RIGA GRADUATE SCHOOL OF LAW

The influence of current EU public procurement legislation on the construction industry within the EU

MASTER'S THESIS

AUTHOR: Jānis Sedlenieks
LL.M 2018/2019 year student
student number M018054

SUPERVISOR: Peter Gjørtler
MA

DECLARATION OF HONOUR:

I declare that this essay is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) …….

RIGA, 2019

ABSTRACT

The single market has been set as one of the base preconditions for the growth of the common market and separate member state economies which should in turn lead to the ultimate goal of achieving better living conditions for the citizens of the European Union.

One of the factors directly influencing the most widely used measure for economic activity – the gross domestic product, is the amount of government spending. Since the majority of government spending is done through the different kinds of public procurement procedures, it is vital that these procedures are also aimed at the objective to create a single market within the European Union.

The construction industry has had a significant influence on the overall amount of not only government spending but also private sector investments. Thus it has an important role in the overall economic situation of any particular member state and the European Union in general.

In this thesis the influence of the EU legislation on the public procurement market of the construction industry will be studied. The most important factors which hinder the involvement of foreign companies in procurement procedures of other member states will be determined and analysed.

SUMMARY

The aim of the Master Thesis "The influence of current EU public procurement legislation on the construction industry within the EU" is to identify the role of EU public procurement legislation in ensuring the common market principles in the public procurement procedures within the construction industry.

The introduction of the thesis will provide for a brief insight into the overall topic and the main research goals will be defined. The questions which need to be answered in order to reach the defined goals will be set.

The main body of substance of the thesis will be divided into four chapters.

In order to highlight the economic relevance of the topic, a brief overview of the principle of the single market of the EU as well as some introduction into the public procurement regime of the EU and the overall relevance of the construction industry will be presented in the first chapter of the thesis. To further evaluate the economy side of the matters, an insight into the current situation of the construction industry of the Republic of Latvia will be presented with regard to the international competition within it. The possible legal issues hindering the prosperity of the single market will be indicated as well as some reasoning on why the cross border trade should be present from the point of view of the Ricardian theory of comparative advantage.

In the second chapter the existing legal issues which hinder the full power of the single market will be highlighted by performing a comparative analysis of the transposition of the EU legislation into the national legal systems of the individual member states. Further emphasis will be added on the possible reasons for differing interpretations of the EU legislation on public procurement by different users of the law.

The third chapter will be devoted to the analysis of the possible reasons for differing opinions on the way how the EU legislation on public procurement should be interpreted and on which objectives the emphasis should be added.

Lastly, in the fourth chapter, the potential evolution of the EU legislation on public procurement will be analysed by providing an insight into the relevant case law of the Court of Justice of the European Union and a possible path for the further development of the EU rules on public procurement will be suggested.

In the conclusion a summary of the findings of the thesis will be provided and the questions set out in the introduction will be answered and the answers will be reasoned.

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1 INTRODUCTION

The European Union has existed in one form or another for more than sixty years. The documents on establishing the first forms of the European Community contain in their substance the objectives to provide for a single European market which should in turn ensure the prosperity of the whole European society.[1]

However, the common market of the EU still has its issues and the principles of the single market are not present in every aspect and sector of the market. This is observable in the everyday professional life of the participants of the construction industry since the international competition is not as advanced as the principle of the single market would suggest it should be. The lack of international competition is especially noticeable within the territories of the member states which have accessed the EU in this millennium, since they have not had as much time to adjust and accept the freedoms provided by the market economy and the European Community.[2] The main reasons hindering the full potential of the single market should be indicated and analysed in order to find a possible path of further evolution which would lead to the achievement of the full potential of the single market.

As one of the most relevant sectors of the economy, the construction industry should definitely be considered as a valuable tool which could be used in order to achieve a strong and sustainable single market within the EU.[3] The relevance of the construction industry can be further emphasised by the fact that it is taken into account when the central banks are devising their monetary policies as well as the fact that the construction industry is rather often used by the governments to explain the overall state of the economy to the general public.

As one of the five basic economic factors taken into account when describing the construction of the gross domestic import, the government spending can also be considered as one of the major influencers of the economy, thus providing the public procurement sector with a reasonable power to impact any kind of market sector. It can be speculated that the majority of government spending through public procurement in terms of absolute value are devoted to the construction industry and that in the majority the construction industry is financed by these same government spending especially in the developing countries like the new accessors of the EU.

By combining the construction industry and the public procurement, the result is a significant tool which can be used to achieve all kinds of objectives and interests, regardless if those objectives are economic, social or political.[4]

This research will be performed with the objective to provide an insight into the effects of the EU legislation on the governance of this significant tool with regard to the

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[1] Treaty establishing the European Coal and Steel Community, Article 2, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:xy0022, accessed May 19, 2019.
[2] Sue Arrowsmith, "The past and future evolution of EC procurement law: From framework to common code?", *Public Contract Law Journal*, 35(3) (2006), p. 383.
[3] European Commission, *The European construction sector. A global partner*, Ref. Ares(2016)1253962, March 11, 2016.
[4] Albert Sanchez Graells, *Public procurement and the EU competition rules. Second edition* (Oxford: Hart Publishing Ltd, 2015), pp. 77-78.

ensuring of the principle of the single market as the main objective set by the founders of the European Community.

Although, numerous studies can be found on each of these topics separately and in a variety of combinations and there is a vast amount of relevant case law covering the significant issues, there are still issues to be addressed within this field. The principle of the single market is not yet fully sufficient in the sector of construction services and the public procurement rules could be identified as one of the reasons for this insufficiency.

Since the EU legislative rules on public procurement are not provided in a form of a regulation which would be directly applicable across the EU, there is a significant amount of differences in the interpretation of these rules. The interpretations are performed on the supranational level by the EU institutions and the Court of Justice of the European Union as well as on the national level firstly by the national legislators of the individual member states, secondly by the contracting authorities and the national institutions of the separate member states and thirdly by the economic operators which are participating or planning to participate in the public procurement procedures for the awards of public contracts.

Since it will not be possible to drew into every detail of all the possible issues hindering the full employment of the principle of the single market because of the volume of the research, the main principles of issues will be indicated and examined by providing and explaining specific examples.

In order to reach the aim of this thesis in as efficient manner as possible, the following questions shall be answered and the answers shall be reasoned:

1. Is the current EU legislation on public procurement effective and does it reach the aim to ensure the principles of the common market?

2. Does the EU legislation on public procurement influence the market activities of the construction industry and how?

3. Which direction of evolution should be chosen for the EU public procurement legislation? Is a Regulation needed or should the matter be left to the legislators of the individual member states?

The answers to these questions will be found by performing an analysis of the current EU legislation on public procurement in order to clarify the objectives to be achieved by this legislation and the means provided by the legislation for the achievement of these objectives.

Further a comparative study of the interpretations of the EU legislation on public procurement will be performed in order to understand and identify the possible issues and deficiencies enclosed within the legislation itself and the whole legislative process in general.

