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SKI's revised input to the revision of the Public Procurement Directive with proposed amendments

1. Introduction

Staten og Kommunernes Indkøbsservice ("SKI") has with great interest followed the debate on the revision of the Public Procurement Directive[1] arising from, in particular, the European Court of Auditors' special report on public procurement in the EU, The Draghi report on EU competitiveness and the new urgent need for resilience in our supply chains.

We thank the Commission for the opportunity to participate in the consultation on the evaluation, which we find crucial for the future of public procurement and the EU's competitiveness going forward.

SKI is Denmark's leading central purchasing body, and a local public procurement expert tendering out goods and services on behalf of a vast majority of Danish contracting authorities, including municipalities, regions, and governmental institutions. Founded in 1994, SKI provides framework agreements and dynamic purchasing systems across a broad range of products and services, enhancing competition and supporting SMEs. We are in close dialogue with our regional and local public buyers and users, and we are met with the challenges and increasing administrative burdens they face in their eagerness to comply with the complicated set of rules.

The public spending on products and services covered by our agreements and dynamic purchasing systems is approximately 2.7 billion EUR annually. SKI focuses on cost saving and strategic procurement hereunder sustainable solutions. SKI possesses extensive legal, economic, and data driven analytical expertise, covering all aspects of procurement and contract management, and is a frontrunner in strategic sustainable procurement, promoting green initiatives in Denmark.

SKI has had a good and constructive dialogue with the Commission over the past year and has sent our thoughts on the revision of the directive in 2024. In the autumn of 2024 we met with representatives of the Commission. Should you find it beneficial, we are available for further dialogue, and if needed, we have extensive data which we could share. Alongside our filled-out questionnaire on the evaluation of the public procurement directives, we submit this revised memorandum.

[1] DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

…

Overall, the Court of Auditors concludes that the objectives of the 2014 reform have not been achieved. This means, among other things, that public procurement is still associated with excessive administrative burdens, and that strategic aspects are rarely taken into account. Compliance with the rules and progress in the lengthy tender processes are often prioritized over strategic considerations and the performances of the contract.

SKI considers it essential that amendments to procurement legislation are introduced with a view to promote increased and effective competition. Achieving this objective requires greater freedom and flexibility in designing the optimal competitive framework for the relevant market. Such an approach would enable contracting authorities to conduct procurement processes that are both attractive to the market and aligned with important strategic objectives.

Furthermore, it is imperative that the process be simplified and made more transparent for both contracting authorities and suppliers, thereby reducing administrative burdens for all parties involved in the procurement process. This, in turn, ensures that well-intended political initiatives and goals can be efficiently and effectively translated into tangible results. It is our opinion, that a future directive should drastically reduce complex regulation and excessive rigidity in procurement legislation which hinders competition today. A more simple and harmonized set of rules across EU member states will also motivate European suppliers to prioritize tenders across national borders and minimize the uncertainty in entering new markets.

The work on the revision of the Public Procurement Directive comes at a time when many political agendas will influence the work. There is no doubt that resilience, security and defense policy, sustainability and environmental concerns are high on the political agenda. This is, of course, a basic premise of the thoughts that will underpin the revision.

SKI hopes that the following will be received in the light that we fully understand the importance of these agendas which we fully support. However, we also hope that the Commission, in its work, will consider where these agendas are most effectively and appropriately belong.

It is our experience that such regulation is best kept in the sector-specific legislation and not brought into the procurement directives. Partly because further complication of the procurement rules is thereby avoided and partly because sector-specific regulation incorporated into the Public Procurement Directive risks becoming rapidly obsolete. Historically, the Public Procurement Directive has been revised once every decade, whereas developments in many sector-specific areas are moving much faster. For example, our knowledge of what is sustainable and green is evolving more rapidly than the rules. What was green yesterday is not necessarily as green today or tomorrow. Similarly, recent years and especially the recent couple of months show that the EU's global position and security policy landscape is evolving at a pace where a simple and effective framework for public procurement are urgently needed.

Autonomous and sector-specific legislation provides much greater room for manoeuvre for necessary and agile change in line with developments.

SKI has identified five themes that can contribute to achieving the objectives described above. These themes are listed below and are then elaborated on in the note under the indicated sections:

1. **The current legal framework – the three procurement directives, se section 2.**
    - It should be considered whether the current separation of concessions, utilities, and public procurement directives is necessary or effective. A complete overhaul and consolidation of these legal frameworks, with a focus on simplification, could encourage more flexible and innovative procurement while incorporating principles from less burdensome directives where appropriate.

2. **Simplification of the public procurement rules, see section 3.**
    - The 2014 revision of the Public Procurement Directive aimed to simplify procurement processes but has instead led to increased complexity, longer procedures, and heavier administrative burdens for both contracting entities and tenderers. SKI advocates for a revised directive with fewer, more focused rules that ensure flexibility while maintaining fundamental principles and suggests removing regulations like the European Single Procurement Document (ESPD), which has unintentionally increased bureaucracy.

3. **Possibilities for changes to tender and contract material, see section 4.**
    - We see a need for greater flexibility in modifying tender materials and completed contracts. Current regulation imposes excessive restrictions, leading to unnecessary administrative burdens, cancellation of procurement procedures and lengthy procurement processes.
    - At the same time the static nature of concluded contracts is not aligned with reality where products and services are rapidly modified. We propose clearer and more flexible rules, including allowing significant changes with appropriate transparency measures.

4. **Sustainability measures, including better opportunities to use labels and/or standards in public procurement, see section 5.**
    - Current EU regulations make it difficult to impose sustainability measures in public procurement. The regulation introduced in the 2014-directive regarding labels and standards creates unnecessary complexity and legal uncertainty despite the intention of the opposite. SKI proposes a deletion of these restrictions, allowing broader use of labels like the EU Ecolabel, simplifying documentation requirements, and providing more flexibility for contracting entities to incorporate sustainability considerations effectively.

