

# New Directives from the European Union on Public Procurement



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## 1) Introduction of the unholy trinity



## 2) Novelties of the new directive 2014/24/EU

- a. Definitions
- b. Mixed procurement
- c. Exclusions
- d. Rules on public contracts
- e. Particular procurement regimes
- f. Governance



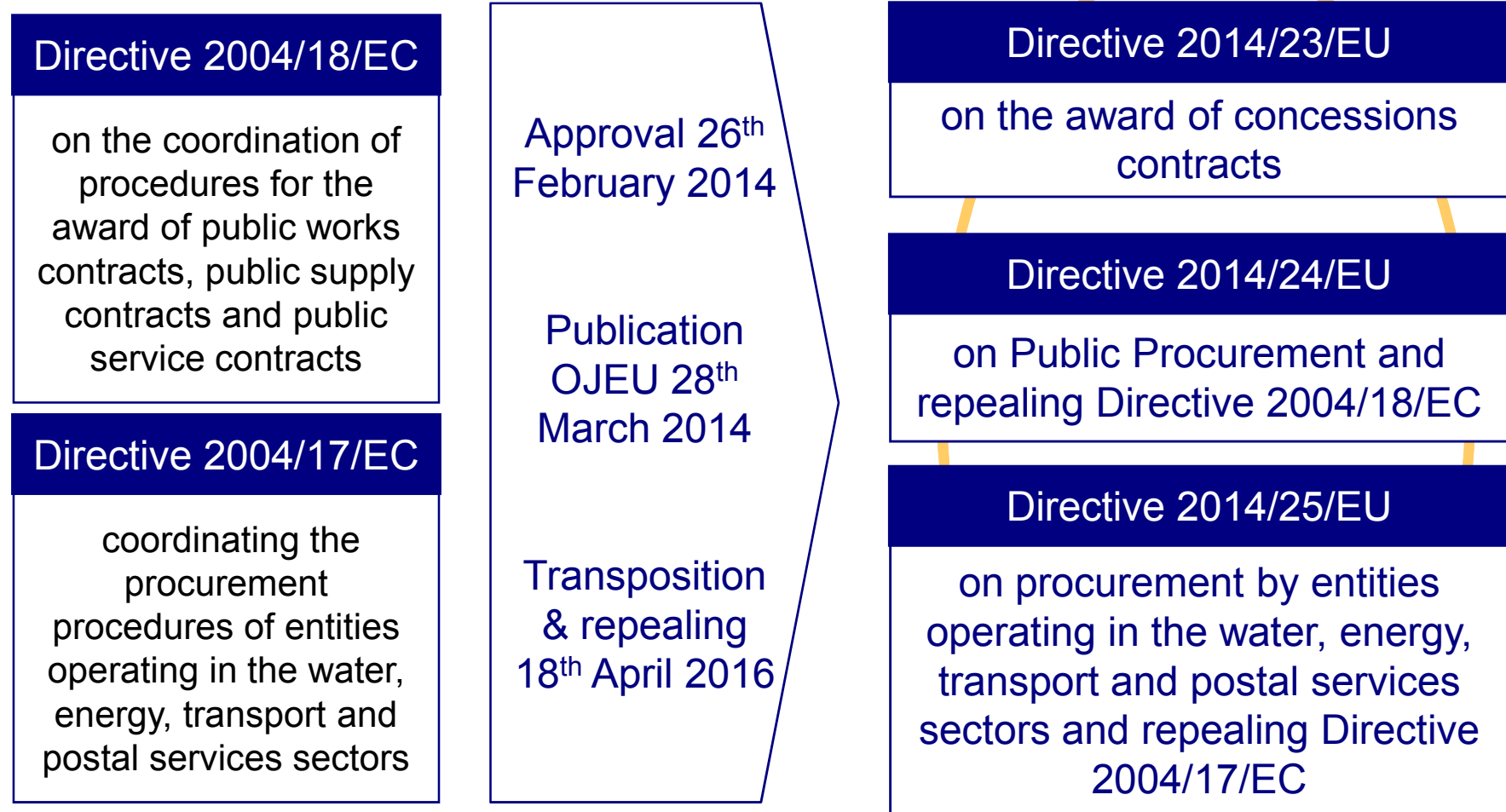
Public procurement is key instrument to achieve the Europe 2020 strategy

Public procurement expenditures account for approximately 20% of the EU's GDP<sup>1</sup>

New Directives on public procurement have to ensure the most efficient use of public funds

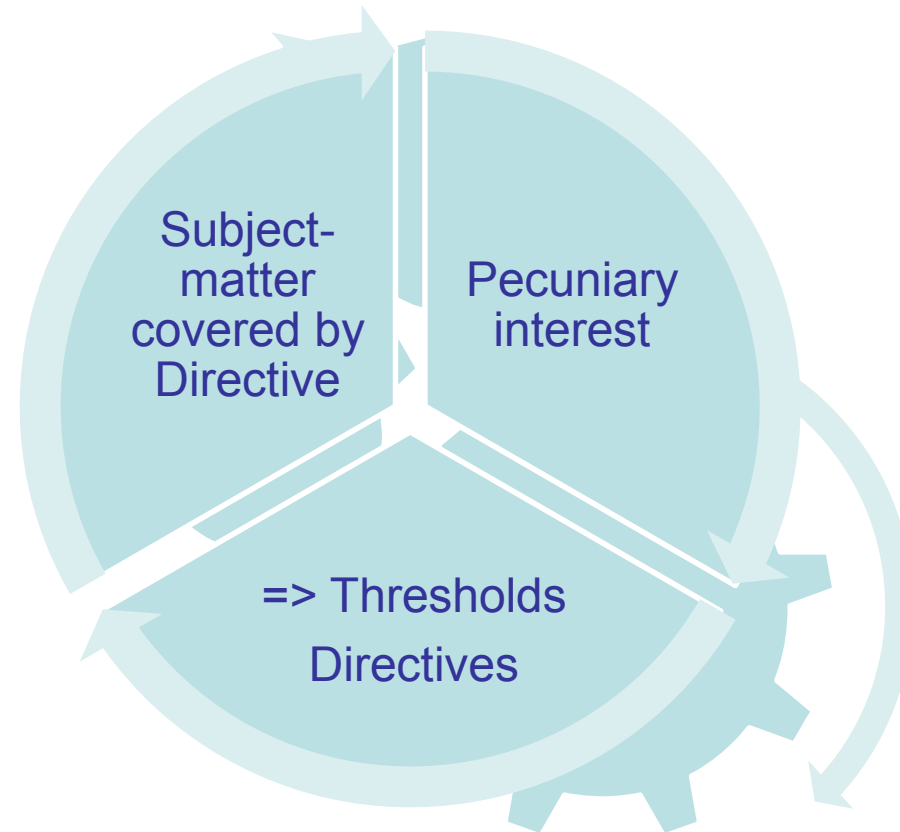
<sup>1</sup>Las nuevas directivas sobre contratación pública. Apuntes para su aplicación directa y para su transposición. Jose Manuel Martínez Fernández