In conclusion the possible development of the legislative process will be analysed in order to understand the future direction of the evolution of the EU rules on public procurement.

2 INTERNATIONAL COMPETITION IN PUBLIC PROCUREMENT OF LATVIA

Competition within the single market of the EU is a necessary mean in order to ensure a natural environment for the economy to develop in, thus it has been quite correctly put that:

> [C]ompetition is a general principle of EU (economic) law that must be taken into account in the design of all types of economic regulation.[5]

This should be correct for the individual markets of each separate member state, as well as the internal market in general. The EU economic legislation should indeed be aimed on openness of the internal market as it was intended since the founding of the first European Community.[6]

Public procurement is closely related to the principles of the common market and should be regarded as one of the significant ingredients necessary for the ensuring of the principle of the single market within the EU.[7] The general importance of the public procurement as a tool which can be used inappropriately will be briefly described by this chapter. The topicality of the Thesis will be reasoned by giving a brief market analysis of the construction industry in general, the part of the market financed by public funds and the part which is attributable to non-domestic companies participating in public procurement procedures.

In order to achieve a stronger single market the public procurement sector should be improved accordingly.[8] However, if a more advanced single market is the objective of the public procurement rules, there should be a harmonized and generally accepted definition on what exactly is to be understood as a more advanced single market.

2.1 The principle of the single market in the EU

The European Union is an economic union which has its beginnings in the European Coal and Steel Community. The Treaty for the establishment of the European Coal and Steel Community provides the idea of a common market as the main pillar on which the success of its objectives should be based on.[9] Furthermore, the basic definitions on the main goals to be achieved in order to ensure the functioning of the common market are given within the treaty.[10] Although, the treaty is only subjected to the coal and steel trade within the six member states which originally signed the treaty, it has formed the base of all further European Union agreements and principles.

The idea of a single market within the whole European Union is still being pursued today and there are numerous publications and official documents in which the necessity of such a market is emphasised and supported. The single market is the base condition for the competitiveness of the European economy on a global scale which provides the possibility for

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[5] *Ibid*, p. 13.
[6] Treaty establishing the European Coal and Steel Community, *supra note* 1.
[7] Christopher Bovis, *The law of EU public procurement. Second eddition* (Oxford: Oxford University Press, 2015), p. 9.
[8] European Commision, *Making Public Procurement work in and for Europe*, COM/2017/0572 final, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A572%3AFIN, accessed May 19, 2019.
[9] *Supra* note 1.
[10] *Ibid*, Article 4.

the overall economy of the EU to grow.[11] The more unified the market the bigger the common economy which leads to a greater power to influence the global market.

The main principle of the common market is the free movement of goods and services throughout the whole EU.[12] This works very well on paper; however, in reality there are still numerous burdens set by the individual member states for non-domestic suppliers and producers. These burdens are not always regulatory or legislative; they can also be defined as the common practice or even as a social discrimination or prejudice.[13] Although, the European Union has put its best efforts in ensuring a union wide common market for more than sixty years and provided for clear interpretations of the main principles of the internal market with the help of the Court of Justice of the European Union,[14] there are still very sensible differences between the perception of quality of goods and services coming from the western countries of the union in comparison to the same products originating in the East of the union. In some instances these differences are supported by actual and measurable differences,[15] however, in a large amount of cases the differences are perceived to be present only because of historical beliefs and social aspects set by the society. The principles of the single market are even further hindered in the countries which joined the EU in year 2004 and later since they have had less time to implement the principles in their legislative systems. The reasons for hindering an appropriate transposition are mainly connected with the perception of the society and thus the legislators themselves. The understanding for the need of the single market and the benefits from such a concept are clouded by nationalistic reasons and some false prejudice and comparison to the single market of the Soviet Union.

By taking a closer look at a single industry within the European Union such as the construction industry, the reasons for possible burdens for ensuring a single market become more evident. In principle the main idea of a single market should provide for free movement of construction specialists, companies and materials throughout the European Union.[16] In practise this is not the case. The main reason for it can be identified instantly and it is the lack of harmonization between the specific and professional requirements between the member states. The situation has drastically improved in the segment of construction materials by the entry into force of the Regulation (EU) No 305/2011.[17]

The uniform and harmonized rules set down by this Regulation minimise the risks of international discrimination and they abolish any kind of possible limitations set by the national rules with respect to usage of products originating from anywhere within the EU since the Regulation (EU) No 305/2011 has to be directly applied across the EU which does

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[11] European Commission, *The European Single Market*, available on: https://ec.europa.eu/growth/single-market_en, accessed May 19, 2019.
[12] *Ibid.*
[13] *See* subchapter 2.4 Differences in the legal requirements for the construction process within the EU which affect the public procurement, pp. 13-16, *also* 3.3 Provisions of the Directive 2014/24/EU on recognition of professional qualification, pp. 23-25.
[14] Judgement in *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein*, C-120/78, ECLI:EU:C:1979:42.
[15] Olga Sehnalova, *Report on dual quality of products in the single market*, available on: http://www.europarl.europa.eu/doceo/document/A-8-2018-0267_EN.html, accessed May 19, 2019.
[16] *Supra* note 11.
[17] Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC Text with EEA relevance, *OJ L* 88, 4.4.2011, pp. 5–43, available on: http://data.europa.eu/eli/reg/2011/305/oj, accessed May 19, 2019.

not allow for differing rules set by the individual member states. Furthermore, by setting harmonized and uniform rules on the recognition requirements for quality of the products, the Regulation (EU) No 305/2011 opens the EU market to such goods originating from third countries as well. Any producer wishing to participate in the EU market of construction materials can receive a uniform acknowledgement of the quality of their product and market it across the whole EU without the interference of national legislation hindering such activities. This provides for the possibility to diversify the market and increase competition thus reducing the costs. Since the rules are uniform within the whole EU internal market, the producers originating from third states are interested to invest the means necessary to receive the appropriate acknowledgements. If no such rules would be present, the individual markets of the member states especially the smaller ones, would be of no interest to such producers since the provisional return of their investment would be less tempting.