5. **Flexibility, see section 6, including**
    a. Extended opportunities for using flexible procurement procedures and dialogue; and
    b. Framework agreements and procurement of large product ranges.

    - SKI advocates for expanded use of flexible procurement methods, such as competitive dialogue and negotiated procedures, to improve efficiency. It also calls for more adaptable rules on framework agreements, including allowing for a longer duration and more freedom in awarding contracts. Additionally, SKI suggests simplifying procurement for large product ranges and specifically enabling framework agreements under dynamic purchasing systems to better reflect market realities and ensure effective competition.

In this memorandum, we particularly elaborate on proposed solutions to the themes on the possibilities for changes (section 3) and sustainability measures (section 4), while the other themes are

of a more general nature and are thus dealt with through a description of the direction that SKI would like the legal situation to take - and, where relevant, proposals for specific initiatives in this connection. It should be noted that the solutions proposed are solely an expression of SKI's reflections in this regard, and that other solutions may undoubtedly be possible in relation to the issues outlined.

2. The three public procurement directives?

Initially it is in our opinion worth considering whether the current division between concessions, utilities and public procurement directives is necessary and/or the most effective legal framework.

One could consider starting from scratch merging these three pieces of legislation into one, and at the same time focusing on simplification.

This could ensure that we are not being (too) bound by “the usual way of thinking”. At the same time it would be natural to have an eye on whether principles from the less burdensome directives could be generally available.

A more fundamental reconsideration of the current EU legal framework governing public procurement, utilities, and concessions may be warranted. While these three areas have historically been regulated separately, it is worth questioning whether maintaining this division remains the most effective approach. The existence of three distinct directives inevitably leads to legal complexity, potential overlaps, and unnecessary administrative burdens for both contracting authorities and economic operators.

One could consider a more ambitious reform by consolidating the rules into a single, coherent legislative framework. Such an approach would provide an opportunity to simplify procurement rules, increase legal certainty, and ensure greater consistency in their application across sectors. A unified legislative instrument could also reduce fragmentation and promote a more harmonized interpretation of key principles such as transparency, non-discrimination, and proportionality.

Moreover, a merger of the three directives could serve as an occasion to rethink and recalibrate the regulatory balance between flexibility and legal certainty. By systematically identifying best practices from the current directives— particularly those provisions that allow for less burdensome and more innovation-friendly procurement processes— it may be possible to develop a framework that enhances efficiency while still safeguarding fundamental EU Treaty principles. For example, lessons learned from the lighter-touch approach applied in the utilities directive could inspire broader application of streamlined procedures in other procurement contexts.

From an EU legislative perspective, such a reform would align well with the Commission’s Better Regulation agenda and the resent omnibus negotiations, which seeks to reduce unnecessary regulatory burdens while ensuring that rules remain fit for purpose. The revision process could also benefit from stakeholder consultations and impact assessments to ensure that any new framework effectively meets the needs of contracting authorities, businesses, and society at large. A consolidated approach could further strengthen the internal market by making it easier for companies—particularly SMEs—to navigate procurement rules across different sectors and member states.

Ultimately, a bold simplification effort could help ensure that public procurement law in the EU remains a dynamic and future-proof instrument, capable of supporting innovation, sustainability, and value for money in public spending.

3. Simplification of the public procurement rules

The prime objective of revising the Public Procurement Directive in 2014 was to simplify the administration of public procurement. However, SKI finds that the public procurement process has become increasingly complicated in recent years, which is also seen in the themes highlighted below in this memorandum.

The analysis of the Court of Auditors revealed that the administrative burden of public procurement is still perceived as heavy for both contracting entities and tenderers, that the rules of procedure are far too complicated and inflexible, and that the Directive has provided no major simplification. In fact, the duration of procurement procedures has become longer and longer over the past 10 years.

Sector-specific legislation, such as the so-called Foreign Subsidies Regulation[2] and sanctions imposed on Russia in connection with the war in Ukraine[3], add to the complexity for both contracting entities and tenderers. Sector-specific legislation may be necessary, but it creates an even greater need for the public procurement rules to provide room and flexibility for contracting authorities to organise their processes in compliance with other relevant legislation.

SKI is in favor of the general focus being on a directive with fewer rules, and for the rules that remain focused on the public procurement process and how fundamental principles of equal treatment, transparency and proportionality are ensured.

The 2014 Directive introduced several measures intended to simplify the procurement processes and/or provide greater flexibility and more options for contracting entities, but which in fact have had the opposite effect. This should be kept in mind in connection with the revision.

In SKI's opinion, the introduction of the European Single Procurement Document (ESPD), for example, has contributed to significantly increasing the administrative burden for both contracting entities and tenderers despite the intention to the contrary. This is partly because the document itself is unnecessarily detailed and complicated, and partly because the documentation requirements introduced are regulated in such detail that they in fact prevent and obstruct the contracting entity's ability to organise the documentation process appropriately.

It is SKI's opinion that the regulation introduced by the 2014 Directive in this regard has neither resulted in reduced administrative burdens nor significantly increased security for the information provided through the documentation process, and that a rollback of the regulation should therefore be considered.

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[2] For example, Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

[3] See the judgment of the Court of Justice in case C-298/15 of 5 April 2017, "borta" UAB v Klaipedos valstybinio juru uosto direkcija VI, paragraph 69, the judgment of the Court of Justice in case C-368/10 of 10 May 2012, "Max Havelaar", Commission v Netherlands and the judgment of the Court of Justice in case C-19/00 SIAC of 18 October 2001 Construction Ltd. v County Civil of the County of Mayo,

4. The possibility for changes

SKI finds flexibility lacking in the contracting entity's possibilities for changing the tender material after publication. Both during the procurement process and after the contract has been signed.

