

Alessandro Palmaccio, Procurements and grants, two different instruments to implement the EU budget: a brief introduction.

ABSTRACT: The present paper aims to provide a brief description of two of the different ways to spend the EU budget under direct management (procurements and grants) in the light of the new Financial Regulation applicable to the general budget of the European Union adopted in July 2018 aimed at establishing simpler, more transparent and more flexible rules for the management of EU funds by European Institutions.

SINTESI: Il presente contributo intende fornire una breve descrizione di due diverse modalità di spesa del budget dell'UE da parte delle Istituzioni Europee tra quelle esistenti nell'ambito della gestione diretta: la spesa per gli appalti e quella per l'erogazione di sovvenzioni destinate a promuovere la realizzazione di un obiettivo di una politica dell'Unione o il funzionamento di un organismo finalizzato al perseguimento di una politica europea. L'analisi è stata svolta alla luce del nuovo regolamento finanziario applicabile al bilancio generale dell'Unione europea adottato a luglio 2018 volto a stabilire norme più semplici, trasparenti e flessibili per la gestione dei fondi dell'Unione da parte delle Istituzioni europee. Lo stesso Regolamento persegue, tra l'altro, l'obiettivo di armonizzare la disciplina degli appalti assicurando che le Istituzioni europee, quando aggiudicano appalti, applichino norme identiche a quelle imposte alle amministrazioni aggiudicatrici degli Stati Membri disciplinate dalle direttive 2014/23/UE e 2014/24/UE.

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1. Introduction: different ways to implement EU budget

The EU budget is implemented mostly by the European Commission and the EU Member States. The Member States implement about three quarters of the EU budget. This means that the European Commission directly pays out only a small part of the budget. However, ultimate responsibility for implementing the entire annual budget of the EU lies with the European Commission¹. The Commission, in fact, *“is responsible for implementing the revenue and expenditure of the budget in accordance with the Treaties, in accordance with the provisions and instructions set out in the Financial Regulation, and within the limit of the appropriations authorized. The Member States cooperate with the Commission so that the appropriations are used in accordance with the principles of sound financial management, i.e. economy, efficiency and effectiveness”*². In practice, some 80% of the budget is spent under so called 'shared management', with individual EU countries actually distributing

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¹ According to Article 317 (1) of the Treaty on the Functioning of the European Union *“The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management”*.

² Alexandre Mathis 10-2018 <http://www.europarl.europa.eu/factsheets/en/sheet/30/implementation-of-the-budget>

funds and managing expenditure “in areas such as agriculture, growth and employment aid to EU regions (European Structural and Investment Funds)”³.

According to the Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 (Financial Regulation - FR),⁴ EU budget can be managed in three different ways⁵:

- directly by the European Commission, Union delegations, Executive Agencies (direct management);
- jointly by the European Commission and national authorities (shared management)⁶;
- indirectly by other bodies inside or outside the EU such as third countries and international organisations (indirect management)⁷.

Direct management means that the budget implementation tasks performed either by the Commission or by executive agencies⁸ don't involve participation of other bodies.

Shared management, as previously mentioned, accounts for the most relevant share of the Union budget. Under shared management, the Commission relies on the Member States to implement certain policies. For example, in the case of the Structural Funds, the European Institutions decide on the total amounts to be paid and the conditions of implementation while the Member States' administrations (at national, regional and local level) choose which projects to finance and take responsibility for day-to-day management. Working together with the Member States, the European Commission ensures a successful conclusion of the projects and that the money is well spent. To this end, it is essential that the Commission puts in place strong and efficient EU controls on how EU money is spent.

³https://ec.europa.eu/info/about-european-commission/eu-budget/how-it-works/annual-lifecycle/implementation/management-types_en

⁴ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 - OJ-L 193/30.07.2018, p.1. Entered into force the 2nd August 2018 it is the main legal basis for EU procurements and grants.

⁵ See Article 62 FR “*Methods of budget implementation*”.

⁶ In this context it is sufficient to report the pivotal provisions of Article 63(1) FR “Shared management with Member States”: “1. *Where the Commission implements the budget under shared management, tasks relating to budget implementation shall be delegated to Member States. The Commission and Member States shall respect the principles of sound financial management, transparency and non-discrimination and shall ensure the visibility of the Union action when they manage Union funds. To that end, the Commission and Member States shall fulfil their respective control and audit obligations and assume the resulting responsibilities laid down in this Regulation. Complementary provisions shall be laid down in sector-specific rules.*”

⁷ Specifically, budget implementation tasks can be entrusted to:

- third countries or the bodies they have designated;
- international organisations or their agencies, within the meaning of Article 156;
- the European Investment Bank (“the EIB”) or the European Investment Fund (“the EIF”) or both of them acting as a group (“the EIB group”);
- Union bodies referred to in Articles 70 and 71 of FR (bodies set up under the TFEU and the Euratom Treaty and Public-private partnership bodies);
- public law bodies, including Member State organisations;
- bodies governed by private law with a public service mission, including Member State organisations, to the extent that they are provided with adequate financial guarantees;
- bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that are provided with adequate financial guarantees;
- bodies or persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.