The principle of free movement of professionals within the EU is ensured by the Directive 2005/36/EC. [18] The Directive 2005/36/EC has a direct impact on the recognition of expertise of foreign professionals, since it sets out a list of specific criteria based on which the professional abilities should be evaluated by the competent authorities of the host member state.[19] However, it has a reduced influence on the ensuring of the common market within the construction industry, since only the profession of the architect can be automatically recognised by any member state, leaving other professions like construction supervisor or construction manager with the burden of proving their professional capabilities separately in each individual member state.[20] According to paragraph eleven of the preamble of the Directive 2005/36/EC the individual member states can set out individual requirements for the recognition of any professional qualification if it is deemed necessary by the general public interest. This explanation basically gives the right to a member state to interpret the directive in an unreasonable manner which can lead to unnecessary or discriminatory burdens set by the member state for any non-domestic professionals pursuing their profession in that particular member state. Nevertheless, the legislators should take into account the case law of the Court of Justice of the European Union which has provided in numerous cases the correct interpretations of the principle of public interest and its applicability in different circumstances.[21]

Similar burdens as for professionals can be set for foreign construction companies as well. The most basic one which should be mentioned is the need for a special registration for any company performing construction within a specific member state. A more detailed analysis of such regulations will be provided further in this research with the example of requirements set out for construction companies in the Republic of Latvia.[22]

Although, none of these burdens can be considered as prohibiting the international competition, it is safe to say that they set the grounds for additional admistrative expenses for

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[18] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Text with EEA relevance), *OJ L* 255, 30.9.2005, pp. 22–142, available on: http://data.europa.eu/eli/dir/2005/36/oj, accessed May 19, 2019.
[19] *Supra* note 18, Chapters I, II and III.
[20] *Supra* note 18, Article 21.
[21] Opinion of Advocate General Szpunar, *European Commission* v *Federal Republic of Germany*, C-377/17, Celex No. 62017CV0377, para. 83-85, available on: Westlaw International database.
[22] *See* Subchapter 2.4 Differences in the legal requirements for the construction process within the EU which affect the public procurement, pp. 13-16.

the companies and individuals, thus substantially reducing their competitiveness against domestic market participants.

All of the above mentioned issues are essentially crucial in the sector of the construction industry which is financed by the public funds. In general all public spending within the European Union is governed by different kinds of public procurement rules both domestic as well as EU wide regulatory requirements.[23] This fact puts even more emphasis on the formal requirements set for the potential participants in the procurement procedures which further restricts the competition within the public procurement market of the EU.[24]

2.2 Public procurement in the EU

Throughout the history of mankind the need for the management of public capital has been evident since people are generally considered to be social beings living in groups.

Although, in modern times there still are different kinds of governing systems even among the different member states of the EU, the idea of the need of an efficient management of public funds is present among every state in the World. Whether it is just an idea or a clear strategy pursued by all the governing bodies as a whole, is a subject for a different topic; however, the EU has defined the main objectives of its public procurement policies very clearly and the relevant steps in ensuring the fulfilment of these objectives are following.[25]

There is no one single definition of public procurement in the World since the process itself has different names around the Globe[26]. However, the term "Public procurement" is used within the European Union and it is accepted by the society as understandable and sufficiently self-explanatory since it is easily deductible from the direct wording of the term that the process should provide some form of acquisition of a product and it should be done with regard to the public. In a more precise sense; the word "procurement" represents the various forms of acquisition of different kinds of goods and services while the word "public" represents the fact that the previously mentioned acquisition should be performed in the name of the public or society. Since it is performed in the name of the public it automatically demands that the public is also the source for the funding of the specific acquisition at hand. Nevertheless, complicated cases involving a variety of factors which attribute to some degree of misunderstandings of the public procurement concept are evident in the case law of the Court of Justice of the European Union.[27] However, such complicated cases relevant to the concept of public procurement in general will not be studied within the scope of this research.

The EU legislation provides for a rather complicated description of the public procurement process in the paragraph 2 of article 1 of the Directive 2014/24/EU which is one of the main EU legislative acts on public procurement currently in force:

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[23] *See* Chapter 3 EU legislation on public procurement, pp. 21-33.
[24] Graells, *supra* note 4, p. 246.
[25] European Commission, *Public procurement strategy*, available on: http://ec.europa.eu/growth/single-market/public-procurement/strategy_en, accessed May 19, 2019.
[26] Robert E. Lloyd and Clifford P. McCue, *What is public procurement? Definitional problems and implications*, International public procurement conference proceedings, no. 3 (January 2004), available on: https://www.researchgate.net/publication/237538383_WHAT_IS_PUBLIC_PROCUREMENT_DEFINITIONAL_PROBLEMS_AND_IMPLICATIONS, accessed May 3, 2019.
[27] Opinion of Advocate General Sharpston, *European Commission* v *Italian Republic*, C-526/17 Celex No. 62017CV0526, Available on: Westlaw International database.

> Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.[28]

This definition provides a significant amount of possibilities for various interpretations. Thus it increases the scope of application of the Directive 2014/24/EU; however, this is countered by limitations of scope provided in paragraph 1 of article 1 of the Directive 2014/24/EU.[29]

In order to further consolidate the description of public procurement for the purposes of this research, the term "public procurement" shall be understood as a composition of procedures which are used by public authorities in order to ensure a transparent and efficient process of acquisition of any kind of good or service including construction.

Although, there are different kinds of procedures which can be chosen by the contracting authority according to the amount of funds planned for spending and the type of product needed, there is a set of unitary principles for all kinds of public procurement procedures which can be found in the recital 1 of the Directive 2014/24/EU:

> The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition.[30]

This recital provides not only for the definition of the main objectives of the current EU legislation on public procurement, it also provides for some reasons of the possible differences in the interpretation of the rules provided by the Directive 2014/24/EU.[31]

The pure economic importance of the public procurement sector of the EU can be introduced by examining some key figures provided by the overall economic statistics of the internal market. Public procurement in the EU internal market accounts for around 14 percent of the annual gross domestic product of the EU.[32] And it has been estimated by the European Commission that more than two hundred and fifty thousand public authorities are involved in the public procurement procedures which are being performed on a daily basis.[33] This shows the fact that public procurement has a reasonably large impact on the overall economy of the EU, and it should be taken into consideration when performing any kind of microeconomic or macroeconomic analysis for separate sectors of the whole economy such as the construction industry.

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[28] 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 Text with EEA relevance, *OJ L* 94, 28.3.2014, p. 65–242, Article 1 para. 2.
[29] *Ibid*, Article 1 para. 1.
[30] *Ibid*, Recital 1.
[31] *See* Chapter 4 Interpretations of the "ultimate goal" of the EU public procurement rules, pp.33-41.
[32] European Commission, *Policies. Public procurement*, available on: https://ec.europa.eu/info/policies/public-procurement_en#objectives, accessed May 19, 2019.
[33] *Ibid*.

2.3 The importance of the construction industry

The construction industry accounts for approximately 9 percent of the gross domestic product of the EU and it provides eighteen million direct work places for the EU citizens.[34] This represents the importance of the construction industry in the economy of the EU as one of the largest single contributor to the overall economic activity.

The production in construction is used by the European Central Bank and central banks of the member states as well as other EU institutions as one of the principal European economic indicators for the support of their economic and monetary policies.[35]

There is a direct link between the construction industry and other sectors of the economy like production of construction materials, production of technologies used in the construction industry and the mining of raw materials. Since the construction industry accounts for such a large part of the overall economy, it can be speculated that it can affect any other participant of the overall market including individuals or simple households. The changes in the whole construction industry can influence prices for housing or construction materials as well as the levels of wages.[36]

Without any reasonable doubt the construction industry should be considered to have a significant impact on the ensuring of the single market principle within the EU. It is obvious that by taking up such a large part of the overall economy, it would be impossible to fully ensure a common market if the construction industry does not participate in the construction of it. Furthermore, the European Commission has already started the process of strict regulation of the construction industry, at least to some extent, by introducing the Regulation (EU) No 305/2011.[37] This regulation has a direct effect on the construction material market and it regulates the harmonization of quality and marketing requirements for all kinds of construction products.[38] Although, there still are some issues with the application of the regulation in practise, it can be considered as a solid first step in the direction of a harmonized construction market of the EU as a fully functioning participant of the single market.