Although SKI is an organisation with relatively many resources, and a lot of preparatory work is put into SKI's procurement in the form of extensive market analyses and often several rounds of technical dialogue, there is almost in every procurement a need to make changes after publication.

This section focuses on the possibilities for changing the tender material and the subsequent contract documents, respectively.

In SKI's opinion, the lack of flexibility is a significant limitation to the contracting entity's ability to promote effective competition and, not least, a key factor adding to the large administrative burdens associated with public procurement.

Changes to the tender material:

The scope of the contracting entity's right to change already published tender material is limited and relatively unclear. The present state of the law therefore does not support the underlying purpose of the Public Procurement Directive to simplify and reduce transaction costs for both tenderers and contracting entities.

The rules on the right to make adjustments to already published tender material are set out in the Directive's provisions on the time allowed for providing additional information. These are set out in Article 47(3) of the Directive, which states the following [emphasis added]:

"3. Contracting authorities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases:

(a) where, for whatever reason, additional information, although requested by the economic operator in good time, is not supplied at the latest six days before the time limit fixed for the receipt of tenders. In the event of an accelerated procedure as referred to in Article 27(3) and Article 28(6), that period shall be four days;

(b) where significant changes are made to the procurement documents.

The length of the extension shall be proportionate to the importance of the information or change.

Where the additional information has either not been requested in good time or its importance with a view to preparing responsive tenders is insignificant, contracting authorities shall not be required to extend the time limits."

It is thus clear from the above that there is - relatively free - opportunity to provide "additional information" to the tender material. Likewise, it is possible to make "significant changes" if the contracting entity at the same time grants an extension of the time limit.

In addition to the above, recital 81 of the Directive states the following [emphasis added]:

"It should be clarified that the need to ensure that economic operators have sufficient time in which to draw up responsive tenders may entail that the time limits which were set initially may have to be extended. This would, in particular, be the case where significant changes are made to the procurement documents. It should also be specified that, in that case, significant changes should be understood as covering changes, in particular to the technical specifications, in respect of which economic operators would need additional time in order to understand and respond appropriately. It ***should****, however, be clarified that such changes should not be so substantial that the admission of candidates other than those initially selected would have been allowed for or additional participants in the procurement procedure would have been attracted. That could, in particular, be the case where the changes render the contract or the framework agreement materially different in character from the one initially set out in the procurement documents."*

Recital 81 thus states that although significant changes may be made to the material, including changes to technical specifications, these changes *should* not have been able to affect the potential field of interested candidates/tenderers.

The limits for how much can be changed are not directly regulated in the Public Procurement Directive, which in itself gives rise to uncertainty about the changes that may be made. The limits are derived from the principles of the TFEU, in particular the principles of equal treatment and transparency. These principles have subsequently been interpreted by the Court of Justice of the European Union.

It follows from the case law of the Court of Justice that the TFEU's fundamental principles of equal treatment, non-discrimination and transparency imply that the subject-matter of the contract and the award criteria must be clearly defined from the very beginning of the procedures for the award of a public contract[4]. This can be read as an expression of the Court's view that award criteria and the technical specification (including minimum requirements) always constitute fundamental elements, which therefore may not be changed. However, in later case law, the Court has stated that this applies "in principle"[5], which must presumably be understood to mean that the ban on changes to the subject-matter of the contract and the award criteria is a clear general rule, which by implication therefore also entails certain exceptions. However, the extent (and the very existence) of these exceptions has not yet been decided by the Court of Justice, and the legal situation is therefore unclear on that point as well.

It also follows from Court of Justice case law[6] that the contracting entity is entitled to make certain changes to the tender material if the following conditions are met and the principle of equal treatment is respected:

- Changes must not have been able to attract potential tenderers who would not have been able to submit tender in the absence of such changes. This may be the case, for example,

[5] See the judgment of the Court of Justice in case C-298/15 of 5 April 2017, "borta" UAB v Klaipedos valstybinio juru uosto direkcija VI, paragraph 70.

[6] See the judgment of the Court of Justice in case C-298/15 of 5 April 2017, "borta" UAB v Klaipedos valstybinio juru uosto direkcija VI, paragraphs 73-76.

where the changes give the contract a significantly different character than the one originally foreseen.
- Changes must be adequately publicised, so as to enable all those potential tenderers which are reasonably informed and exercising ordinary care to become acquainted with them under the same conditions and at the same time.
- Changes must be made before the tenderers submit their tenders. If the changes are significant, the time limit for submission of tender must be extended.

At the same time, it is a prerequisite for making a change that it does not distort competition between candidates or tenderers.[7]

One condition that is very difficult for contracting entities to manage under the current legal situation is the condition based on the consideration of potential suppliers who have refrained from participating in the procurement procedure due to the nature of the contract or the framework agreement.

However, in EU public procurement, it is already possible to make all tender material electronically available to the public free of charge. In addition, suppliers now also have the opportunity to sign up for monitoring services that automatically advise them of any notifications from contracting entities, including notifications of changes, in specific procurement procedures. In addition, contracting entities are obliged to publish modification notices when changes are made to information provided in the contract notice, including extensions of time limits. This makes it possible (and in some cases required) for contracting entities to communicate widely when changes are made, and similarly, there are simple ways for suppliers to stay updated on the procurement procedures that are potentially of interest.

Thus, it is technically possible already now to support a very high degree of transparency that meets suppliers' need to determine their interest in a procurement procedure in full knowledge of the facts. Additional technical solutions could undoubtedly support this to an even greater extent.

