inter-state level and the global level in the strict sense is an essential element of that order, so that there are numerous committees of international organizations composed of representatives of national administrations which play the triple role of information tool bodies comprehensive, means of transmission of their

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<sup>352</sup> Giuliana Ziccardi Capaldo, *op. cit.*

decisions at the national level, the means to ensure dialogue and negotiation between national administrations<sup>353</sup>;

- Collective guarantees: the global law provides tools for the implementation of the universal values of the community, that is, procedures and integrated monitoring mechanism, assessment, implementation of coercive law involving the UN, governments, international organizations, and other subjects.

We compared the global law to constitutional law, but we know that the constitutional right to discipline, first, the three major branches of government: legislative, executive and judicial. To end the comparison above started, it should be checked whether the legal system is global, from the point of view of these three powers<sup>354</sup>, comparable to a normal state.

From the legislative point of view, there is no doubt that globally regulatory power has been developed (and not just the international treaty or customary, because there are also rules that do not derive from agreements but are produced by public authorities with, treaties, skills standards; these standards are not directed only to states and state authorities, but also to civil society within the Member).

From the point of view of executive power, certainly the global order does not have a central authority similar to "our" government, but there are so many government sectors, with tasks even minutely executive<sup>355</sup>.

Finally, from the point of view of the judiciary, there is to say that the global legal order has developed a large number of courts, and each one is a separate system, the use of which does not depend on the unanimous agreement of the parties.

We could say, then, that only part of the global law reflects the composition of an ordinary legal system. I say this because in the domestic legal systems, in the presence of a central government, is accompanied by a body of general rules, which then is divided into rules of the sector. But those rules are governed by the

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<sup>353</sup> Sabino Cassese, *"Globalizzazione del diritto"*, in XXI Enciclopedia Italiana, Roma, 2009.

<sup>354</sup> Sabino Cassese, *"Globalizzazione del diritto"*, *op.cit*

<sup>355</sup> For the analysis of the legislative, executive and judiciary powers, please see: Sabino Cassese, *ibid.*

general part, which gives coherence and consistency. In global law, however, there are many regulatory bodies, all sectorial, thus missing a general set of rules that act as a unifying element<sup>356</sup>. This, however, does not mean that in the global law does not exist the so-called rule of law, because in any case we can say that are part of global law:

- the principles and global constitutional values (e.g. The use of force or the protection of human rights or health or sustainable development);
- the principles of the global economy, a concept which refers to the economy "globalized", that is in contrast to the national economy, which refers to the concept of open economy: multinational companies active throughout the world, fewer and fewer barriers (also customs) to trade among the countries of the world, which results in increased trade between countries that before - particularly in light of the many obstacles - could not trade;
- the concept of integration, which suggests the desire to create a world population dictating uniform standards and creating common tools, but also putting all the various realities actually related to each other, so that integration can be generated in a natural and gradual way. Also because there is a factor to consider when we talk about global law we refer not only to States, but there is a social basis even greater: there are states, all non-state actors and other global forces (including individuals, NGOs), that only through integration can come into agreement with each other<sup>357</sup>.

Still on the subject of the comparison made between the global legal system and the state, it arises another consideration on the democratic legitimacy of the global order. It has always maintained that they were the same states, establishing international organizations and regulate them, to lend its legitimacy to them (so-called legitimacy of indirect). However, since the global public authorities are becoming more independent and even establishing direct links with civil society and be trained not only by states but also by other international organizations, this

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<sup>356</sup> *Ibid.*

<sup>357</sup> It is also based on this observation, namely the fact that states are not the only subjects of global law, but rather mingle with others losing their unity, we cannot argue that the legal system is a global level It is superimposed on the state level. Please see Sabino Cassese, "*Il Diritto Globale*", *op. cit.*



seems insufficient legitimacy. This deficit of democracy, however, is only apparent; just think, first, that the parliaments, always, are set up so to represent the people, but also to control the executive; in this case there is no executive to combat, so that is not abnormal that there is no democracy. Secondly, we must also consider that the global bodies have authoritative powers limited, in fact, only in specific cases may give orders or impose obligations, while in most cases establish standards or encourage behavior, which is why there is an absolute need for a democratic control<sup>358</sup>.