Nevertheless there are still a number of differences in other sectors of the construction industry between the individual member states. These include different approaches to professional qualification of the labour as well as differences in the rules for construction process in general.[39] These differences influence the principle of a single market directly by setting different requirements for the participants of the market in different member states as well as they hinder the participation of potential tenderers who are wishing to participate in non-domestic public procurement procedures.

2.4 Differences in the legal requirements for the construction process within the EU which affect the public procurement

There is no harmonization of rules governing the construction industry among the member states of the EU other than the Regulation (EU) No 305/2011 and the EN Eurocodes which

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[34] *Supra* note 3.

[35] Eurostat, *Principal European economic indicators*, available on: https://ec.europa.eu/eurostat/documents/4031688/5928360/KS-30-10-689-EN.PDF/bf7da443-edf0-4d48-ad65-373ee6ec4c69?version=1.0, accessed May 19, 2019.

[36] Rune Wigren, Mats Wilhelmsson, "Construction investments and economic growth in Western Europe", *Journal of Policy Modeling* 29 (2007): pp. 449-450.

[37] *Supra* note 17.

[38] *Supra* note 17, Article 1.

[39] *See* Subchapter 2.4 Differences in the legal requirements for the construction process within the EU which affect the public procurement, pp. 13-16.

standardize the purely basic requirements for construction safety.[40] Each member state has its own legal requirements for the construction process itself as well as requirements for the persons participating in the construction process.

The overall objectives of rules governing the construction industry are similar in the legal systems analysed in this research; however, the specific means used in order to achieve the objectives are significantly different.

In order to provide for an insight into some of the different requirements set by different member states, the main rules governing the construction industry in the Republic of Latvia and the legislation on construction industry in the Republic of Lithuania will be compared and the main differences with emphasis on the requirements for qualification of the market participants will be analysed within the following subchapters.

2.4.1 Requirements of the law on construction of the Republic of Latvia

The Law on construction of the Republic of Latvia provides the reasoning of the law in its second article. The article states that the law should provide for a qualitative living environment by efficiently regulating the construction process. In order to achieve the main objectives, a sustainable economic and social growth should be established as well as the historical and environmental values should be preserved. This all should be achieved while ensuring an efficient use of the energy resources.[41] The objectives stated in this article seemingly provide a reasonable objective for the law. However, without regard to other provisions of this article, it is questionable whether the efficient regulation of the construction industry has been achieved and to which extent this law provides for the objective of economic and social development.

Some of the provisions set by the Law which directly influence all persons wishing to participate in the construction industry of the Republic of Latvia regardless of their legal status or state of origin are the provisions set out in article 22 of the Law.

The article explicitly states that in order to participate in any kind of commercial activity within the construction industry of the Republic of Latvia, a company should be registered in the construction company registry of the Republic of Latvia.[42] The first paragraph of the article ads the obligation to the company wishing to get registered to indicate all the construction specialists it employs on the grounds of an employment contract. Furthermore, the second paragraph of the same article provides for the requirement that the construction company is allowed to participate in only those specific spheres of the construction industry in which it has appropriate specialists.

Regardless of the fact that the requirement of such special registration could be against the principles of mutual recognition and the single market, this article is subjected to any kind of commercial activity within the construction industry and requires the same actions to be

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[40] Commission Recommendation of 11 December 2003 on the implementation and use of Eurocodes for construction works and structural construction products (Text with EEA relevance) (notified under document number C(2003) 4639), *OJ L* 332, 19.12.2003, p. 62–63, available on: http://data.europa.eu/eli/reco/2003/887/oj, accessed May 19, 2019.

[41] Būvniecības likums (Construction Law), 09.07.2013, Latvijas Vēstnesis, 2013, 30. Jūlijs, nr. 146 (4952), Article 1.

[42] *Ibid*, Article 22.

performed by domestic as well as foreign companies which intend to perform any kind of construction within the territory of the Republic of Latvia.

The wording of these paragraphs can cause some additional confusion since no reasoning is provided why only the construction specialists employed on the basis of an employment contract should be notified about and is it meant that only these specialists are the ones which the company *has* with regard to the last sentence of the second paragraph of the article which requires the company to *have* specialists in any particular sphere of the construction industry in which it wishes to perform in.

The main criteria to fulfil in order for the company to be registered in the public construction company registry is the employment of at least one specialist with the specialisation in the specific construction sphere in which the company wishes to perform its services. In the case of building construction the desired specialisation would be building construction management. This specialist should be registered in the same public registry where the company only as an individual.[43]

There are two ways for a foreign company to achieve this criterion. Firstly it can hire a local specialist which is already registered in the registry. Secondly the foreign specialists which the company already employs can get registered in the registry; however, this would require a submission of a declaration to the specially authorized institution in the specific construction sphere or in some cases even a special permit from these institutions will be necessary. The definitions on which procedure is applicable can be found in the list provided by the law on the order in which temporary provision of services in a regulated profession can be performed.[44]

2.4.2 Requirements of the law on construction of the Republic of Lithuania

The law on construction of the Republic of Lithuania has a slightly different objective than the law on construction of the Republic of Latvia. In article 1 of the Lithuanian law on construction the reason and applicability of the law is provided. The article concerns itself more with the necessity to harmonize the construction processes and to involve as much standardization as possible in order to protect the interests of all the persons who might be concerned.[45] Although, the wording of the provision differs quite significantly from the wording adopted by the Latvian law on construction, the objective of protection of all kinds of interests is similar.

In order to provide a valuable comparison between the construction law of the Republic of Latvia and the according law of the Republic of Lithuania the relevant provisions on requirements for the potential contractor should be analysed

[43] Būvkomersantu reģistrācijas noteikumi (Rules on registration of construction companies): Ministru kabineta 2014. gada 25. februāra noteikumi nr.116, Latvijas Vēstnesis, 2014, 7. marts, nr. 48 (5108).
[44] Īslaicīgu profesionālo pakalpojumu sniegšanas kārtība Latvijas Republikā reglamentētā profesijā (Order of temporary provision of professional services within a regulated profession within the territory of the Republic of Latvia): Ministru kabineta 2017.gada 28.marta noteikumi Nr. 168, Latvijas Vēstnesis, 2017, 30. marts, nr. 66 (5893).
[45] Lietuvos Respublikos Statybos Įstatymas (Law on construction of the Republic of Lithuania), 19.03.1996, Valstybės žinios, 1996, 10. apr, , nr. 32 (788), Article 1 para. 1.