# DIRECTIVES ON PUBLIC PROCUREMENT



Directive 2009/81/EC on the awarding of certain contracts in the fields of defense and security  
Directive 2007/66/EC improving the effectiveness of review procedures concerning the award of public contracts

# CONTRACTS COVERED BY DIRECTIVES ON PUBLIC PROCUREMENT



# SUBJECT – MATTER – SCOPE

## Directive 2014/23/EU – “Concessions Directive” (I)



Rules on the procedures for procurement by contracting authorities and contracting entities:

- Contracting authorities and contracting entities (activities Annex II)
- Concessions:
  - Works
  - Services
- Estimated value  $\geq$  thresholds: €5.186.000 net VAT

The award of a works or services contract shall involve the transfer to the concessionaire of an **operating risk**:

- demand risk:
- or a supply risk: risk that the provision of the services will not match demand

# SUBJECT – MATTER – SCOPE

## Directive 2014/23/EU – “Concessions Directive” (II)



*Not affected by the Directive:*

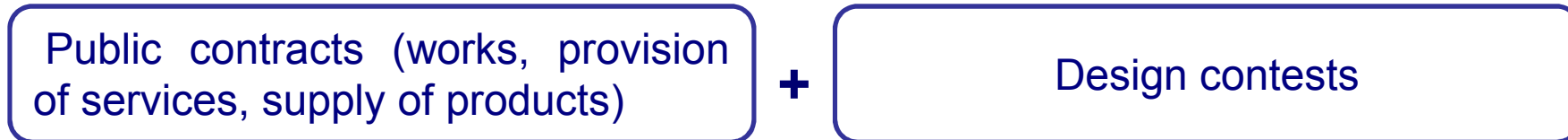
- The freedom of Member States to define services of economic interest, its organization and finance and obligations they should be subject too;
- The organization of social security systems;
- Agreements, decisions and other legal instruments that organize the transfer of powers and responsibilities for the performance of public tasks between public authorities without any remuneration;
- Free administration by public authorities;
- Systems of property ownership. It does not require the privatization of public enterprises providing services to the public;
- Non economic services of general interest.

# SUBJECT – MATTER – SCOPE

## Directive 2014/24/EU – “Classical Directive” (I)



*Rules on the procedures for procurement by contracting authorities:*



Type of contract	Threshold <sup>1</sup>
public works contracts	≥ €5.186.000
- public supply and services contracts, design contests awarded by central government authorities. - supply contracts awarded by contracting authorities operating in field of defense for products covered by annex III	≥ €134.000
- public supply and services contracts, design contests awarded by sub-central government authorities. - supply contracts awarded by central government authorities operating in field of defense for products not listed in annex III	≥ €207.000
public service contracts for social and other specific services listed in Annex XIV	≥ €750.000

<sup>1</sup>Net VAT



# SUBJECT – MATTER – SCOPE

## Directive 2014/24/EU – “Classical Directive” (II)



*Not affected by the new Directive:*

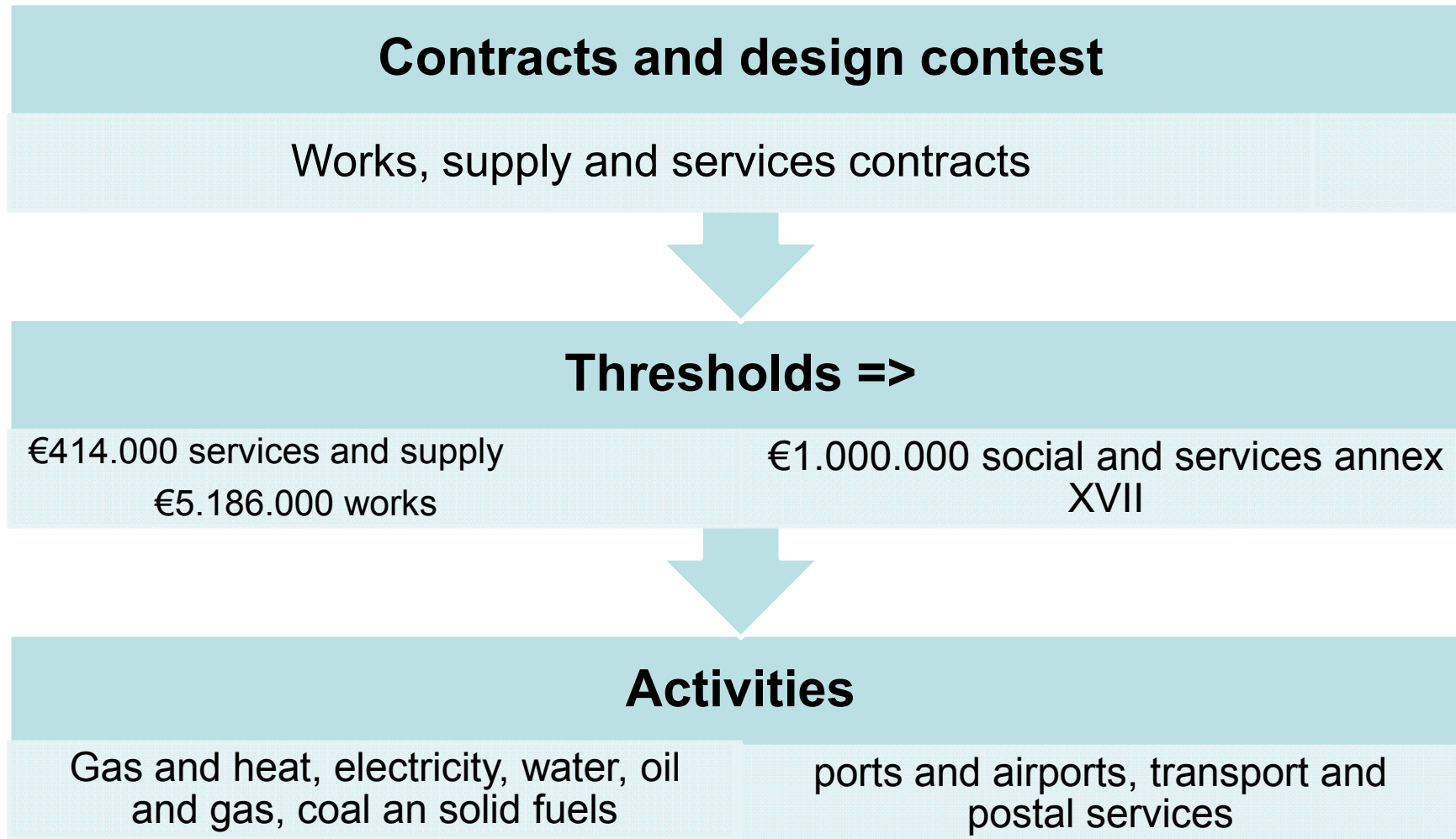
- The freedom of Member States to define services of economic interest, its organization and finance and obligations they should be subject too.
- The organization of Social security systems
- Agreements, decisions and other legal instruments that organize the transfer of powers and responsibilities for the performance of public tasks between public authorities without any remuneration.