It seems unnecessarily formalistic for contracting entities to be repeatedly forced to cancel procurement procedures for risk reasons and start over with the ensuing burdens and significant costs for all parties involved in the process, in a situation where all tenderers and interested parties are able to follow everything that takes place and at the same time adapt to the changes if appropriate time limit extensions are granted.

SKI thus sees an obvious opportunity to establish a legal situation in connection with the revision of the Directive that ensures a wider right to changes and greater clarity in this respect for contracting entities.

Proposed solution:

First of all, it is relevant to distinguish between the various types of procurement, as the assessment of protection considerations differs significantly depending on the type of procurement and where in the process changes are made.

[7]See the judgment of the Court of Justice, case C-396/14 of 24 May 2016, *MT Højgaard A/S and Züblin A/S v Banedanmark*, paragraph 44.

A. Changes to the tender material

Open procedures:

Solution a – an end to the distinction between "significant changes" and "fundamental elements":

In SKI's opinion, the distinction between significant changes and changes to fundamental elements should be removed in connection with changes to published tender material in open procedures. In open procedures, all materials and correspondence are publicly available to everyone during the entire procurement process.

The interests protected by the current regulation and case law can therefore be fully safeguarded by requiring adequate publication (notices) and appropriate extensions of time limits, regardless of whether the change being made is “significant" or "fundamental". This is primarily due to technological developments and all the opportunities that exist today for all relevant economic operators to be informed and stay informed of all changes.

Ultimately, the scope for change will thereby be free, but any tenderers who had initially refrained from submitting tender will have the opportunity to stay fully informed when changes are published, and the extensions of time limits will give them equal opportunity to participate in the procurement process.

In SKI's view, this will lead to significantly fewer annulments, especially the type of annulments initiated to mitigate an (often theoretical) legal risk in the event of a subsequent complaint about the nature of the change.

Solution b - positive definition of “fundamental elements":

If the above is considered too far-reaching, a definition of fundamental elements could advantageously be made in order to clarify when the contracting entity is permitted to make changes to published tender material during an open procedure so that greater clarity is provided to both contracting entities and tenderers.

A contribution to clarity on the state of the law could be incorporated either in the form of a positive or a negative delimitation of what constitutes “fundamental elements" in the tender material.

One form of positive definition could be the contracting entity’s definition in the tender material of what constitutes fundamental elements that cannot be changed during the procurement procedure.

Alternatively, the Directive could include such a definition. One suggestion could be to look at the level of detail of the information required in the contract notice and compare the assessment of what is fundamental elements in a change context to the information required in the contract notice.

An example – simplified - could be a requirement that the contract notice (in addition to the standard information about the contracting entity etc.) should only contain CPV codes, minimum suitability requirements, the award criterion and the estimated value (and possible maximum value) of the procurement, and that this information is subsequently considered fundamental elements that cannot be changed without a new procurement procedure. Otherwise, all other material may be changed - subject, of course, to appropriate publication and extension of time limits.

Solution c - negative delimitation of "fundamental elements":

As an alternative to a positive definition of fundamental elements, a negative delimitation could consist of a (non-exhaustive) list of types of changes that are never considered fundamental elements. This could be, for example:

- relaxation of requirements or conditions that *have* not affected the participation of potential candidates or tenderers in the procurement, where the burden of proving that a change is fundamental is on the person claiming so (and not the contracting entity);
- changes necessary to bring the tender material in line with national or international legislation, administrative regulations or similar obligations;
- changes to technical specifications as long as they do not result in the contract being directed at a different field of suppliers; or
- changes in financial terms, including, for example, penalty or compensation terms, to the extent that a similar change could legally have been made after the contract was entered into.

As an alternative, a solution in SKI's view could be found in adapting either the rules on the burden of proof regarding the impact of a change on competition and/or the potential field of participants, or by regulating/restricting the right to complain. The latter could be, for example, that economic operators who choose to submit tenders despite the changes are thereby denied the opportunity to complain about a change made. However, these proposals probably do not belong in a revision of the public procurement directives, but of the Enforcement Directive.

Restricted procedure:

The above solution would not be appropriate for restricted procedures, as their division into phases means that full publicity in itself does not ensure equal treatment and transparency. This is due to the fact that the restricted procedure entails that a number of economic operators are expected to be excluded from participating in the procurement procedure after the initial selection phase.

In SKI's experience, restricted procedures often give rise to the particular problem that most candidates do not consider the tender material in detail until they have been prequalified and thus certain to submit tender. Therefore, the need for change often only becomes apparent in the question-and-answer phase during the bidding phase, where a number of operators are already prevented from expressing their interest and participating in the procurement procedure.

In relation to the restricted procedure, an approach is therefore proposed according to which the Public Procurement Directive's division into the selection phase and the bidding phase is clarified.

One solution for the restricted procedure could be that contracting entities are not allowed to publish the complete tender material until the relevant operators have been prequalified. An approach similar to the state of the law that applied before the 2014 Directive.

As mentioned, the restricted procedure is characterised by being divided into two phases - the selection phase and the bidding phase. Any operator may participate in the selection phase, but only tenderers invited by the contracting entity may submit tender. The contracting entity may thus limit the number of tenderers.

Accordingly, it is proposed that the information published in each phase is reduced so that economic operators only have to deal with the information that is relevant in the phase in question.

In the selection phase, only the information that is relevant to the selection process will thus be published. This will be a description of the subject-matter of the contract, minimum suitability requirements and the criteria applied for the selection of candidates invited to submit tender, see further below.

After the selection phase, it is proposed that the contracting entity only submits its complete tender material in connection with the bidding phase, and only to the prequalified operators.