The law on construction of the Republic of Lithuania provides the provisions on requirements for the construction companies in article 18.[46] Paragraph 2 of article 18 of the law on construction of the Republic of Lithuania provides for a specific rule which states that the right to perform construction contracts are provided to any company originating from any other member state of the EU, Switzerland or a country included in the European Economic Zone with the precondition that such a company has received the right to perform construction contracts under the applicable rules in its country of origin.[47] Since this implies that no further approval is needed other than the approval of the authorities of the state of origin for a company to perform construction contracts within the territory of Lithuania, it is safe to say that the Lithuanian construction industry is more open to cross-border trade than the construction industry of the Republic of Latvia.

The significance of this one seemingly small difference of the laws on construction will manifest itself further in this research when the analysis of the public procurement regulations will be performed.[48]

2.5 The state of the Latvian construction market with regard to the rate of participation by foreign companies

In order to evaluate the Latvian construction industry in terms of its participants and their state of origin, the construction company registry of the Republic of Latvia is a fairly useful tool. Since no construction can be performed without the prior registration in this registry, all of the active participants of the construction industry are registered.

Currently there are fifteen thousand sixty six records in the registry, five thousand seven hundred thirty seven of which are considered to be active registrations. Three hundred and sixty two records from the complete amount are general partnerships which include a combination of one or more companies from the individual records; however, there are only one hundred and sixty three active general partnerships which can be considered as a relatively small part of the overall amount of the active companies. Thus the fact that some companies, because of this reason, appear twice or more times in the registry, does not influence the overall prospect of the current situation within the registry.[49]

In order to get a perspective on the current activity of foreign construction companies operating within the territory of Latvia, the amount of foreign companies which are registered should be obtained, since if any foreign construction company has been awarded with the right to perform a construction contract, the company should be registered in the registry not later than before the start of actual performance of the contract. Thus the companies which are registered can be considered as the currently active market participants in the Latvian construction industry.

At this moment there are one hundred and nine foreign companies which are registered in the registry and are considered active. There are also one hundred and twenty four companies which have been registered in the registry; however, due to various reasons

[46] *Ibid*, Article 18.
[47] *Ibid*, para 2.
[48] *See* chapter 3 EU legislation on public procurement, pp. 21-33.
[49] The construction company registry of the Republic of Latvia, available on: https://bis.gov.lv/bisp/lv/construction_companies, accessed May 19, 2019.

their registration is no longer active. In order to provide a topical study, the inactive companies and the reasons for their exclusion from the registry will not be studied at this point. It should also be noted that the number of registered and active or inactive companies varies on a daily basis; however the actual number fluctuates around a hundred active records at any given moment.[50]

Although, not all of the companies registered in the construction company registry truly perform real construction works and there are some companies which are registered for the reason to simplify their own internal construction processes,[51] the proportion of the domestic companies and the foreign establishments becomes evident. Less than 2 percent of registered companies are companies originating from other state than Latvia. The complicated administrative and legal system of the Republic of Latvia can definitely be held responsible for such a low foreign activity in the construction industry of the Republic of Latvia.

The low amount of registered companies explains the rather low rate of construction import of the Republic of Latvia. It is estimated by the Latvian construction company association that in year 2017 the overall construction import amounted to only 42 million euros.[52] And this is not an extreme amount since the overall construction import has fluctuated around 30 million euros per year for the last ten years.[53] In order to put these amounts into perspective it should be noted here that the overall gross domestic product of the Republic of Latvia is estimated to be around 22.7 billion euros in real nominal value and the construction industry accounts for approximately 6 percent of this value which is around 1,4 billion.[54] This shows that the amount of construction works imported account for approximately 3 percent of the overall construction industry of the Republic of Latvia.

Since not all of the construction works which are imported are performed by a public works contract, it can be speculated that the overall amount of construction works procured by a public procurement procedure is even lower. It should also be taken into consideration that even in the case that a public works contract is concluded with a foreign company, some of these contracts include a general partnership or a different kind of establishment of companies which can also include a domestic company as one of the partners.

These statistics provide for an insight into the state of the Latvian construction market which provides for evidence of the fact that the cross-border trade in the construction industry of the Republic of Latvia is so low that it can be considered as non-existent.

2.6 The participation of the Latvian construction companies in the construction markets of the neighbouring EU member states

The overall exports of the construction industry of the Republic of Latvia are estimated to amount to approximately two hundred and sixty seven million euros in year 2017. The

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[50] *Ibid.*

[51] *E.g.*, A manufacturer of furniture can register as construction a company in order to perform the construction of new premisses for its own use by concluding the relevant subcontractor agreements itself in order to avoid the necessity for an intermediary cmpany acting as a general contractor.

[52] Latvian construction company association, Export and Import of the construction industry, available on: http://www.latvijasbuvnieki.lv/chart/2018-10-buvniecibas-eksports-imports/, accessed May 19, 2019.

[53] *Ibid.*

[54] The central statistics bureau of the Republic of Latvia, *The gross domestic product and the gross national income*, available on: https://www.csb.gov.lv/sites/default/files/data/Skoleniem/IKP.pdf, accessed May 19, 2019.

exports have experienced a steady growth for the last ten years.[55] However, taking into account the overall size of the construction industry, this again is a rather small part of it.

Some of the largest construction companies of Latvia have tried to enter the construction markets of the neighbouring EU countries. Some rather successful attempts have been made by the join-stock construction company "UPB" which has participated in some rather large scale construction projects in the Scandinavian countries; however, this participation has been achieved as a subcontracting company for specific types of works under a domestic general contractor.[56]

The join-stock construction company "LNK GROUP" has performed similar activities as the join-stock company "UPB" by putting more emphasis on central Europe. However, the significant difference is that "LNK GROUP" has performed two projects as a general contractor in a public works contract in Lithuania.[57]

The absolute leader in cross-border public construction performance among the Latvian construction companies is the join-stock company "BMGS" which has performed several public works contracts in the Republic of Lithuania as a general contractor under a public works contract. It has also participated as a subcontractor in several projects within Scandinavia.[58] Nevertheless, the absolute majority of construction projects which have been performed by JSC "BMGS" remain within the territory of the Republic of Latvia. As stated by the executive director of JSC "BMGS" Kirils Loskjarnovs, there are several significant factors which hinder the Latvian construction company competitiveness in the construction industries of the neighbouring EU member states. The main reason indicated here is the unpredictability of the foreign market because of the lack of harmonized rules. An example of this being, the unpredictable quality requirements imposed by the local practices of the construction industry, which are not governed by any standards or other set of rules. This factor requires the participation of a local construction company or at least some local construction experts which leads to the conclusion that it is more efficient to establish a subsidiary in the particular member state rather than participating in the construction industry as a foreign company originating from a different member state.[59]

The statistical analysis of the construction industry of the republic of Latvia provides for the conclusion that there are factors hindering the cross-border trade and that the influence of these factors is so great that the cross-border trade is almost non-existent regardless of the fact that the principle of the single market should adhered to with regard to the construction industry in the same way as with other sectors of the economy.

The Ricardian theory of comparative advantage should be a useful tool to implement in order to further understand the possible economic factors which affect the internationality factor of the construction industry.