# SUBJECT – MATTER – SCOPE

## Directive 2014/25/EU – “Utilities Directive” (I)



Rules on the procedures for procurement by contracting entities:



# **SUBJECT – MATTER – SCOPE**

## **Directive 2014/25/EU – “Utilities Directive” (II)**



### **1.- Contracting authorities**

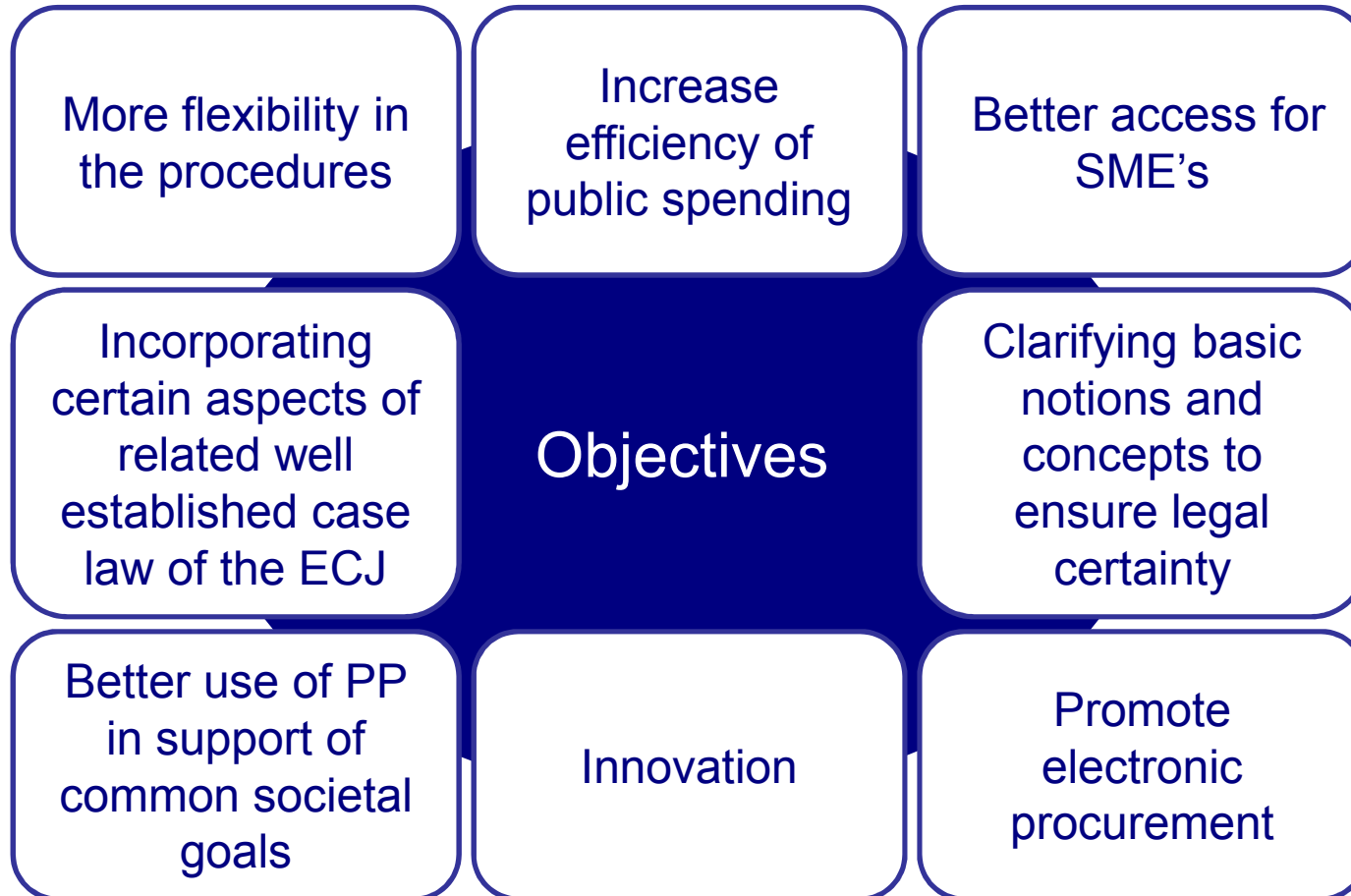
- State, regional and local
- Bodies Governed by public law

### **2.- Contracting entities:**

- Contracting authorities and public undertakings
- Entities that operate one the activities referred in articles 14 to 18 on the basis of a special or exclusive rights granted by a competent authority.

