

UPEC - Masters in Public Business Law, "DRCP" (apprenticeship) and DPAE - 2023/2024

European public procurement law and sustainable purchasing strategies

Course given as part of the *Jean Monnet Chair* "Legal instruments of European economic sovereignty".



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➤ **Course objective**

- A good knowledge of the public contracts course in M1 is a prerequisite.
- Be familiar with the European regulatory framework applicable to public procurement contracts;
- Understanding the contribution and scope of the fundamental principles of public procurement;
- Measuring the contribution of the Public Procurement Directives (2014/24 and 2014/25) and the Concessions Directive (2014/23) in the contemporary transformation of public contracts;
- Understand the reasoning behind European law in public procurement disputes.
- Understand and appreciate the changes underway in European public procurement rules in the context of the health crisis and the reorientation of public policies.
- Assess plans to redefine public procurement rules in the context of the crisis in international multilateralism.

➤ **Bibliography**

Auby (J-B.), Dutheil de la Rochere (J. de), *Traité de droit administratif européen*, Brussels, Bruylant, 2020, 3rd ed.

Bovis (C.), *EU Public Procurement Law*, Cheltenham, Edward Elgar Publishing, 2007

Bovis (C.), *Public Procurement: Law, Policy and Regulation in the European Union*, Cheltenham, Edward Elgar Publishing, 2012

Richer (L.), Lichère (F.), *Droit des contrats administratifs*, Paris, LGDJ, coll. Manuels, 13^{ème} ed, 2022

Sanchez Graells (A), *Public Procurement and the EU Competition Rules*, Hart Publishing, 2015, 2nd ed.

La Rosa (S. de), *L'apport de la directive 2014/23/UE au droit européen de la commande publique*, Paris, Société de Législation Comparée, coll. Trans Europe Experts, 2014

La Rosa (S. de), *Droit européen de la commande publique*, Bruxelles, Bruylant, coll. Droit de l'Union, série manuels, deuxième ed. , dec 2020.

La Rosa (S. de.), *Principes des contrats publics en Europe*, Brussels, Bruylant, Administrative Law series, April 2022.

Noguellou (R.), Stellkens (U) (eds.), *Droit comparé des contrats publics*, Brussels, Bruylant, 2010

Caranta (R.), *Commentary on Directive 2014/24/EU*, Edwar Elgar, 2021

Consult the strada lex database (via UPEC) and the public purchasing database (UPEC)

➤ **Documents to consult (more detailed documents will be posted online)**

Directive 2014/24/EU of 26 February 2014 on public procurement; *OJEU* of 28.3.2014.

Directive 2014/25/EU of 26 February 2014 on the procurement by entities operating in the water, energy, transport and postal services sectors; *OJEU*, 28.3.2014.

Directive 2014/23/EU of 26 February 2014 on the award of concession contracts; *OJEU* of 28.3.2014.

Public procurement code

https://ec.europa.eu/growth/single-market/public-procurement_en

Chapter 1 - Genesis, developments and contemporary challenges of European public procurement law

§1 Formation of European public procurement law

A - The succession of directives

1. The first legislative package
2. The second legislative package
3. The 2004 directives: 2004/17 and 2004/18

B - The application of freedom of movement to public contracts

- ⇒ Historical example: the *Dundalk* case (ECJ, 22 September 1988, *Commission v. Ireland*, aff. 45/87)
- ⇒ Example of public domain occupation contracts: CJEU, 14 July 2016, *Promoimpresa Srl*, Case C-458/14,
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=181682&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=5867659>

C - The fundamental principles of public procurement

- ⇒ The genesis: the *Telaustria* ruling and its consequences (ECJ, 7 December 2000, *Telaustria Verlags GmbH*, case 324/98):
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=45859&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=5876583>

§2 The state of positive law: the recasting of the regulatory framework in 2014 (Directives 2014/23, 2014/24, 2014/25) and its consequences in national law: a comparative approach to the transposition of directives

- ⇒ Evaluation of the transposition of directives in France: see official report:
<https://www.economie.gouv.fr/daj/publication-du-rapport-triennal-la-commission-europeenne-relatif-lapplication-de-la>

§3 Adaptations of European public procurement law in a context of multiple crises