For specific provisions on the functioning of “Indirect Management” see Articles 154 to 159 FR.

⁸ Executive agencies are Union bodies with legal personality created by the Commission and entrusted with powers to implement all or part of a Union programme or project on behalf of the Commission and under its responsibility, in accordance with Council Regulation (EC) 58/2003; they are located either in Brussels or in Luxembourg.

With indirect management the Commission delegates budget implementation tasks to other subjects; for this reason the selection of the persons and entities to be entrusted with the implementation of Union funds or budgetary guarantees under indirect management shall be transparent, justified by the nature of the action, shall not give rise to conflicts of interest and shall respect the principles of sound financial management, transparency, non-discrimination and visibility of Union action⁹.

All these modalities of budget implementation should respect the principle of sound financial management and in particular ensure that the budget is implemented within the limits of the appropriations authorised as established by Article 56 of Financial Regulation¹⁰.

With particular reference to “direct management”, Article 62(2) states that for the “*purposes of direct management, the Commission may use the instruments referred to in Titles VII, VIII, IX, X and XII*” of the Financial Regulation.

2. Procurements and grants

Title VII of FR outlines the discipline of procurements and concessions, while Title VIII establishes the main rules for awarding grants.

Procurements and grants are only two of the methods of EU budget implementation which fall under “direct management”. Prizes¹¹, financial instruments, budgetary guarantees and financial assistance¹², Union trust funds for external actions¹³, budget support to a third country (under certain conditions)¹⁴, remunerated external experts are other expenditure instruments foreseen by FR; however, procurement and grants represent the most frequent methods of spending European budget under direct management.

Procurements and grants always need a budgetary commitment, that is, the reservation of the budget needed by the Authorising Officer for payments to be carried out in the future. A budgetary commitment is always preceded by a financing decision¹⁵ required for every operational expenditure and adopted by the Union Institution or by the authority to which powers have been delegated by the Union Institutions.

⁹ See Article 154 FR. More in detail, according to Article 154 (4) the Commission “*shall, in accordance with the principle of proportionality and with due consideration for the nature of the action and the financial risks involved, assess that persons and entities implementing Union funds pursuant to point (c) of the first subparagraph of Article 62(1):*

(a) set up and ensure the functioning of an effective and efficient internal control system based on international best practices and allowing in particular to prevent, detect and correct irregularities and fraud;

(b) use an accounting system that provides accurate, complete and reliable information in a timely manner;

(c) are subject to an independent external audit, performed in accordance with internationally accepted auditing standards by an audit service functionally independent of the person or entity concerned;

(d) apply appropriate rules and procedures for providing financing to third parties, including transparent, non-discriminatory, efficient and effective review procedures, rules for recovering funds unduly paid and rules for excluding from access to funding;

(e) make public adequate information on their recipients equivalent to that provided for under Article 38;

(f) ensure protection of personal data equivalent to that referred to in Article 5”.

¹⁰ Article 56: “1. *The Commission shall implement the revenue and expenditure of the budget in accordance with this Regulation, under its own responsibility and within the limits of the appropriations authorised.*

2. *The Member States shall cooperate with the Commission so that the appropriations are used in accordance with the principle of sound financial management.”*

¹¹ See Articles 206 and 207 FR.

¹² See Article 208 FR and following.

¹³ See Article 234 FR.

¹⁴ See Article 236 FR.

¹⁵ See Article 110 FR.

The financing decisions can be annual or multiannual. The financing decision indicates the total amount it covers and contains a description of the actions to be financed. In particular, it specifies:

- the basic act and the budget line;
- the objectives pursued and the expected results;
- the methods of implementation. In this regard the financing decision sets out, for grants, the type of applicants targeted by the call for proposals or direct award and the global budgetary envelope reserved for the grants; for procurement, the global budgetary envelope reserved for procurements.

3. Procurements and public contracts: what is the difference?

When talking about procurement, it is important to clarify the difference between “procurement” and “public contract”.

According to Article 2(49) FR ‘procurement’ means the *“acquisition by means of a contract of works, supplies or services and the acquisition or rental of land, buildings or other immovable property, by one or more contracting authorities from economic operators chosen by those contracting authorities”*;

Pursuant to Article 2(51) ‘public contract’ means *“a contract for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities within the meaning of Articles 174 and 178, in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services, comprising: (a) building contracts; (b) supply contracts; (c) works contracts; (d) service contracts”*.

From the two definitions it is clear that by the first term, the “procedure” that leads to the signature of a public contract is indicated. A specific procedure in which the two parties are well identified: the contracting authority on one side and an economic operator on the other side. A procedure in which the economic operator is chosen by the contracting authority in compliance with certain and clear rules defined by the Financial Regulation¹⁶.

EU public procurement plays an important role in the European single market and is governed by rules intended to remove barriers and open up markets in a non-discriminatory and competitive way. The objective of public procurement is to increase the choice of potential contractors to public bodies, in order to select the most economically advantageous tender, while developing market opportunities for companies.