**SPECIAL OR EXCLUSIVE RIGHT:** not when it is granted by a procedure based on objective criteria and adequate publicity.

# OBJECTIVES OF THE NEW DIRECTIVES



# COMMON PRINCIPLES OF PROCUREMENT



1. Equal treatment
2. Non discrimination
3. Transparency
4. Proportionate manner
5. Competition
6. Efficiency
7. Environmental and economic sustainability

} NEW

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## DEFINITIONS (I)

<p>Contracting authorities (CA)</p>	<p>New category: sub-central contracting authorities</p> <ul style="list-style-type: none"> <li>• all CA that are not central Government authorities</li> <li>• more flexibility on public procurement procedures</li> </ul>
<p>Ancillary purchasing activities</p>	<p>Activities consisting in the provision of support to purchasing activities:</p> <ul style="list-style-type: none"> <li>• Technical Infrastructure</li> <li>• Advice on the conduct of design of public procurement procedures</li> <li>• Preparation and management of public proc procedure</li> </ul>
<p>Procurement service provider (PSP)</p>	<p>Public or private body which offers ancillary purchasing activities on the market</p>
<p>Life cycle</p>	<p>All consecutive or interlinked stages through the existence of a product, works or provision of services.</p>



## DEFINITIONS (II)

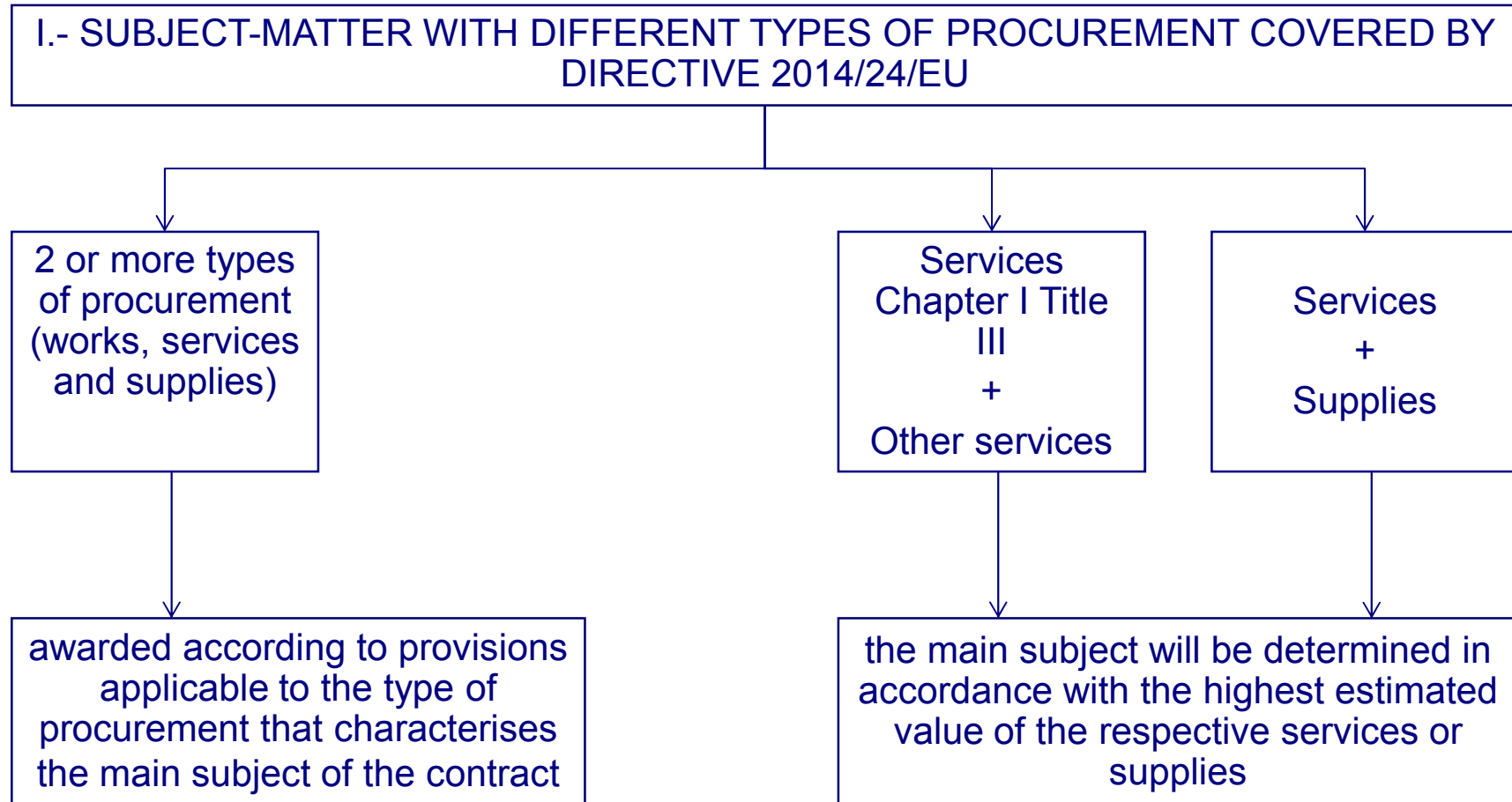
innovation	Implementation of a new or significantly improved product, process or service
label	Document confirming that works, processes, services and products meet certain requirements
irregular offer	<ul style="list-style-type: none"><li>• Tenders which do not comply with procurement documents</li><li>• Which were received late</li><li>• Where there is evidence of collusion or corruption</li><li>• Abnormally low</li></ul>
unacceptable offer	<ul style="list-style-type: none"><li>• Tenders submitted by tenderers without the required qualification</li><li>• Whose price exceeds the contracting authority's budget</li></ul>
provision of services contract	No distinction between priority services and non priority services as in Annex II A and B of Directive 2004/18/CE