A - The health crisis and European public procurement law

- ⇒ European Commission guidelines from 1^{er} April 2020: [https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52020XC0401\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52020XC0401(05)&from=EN)
- ⇒ Collusive practices - Communication on tools to combat collusion in public procurement and guidance on how to apply the related exclusion ground, 18 March 2021, C 91/1, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwifhabxjYvzAhUqz4UKHXaHD54QFnoECAQQAQ&url=https%3A%2F%2Feur-lex.europa.eu%2Flegal-content%2FFR%2FTXT%2FPDF%2F%3Furi%3DCELEX%3A52021XC0318\(01\)%26from%3DEN&usg=AOvVaw1YgLv4yL_O7Ad1MPu1TPUu](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwifhabxjYvzAhUqz4UKHXaHD54QFnoECAQQAQ&url=https%3A%2F%2Feur-lex.europa.eu%2Flegal-content%2FFR%2FTXT%2FPDF%2F%3Furi%3DCELEX%3A52021XC0318(01)%26from%3DEN&usg=AOvVaw1YgLv4yL_O7Ad1MPu1TPUu)
- ⇒ Order no. 2020-319 of 25 March 2020 on various measures to adapt the rules governing the award, procedure or performance of contracts subject to the public procurement code and public contracts not covered by it during the health crisis arising from the covid-19 epidemic
- ⇒ Order no. 2020-738 of 17 June 2020 on various measures relating to public procurement

B - European public procurement law and the imperatives of ecological transition: the consequences of the green deal

- ⇒ https://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm
- ⇒ Conclusions of the Council of the European Union on the development of sustainable public procurement: <https://www.economie.gouv.fr/daj/publication-des-conclusions-du-conseil-de-lunion-europeenne-sur-le-developpement-de-marches>
- ⇒ Act no. 2021-1104 of 22 August 2021 to combat climate change and strengthen resilience to its effects
 - V. decree implementing article 35 of the "Climate and Resilience" law: decree no. 2022-767 of 2 May 2022: <https://www.economie.gouv.fr/daj/le-decret-dapplication-de-larticle-35-de-la-loi-climat-resilience-est-publie>

C - European public procurement law and the need for fair trading: the consequences of the EU's strategic autonomy objective

Putting it into perspective: the new industrial strategy for Europe (March 2020) (https://ec.europa.eu/commission/presscorner/detail/fr/ip_20_416)

- ***The introduction of a reciprocity mechanism in relation to third country markets***
 - ⇒ See the Commission's draft Guidelines on the participation of third-country tenderers and products in EU public procurement (July 2019): <https://ec.europa.eu/transparency/regdoc/rep/3/2019/FR/C-2019-5494-F1-FR-MAIN-PART-1.PDF>
 - ⇒ Adoption of the IPI instrument: Regulation No. 2022/1031 - <https://eur-lex.europa.eu/eli/reg/2022/1031/oj?locale=fr>
- ***Control of foreign subsidies by third countries***
 - ⇒ The challenges of increasing foreign subsidies: https://ec.europa.eu/competition/international/overview/foreign_subsidies.html
 - ⇒ COM (2021), 5 May 2021, 223 final, Proposal for a regulation on distortive foreign subsidies - https://ec.europa.eu/commission/presscorner/detail/fr/qanda_21_1984

- ⇒ Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market

Chapter 2 - Adapting the fundamental principles of public procurement to the contemporary challenges of public purchasing

§1 Applicability of the principles: certain cross-border interest

- ⇒ CJEU, 16 April 2015, *SC Entreprise Focused Solutions*, Case C-278/14: <http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-278/14>
- ⇒ CJEU, 19 April 2018, *Oftalma Hospital Srl*, Case C-65/17 (<http://curia.europa.eu/juris/document/document.jsf?text=%2522int%25C3%25A9%25C3%25AA%2Btransfrontalier%2Bcertain%2522&docid=201262&pageIndex=0&doclang=fr&mode=req&dir=&occ=first&part=1&cid=5829445#ctx1>): example of cross-border interest in contracts for health services.

§2 The scope of the principles

A - Principle of equality

B - Principle of non-discrimination

C - Principle of transparency

D - The principle of proportionality: a principle in the making?

- ⇒ Proportionality and grounds for exclusion of tenders: CJEU, 17 November 2022, *Antea Polska S.A.*, Case C-54/21, ECLI:EU:C:2022:888, <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=fr&num=C-54/21&jur=C>

§3 Linking the principles with the contemporary purchasing strategies of public bodies

- ⇒ The framework for subcontracting practices: CJEU, 5 April 2017, *Borta UAB*, aff. C-298/15 (<http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-298/15>)
- ⇒ The use of environmental labels: CJEU, *Commission v Netherlands* [Max Havelaar case], Case C-368/10 (<http://curia.europa.eu/juris/document/document.jsf?&docid=122644>)
 - Putting circular economy issues into perspective: **Decree no. 2021-254 of 9 March 2021 on the obligation for public authorities to purchase goods produced by reuse or incorporating recycled materials.**
- ⇒ The issue of "proximity" clauses (local employment clauses) :
- ⇒ Purchasing techniques: EU law and framework agreements: CJEU, 17 June 2021, *Simonsen & Weel A/S v Region Nordjylland og Region Syddanmark*, Case C-23/20: <https://curia.europa.eu/juris/liste.jsf?num=C-23/20&language=FR>