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[55] *Supra* note 52.
[56] Join-stock Company "UPB", *References*, available on: https://www.upb.lv/en/references, accessed May 19, 2019.
[57] Join-stock Company "LNK GROUP", *Operational map*, available on: http://www.lnk.lv/en_US/about/darbbaskarte, accessed May 19, 2019.
[58] Join-stock Company "BMGS", *Our projects*, available on: https://www.bmgs.lv/lv/projects, accessed May 19, 2019.
[59] Interview with Kirils Loskjarnovs, executive director of Join-stock Company "BMGS".

2.7 The theory of comparative advantage in cross-border construction industry

The Ricardian theory of comparative advantage suggests that the relative productiveness of the labour force is the main determinant of international trade.[60] Although, this theory does not provide for an actual model of the existing trade due to the limitations and assumptions it requires in order to function, it can be used to predict the possible trade patterns which should theoretically become evident as trading actually commences.[61]

The classical application of the Ricardian model for the assessment of potential advantages of international trade is done by comparing two different industries of two different countries.[62] Since this research is limited only to the construction industry, two different parts of the construction industry will be taken as an example. The comparison will be done between the transport infrastructure and the public building sectors of the construction industry of Lithuania and the same construction industry sectors of the Republic of Latvia.

By using the statistics on total employment in the construction industries and the total value added by the industries in general, the relative productiveness can be calculated as the amount of value added per one employee. According to the statistics of year 2015, the relative productiveness of the construction industry of the Republic of Latvia was eleven thousand seven hundred eighty four euros per employee and the relative productiveness of the construction industry of the Republic of Lithuania was eleven thousand eight hundred forty one euros per employee.[63] These statistics prove that there is no need for further analysis of the Ricardian model since the labour productiveness of the construction industries is almost identical, thus none of the countries has a comparative advantage in the construction industry.

However, since the statistics are not provided for each of the subsectors of the construction industry separately and the labour efficiency is slightly higher for the construction industry of the Republic of Lithuania, it can be argued that the Lithuanian construction industry has an absolute advantage in comparison with the construction industry of the Republic of Latvia.[64]

It should be argued that there is a chance that by comparing the individual subsectors of the construction industries, the results might differ and the potential advantages might balance each other, thus creating the equilibrium which can be observed in real life by the non-existence of the cross border trade between the construction industries of Latvia and Lithuania.[65] However, if factors which are excluded from the Ricardian theory of comparative advantage like size of the economy, access to raw materials, transportation costs and other

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[60] Stephen S. Golub, Chang-Tai Hseih, "Classical Ricardian Theory of Comparative Advantage Revisited", *Rewiev of International Economics*, 8(2)(2000): p. 221.
[61] *Ibid.*
[62] *Ibid*, p. 222.
[63] Eurostat, *Constructionof buildings staistics – NACE Rev. 2*, available on: https://ec.europa.eu/eurostat/statistics-explained/index.php/Construction_of_buildings_statistics_-_NACE_Rev._2, accessed May 19, 2019.
[64] Stergios A. Seretis and Persefoni V. Tsaliki, "Absolute Advantage and International Trade: Evidence from Four Euro-zone Economies", *Review of Radical Political Economics* 48(3) (2016): p. 443.
[65] *Supra* note 52.

relevant economic factors are taken into account, the Lithuanian construction industry would still have a slight advantage over the Latvian construction industry.

The rather small advantage of the Lithuanian construction industry would explain the fact that it has not taken over the construction industry of Latvia completely; however, it raises the question why the competition from the Lithuanian construction industry is almost non-existent in the Latvian construction market.

Since the public procurement market accounts for more than a half of the whole construction industry of the Republic of Latvia,[66] the possible reasons for the lack of cross-border trade in the construction sector will be studied further in this research by indicating the possible legal issues concerning the specific nature of rules governing the cross-border public procurement procedures for public works contracts.

[66] Confederation of employers of the Republic of Latvia, *Evaluation of the influence of policy – Report of market analysis on the construction industry*, available on: http://www.lddk.lv/wp-content/uploads/2018/08/buvnieciba.pdf, accessed May 19, 2019.

3 EU LEGISLATION ON PUBLIC PROCUREMENT

A brief introduction on the history of the EU legislation on public procurement is required in order to understand the path and the basic principles and objectives of the EU legislation on public procurement which have not significantly changed since the drafting of the first rules governing public spending within the EU. Nevertheless, it should be noted that the nature of the rules has progressed from a more general framework towards more specific rules.[67]

This path has been further strengthened by the adoption of the Directive 2014/24/EU which has been adopted in accordance with the Europe 2020 strategy of the European Commission[68] and has provided for clear objectives to be achieved by any kind of public procurement procedure performed by the contracting authorities of the EU. The relevant case law of the Court of Justice of the European Union has also been incorporated in the legislative act currently in force.[69]

3.1 History of the legislation

The history of EU legislation on public procurement can be explained very efficiently by organizing it into five phases[70]. However, since the five phases include only the time period before the current public procurement directives have been introduced, two extra phases should be added making it possible to state that the current situation on the EU legislation on public procurement has been developed through seven distinct phases of evolution.

The first phase represents the introduction of Directive 71/305/EEC on public works contracts in year 1971 and the following Directive 77/62/EEC on public supply contracts in year 1977. These two directives set out the first common rules governing public procurement within the EU.[71]

Phases two till five represent the process of further development of the legislation towards the aim of creating a legal background to ensure the principles of common market within the public procurement sector of the EU. This process included the revision and consolidation of the existing directives as well as the adoption of two new directives on remedies for the public and utilities sector. Further improvements in the directives were needed in order to facilitate the accession of the EU to the World Trade Organizations Agreement on government Procurement. The adoption of the Directive 2004/17 and the Directive 2004/18 even further consolidated the legal framework of the EU public procurement procedures. Other Directives adopted after the Directives from year 2004 included a new Directive on remedies for aggrieved companies and a special Directive for contracts in the defence and security sectors.[72]

Phase six was initiated by the Europe 2020 strategy of the European Commission which set out three main tasks for the public procurement. The tasks are described in the

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[67] Arrowsmith, *supra* note 2, pp. 339-340.
[68] *Supra* note 28, recital 2
[69] *Ibid*.
[70] Sue Arrowsmith, "Introduction to the EU", in *EU public procurement law: An introduction*, ed. Sue Arrowsmith, pp. 55-58, available on: https://www.nottingham.ac.uk/pprg/publications/downloads/eu-public-procurement-law-an-introduction.aspx, accessed May 19, 2019.
[71] *Ibid*, p. 56.
[72] *Ibid*, pp. 56-58

Green paper on the modernisation of EU public procurement policy by the European commission issued on the 1st of January, 2011.[73] Firstly public procurement should improve the conditions for innovations. Secondly it should improve environmental sustainability. Thirdly the small and medium enterprises with innovative ideas should be supported.[74] The Green paper also reflects the aim set by the strategy for the public procurement procedures to ensure efficient use of public funds and the obligation to keep the procurement markets open EU wide.[75] In general the paper proposes the need to further consolidate the public procurement directives in order to achieve the goals set by the strategy.