This means that the other operators have only considered the contract notice and the suitability requirements, but not the *other* tender material.

As mentioned, it is SKI's opinion and experience that, under the current state of the law, most operators already only consider the prequalification and the content of the contract notice in this phase, and subsequently - and only if the operator is prequalified - consider the tender material. This process would also ensure that there are not a disproportionate number of potential suppliers spending resources dealing with extensive and detailed tender material in cases where they are ultimately not selected to compete for the contract.

This approach significantly increases the contracting entity's scope for changes, as the contracting entity does not have to consider whether the changes would have potentially and theoretically affected the field of tenderers or changed the outcome of the competition for others than the prequalified field of tenderers, provided that the subject-matter of the contract as described during the bidding phase is not changed. Other potential and theoretical tenderers have not seen the tender material but have only considered the contract notice and the prequalification.

The proposed approach does not change the fact that the subject-matter of the contract must be fully transparent and public, as well as the award criteria applied, and the suitability requirements set by the contracting entity. The subject-matter of the contract and the award criteria can still not be changed, but the scope for subsequent change of the *other* tender material is extended. This is due to the fact that the contracting entity does not have to take into account an unknown number of potential and theoretical tenderers, as the tenderers have not been able to consider the tender material at all.

Competitive procedure with negotiation:

The competitive procedure with negotiation is regulated in Article 29 of the Directive. The procedure stipulates that the tender material must define the subject-matter of the contract put up for tender by describing the needs and required characteristics. When specifying the subject-matter of the contract, the elements must be described that define the minimum requirements to be complied with in all tenders.

The information provided must be sufficiently precise to enable economic operators to identify the nature and scope of the contract put up for tender and decide whether to apply for participation in the procedure.

The approach and basic principles of this procedure are completely compatible with the change management approach described above.

However, in SKI's assessment, it should be clarified in the second subparagraph of Article 29(1) that "minimum requirements" only means the requirements that the contracting entity has determined cannot be changed during the negotiation process. Similarly, it should be clarified in the

second subparagraph of Article 29(3) that "minimum requirements" are only the requirements that the contracting entity has determined cannot be changed during the negotiation process.

Alternatively, the right to changes under the competitive procedure with negotiation and the competitive dialogue procedure could advantageously be standardised so that the same rights are applied as described in Article 30(3) according to which, in competitive dialogue procedures, dialogue may be conducted on "all aspects of the procurement".

B. Changes to the concluded contract

Initially, it is generally debatable whether the issue of changes to a concluded contract should be regulated by the public procurement directives or whether such regulation of the subsequent private law agreements is a national matter.

From a societal perspective, it is inappropriate for public contracts to become static and unable to adapt to the rapid developments in society due to requirements that the contract is clear from the start and only can be changed to a limited extent afterwards. This leads to less efficient use of society's resources and may discourage suppliers from bidding for public contracts.

If the possibilities for changes to a concluded public contract are regulated in the Public Procurement Directive, such regulation should therefore be significantly simpler and provide greater opportunities than the regulation currently following from Article 72 of the Public Procurement Directive.

In general, there are several ambiguities in Article 72 that could benefit from clarification. For example, the conditions for additional purchases in point (b)(i) and (ii) of Article 72(1) seem to coincide. The requirement in point (i) that it is not possible for economic or technical reasons, and the requirement in point (ii) that it would cause significant inconvenience or substantial duplication of costs for the contracting entity, have a significant overlap. The requirement in point (ii) could advantageously suffice, as it could probably incorporate point (i). Similarly, it is unclear what is meant by "need for modification" in point (c) of Article 72(1). Does it have to be the contracting entity that has a need to modify the contract or can the need also lie with the supplier (e.g. delivery difficulties or high price increases for the supplier)?

According to the Directive, a change clause must be "clear, precise and unequivocal" and must state the scope and nature of the modifications as well as the conditions under which they may be used, see point (a) of Article 72(1). In practice, this means a detailed and locked approach that deprives the parties to the contract of the opportunity to continuously ensure an appropriate and up-to-date contract. This also means that the possibility for a change clause that takes unforeseeable circumstances into account is not available. This makes point (a) of Article 72(1) very little applicable, as it is precisely the unpredictable circumstances that may need adjustment.

It is SKI's wish that the scope for subsequent changes to the contract can be defined to a greater extent in the contract material prior to the procurement without such adjustment having to be very detailed. It should be possible for the contracting entity - possibly in consultation with the market during a technical dialogue - to determine the scope of change in the specific contract or framework agreement, taking into account the specific subject-matter of the contract and the market. This could, for example, be done thematically, where specific themes are highlighted as subject to

possible changes during the term of the contract. Thereby the current very detailed and locked approach would be avoided.

In addition to the change options given to the contracting entity *under the contract*, more leeway and transparency regarding changes *to* the contract could advantageously be provided.

The "de minimis rule" in Article 72(2) is effectively irrelevant to contracting entities such as SKI that offer framework agreements of very significant financial value, as the thresholds are very easily reached in connection with a change. SKI would therefore like the rule to be changed so that the conditions in (a) and (b) were not cumulative. Consequently, the value of the change would *either* have to be below the threshold *or* be below 10%/15% of the value of the original contract. This would increase the scope of the provision, but the relatively low value is retained. In this context, SKI would also like it to be specified that the de minimis rule also applies to framework agreements (and how the value of the framework agreement is determined in this respect).

Finally, it would be useful to explicitly regulate the question of whether a framework agreement is fundamentally changed in case of orders under the framework agreement after the maximum has been reached, whether it is possible to extend this maximum under point (a) of Article 72(1), and whether the other exceptions of Article 72 also apply in this situation.