After our comparison with "ordinary legal system", it is right to refer to global law as an important tool for another reason: often there are global problems (e.g. International terrorism or environmental pollution) that individual states cannot solve alone, but need solutions globally. The global law also serves to this, to prescribe the solutions that must be followed by the entire global community. What we see through this simple example, however, is that Member States, as individuals, do not leave the scene; they participate in the deployment and execution of this mechanism, with the only limitation that once this mechanism became operational, they act as agents of this, and not as autonomous units<sup>359</sup>. Of course, the above situation is very rare, not always the case that, in the face of a global problem, the global law called for a solution is immediately accepted and executed by the States, because there are many possible obstacles - as Cassese explains- to achieve this state, for example the fact that some countries prove to execute the solutions adopted in the national context (often ineffective), or that some states, because of the constraints that globalization can cause, are opposed to it.

To end our brief mention of the global law, there has to specify the reason why we raised this topic in conclusion to our chapter. After indicating summarily its characterizing points, we could say that the Transatlantic Trade and Investment Partnership could be a great tool for the development of global law. In short, the TTIP has as its primary purpose the elimination of trade barriers, even minor, that still exist between the two great powers such as the EU and US, and if this goes

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<sup>358</sup> Sabino Cassese, *"Globalizzazione del diritto"*, *op. cit.*

<sup>359</sup> Sabino Cassese, *"Il Diritto Globale"*, *op. cit.*

ahead, could contribute greatly to the aforementioned globalization from an economic point of view. There would be a further expansion of trade, increased economic integration between these two countries, growth in the international mobility of capital. And all this, in turn, would bring with it the second goal TTIP has set itself: the creation of uniform standards to be enforced in the territories of the two parties. From a regulatory point of view, it would be a good starting point for the global law. The fact that the US and EU can create uniform standards in many sectors of the economy, could help establish standards in the world and so it may be the first step towards the formation of a body of standards globally.

Finally, with this chapter I wanted to try to identify potential changes to European rules on public contracts, that may have occurred since the signing of transatlantic TTIP. In short, I noticed - a bit from the proposals made by both sides during the rounds of negotiation, and a bit from the differences in legislation between the signatory future in some areas, which could then affect the TTIP once implemented - that the two great powers do not differ significantly between each other. This is certainly dictated by the fact that the US and EU are signatories to many common agreements, in fact they share the same fundamental principles and the same rules. What often, though not always, changes between the two regulations is only the approach, the setting mode of regulation. I think, however, that this difference is closely related to the difference between the two sides of the Atlantic: regional differences, cultural, social, economic, historical. The one with an ancient history and the other that is more recent; one as a political and economic union of states, the other as a federation of states; one drawn - in large part- by the rules of civil law to which almost all of the member countries responding to, the other inspired by the common law (as a former British colony); one based on the rules of the treaties - for the adoption of which serves the unanimity- the other based on a Constitution. And yet, in the EU there are less the united states federated than in the US, but there is a wider population, there is a different electoral system, different rules for citizenship, etc.

All this to say that the differences of discipline, in a particular field such as public procurement, are normal and sometimes necessary, especially given the two

powers that we are examining. But, apart from some institution that really threatens to affect significantly the European rules (see: ISDS), these differences should not, in most cases, turn any basic principle of our European Union. The only thing that often must be done, if a unified framework in this area wants to be reached, will be to choose or to find a compromise between the two different approaches proposed.

## **CONCLUSION**

As I said in the introduction to this work, the purpose of this script is to identify if and what might be the changes that the Transatlantic Trade and Investment Partnership, or his further implementation, would bring to the European rules on public procurement.