The procurement procedure leads to the acquisition of works, supplies or services¹⁷, the acquisition or rental of land, buildings or other immovable property by means of a public contract; the three main features of these contracts are: they should be concluded for profit; they should be in writing and they should be signed by the contracting authority and the economic operator. All contracts financed in whole

¹⁶ According to Recital 108 FR *“Union procurement should ensure that Union funds are used in an effective, transparent and appropriate way, while reducing administrative burden on recipients of Union funds. In that regard, e-procurement should contribute to the better use of Union funds and enhance access to contracts for all economic operators. All Union institutions conducting procurement should publish clear rules on their websites regarding acquisition, expenditure and monitoring, as well as all contracts awarded, including the value thereof.”*

¹⁷ Typical examples of procured services and materials include both intellectual and non-intellectual services such as statistical and audit reports, consultancy work, interpretation, maintenance of the Institutions buildings and material such as office stationary, IT equipment and building work.

or in part by the budget need to comply with the principles of transparency¹⁸, proportionality¹⁹, equal treatment and non-discrimination²⁰; moreover they shall be put out to competition on the broadest possible basis²¹: in this regard the contracting authority is requested to divide a contract into lots, whenever appropriate, with due regard to broad competition. However, an important clarification is necessary: the contract (and its value) shall not be split up artificially in order to circumvent the applicable rules (“saucissonnage” in Commission jargon).²²

4. Procurement procedures

In light of the above, it can be said that the characterising element of European contracting authorities’ acquisitions is not so much the contract but the specific procedure to be used²³.

In this regard it should be specified that detailed rules on procurement are laid down in Annex I to the Financial Regulation²⁴. Article 164 of the Financial Regulation establishes the types of procurement procedures that can be used for awarding public contracts (and concession contracts). The most important information for each procedure is provided below.

4.1 Open procedure

The open procedure (together with the restricted procedure) is the standard procedure for contracts worth more or equal to the thresholds referred to in Article 175(1)²⁵ as it allows the highest rate of

¹⁸ By transparency it is meant openness and clarity on procurement policy and its delivery.

¹⁹ The choice of the procurement procedure and its organisation has to be proportionate to the subject matter and the value of the purchase.

²⁰ Economic operators should be treated fairly and all interested parties in the same situation should be treated in the same way. For example, additional information given to one tenderer must be given to all the other tenderers.

²¹ Ensuring widest competition is one of the objectives of public procurement so as to increase the choice of potential suppliers, thereby achieving better value for money. This principle is less stringent for the negotiated procedure.

²² See Article 160 (*Principles applicable to contracts and scope*) FR.

²³ Procurement procedure of the Member States contracting authorities are foreseen by the 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*”. In this regard Recital 96 FR has to be mentioned: “*Procurement rules and principles applicable to public contracts awarded by Union institutions on their own account should be based on the rules set out in Directive 2014/23/EU of the European Parliament and of the Council and Directive 2014/24/EU*”. Directive 23 of 26 February 2014 lays down rules on the award of concession contracts. As explained in Recital 11 FR “*Concessions are contracts for pecuniary interest by means of which one or more contracting authorities or contracting entities entrusts the execution of works, or the provision and the management of services, to one or more economic operators. The object of such contracts is the procurement of works or services by means of a concession, the consideration of which consists in the right to exploit the works or services or in that right together with payment. Such contracts may, but do not necessarily, involve a transfer of ownership to contracting authorities or contracting entities, but contracting authorities or contracting entities always obtain the benefits of the works or services in question.*”

²⁴ In order to ensure the harmonization of the legislation applicable to the Member States and the one applicable to the European institutions, Article 161 FR establishes that “*To ensure that Union institutions, when awarding contracts on their own account, apply the same standards as those imposed on contracting authorities covered by Directives 2014/23/EU and 2014/24/EU, the Commission is empowered to adopt delegated acts*” to amend Annex I to the FR, in order to align the Annex to amendments to the Directives 23 and 24 and to introduce related technical adjustments.

²⁵ It recalls thresholds laid down at points (a) and (b) of Article 4 of Directive 2014/24/EU that apply to procurements with a value net of value-added tax (VAT) estimated to be (originally) equal to or greater than:

(a) € 5 186000 for public works contracts;

(b) € 134000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities;

(c) € 207000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities;

participation and the acquisition of any purchase. The open procedure is a one step - procedure in which any economic operator who is interested may submit a tender. The most important phases of this procedure are the following:

- publication of the notice in the Official Journal (and publication of the procurement documents in Tenders Electronic Daily - TED);
- receipt of the offers from all tenderers;
- opening and evaluation of all offers by a dedicated Committee²⁶. The opening of offers takes place in the context of a public session enabling the tenderers who are present to verify that their offer had not been opened before;
- choice of the best offer based on the award criteria after checking exclusion and selection criteria²⁷;
- award of the contract and information of the result of the procedure.

4.2 Restricted procedure

The restricted procedure is a standard procedure that may be used for any purchase. Contrary to the open procedure, the restricted procedure is organised in two steps: in the first step only the exclusion and selection criteria are assessed and in the second step the award criteria are evaluated. Any interested economic operator may ask to take part in the first step of this procedure, but only those invited can submit a tender that will be evaluated in the second step. The minimum number of candidates invited

(d) € 750000 for public service contracts for social and other specific services listed in Annex XIV of the Directive.