For SKI, which primarily offers four-year framework agreements, it is essential to be able to ensure that our agreements are up-to-date, including, for example, that the supplier can continuously update its range of products or services with more sustainable solutions or continue to deliver in accordance with the contract if a required ecolabel/extracted ecolabel requirement is updated during the contract period.

C. Changes to dynamic purchasing systems in operation

In connection with a possible revision of the Directive, SKI would like interpretative aids on the possibilities of changing the material published in connection with the establishment of dynamic purchasing systems while the system is in operation. The possibilities are not clarified in the Directive, and there is as yet no case law to help determine the state of the law.

Due to the specific nature of dynamic purchasing systems, it seems neither to be appropriate to apply the principles for changes to tender material during the procurement process nor the rules for changes to the contract, both described above.

As dynamic purchasing systems are characterised by their flexible nature, where suppliers may be included on an ongoing basis and where they are not obliged to bid on the procurement published in the system, there would be no point in applying the relatively restrictive principles that apply to the change of published tender material in ordinary procurement procedures in connection with dynamic purchasing systems.

It is SKI's view that, during the lifetime of dynamic purchasing systems, there should be relatively large inherent room for making changes, as suppliers on the system are not obliged to remain on the system or submit tenders, and as new suppliers may be admitted to the system at any time. Thus, there seems to be no challenges with respect to the principles of transparency or equal treatment, as long as proper notification of the changes is provided and it is ensured that any new interested suppliers are given time to join the system before new purchases are made.

SKI thus supports a legal situation where, in principle, there are no restrictions on changes during the term of the systems, but where changes must of course be duly published, and where changes that may affect the field of interested suppliers must be followed by an appropriate period where no purchases are made under the system so that interested suppliers can apply for admission and submit tenders for new purchases.

Furthermore, SKI wants clarity on whether the maximum value that must be stated in connection with the publication of framework agreements, as established by the Court of Justice of the European Union[8], also applies to dynamic purchasing systems. In SKI's assessment, it would make no sense for this to be the case, as a potential supplier's interest can hardly depend on the expected total amount of purchases under the system. At the same time, suppliers have the opportunity to be admitted to the system at any time and are under no obligation to submit tender and thereby take on a delivery obligation. This interpretation is also supported by the fact that the Directive provides for the duration of a dynamic purchasing system to be changed during its lifetime.

In accordance with the above, regulation could be advantageous stating whether it is possible to change the value of a dynamic purchasing system by issuing a notice pursuant to Article 34(8).

Finally, in SKI's opinion, it would be advantageous to include regulation that enables new contracting entities to join a dynamic purchasing system after it has been published - as is the case, for example, for qualification schemes under the Utilities Directive.

5. Sustainability - The possibility to use ecolabels and/or standards in public procurement

This section focuses on the obstacles experienced by SKI in the legal framework introduced by the 2014 Directive to require and refer to labels and standards in the technical specifications.

The issue should be seen as a more general wish on SKI's part for room to manoeuvre in connection with strategic procurement, also in areas other than ecolabels and standards. As indicated above, SKI expects that in light of the political trends in the area, there will be interest in highlighting opportunities for and perhaps even imposing sustainability considerations on the contracting entity. In our view, it is crucial that this should be done with great caution and at a level that still leaves flexibility for contracting entities to organise their strategic procurement in the best possible way in the specific procurement area so that action is taken where it is most cost-effective. It is equally important that the regulation does not become a barrier to strategic and green ambitions in an inappropriate and unintended way that is contrary to the basic intention of making it easy for public procurers to support green transition.

Unfortunately, despite the stated intention of the legislator, the provisions inserted in the 2014 Directive regarding labels and standards have not made it easier to promote sustainable initiatives in public procurement. The setting of label requirements is provided for in Article 43 of the Directive.

[8] Judgment of the Court of Justice of 17 June 2021 in case C-23/20, Simonsen & Weel A/S v Region Nordjylland and Region Syddanmark and judgment of the Court of Justice of 19 December 2018 in case C216-17 Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice Soc. coop. arl v Azienda Socio-Sanitaria Territoriale della Vallecamonica - Sebino (ASST) and others.

The provision sets out a number of conditions for imposing label requirements, including the condition that the specific requirements under the label in question only concern criteria which are *"linked to the subject-matter of the contract"* and which are *"appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract"*, see point (a) of Article 43(1).

The conditions de facto mean that it is not really possible to legally impose label requirements in Denmark. The reason for this is that, to SKI's knowledge, all relevant labels contain a number of requirements that are of a more general nature and therefore may relate to the business, the conduct of the business in more general terms or matters relating to production conditions for workers that do not *define characteristics* of the subject-matter put up for tender but conditions relating to the production thereof.

In its current wording, the Directive's provision does not address the consideration on which it is based, namely to promote/clarify the possibility of referring to labels in the development of the requirements specification. In reality, the contracting entity is forced to extract relevant requirements from the labels and use those instead of basically being able to "just" require a specific label. This also applies to the so-called "Type 1 labels", see ISO 14024, such as the Nordic Swan Ecolabel, Blauer Engel or the EU Flower label.

As a specific example, the Nordic Swan Ecolabel for "de-icers", which is one of the products offered by SKI, contains both relevant requirements for the product, such as limit values for environmentally harmful chemicals, but also a number of less specific general requirements, such as the requirement that the supplier must keep records of customer complaints. The latter requirement must be excluded from the ecolabel requirement due to the interpretation of the above conditions. However, a requirement to keep records of customer complaints may well be included in other parts of the contract material. It therefore makes no sense for the contracting entity to extract requirements or criteria that could legally be included in other parts of the contract or framework agreement put up for tender.