To achieve this goal, in the thesis, at first, I rebuilt an overview of TTIP, of its potential content, of its possible advantages (open markets, elimination of trade and non-trade barriers, the consequential increase in exports and jobs) and of its weaknesses (the non-transparent negotiations held at the beginning, non-confidence of the population in the agreement, the danger of some of its potential standards). After that, I proceeded to outline the European rules on public procurement, which I described in Chapter II by analyzing the Directive n. 24 of the 2014 (2014/24 / EU), particularly with regard to who may participate in the award of a contract, the principles that must be respected, the award criteria and best bidder selection, and appeals. And, although this is a matter to which an entire book could be dedicated, I tried to summarize the main points in the best way.

Once guaranteed the tools needed to proceed with the analysis, using the reasoning made through the Chapters, the work comes to Chapter III: this is where what was said in Chapter I about the TTIP and its contents can be applied to the

matters discussed in Chapter II on the key institutions of the European context of public procurement. And it is here that the thesis wants to answer to the following question: the Transatlantic Trade and Investment Partnership could change the European rules on public procurement? And if so, how and in what areas?

To arrive at the conclusions that I will present soon, I have used- as specified in the Introduction – the comparison between the European discipline and proposals for TTIP text that have been disclosed by the parties to date, and the comparison between the European discipline and US regulations.

I did this on the basis that, for some sectors that are part of the large group of public procurement (such as so called ISDS and special areas), the key will be the drafting of the text of the Treaty. I mean, for any of them the discipline will be modified if and only if they will be provided a specific discipline in the text (for example, the dispute resolution mechanism that I described in Chapter I and Chapter III, will be used by investors only if included in a clause of the agreement; the opening to US companies of the public procurement market in the European utilities will be real only if expressly provided by the text of the Treaty - or better, if not provided in the list of exceptions, as the negative list approach will be adopted), while other areas of the same field (ex. requirements to participate, called thresholds, etc.) that may not be covered by the text of the agreement signed, may change later, when the Agreement will come to execution. It is precisely on the basis of this consideration that I have brought forward the two comparisons mentioned above.

From the comparison between the European and US regulatory framework, which was used mostly to identify future potential changes resulting from the implementation of TTIP (and not by its editorial staff), we can deduct the things that constitutes, then, the premise of the outcome of this research. As I mentioned in Chapter III, the European Union and the United States, although different from many points of view, starting from the local to the political one, at the same time share many values. And these are the values we know to be the basis of all the disciplines set within a territory, of any areas considered. The same fact that the two great powers, over the years, have been signatories of many common

agreements made (by the New Deal at Bretton Woods, the Marshall Plan to NATO), demonstrates a fundamental point, namely that the US and the EU are two plants that are born from the same root. The roots are the fundamental principles recognized by both sides and above all through the agreements to which we referred, which were then obviously applied to different worlds, with different histories, and have created two different entities. But different in approach, not in the content; divided more than anything else in the form, but not in substance. And even within the discipline of public procurement, the point is almost the same. When I approached the European and US regulations, the differences I found them almost always been related to the approach to the arrangement. Differences in the preparation of such standards also depend, above all, on their recipients; the provisions on US government procurement, that I have analyzed as included in the Federal Acquisition Regulation, are applicable to federal procurement, not national, while the European Union's provisions, once stated, are binding on all member countries (in the case of the Directives, to be binding is the objective that the Directive requires to reach). A difference in approach between the Union and the federation, that changes then - as a consequence - the formulation of the rules without changing - however - the substance.

From the second comparison, namely that between the European discipline and the demands on the text of TTIP disclosed (especially thanks to the internet site of the European Commission), from which should have come to light the possible changes made by TTIP agreement as negotiated and signed by the parties, other types of reflections have arisen, in their end used as second premise for the outcome of the work, especially in relation to the negotiation phase.

One of the starting points of the agreement, meaning the fundamental principles that influence the rules, that we have seen to be similar to both powers, and cannot therefore modify significantly the European discipline.