In this regard it is necessary to remind that, according to Article 6 of the same Directive, every two years the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the World Trade Organisation Agreement on Government Procurement (GPA) and shall, where necessary, revise them in accordance with this Article. According to Article 1 of Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017 “amending Directive 2014/24/EU of the European Parliament and of the Council in respect of the application thresholds for the procedures for the award of contracts”, Article 4 of Directive 2014/24/EU is amended as follows:

- (a) in point (a), the new amount is ‘EUR 5 548 000’;
- (b) in point (b), the new amount is ‘EUR 144 000’;
- (c) in point (c), the new amount is ‘EUR 221 000’.

²⁶ The opening committee is appointed when the value of a contract is equal to or greater than the thresholds referred to in Article 175(1), see note above.

²⁷ According to Article 166 (2) FR “*In the procurement documents, the contracting authority shall identify the subject matter of the procurement by providing a description of its needs and the characteristics required of the works, supplies or services to be bought, and shall specify the applicable exclusion, selection and award criteria*”. The criteria for choosing the contractor are divided into three categories: exclusion, selection and award. Exclusion and selection criteria are related to the candidate or tenderer, whereas award criteria are related to the tender.

The purpose of the exclusion criteria is to determine whether an operator is allowed to participate in the procurement procedure or to be awarded the contract; the criteria to be applied are already established in Articles 136 and 141 (1)(b)(c)FR. With reference to selection criteria, the contracting authority “*shall apply the selection criteria to evaluate the capacity of the candidate or tenderer. Selection criteria shall only relate to the legal and regulatory capacity to pursue the professional activity, the economic, and financial capacity, and the technical and professional capacity*” (Art. 167 (2) FR. In brief, the purpose of selection criteria is to ensure that the economic operator has the financial, economic, technical and professional capacity required to perform the contract. Annex I FR provides further clarifications: “*The contracting authority shall indicate in the procurement documents the selection criteria, the minimum levels of capacity and the evidence required to prove that capacity. All requirements shall be related and proportionate to the subject matter of the contract.*” (Point 18.2). To ensure that economic operators possess the necessary economic, financial, technical and professional capacity to perform the contract, Annex I FR provides examples of concrete conditions and supporting documents (Points 18, 19 and 20). In summary, the selection criteria must be drafted in the procurement documents and they must be clear, appropriate and proportionate in view of the subject matter and value of the contract and must allow for a transparent and non-discriminatory selection.

Finally, the award criteria are necessary to evaluate and rank the tenders (see Article 167(3)FR). The purpose of the award criteria is to evaluate the technical and financial offer in order to choose the most economically advantageous tender. The choice of the most economically advantageous tender is carried out using one of three award methods: lowest price, lowest cost or best price-quality ratio (see Article 167(4)FR). Important clarifications and examples of award criteria are set in Annex I Point 21 FR.

shall be five. A restricted procedure may be useful for example in order to receive tenders only from selected economic operators or to know in advance the maximum number of tenders and plan the evaluation accordingly.

4.2.1 Dynamic purchasing system

A dynamic purchasing system is a variant of the restricted procedure which make exclusive use of electronic means as its main advantage. It may be divided into categories of works, supplies or services that are objectively defined on the basis of characteristics of the procurement to be undertaken in the category concerned. In that case, selection criteria shall be defined for each category. The contracting authority gives any economic operator, throughout the period of validity of the dynamic purchasing system (not more than four years, except in duly justified exceptional cases) the possibility of requesting to participate in the system. The contracting authority invites all candidates admitted to the system in the relevant category to submit a tender within a reasonable time and it awards the contract to the tenderer who has submitted the most economically advantageous tender on the basis of the award criteria set out in the contract notice²⁸. As a general rule, the contracting authority follows the rules of the restricted procedure for procurement through a dynamic purchasing system.

4.3 Negotiated procedure

This procedure can be chosen for contracts with a value below the thresholds referred to in Article 175(1)²⁹. In general, the choice and organisation of a procurement procedure have to be proportionate to the subject and the value of the purchase. With reference to the negotiated procedure and on the basis of the estimated value of the purchase (excluding VAT) it is possible to distinguish between the following value thresholds:

- up to and including €1000, no contract is required. An invoice is sufficient (without prior acceptance of a tender) and should be issued by the contractor in the name of the Institution³⁰;
- a contract of a value not exceeding € 15000 is considered of very low value³¹;
- a contract of a value not exceeding € 60000, but exceeding € 15 000 is deemed of low value³²;
- a contract of a value exceeding € 60000 and below the thresholds referred to in Article 175(1) is defined as of middle value³³;

Middle, low and very low value contracts may be awarded by a negotiated procedure while still applying of the principles of transparency, proportionality, equal treatment and non-discrimination for all tenderers. In fact, above € 1000 the different thresholds for the negotiated procedure imply, essentially, only a difference in the number of candidates invited:

- negotiated procedure for very low value contract: at least 1 candidate invited;
- negotiated procedure for low value contract: at least 3 candidates invited;
- negotiated procedure for middle value contract: at least 5 candidates invited.