# MIXED PROCUREMENT (I)

(article. 3)





# MIXED PROCUREMENT (II)

(article 3)

II.- SUBJECT-MATTER WITH DIFFERENT TYPES OF PROCUREMENT COVERED BY DIRECTIVE 2014/24/EU AS WELL AS NOT COVERED BY THE DIRECTIVE

## SEPARATE OR SINGLE CONTRACT

- separate contracts: legal regime determined by characteristics of the separate part concerned.
- Single contract: Directive 24 applies irrespective the value and regime that non covered procurement would otherwise have been subject to. EXCEPTION article 16: defence or security

MIXED CONTRACTS containing elements of supply, works and service and of concessions shall be awarded according to Directive 2014/24/EU if estimated value of part of the contract is => than thresholds

Procurement covered by Directives 2014/24 and 2014/25 applicable rules determined according to:

- 1) Rules applicable to main activity.
- 2) When impossible to determine, according to Directive 2014/24.



# NOVELTIES ON EXCLUSIONS (I)

(article 10)

Legal services	<ul style="list-style-type: none"> <li>• Legal representation of a client by a lawyer in a Member State, a third country or before international institutions in:             <ul style="list-style-type: none"> <li>• arbitration or conciliation</li> <li>• judicial proceedings before the Courts, Tribunals or public authorities</li> </ul> </li> <li>• Legal advice given in preparation of any of the previous proceedings</li> <li>• document certification and authentication services which must be provided by notaries</li> <li>• Legal services provided by trustees, appointed guardians or others designated by Court</li> <li>• Other connected even with the exercise of official authority</li> </ul>
Loans	whether or not in connection with the issue, sale, purchase or transfer or securities of other financial instruments
Civil defense services	Civil defence and protection and danger prevention services provided by non profit organizations or associations except patient transport ambulance services
transport services	public passenger transport services by rail or metro
political campaign services	when awarded by a political party in the context of an election campaign



## NOVELTIES ON EXCLUSIONS (II)

(article 12)

### PUBLIC CONTRACTS BETWEEN ENTITIES WITHIN THE PUBLIC SECTOR

- Necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules due to different interpretation between Member States and Contracting authorities.
- Excluded when conditions referred in article 12 are fulfilled. (control by the contracting authority over a legal person governed by public or private law. Exception: when a private operator participates in the capital of the legal person)



# RULES ON PUBLIC CONTRACTS

## Rules applicable to communications

(article 22)

1. Member States should ensure that all communications and information exchanged under this Directive are performed using electronic means of communication in accordance with the requirements of article 22. (exceptions article 22 a) to c))

Member States may postpone this obligation for central purchasing bodies until April 2017 and for the rest of contracting authorities until October 18<sup>th</sup> 2018, with some exceptions.

2. Possibility of using oral communication:
  - in communications other than those concerning essential elements of a procurement procedure;
  - if they are documented to a sufficient degree (written or audio records or summaries of the main elements of the communication)



# **RULES ON PUBLIC CONTRACTS**

## **Measures to guarantee integrity in the Public Procurement Procedures**

- 1. CONFLICT OF INTEREST (Art 24):** member states have to ensure that CA:
  - take effective measures to prevent, identify and remedy conflicts of interest
  - avoid distortion of competition and ensure equal treatment to all tenderers.

Conflict of interest: staff members of CA or PSP have directly or indirectly, financial, economic or other personal interest which might be perceived to compromise the impartiality and independence.

- 2. PRELIMINARY MARKET CONSULTATIONS AND ENSURING THAT COMPETITION IS NOT DISTORTED BY PRIOR INVOLVEMENT OF CANDIDATES OR TENDERERS.** (arts 40 ad 41) communication to all tenderers of the information exchanged in preparation of the procedure and fixing adequate time limits for the receipt of the tenders.
- 3. EXCLUSION GROUNDS (art 57)**
- 4. ABNORMAL LOW TENDERS (article 69)** two new criteria to consider abnormal low tenders: non compliance with (i) obligations referred to subcontracting and (ii) obligations established in fields of environmental, social and labour law.
- 5. MODIFICATIONS OF THE CONTRACT DURING ITS TERM (art 72)**



## RULES ON PUBLIC CONTRACTS: Facilitate the participation of SME's

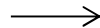
Simplification of the means of proof obligation (art 59)



### European Single Procurement Document (ESPD)

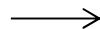
updated self-declaration as preliminary evidence in replacement of certificates issued by CA and other parties in proof of being eligible for awarding a contract.

Division of contracts into lots (art 46)



- obligation to justify when a contract is not subdivided in lots
- Possibility to limit the number of lots (to be submitted and to be awarded)
- MS can determine contracts which subdivision in lots will be mandatory.

Limitation in the proof of economical and financial standing (art 58)



The minimum yearly turnover required shall not exceed two times the estimated contract value

Possible direct payments to subcontractors (art 71)



When contract allows it, at the request of subcontractor and possibility for contractor to object.



# RULES ON PUBLIC CONTRACTS: Public Procurement procedures (I)

**OPEN** (article 27)

**RESTRICTED** (article 28)

**NEGOTIATED** (article 29 and 32)

**COMPETITIVE DIALOGUE** (article  
30)

**INNOVATION PARTNERSHIP**  
(article 31)

Existing  
procedures

New procedure





## RULES ON PUBLIC CONTRACTS: Public Procurement procedures (II)

### REDUCTION OF DEADLINES TO SUBMIT (articles 27 and 28):

- a tender (open procedure)
- a request of participation (restricted procedure)

Sub-central CA may make the call for competition in restricted procedure or competitive procedure with negotiation by means of a prior information notice (article 26.5)

Restricted procedures: Possibility to agree with selected candidates the time limit to receive tenders (article 28.4):

- only sub-central CA
- Same deadlines for all candidates

No agreement: at least 10 days

Possibility to award contracts without negotiation in a competitive procedure with negotiation (article 29.4)



## Object

# RULES ON PUBLIC CONTRACTS: Innovation partnerships (I)

Development of Products,  
Services and Works that  
are not already in the  
market



Purchase without a new  
procedure, if they comply  
with performance levels  
and costs

## Characteristics of the procedure (art. 31)

1. Any economic operator may submit a request to participate.
2. Selection criteria according to capacity in R+D and in developing and implementing innovative solutions
3. Procurement documents shall indicate:
  - the needs that can not be met by already existing products, works and services.
  - minimum requirements to be met by all tenders.
  - define arrangements related to IP rights.
4. It can be set up with 1 partner or with several partners conducting separate research and development activities.