The consequence of the above is that the contracting entity for each relevant label in each individual procurement must scrutinise all relevant criteria documents, which experience has shown to be quite extensive, and extract the requirements that are deemed to fulfil the conditions in order to establish their own "suitable" versions of the label requirements, see the procedure described in Article 43(2).

This exercise is extremely burdensome on the contracting entity and very often requires deep technical knowledge of some very peripheral parts of the subject-matter put up for tender. The legal situation also seems quite confusing for the field of tenderers, where even the most experienced tenderers question what is actually meant or required by SKI. They do not understand why some requirements are excluded but may be included in other parts of the contract, such as references to the ILO Convention.

At the same time, it is problematic that, according to the Directive, the contracting entity must accept all labels that meet equivalent label requirements, and that the contracting entity - if the tenderer demonstrably cannot obtain the label or an equivalent before the time allowed - must accept other appropriate documentation that an offered product meets the requirements of the label. The contracting entity is not entitled to set requirements for the form of such documentation. In these cases, the contracting entity must therefore compare the label requirements set with the alternative

documentation submitted. In reality, this involves a comparative analysis of some highly technical documents that SKI has never experienced to be 1:1 comparable or overlapping.

The means of proof that may be used are described in Article 44, which contains a number of quite detailed - but also quite extensive and imprecise - documentation options. The same issue applies to standards. The possibility to refer to standards is provided for in point (b) of Article 42(3) of the Directive, which states that a reference to a standard must be accompanied by the words "or equivalent". Following the same principle as for the labels, it is stated in Article 42(5) that the contracting entity is not entitled to reject a tender if the tenderer proves in its tender that the solution offered satisfies the requirements in an equivalent manner, including the means of proof in Article 44.

The current regulation is highly inappropriate as, on the one hand, it ultimately gives the tenderers the right to submit the documentation they consider appropriate and, on the other hand, the contracting entity is obliged not to reject them if the conditions for submitting such other appropriate documentation are met and the documentation is sufficient. Thus, the contracting entity must ultimately be able to assess whether the conditions for submitting other appropriate documentation are met and also be able to assess documentation that is often of a very detailed technical nature.

Ultimately, in highly complex assessments, the position risk will be the contracting entity's. In SKI's experience, managing this risk is in practice associated with a disproportionately large consumption of resources compared to the benefits of the label requirements, and the conclusions are almost always associated with legal risk.

In practice, EN standards are widely used in areas such as IT security and data erasure. It is an area attracting quite a lot of attention due to the abundant regulation to which the area is subject, both now and in the time to come. It may challenge the security considerations that the contracting entity must assess technically heavy and extensive documentation material weighed against the legal risk under public procurement law of rejecting the "equivalent" documentation. Often it is precisely the independent third-party certification or verification from an accredited body that the contracting entity needs in these technically complex areas, but which the contracting entity cannot legally require.

In SKI’s opinion, the above means that many contracting entities refrain from using the opportunities offered by the Public Procurement Directive or use them to a limited extent. This is because any attempts to do so are associated with so much extra work and so much legal risk every time the above assessments have to be made that the intended gain is not commensurate. Fundamentally, this is not in line with the thoughts and purpose behind their implementation.

Proposed solution:

Solution a - relaxation of the meaning of “link to the subject-matter of the contract":

In relation to labels, SKI finds the specific requirement of “link to the subject-matter of the contract" problematic in itself.

In the latest revision of the directives, there were proposals to relax or completely remove the condition that contracting authorities' requirements must be linked to the subject-matter of the contract (for example, requiring tenderers to have an equal opportunities policy in place or to employ a certain percentage of certain categories of people, such as job seekers, disabled people, etc.).

SKI supports a legal position that relaxes the relatively strict requirements that currently apply in relation to the link to the subject-matter of the contract so that the contracting entity is more at liberty to set the requirements for the procurement. This applies not only in relation to the technical specifications, but in general, and thus also in relation to e.g. suitability.

The decisive factor must be whether the requirements set by the contracting entity are appropriate for identifying suitable tenderers and subsequently receiving the best tender to meet the contracting entity's needs - provided, of course, that the requirements are proportional and objective requirements applied with due regard to the principles of equal treatment and transparency.

It is SKI's assessment that it may also be fully legitimate to include societal considerations of a more general nature in the procurement, including for example considerations of green transition or resilience.

Alternatively, a revision could allow the contracting entity to always legally refer to certain special labels, such as the Commission's own EU Flower label, the EU Ecolabel and other type 1 environmental labels, see ISO 14024.

Solution b - Trim/streamline point (a) of Article 43(1):

SKI recognises, however, that there may be a need for a tighter legal framework for the possibility of referring to specific labels in the tender material than the one outlined above. But for the reasons stated above, it is SKI's opinion that a softening is needed.

This could be done by simplifying the provision, thus removing the second indent of point (a) of Article 43(1) so that the phrase "*and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract*" is deleted. The only requirement remaining will thus be "link to the subject-matter of the contract".

In this context, it should be noted that the definitions in points (23) and (24) of Article 2 on labels and label requirements, respectively, also refer to "processes and procedures", which in itself must suggest a broader interpretation than that suggested by point (a) of Article 43(1).

The concept of "link to the subject-matter of the contract" is set out in Article 42(1) as regards technical specifications and Article 67(3) as regards award criteria and the conditions for performance of the contract (see Article 70). Common to the understanding of the concept in these two provisions is that requirements/conditions/factors may well be considered to be linked to the subject-matter of the contract, even if they do not form part of the material substance of the subject-matter of the contract, as long as there is a (factual, of course) link to the subject-matter of the contract and, in relation to Article 42(1), a certain proportionality in relation to the "value and objectives" of the contract.