²⁸ For more information see Point 9 Annex I FR.

²⁹ See note n. 25.

³⁰ Point 14.5 Annex I FR.

³¹ Point 14.4 Annex I FR.

³² Point 14.3 Annex I FR.

³³ Point 14.2 Annex I FR.

Independently of the number of candidates invited, one valid offer is always sufficient for awarding a contract.

Moreover, negotiated procedures for the conclusion of middle and low value contracts shall be advertised by appropriate means (ex ante publicity) on the Institutions' websites or a by a contract notice.

4.3.1 Negotiated procedure without prior publication

The negotiated procedure without prior publication is an exception “*for specific types of purchases falling outside the scope of Directive 2014/24/EU or in the clearly defined exceptional circumstances*”³⁴ regardless of the estimated value of the contract. The submitted tenders (technical and financial offers) are usually negotiated; nevertheless the contract may be awarded on the basis of the initial tender without negotiation if this possibility is indicated in the procurement documents. The contracting authority may use the negotiated procedure without prior publication of a contract notice, for example, where no tenders, or no suitable tender, or no request to participate, or no suitable request to participate have been submitted in response to an open procedure or restricted procedure after that procedure has been completed. Another typical use of this procedure is to entrust new services or works consisting in the repetition of similar services or works to the economic operator to which the same contracting authority awarded an original contract, provided that those services or works are in conformity with a basic project for which the original contract was awarded after publication of a contract notice³⁵.

4.4 Call for expression of interest (CEI)

Procedures involving a call for expression of interest (a sort of restricted procedure in two steps - establishing the lists and using the lists – used for contracts below the Directive thresholds like the negotiated procedure) are used for contracts with a value below the thresholds referred to in Article 175(1)³⁶ FR, to preselect candidates to be invited to submit tenders in response to future restricted invitations to tender, or to collect a list of vendors to be invited to submit requests to participate or submit tenders. In the first case the list of pre-selected candidates is established following evaluation of exclusion and selection criteria. All candidates who are have not been excluded and who fulfil the selection criteria are included on the list or sub-list; where a contract is to be awarded, the contracting authority invites all candidates in the list or sub-list to submit a tender. The call for expressions of interest is open and the list of pre-selected candidates is valid for up to four years from the date on which the call is published in the Official Journal. In the second case the call for expressions of interest only includes the subject matters of future procurement, but no exclusion, selection or award criteria. Any economic operator can simply register on the sub-list (list of vendors) of their choice; where a contract is to be awarded, the contracting authority invites all vendors entered on the relevant list or sub-list to submit tenders including documents relating to exclusion and selection criteria; alternatively the contracting authority invites all vendors to submit documents relating to exclusion and selection criteria and, subsequently, tenders for those fulfilling those criteria. Also in this case the list drawn up following a call

³⁴ Article 164 (5)(f) FR.

³⁵ The complete list of the cases is set out at Point 11 Annex I FR.

³⁶ See note 25.

for expression of interest is valid for not more than four years from the date on which the notice is published.

In both cases any interested economic operator may express interest at any time during the period of validity of the lists, with the exception of the last three months before the end of this period.

4.5 Design contest

Design contest is a procedure by which it is possible to acquire a plan or design (especially in the fields of architecture and civil engineering) selected by a jury after being put out to competition. The number of candidates invited to participate has to be sufficient to ensure genuine competition; where design contests are restricted to a limited number of candidates, the contracting authority shall lay down clear and non-discriminatory selection criteria³⁷.

4.6 Competitive dialogue

Competitive dialogue may be used, regardless of the estimated value of the contract, for concession contracts, for the service contracts referred to in Annex XIV to Directive 2014/24/EU (contracts for social and other specific services), in cases where only irregular or unacceptable tenders were submitted in response to an open or restricted procedure after the initial procedure has been completed and for cases where this is justified by the specific circumstances linked, for example, to the nature or the complexity of the subject matter of the contract or to the specific type of contract³⁸. In some cases, in fact, a contracting authority which manages complex projects might be unable to accurately define the means of meeting their needs or of assessing what the market can offer in terms of technical solutions. This can arise, for example, with integrated transport infrastructures or with large computer networks for which the financial and legal make-up cannot be determined in advance. In these cases a flexible procedure is required in order to guarantee both competition between economic operators and satisfaction of the particular needs for the contracting authorities through the discussion of every aspect of the project with each candidate. The contracting authority specifies its needs and requirements, the award criteria and an indicative timeframe in the contract notice or in a descriptive document. It awards the contract to the tender offering the best price-quality ratio. The contracting authority opens a dialogue with the candidates which satisfy the selection criteria in order to identify and define the means best suited to satisfying its needs. It may discuss all aspects of the procurement with the selected candidates during that dialogue. The competitive dialogue may take place in successive stages in order to reduce the number of solutions to be discussed, by applying the announced award criteria if provision is made for that possibility in the contract notice or the descriptive document. The contracting authority continues the dialogue until it can identify the solution or solutions which are capable of meeting its needs. After informing the remaining tenderers that the dialogue is concluded, the contracting authority asks each of them to submit their final tender on the basis of the solution or solutions presented and specified during

³⁷ For more information see Point 8 Annex I FR.