# RULES ON PUBLIC CONTRACTS: Innovation partnerships (II)

## Development of the procedure (article 31)

- Structured in successive phases following the sequence of steps in the research and development. May include the manufacturing of products, provision of services and completion of works
- Intermediate targets to be attained by the partners and provision of payment of the remuneration in appropriate instalments can be established.
- based on the targets, the CA can decide:
  - to terminate the innovation partnership
  - to reduce the number of partners by terminating individual contracts
- Procurement documents have to indicate possibilities and terms

### NEGOTIABLE

Initial and subsequent tenders to improve the content

### NON NEGOTIABLE

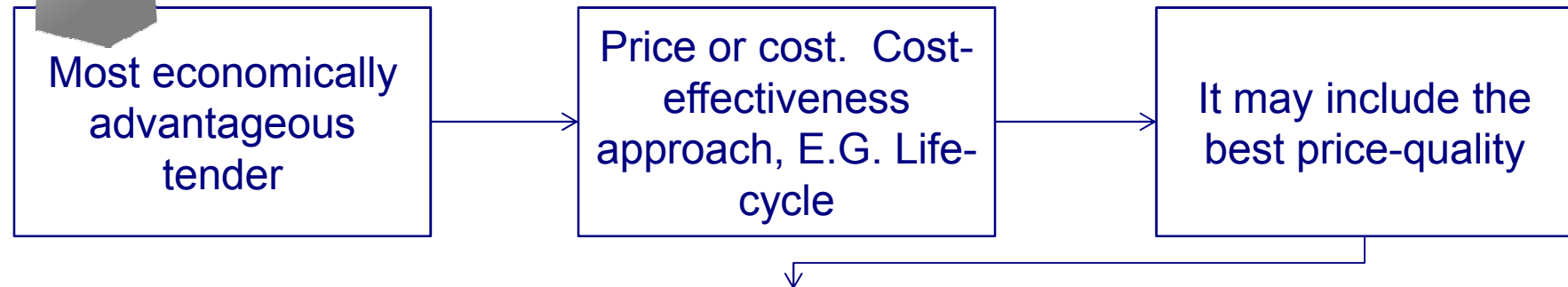
- Minimum requirements
- Award criteria
- The final tender

**Common principles of the procurement must be followed**



# RULES ON PUBLIC CONTRACTS:

## Award criteria (art. 67)

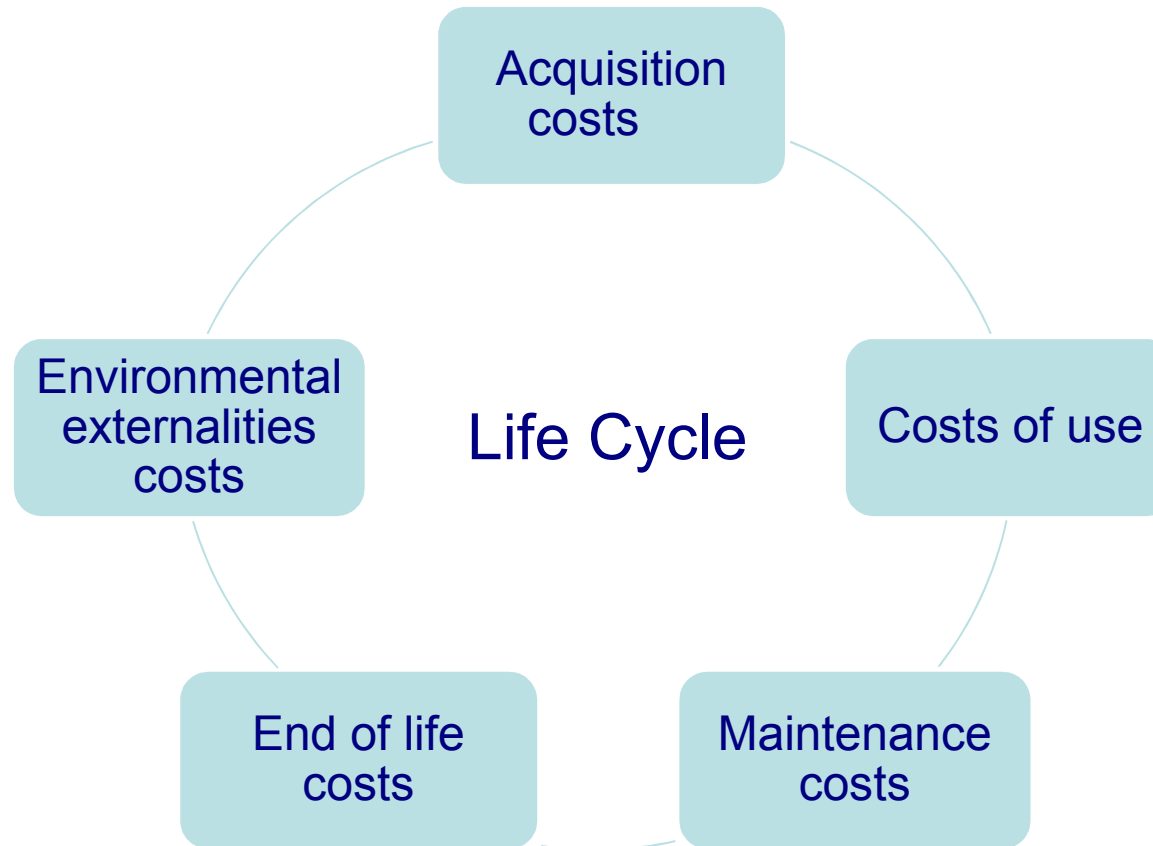


Best price-quality shall be assessed on criteria including qualitative, environmental and/or social aspects linked to the subject-matter of the contract, e.g.:

- a) **QUALITY**, including technical merit, aesthetic, functional characteristics, accessibility design for all users, social environmental, innovative.
- b) **ORGANIZATION, QUALIFICATION AND EXPERIENCE** of staff assigned to performing the contract, where those aspects have a significant impact on the level of performance of the contract.
- c) **AFTER-SALES SERVICE AND TECHNICAL ASSISTANCE, DELIVERY CONDITIONS.**



# RULES ON PUBLIC CONTRACTS: Award criteria – life-cycle (art 68)



## Procurement documents shall indicate:

- Data to be provided by tenderers
- Method to be used by CA to determine life-cycle costs on the basis of those data



# RULES ON PUBLIC CONTRACTS:

## Contract performance (I)

### Subcontracting

#### **MORE CONTROL IN THE SUBCONTRACTOR CHAIN**

- In works contracts and related to services to be provided in the facility controlled by CA: obligation to provide information of the subcontractors and substitutions.
- Extension to further down the subcontracting chain.

#### **DIRECT PAYMENTS TO SUBCONTRACTORS**

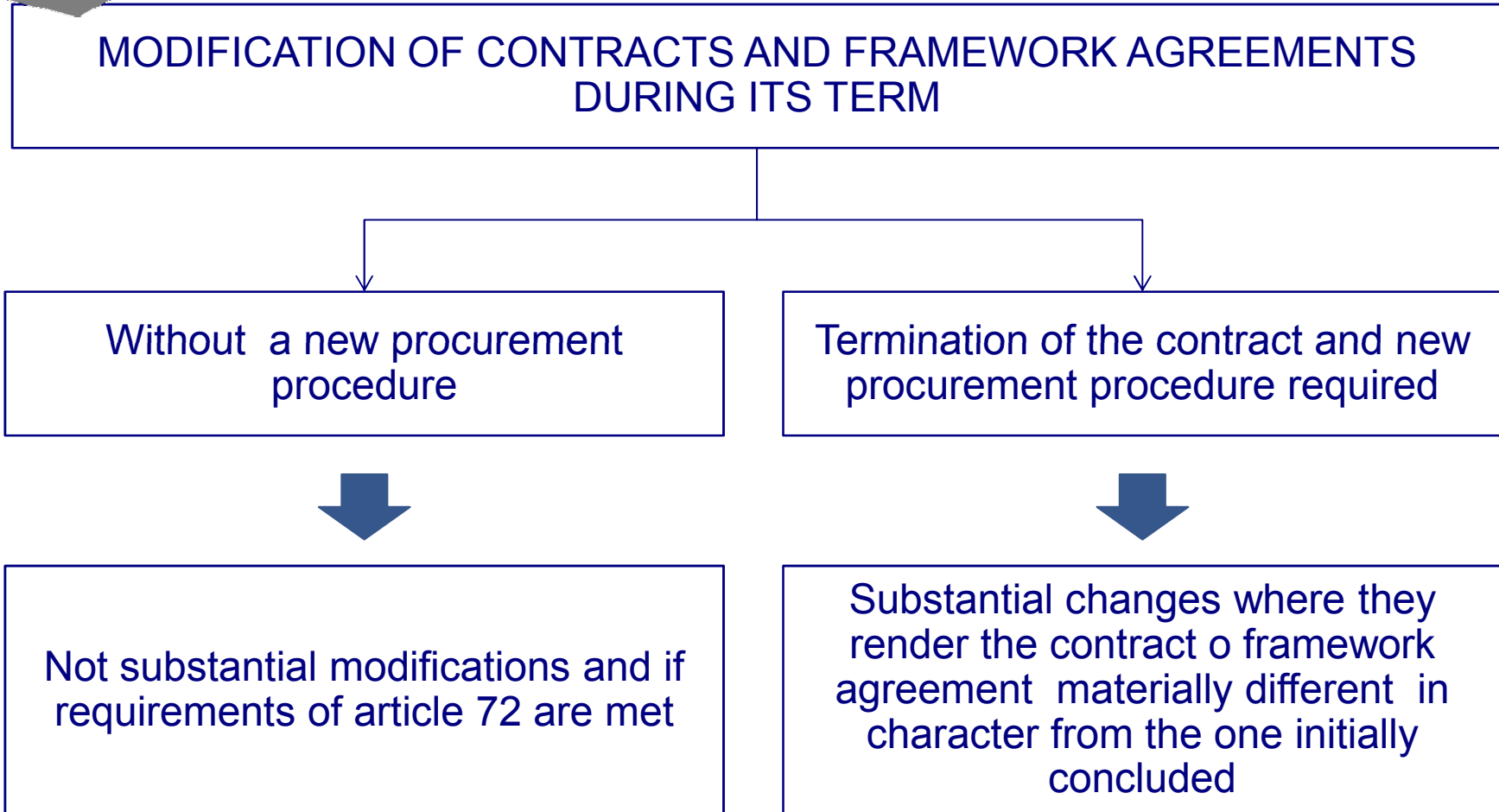
- At the request of the subcontractor and when the contract allows it.
- Mechanisms permitting main contractor to undue payments.

#### **COMPLIANCE OF ENVIRONMENTAL, SOCIAL AND LABOUR OBLIGATIONS**

- Mechanism of joint liability between contractor and subcontractor.
- Grounds for exclusion of subcontractors and replacement.



# RULES ON PUBLIC CONTRACTS: Contract performance (II) Modifications (article 72)





# **RULES ON PUBLIC CONTRACTS:**

## **Contract performance (III)**

### **Modifications allowed** (article 72)

1. Modifications foreseen in the initial procurement documents
2. Additional works, services and supplies that have become necessary and were not included in the initial procurement, where a change of contractor cannot be made for economical and technical reasons or would cause significant inconvenience or double costs for the CA.
3. Circumstances that a diligent CA could not foresee
4. Replacement of a contractor
5. Not substantial modifications irrespective of the value.
6. Where the value of the modification is below both:
  - the thresholds set out in article 4
  - 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts





# RULES ON PUBLIC CONTRACTS:

## Contract performance (IV)

### Termination of the contract (article 73)

#### **SUBSTANTIAL MODIFICATION**

- Which would have required a new procurement procedure (art 72).