It seems unnecessarily restrictive to impose stricter requirements for a label requirement's link to the subject-matter of the contract than for other requirements. As stated in Article 43(1), labels may be used in technical specifications, award criteria and contract performance conditions. SKI would like a legal position where the interpretation of "link to the subject-matter of the contract" follows from the context in which the label requirement is used and thus is more lenient than the wording of point (a) of Article 43(1). This will also lead to a common understanding of the concept of "subject-matter of the contract" across the Directive.

If point (a) of Article 43(1) was adjusted as described above, it would naturally entail that corresponding changes would have to be made in the rest of the provision. The scope of application of Article 43(2) would thus be significantly narrowed and only apply in cases where a label contained requirements that are not considered linked to the subject-matter of the contract as defined in Articles 42(1) and 67(3).

Simplification of the documentation process

Last subparagraph of Article 43(1) in conjunction with Article 44 implies extensive rights for economic operators to document compliance with requirements, including label requirements. It is SKI's opinion that, in practice, this entails a disproportionate administrative burden for the contracting entity. Firstly, the contracting entity must ensure that the conditions for submitting the alternative documentation are met. Secondly, the contracting entity must deal with often technical and complicated material that requires significant insight at a professional level of detail that the contracting entity most often does not have or could be expected to have.

SKI therefore proposes to significantly simplify the conditions for access to and the process for submitting "other appropriate documentation" in relation to labels and documentation “in an equivalent manner" in relation to standards.

This could, for example, be implemented by deleting Article 42(5) (standards), last subparagraph of Article 43(1) (labels) and Article 44 and replacing them with a requirement for the contracting entity to indicate in the tender material what type of documentation it considers appropriate, along with an indication that documentation from an independent accredited body is always appropriate.

6. Flexibility

Right to use flexible procurement procedures

It is SKI's opinion that the right to use flexible procurement procedures, such as the competitive dialogue and the competitive procedure with negotiation, could advantageously be extended even further than provided for by the 2014 Directive.

SKI would like the option to use flexible procurement procedures to be provided at all times, as is also known from the Utilities Directive and the Defence and Security Directive. Alternatively, that a significantly wider scope for the procedures was described, either in the Public Procurement Directive or its recitals.

Flexible procurement procedures should be available to all contracting entities finding it appropriate in connection with a given contract.

At the same time, SKI would like the option to switch to a negotiated procedure without publication of a contract notice to be extended so that this is not only an option where all tenders received are non-compliant or inadmissible. The procedure should be an option in all cases where legitimately needed by the contracting entity after receipt of tenders. This could be in the case, for example, where not enough admissible tenders have been received to fill the places on a framework agreement with multiple suppliers.

In connection with the above, SKI would like the right to use dynamic purchasing systems also to be made free so that this procurement method could be applied to purchases in general, without

necessarily having to be *“commonly used purchases”* that are *"generally available on the market"*, see Article 34(1) of the Directive. In this context, it could be considered whether it is relevant to either adjust or differentiate the minimum time limit of 10 days if the complexity warrants a longer time limit.

Framework agreements

It is SKI's wish that the rules on framework agreements be made more simple and flexible.

In a framework agreement with multiple suppliers, for example, it should be possible for the ordering entity’s specific needs to determine with which supplier under the agreement the purchase should be made, and there should be a free choice between conducting a mini-competition or direct award under the framework agreement. As long as the award is made on an objective basis - and as long as the terms and conditions are known to everyone (stated in the original tender material), this is considered to be transparent and non-discriminatory.

Framework agreements only retain their legitimacy during the term of the agreement as long as the product range is up-to-date. Therefore, the wishes described in section 4 regarding change clauses are particularly relevant for framework agreements.

In addition, it is SKI's wish that the general basis for the duration of framework agreements be reexamined. The current regulation only allows framework agreements to be valid for a maximum period of four years unless there are exceptional circumstances. The latter is interpreted narrowly.

As a central purchasing body, SKI has found, for example, that a framework agreement concluded on behalf of almost 100 municipalities, regions and the entire state is a major task to undertake for most suppliers, and it is not unusual that a change of supplier in connection with a successful tender requires considerable implementation, scaling up and down, recruitment and dismissals etc. Therefore, in these situations, it may quite objectively - but without, in SKI's assessment, being an “exceptional case" - be beneficial for effective competition if a more specific assessment of which contract duration is the most appropriate should be allowed.

Of course, the framework agreement structure should not be used to close markets for an unnecessarily long period of time, but SKI would like a broader view on the duration of framework agreements to be reflected in the Directive.

Finally, the Public Procurement Directive should provide an explicit legal basis for awarding framework agreements under dynamic purchasing systems.

Large-range procurement

SKI offers quite large framework agreements that can be used by a very large number of customers. This often results in the need to tender contracts with very large product ranges in order to ensure that customer needs are met. At the same time, SKI conducts procurement in a number of markets where the suppliers' ranges and related products and services are so extensive that it is not possible in practice to determine the entire desired range, but where there is still a need to purchase related products or services.

SKI believes that not only SKI, but also other public contracting entities in general, have a significant interest in being able to conduct relatively simple tender procedures for large product ranges, including tender procedures that ensure access to, for example, the supplier's entire range/web

shop or similar, without each individual product in, for example, a DIY store having been specified and priced in the procurement procedure.

The Directive does not regulate this, but Denmark has attempted to introduce a national rule regarding so-called "assortment tenders" *(call for tenders for a range of products/services)* in section 45 of the Danish Public Procurement Act, according to which procurement can be made with reference to product categories and subsequently evaluated on a "representative sample".

Although this provision has proved relatively difficult to manage in practice, especially in terms of determining what constitutes a "representative sample", SKI would like international efforts to ensure a similar, more uniform right, realistic in practice, to conduct these types of procurements in compliance with the public procurement rule