³⁸ The detailed list of all cases in which it is possible to use the competitive dialogue (and the competitive procedure with negotiation) is included at Point 12 Annex I FR.

the dialogue. Final tenders include all the elements required and necessary for the performance of the project. The contracting authority awards the contract to the tender offering the best price-quality ratio³⁹.

4.7 Competitive procedure with negotiation

Competitive procedure with negotiation can be used in the same cases of the competitive dialogue regardless of the estimated value of the contract. This is a standard procedure in two steps that may be used only in specific cases regardless of the value of the purchase. It is similar to a restricted procedure: in the first step only the exclusion and selection criteria are assessed and in the second step the award criteria are evaluated. Any interested economic operator may ask to take part in the first step of this procedure, but only those invited can submit a tender that will be evaluated in the second step. The peculiarity of the procedure is that the submitted tenders can be negotiated.

4.8 Innovation partnership

An innovation partnership aims to develop an innovative product (supply, service or works) and to guarantee its subsequent purchase by the contracting authority, provided that they adhere to the performance levels and maximum costs agreed between the contracting authorities and the partners and that no equivalent product becomes available on the market during the partnership. The innovation partnership is structured in successive phases following the sequence of steps in the research and innovation process, which may include the completion of the works, the manufacturing of the products or the provision of the services. The innovation partnership sets intermediate targets to be attained by the partners. Based on those intermediate targets, the contracting authority may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting authority has indicated those possibilities and the conditions for their use in the procurement documents. Before launching an innovation partnership, the contracting authority must carry out a preliminary market analysis to verify that the desired product has not already been developed and is close to the commercial phase, nor is it already available on the market⁴⁰.

4.9 Summary

In a nutshell, as clarified in Article 164 (2) FR, in open procedures any interested economic operator may submit a tender. In restricted procedures, competitive dialogues, competitive procedures with negotiation and innovation partnerships, any economic operator may submit a request to participate by providing the information that is requested by the contracting authority. The contracting authority invites all candidates that satisfy the selection criteria and that are not in any of the exclusion situations listed in Articles 136 and 141 to submit a tender.

³⁹ For more information see Point 10 Annex I FR.

⁴⁰ For more information see Point 7 Annex I FR.

In all procedures involving negotiation, the contracting authority shall negotiate the initial and any subsequent tenders or parts thereof (except for their final tenders) with tenderers, in order to improve their content. The minimum requirements and the criteria specified in the procurement documents shall not be subject to negotiation. A contracting authority may award a contract on the basis of the initial tender without negotiation where it has indicated in the procurement documents that it reserves the possibility to do so.

5. Procurement procedures in the field of external actions

In order to complete the legal framework it is necessary to mention the procurement procedures in the field of external actions⁴¹. According to Annex I FR procurement procedures in the field of external actions are the following:

- (a) the open procedure;
- (b) the restricted procedure; the open or restricted procedure may be used for service and supply contracts and service concession contracts with a value of at least € 300000; works contracts and works concessions contracts with a value of at least € 5 000000;
- (c) the local open procedure; under the local open procedure, the contract notice shall be published at least in the official Journal of the recipient State or in any equivalent publication for local invitations to tender. The local open procedure may be used for:
 - supply contracts with a value of at least € 100000 and less than € 300000;
 - works contracts and works concessions contracts with a value of at least € 300000 and less than € 5000000;
- (d) the simplified procedure; under the simplified procedure the contracting authority shall draw up a list of at least three tenderers of its choice, without publication of a notice; the simplified procedure may be used for:
 - service contracts, service concession contracts, works contracts and works concessions contracts with a value of less than € 300000;
 - supply contracts with a value of less than € 100000.

In addition, contracting authorities may also use the negotiated procedure with a single tender but only in specific cases:

- where the services are entrusted to public-sector bodies or to non-profit institutions or associations and relate to activities of an institutional nature or are designed to provide assistance to people in the social field;
- where the tender procedure has been unsuccessful, that is to say, where no qualitatively and/or financially worthwhile tender has been received. In this case, after cancelling the tender procedure, the contracting authority may negotiate with one or more tenderers of its choice, from among those that took part in the invitation to tender, provided that the procurement documents are not substantially altered;

⁴¹ See Articles 178 and 179 FR and Points 36-41 Annex I FR. Procurement award procedures applying to European Union external actions are used by the Commission services responsible for the management of projects and programmes financed from the general budget of the European Union and the European Development Fund (EDF) in the context of the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as amended in Luxembourg on 25 June 2005 and Ouagadougou on 22 June 2010 (Cotonou Agreement) <http://ec.europa.eu/europeaid/prag/document.do?nodeNumber=1.1>

- where a new contract has to be concluded after early termination of an existing contract.

Finally, contracts with a value of less than or equal to € 20000 may be awarded on the basis of a single tender; payments of amounts less than or equal to € 2500 in respect of items of expenditure may be carried out simply as payment against invoices, without prior acceptance of a tender.