#### **SITUATION OF EXCLUSION GROUND AT THE TIME OF THE CONTRACT AWARD**

- The contractor has at the time of the contract award been in one of the situations referred to in article 57 and should therefore have been excluded from the procurement procedure.

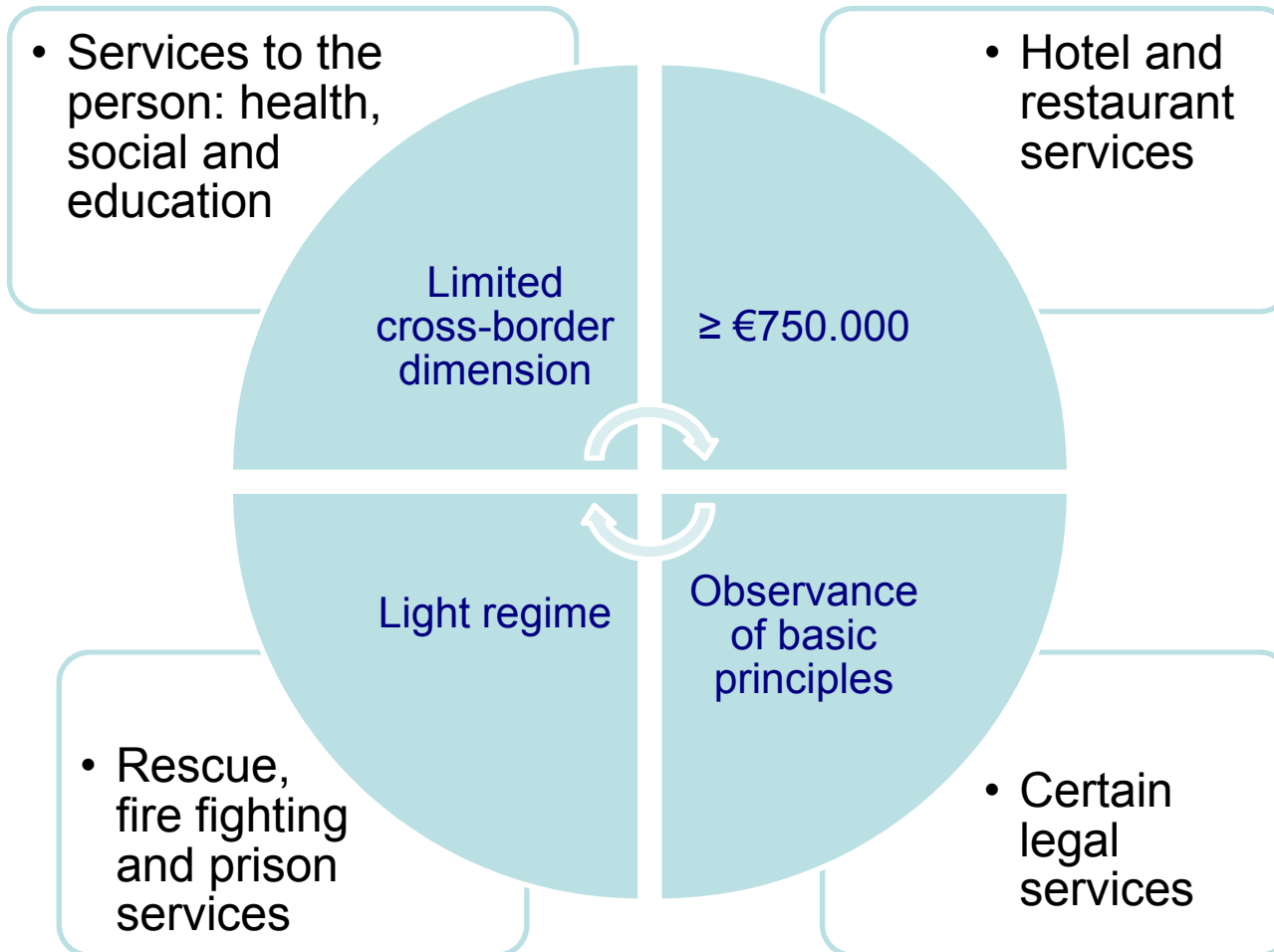
#### **SERIOUS INFRINGEMENT OF THE OBLIGATIONS BY CONTRACTOR**

- Serious infringement of obligations under the Treaties and Directive 2014/24/EU declared by the Court of Justice of EU in procedure pursuant article 258 TFEU.



# PARTICULAR PROCUREMENT REGIMES

(articles 74 to 82)



**Design contests:** also to obtain plans for financial engineering that would optimise SME support. Possibility to award the service contract to the winner of the contest by a negotiated procedure without publication



# GOVERNANCE (1)

(articles 83 to 86)

Monitoring to effectively ensure correct and efficiency implementation of the Directives. Result available to the public and to the Commission

## Member States

- Ensure that information and guidance on interpretation and application of the public procurement is available and free.
- Support to CA with regard to planning and carrying out procurement procedures
- By April 18<sup>th</sup> 2017 and every 3 thereafter shall submit to the Commission
  - a) the monitoring reports covering:
    - Most frequent sources of wrong application or legal uncertainty
    - Possible structural or recurring problems in the application of the rules
    - Level of SME participation in public procurement
    - Prevention, detection and adequate reporting of cases of procurement fraud,
    - Corruption, conflict of interest and other serious irregularities
  - b) National and statistical report



# GOVERNANCE (2)

(articles 83 to 86)

## **Contracting authorities:**

-Obligation of keeping copies of all concluding contracts which value is equal or greater than:

- €1.000.000 for supply and services contracts
- €10.000.000 public works contracts

-Written report with the content foreseen in article 84 for each contract and framework agreement covered by the Directive as well as dynamic purchasing agreement

# Thank you for your attention!

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