The adoption of 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 Text with EEA relevance is the result of phase six.

Phase seven is the current situation of the evolution of legislative framework. This includes the transposition of the last three Directives in the legal systems of the member states and the evaluation of the possible future development of the legislation.

3.2 Current objectives of the legislation

The European Commission has stated in its public procurement strategy the six main objectives of the EU public procurement.[76] Among others the objective to increase access to procurement markets is especially topical with regard to this research. Although, the description of the objective states that the European Commission should also work towards the aim to improve participation of EU tenderers in non-EU procurement markets, it clearly states the need to improve accessibility of the EU procurement markets to the local small and medium enterprises. This indirectly will influence the opening up of public procurement markets in general and increase the opportunities for non-domestic companies to participate in foreign procurement markets more efficiently.

The other objectives also provide more opportunities for international competition in the public procurement markets since they opt for more digitalized procurement procedures with less administrative burdens for the tenderers and increased levels of transparency of the procedures which should be organized by more educated officials. All of these factors have direct impact on the participation of companies in foreign procurement procedures.

In its overview paper on the current procurement and concession rules the European Commission sets the main objectives in an even more condensed way by stating

> The revised European legislation for over 250 000 public contracting authorities is designed to open up the EU's public procurement market to competition, prevent 'buy national' policies and promote the free movement of goods and services.[77]

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[73] European Commission, *GREEN PAPER on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market /* COM/2011/0015 final */,* available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0015&from=EN, accessed May 19, 2019.
[74] *Ibid*, p. 3.
[75] *Ibid*.
[76] *Supra* note 25.
[77] European Commission, *EU Public Procurement reform: Less bureaucracy, higher efficiency. An overview of the new EU procurement and concession rules introduced on 18 April 2016,* Ref. Ares(2016)1875822, April 20, 2016.

This statement clearly shows the intention of the European Commission to truly enforce the single market principle on the public procurement markets. It also specially imposes the need to eliminate the competition crippling factor of nationalism in the public procurement sector. The overview paper also provides the opinion of the European Commission on the main areas affected by the change of the legislation. These include among others the modernisation of public administration and reducing of administrative burdens.[78] These are some of key features which hinder the internationalisation of procurement markets since they increase the expenses of any new market participant which has not participated in the specific procurement procedure of the specific member state before. The increase of costs consists not only of direct expenses for the acquiring and provision of the documents needed, it also consists of expenses for legal advice needed in order to understand the different legal and administrative frameworks. Any company wishing to tender would have to first evaluate the risks of losing its investment in the tender because of simple lack of a local know-how. By reducing or harmonizing these areas it creates more opportunities to participate in the procurement market not only for the local companies but also for the foreign companies wishing to tender in a non-domestic member state. The reduction of expenses and risks makes the tenders of the new market participants more competitive and the foreign markets more attractive.

Although, the objectives stated by the European Commission are advocating that the current legislation should provide a more open procurement market within the EU and that the provisions of the Directives are supposed to provide free access to any procurement market within the EU for companies originating from other member states,[79] the current situation of the construction markets of Latvia and Lithuania shows that these results are not completely achieved. This suggests that there are reasons which do not allow for the objectives to be achieved entirely.

Although, purely economic reasons such as size of foreign markets and return of investment factors should have a significant influence on the overall market activities as shown by the example of comparative advantages between the construction industries of Latvia and Lithuania, their effect is minimised by different kinds of legal factors. Legal reasons with regard to criminal offenses like corruption are indicatable in the public procurement sector; however, they will be excluded from the scope of this research. Thus emphasis will be added on the reasons which originate from different interpretation and application of the legal rules governing the procurement process in the EU.

3.3 Provisions of the Directive 2014/24/EU on recognition of professional qualification

The Directive 2014/24/EU puts down a particular set of rules governing the organization of public procurement procedures for the contracting authorities. These rules are to be followed by the authorities in order to choose the most appropriate procurement procedure for the particular type and value of the public contract to be awarded. The Directive also provides provisions for criteria for exclusion and evaluation of the tenderers.

[78] *Ibid.*
[79] *Ibid.*

Article 64 of the Directive 2014/24/EU provides provisions with regard to professional lists or registries of participants of the economy. Such lists are kept by recognized authorities or other bodies which are provided with the right to maintain such lists by the government. These lists or registries are kept in order to provide information of certified specialists and/or companies which are approved to operate in a particular field or profession.[80]

A provision of particular interest for the study of international tenders is provided in the paragraph 7 of article 64 of the Directive 2014/24/EU:

> Economic operators from other Member States shall not be obliged to undergo such registration or certification in order to participate in a public contract. The contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.[81]

In order to fully understand the scope which this paragraph is covering the overall objectives set out by the European Commission in the strategy Europe 2020 which aims to further strengthen the principle of the single market[82] should be taken into consideration. The strategy sets tasks for the European Commission for actions to be performed in order to reduce the administrative burdens by considering a wider use of Regulations rather than Directives.[83] This should be considered as an exceptionally strong statement made by the European Commission against such burdens. In the strategy the European Commission also states the need for the member states to further reduce administrative burden on companies without specifying the particular kind of the burdens to be reduced which implies that any kind of administrative burden should be minimised at the national level.[84]

Furthermore, the reasoning provided in the first recital of the Directive 2014/24/EU suggests that the aim of the legislator in adopting the Directive 2014/24/EU is to further develop the ensuring of the principles of non-discrimination, equal treatment and mutual recognition regardless of the fact that these principles are provided in the Treaty on the Function of the European Union.[85] In particular article five of the Treaty on the Functioning of the European Union states that any financial or administrative burden should be minimised to the level where it is commensurate with the goal of any such burden.[86]

Paragraph number seven clearly complies with the reasoning provided by the recitals of the Directive 2014/24/EU and the objectives set out by the European commission. It suggests that the contracting authorities are obliged to accept and recognise any kind of proof of professional abilities provided by the tenderer regardless of the member state from which the specific proof originates from.

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[80] *Supra* note 28, article 64.
[81] *Ibid*, para. 7.
[82] European Commission, *EUROPE 2020 A strategy for smart, sustainable and inclusive growth /* COM/2010/2020 final */*, p. 18, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC2020&from=en, accessed May 19, 2019.
[83] *Ibid*, p. 19.
[84] *Supra* note 82, p. 15.
[85] *Supra* note 28, Recital 1.
[86] Article 5, Treaty on the Functioning of the European Union (Consolidated version 2012), *OJ C* 326, 26.10.2012, available on: http://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT, accessed May 19, 2019,

The particular wording of the paragraph suggests that such recognition should be made even beyond the procurement procedure itself. In particular the denial of the obligation of the economic operator to be registered or certified in order to participate in the public contract rather than just the public procurement procedure suggests that by mentioning the public contract the legislator intended to further reduce the administrative burden in general not only with regard to the public procurement procedure.