6. Grants

As stated above, another typical instrument of EU budget implementation within “direct management” is the grant.

According to Article 2 (33) FR ‘grant’ *“means a financial contribution by way of donation. Where such a contribution is provided under direct management, it shall be governed by Title VIII”*.

In Title VIII the scope and form of grants are defined. Grants may be awarded in order to finance either

- an action intended to help achieve a Union policy objective;
- or the functioning of a body which has an objective forming part of, and supporting, a Union policy:

This second kind of grant takes the form of a financial contribution to the work programme of the body.

On the basis of the two different functions grants are better known respectively as ‘action grants’ and ‘operating grants’.

Grants shall be covered by a written agreement⁴² normally referred to as grant agreement. In order to produce its legal effects the agreement needs to be signed by both parties. By means of this signature - a European Institution on the one side, one or more beneficiaries on the other - the successful applicant commits legally to implement the action/work programme and accepts the conditions governing this implementation as specified in the agreement.

It is possible to find in “grants” the same difference already examined between “procurement” and “public contract”. In general “grant” means the “procedure” that governs the financial contribution up to grant award and that leads to sign a grant agreement. The grant agreement is the concrete instrument which makes it possible to take advantage of the financing, either carrying out an action or helping the functioning of an organization.

Grants and procurement differ mainly on the following factors. In the case of grants, the European Institutions do not receive goods, services, etc., in exchange for payments, as in public procurement. A grant is essentially a direct payment, where the purpose consists in giving money to previously identified beneficiaries. In addition, in grants, the results of the financing remain the property of the beneficiaries.

⁴² As required by previous legislation (Commission Delegated Regulation (EU) 1268/2012 of 29 October 2012 *“on the rules of application of Regulation No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union”* (RAP) grants shall be covered *“by a decision or by written agreement. To determine the instrument to be used, the following elements shall be taken into account: a) location of the beneficiary, within or outside the Union; b) complexity and standardization of the content of the actions or work programmes funded”* (Article 174 RAP). The new Financial Regulation no longer contains this provision. In this regard it is interesting to note that according to transitional provisions set in Article 279 (1) FR *“Legal commitments for grants implementing the budget under the Multiannual Financial Framework 2014-2020 may continue to take the form of grant decisions. The provisions of Title VIII applicable to grant agreements shall apply mutatis mutandis to grant decisions. The Commission shall review the use of grant decisions under the post-2020 multiannual financial framework, in particular in view of the progress made in electronic signature and electronic management of grants by that time”*.

In the case of procurement, the European Institutions aim to obtain, for example, a product or a service they need in return for payment, while in the case of a grant they make a contribution either to a project carried out by an external organisation or directly to that organisation because its activities contribute to Community policy aims. Grants, unlike procurement, generally need to respect the principle of co-financing and the principle of no-profit. According to the first principle, except in the field of external action⁴³, the beneficiary will share part of the costs (the contracting authority will not cover 100% of the costs of the action). According to the no profit principle, grant beneficiaries may not generate profit with the EU grant they receive. Finally, while the procedure followed to award a grant agreement is launched through a “call for proposals” the one used to award a public contract is launched through a “call for tenders” or a “call for expression of interest”.

7. Different forms of grants

Grants may take any of the following forms⁴⁴:

- (1) financing not linked to the costs of the relevant operations based on:
 - (a) the fulfilment of conditions set out in sector-specific rules or Commission decisions; or
 - (b) the achievement of results measured by reference to previously set milestones or through performance indicators;
- (2) reimbursement of eligible costs actually incurred;
- (3) unit costs, which cover all or certain specific categories of eligible costs which are clearly identified in advance by reference to an amount per unit;
- (4) lump sums, which cover in global terms all or certain specific categories of eligible costs which are clearly identified in advance;
- (5) flat-rate financing, which covers specific categories of eligible costs, which are clearly identified in advance, by applying a percentage.

A combination of the single forms referred to above is also possible.

Grants based on the fulfilment of conditions or on the achievement of results is a new provision of the Regulation 2018/1046.

The grant-forms under numbers 3, 4 and 5 are better known as “simplified cost options”. In this regard, the new FR has encouraged the use of these forms by making the conditions for using lump sums, unit costs and flat rates more flexible and in particular by eliminating the 60,000 euro threshold. According to Recital 127 FR “*experience gained in the use of lump sums, unit costs or flat-rate financing has shown that such forms of financing significantly simplify administrative procedures and substantially reduce the risk of error...omissis...lump sums, unit costs and flat rates are suitable forms of financing, in particular for standardised and recurrent actions, such as mobility or training activities...omissis...In the interest of increased efficiency, Member States and other recipients of Union funds should be able to make more frequent use of simplified cost options*”.

8. Functioning of grants

⁴³ According to Article 190 (3), “By way of derogation from paragraph 1, an external action may be financed in full by the grant where this is essential for it to be carried out. In such a case, justification shall be provided in the award decision”.

⁴⁴ See Articles 180 (3) and 125 (1) FR.