But there are other issues that must be taken into account at the time of the negotiation of an agreement: the demands made to the other party, and, closely related to them, the contractual power of each. In this case, the first, as seen in Chapter III, likely seems to be a little out of proportion: the European Union calls

on the US opening of the procurement of each administrative level US market, while the US, having already obtained previously the whole of the market access of ordinary public procurement in Europe, would be interested in being admitted to the procurement market in the utilities sectors (water, telecommunications, transport, etc.). From this negotiation the US would benefit, because for American businesses having access also to special areas, privatizing them - as it happens in America - would undoubtedly bring an enormous extension of the market; for the European Union, however, both sides of the coin have to be examined: finally, having access to public procurement also at sub-federal level would help European companies accessing the largest slice of the contracts in the US market, but at a high price; the opening of utilities and their privatization would be a blow to the European system (ex. the existing national health system in the country). All this is compounded, moreover, by an element: privatizing a sector of the caliber of the special ones, means not being able to retrace the path backward; I mean that - once privatization has happened - would be almost impossible for governments of EU Member States to return to a public service, because it is increasingly difficult to enter an "obstacle" into the system, rather than remove it. So there is a first element which, in hindsight, results to be negative for the European rules: the risk of excessive US request, facing a European request that, for the kind of transatlantic agreement that is to be signed, is ordinary.

There is, however, an additional "negative" element for Europe, also requested- at least for the moment - from the United States, and is the mechanism of the ISDS (Investor State Dispute Settlement), a dispute resolution mechanism allowing investors, if they consider that to have been infringed certain rights that they reserved by foreign state, to file a lawsuit directly against the government in question. The many ISDS' negative points have been described in Chapter I and, in more detail with reference to the subject matter of the contracts, in Chapter III (for example the lack of impartiality of the judicial body for both the book from which they are drawn prospective referees for both the "gratitude" of the referees themselves to the one who proposes arbitration etc.); we have seen how this institution requested by the United States (who have attempted to enter this mechanism in a number of recently negotiated agreements with several countries)

would negatively affect the matter of European appeals, always governed by rules based on transparency and impartiality, and how it could make not desired changes to our discipline.

These resounding examples represent a danger connected to TTIP: the possible asymmetry of the parties' requests; for the EU, this problem arises, however, because of the second element that I mentioned above: the contractual power. Although the two sides in question are two great powers, and I have also supported, in Chapter I, the conclusion of a bilateral nature of the negotiations, also by virtue of the importance of European values which make up the Union a great source of strength, we must always remember that the current partner is the United States of America, a global leader, and that this could not affect positively on the TTIP negotiations. I say this because it could be (always using the conditional, because, not being terminated negotiations, and especially according to a statement of the European Commission, for which the special areas will be excluded from the subjects of the agreement and the ISDS mechanism will be upset, what we are assuming might not happen) that the EU feels the need to conclude at any cost to reach a similar agreement with a global player like America, and therefore give in to US demands. Do not forget, also, that the EU still has an energy and military dependence on the United States, which could in any way influence its negotiating choices.

Those mentioned above are the prerequisites that I have used to reach the conclusion. From the analysis of the proposals on the text of TTIP and differences between the European and US subjects, it was found that the TTIP - as an agreement as such - does not appear to pose a threat to our procurement law, indeed, for most of the issue it intends to deal with, probably could lead to a major evolution. Those that I have found, however, much more worrisome, are the (few) proposals announced to date, relating to the actual text of TTIP, and primarily ISDS. I have seen, then, that is not so much the comparison with the American discipline in order to "scare" the European regulation of contracts (because of the similarity that I have come across and which I mentioned above), but rather what Americans want: the problem is not the essence of the US, but their requests. Are

the US proposals, based also on their "contractual power", to be hazardous to the European system: the ISDS, strongly wanted by the United States is proof of this. But this mechanism is not the only one, I consider the American willingness to not open their sub-federal procurement in the European market or, if so, to ask in return for the opening of the European utilities market, as I said above. There is a risk that one of the issues that I addressed in Chapter I happen can happen: an imbalance in the negotiations. A closer look, then, is not the agreement as such in order to make significant changes to European rules (or at least, not for the regulation of public procurement), but these are two big macro-areas (appeals and utilities) to have to be kept in check to avoid the considerable distortions of our system.



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