Chapter 3 - Using the Public Procurement and Concessions Directives to develop innovative public procurement solutions

§ 1 Reminder of the scope of the "public contracts" and "concessions" directives

- A. The organic field
 - 1. The contracting authority
 - ⇒ Recent ruling: CJEU, 3 February 2021, *Federazione Italiana Giuoco Calcio (FIGC) and Consorzio Ge.Se.Av. S. c. arl v. De Vellis Servizi Globali Srl*, Case C-155/19 and C-156/19, ECLI:EU:C:2021:88.
 - 2. The contracting entity
- B. Crossing thresholds
- C. Classification of contracts
 - 1. Public procurement contracts: works, services or concessions
 - 2. The concession contract
 - CJEU, 2 September 2021, *Sisal Spa and a. v. Agenzia delle Dogane e dei Monopoli, Ministero dell'Economia e delle Finanze*, aff. jtes. C-721/19 and C-722/19, ECLI:EU:C:2021:672
 - Urban mobility contracts: CJEU, 10 November 2022, *SHARENGO najem in zakup vozil d.o.o. v. Mestna občina Ljubljana*, Case C-486/21, ECLI:EU:C:2022:868, <https://curia.europa.eu/juris/liste.jsf?language=fr&td=ALL&num=C-486/21>

§2 Centralising and pooling purchasing

- A. *The use of central purchasing bodies*
 - ⇒ Implementing Judgment: CJEU, 4 June 2020, *Asmel Soc.* case C-3/19 (<http://curia.europa.eu/juris/document/document.jsf?text=agent%2Bcommercial&docid=226974&pageIndex=0&doclang=fr&mode=req&dir=&occ=first&part=1&cid=5247912#ctx1>)
- B. *Joint procurement between Member States: the example of joint procurement in the health sector*
 - ⇒ See the joint contract, issued on the basis of the [EU](#) Financial Regulation: https://ec.europa.eu/health/preparedness_response/joint_procurement_en
 - ⇒ See vaccine purchasing contracts: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_302
- C. *Mutualisation between public bodies*
 - ⇒ In house and inter-municipality: CJEU, 18 June 2020, *Porin kaupunki*, Case C-328/19 (<http://curia.europa.eu/juris/liste.jsf?language=fr&td=ALL&num=C-328/19/>)
 - ⇒ Institutionalised public/private partnership (PPI) arrangements: <https://curia.europa.eu/juris/liste.jsf?language=fr&td=ALL&num=C-332/20> (CJEU, 1 August 2022, *Roma Multiservizi Spa, Rekeep SPA v. Roma Capitale*, Case C-332/20).

§ 3 Integrating environmental requirements into public procurement: green public procurement

- ⇒ Highlighting of innovative solutions by the European Commission: Highlighting of innovative solutions by the Commission: see Communication from the Commission, Guidance on the procurement of innovative solutions, 15.5.2018, C (2018) 3051 final: <https://ec.europa.eu/transparency/regdoc/?fuseaction=list&coteId=3&year=2018&number=3051&version=F&language=fr>
- ⇒ Standard clauses for green public procurement: https://green-business.ec.europa.eu/green-public-procurement_en / National Plan for Sustainable Procurement (<https://www.ecologie.gouv.fr/achats-publics-durables>)

§4 Innovative purchasing techniques

- A. *Buying for the long term: the dynamic acquisition system*
- B. *Taking innovation into account in the life of the contract*

- ⇒ See https://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/conseil_acheteurs/guides/guide-pratique-achat-public-innovant.pdf?v=1562156837 DAJ guide:

§ 5 Integrating flexibility into contract performance

- ⇒ Art. 72 dir. 2014/24 and art. L. 2194-1

A concession contract / public procurement contract may be amended without a new competitive tendering procedure, under the conditions laid down by decree in the Conseil d'Etat, when :

- 1° The changes were provided for in the original contractual documents;
- 2° Additional work or services have become necessary;
- 3° The changes are made necessary by unforeseen circumstances;
- 4° A new concessionaire replaces the initial concessionaire under the concession contract
- 5° The changes are not substantial;
- 6° The changes are small.

- ⇒ Scope of the regime of substantial amendments to the contract: CJEU 3 February 2022, *Advania Sverige AB and Kammarkollegiet v. Dustin Sverige AB*, Case C-461/20, <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=fr&num=C-461/20&jur=C>
- ⇒ Circular on the performance of public procurement contracts: [S1302722092917470 \(economie.gouv.fr\)](https://www.economie.gouv.fr/achats-publics-durables) (circular)