The award of grants is subject to the following principles⁴⁵:

- equal treatment: applicants shall not have preferential treatment;
- transparency: grants shall be awarded following a publication of calls for proposals;
- co-financing: the resources necessary to carry out the action or the work programme shall not be provided entirely by the grant;
- non-cumulative award and no double financing: a beneficiary may be awarded only one operating grant from the budget per financial year; in no circumstances the same costs can be financed twice by the budget;
- non-retroactivity: grants shall not be awarded retroactively for actions already completed;
- no-profit: grants shall not have the purpose or effect of producing a profit within the framework of the action or the work programme of the beneficiary.

As regards the grant award procedure, the Financial Regulation provides that grants must be awarded following a call for proposals⁴⁶. Calls for proposals must specify⁴⁷: the objectives pursued; the eligibility⁴⁸, exclusion⁴⁹, selection⁵⁰ and award criteria⁵¹ and the relevant supporting documents; the arrangements for Union financing, specifying all types of Union contributions, in particular the forms of grant; the arrangements and final date for the submission of proposals; the planned date by which all applicants are to be informed of the outcome of the evaluation of their application and the indicative date for the signature of grant agreements. Calls for proposals shall be published on the website of Union Institutions and by any other appropriate means, including the Official Journal of the European Union, where it is necessary to provide additional publicity among potential beneficiaries.

Proposals are evaluated on the basis of the pre-announced selection and award criteria, with a view to determining which proposals may be financed.

⁴⁵ These principles are listed in Article 188 FR and explained in Articles from 189 to 193 FR.

⁴⁶ Article 189 FR. Grants may be awarded without a call for proposals only in the following cases (Article 195 FR):

- for the purposes of humanitarian aid, emergency support operations, civil protection operations or crisis management aid;
- in other exceptional and duly substantiated emergencies;
- to bodies with a de jure or de facto monopoly or to bodies designated by Member States, under their responsibility, where those Member States are in a de jure or de facto monopoly situation;
- to bodies identified by a basic act as beneficiaries or to bodies designated by Member States, under their responsibility, where those Member States are identified by a basic act as beneficiaries;
- in the case of research and technological development, to bodies identified in the work programme (financing decision), where the basic act expressly provides for that possibility, and on condition that the project does not fall under the scope of a call for proposals;
- for activities with specific characteristics that require a particular type of body on account of its technical competence, its high degree of specialisation or its administrative powers, on condition that the activities concerned do not fall within the scope of a call for proposals;
- to the EIB or the EIF for actions of technical assistance.

⁴⁷ See Article 194 FR.

⁴⁸ The eligibility criteria determine the conditions for participating in a call for proposals. They are listed at Article 197(2)(a)(b)(c)FR. Further eligibility criteria may be laid down in the call for proposals with due regard for the objectives of the action.

⁴⁹ On the basis of the exclusion criteria, a person or entity is excluded from participating in award procedures governed by the FR or from being selected for implementing Union funds where that person or entity is in one or more of the exclusion situations listed in Article 136 FR. The provision is the same for procurement procedures.

⁵⁰ The selection criteria are required to assess the applicant's ability to complete the proposed action or work programme (see Article 198 FR).

⁵¹ The award criteria are necessary to:

- assess the quality of the proposals submitted in the light of the objectives and priorities set and of the expected results;
- award grants to the actions or to the work programmes which maximise the overall effectiveness of the Union funding;
- evaluate the grant applications (see Article 199 FR).

The authorising officer responsible takes the award decision on the basis of the evaluation providing the subject and the overall amount of the decision, the names of the successful applicants, the title of the actions, the amounts accepted and the reasons for that choice, including where it is inconsistent with the opinion of the evaluation committee, the names of any applicants rejected and the reasons for that rejection.

When a grant is awarded, the amount of the grant does not become final until the authorising officer responsible has approved the final reports and, where applicable, the accounts. Any funds found ineligible in the context of subsequent audits, checks and investigations by the Union Institution concerned, OLAF or the Court of Auditors can be recovered even after approval of the final report.

9. Conclusions

In conclusion, it is possible to summarize the key features of the two main modalities of EU spending under direct management as following.

Through grants E.U. public bodies makes direct financial contributions following a call of proposal to support projects intended to help achieve a Union policy or organisations which promote EU interests or help implement an EU programme or policy. Grants are generally based on the reimbursement of expenditure effectively incurred by the beneficiaries or on the basis of lump sums, unit costs or flat-rate financing. Financing not linked to cost is also possible under the new FR. The results of the activities carried out will always remain the property of the beneficiaries although the grant shall not have the purpose or the effect of generating a profit for the beneficiary.

Public procurements are used for the purchase of services and material necessary for the working of the European Institutions following the launch of a call of tender or a call for expression of interest. Different procurement procedures are available; the identification of the correct procedure to be followed is carried out taking into account different elements such as the complexity of the subject matter or the estimated value of the contract. The interests involved are twofold: the European Institutions aim at selecting the most economically advantageous tender while the economic operators are interested in including an element of profit in their remuneration. The best value for money is obtained by assuring the widest possible competition through the respect of the principles of transparency, equal treatment and non-discrimination.