The scope of the Directive set out in paragraph 1 of article 1 of the Directive 2014/24/EU does not include the specific regulation of the *public contract* which is to be awarded by the *public procurement procedure* organised in accordance with the Directive 2014/24/EU. However, the paragraph on the scope of the directive clearly states that the rules set out within the directive are established with respect to the *public contracts*. It can be argued that the intention of this formulation is to widen the scope of the Directive 2014/24/EU to the extent where the requirements for the execution of the public contract, awarded to the tenderer in accordance to the rules established by the Directive 2014/24/EU, should not provide for additional burdens on the economic operator which can be considered irrelevant for the appropriate execution of the contract at hand.

The idea that ay restrictive measure should be supported by a reasonable necessity for it, manifests itself in the judgement of the case C-377/17 of the Court of Justice of the European Union. The judgement provides for the reasoning that the substance and aim of a measure imposed by the legislation should be taken into consideration when evaluating its compliance with the community rules; however, the possibility of less restrictive or alternative measures should be evaluated as well if the measure causes any potential restriction. In the absence of such evaluation, the measure should be perceived as infringing the community rules.[87]

The different interpretations of this paragraph by the legislators of the member states which have transposed the Directive 2014/24/EU into their legislation are obvious by examining two different regulations set by the legislators of Latvia and Lithuania.

3.4 Transposition of the Directive 2014/24/EU in the legal systems of Latvia and Lithuania

The Directive has been transposed into the Law of Republic of Lithuania on public procurement in a quite direct manner. The provision regulating the recognition of foreign professional registries is set down in paragraph 4 of the article 51 of the Law. It states that the contracting authorities shall require only such documents which have been authorized by the State which are necessary for the performance of similar contracts in the member state where the economic operator is established. Furthermore, it is implied that a declaration of oath shall also be accepted as a sufficient proof of the capability to perform the contract by the economic operator.[88]

[87] *Supra* note 21, para. 111.
[88] Lietuvos Respublikos viešųjų pirkimų įstatymo Nr. I-1491 pakeitimo įstatymas (Law on Public Procurement of the Republic of Lithuania Nr. I-1491 recast), 02.05.2017, TAR, 2017, 5. may, nr. 7550, Article 51 para. 4, available on: https://www.e-tar.lt/portal/en/legalAct/207ad17030a011e78397ae072f58c508, accessed May 19, 2019.

This provision of the Lithuanian Law provides a completely open approach to the Lithuanian public procurement market for any foreign tenderer originating from any other member state of the EU by minimising the administrative burden on the foreign tenderers. The provision also suggests that Lithuania has trusted other member states in ensuring that the economic operators originating from these member states have the necessary professional capabilities to perform specific contracts within the whole EU. Furthermore, paragraph 6 of article 53 provides for the obligation of the contracting authority to recognize any certificates issued by competent bodies of other member states as well as the possibility for the economic operator to provide other documents which prove the level of qualification required by the contracting authority.[89]

The approach of direct transposition of the Directive 2014/24/EU into the law on public procurement of the Republic of Lithuania has ensured that the objectives of the Directive 2014/24/EU have been ensured to the maximum extent possible. The Lithuanian legislator has chosen the more simple approach and achieved an efficient result. With regard to provisions governing the mutual recognition of documents issued by other member states the Republic of Lithuania has performed all the necessary steps required for an effective enforcement of the objective of a single market within the EU. It can be objectively reasoned that the public procurement market of the Republic of Lithuania is a part of the single market of the EU.

Latvian Law on public procurement has been amended with a completely different approach. The provisions of the Directive 2014/24/EU have been altered quite significantly. The Latvian law on public procurement sets the requirements for specific registration in a more detailed way. Article 44 of the Law provides the rules applicable to the evaluation of professional qualifications of the economic operators participating in a public procurement procedure. The first paragraph of this article provides the contracting authority with the right to require proof on the fact that the economic operator is certified, registered or licensed in accordance with the law of the state of origin. The second paragraph provides similar rights to contracting authority to request proof of any special qualification if such qualification is required by the state of origin of the tenderer.[90] It is notable here that the provisions mentioned require the economic operator to be registered or qualified in accordance to the laws of other states rather than just member states. Theoretically this opens the market to other states as well as the member states of the EU; however, the abolishment of such requirements would open the market even more.

The third paragraph of article 44 of the Law on public procurement of Republic of Latvia, however, is of particular interest to this research since it provides a rather complicated, discriminative and by all means interesting provision on the recognition of professional qualification of economic operators participating in the public procurement procedures for public works contracts.

The paragraph states that in the case of public works contract the contracting authority is obliged to request the economic operator to provide proof of the specific qualification class acquired by the company of the construction field and that the rules governing the

[89] *Ibid*, Article 53 para 6.
[90] Publisko iepirkumu likums (Law on public procurement), Latvijas Vēstnesis, 2016, 29. decembris, nr. 254 (5826), Article 44.

requirements of experience and a specific qualification class which should be acquired by a construction company in order to perform construction on particular types of buildings by a public works contract are provided by the Cabinet of Ministers of the Republic of Latvia.[91]

Firstly the paragraph imposes an obligation to the contracting authority to require the documents proving the specific qualification required of the tenderer. The obligation abolishes the possibility for the contracting authority not to require such proof if there is no reasonable doubt about the professional qualification of the tenderer. Although, this provides for a high level of legal certainty, it is questionable whether such proof would be needed if there was no reasonable doubt about the qualification of the tenderer.

The need for such formulation stems from the fact that a potential contractor will not be able to perform a public works contract without the required registration in accordance to the construction law of the Republic of Latvia.[92] There are no possible exceptions provided by the construction law of the Republic of Latvia from the need to perform the registration in the construction company registry of the Republic of Latvia in order to perform any kind of construction works which are fully or partially financed by the public.[93] This provision applies to the public works contracts concluded in accordance with the Directive 2014/24/EU as well as public works contracts financed by any kind of public funds. No regard to the objectives set out in the Directive 2014/24/EU on enhancement of the principle of the single market and the minimisation of administrative burdens on the economic operators has been provided by the legislator of the Republic of Latvia in connection to this provision.

Secondly the wording of the provision explicitly states that the qualification class refereed to can be acquired only by an establishment which is registered in the Latvian registry of construction companies.[94] Not only such wording prevents the possibility of foreign economical operators not to be registered in the Latvian construction company registry, it also excludes natural persons from any kind of possibility to participate in public procurement procedures for public works contracts. Although, the possibility for a natural person to be willing and capable to execute a public works contract is rather low, such provision significantly hinders the participation in public procurement procedures for public works contracts of different economic operators especially small enterprises.

Thirdly the last sentence of the paragraph obliges the Cabinet of ministers of the Republic of Latvia to define the rules by which the qualification classes are assigned to the construction companies and what are the requirements for the experience and qualification class to be obtained by the construction company in order to perform a public works contract in any particular building process according to the importance and complexity of the specific building process in question.[95] This requirement even further complicates the public procurement procedure and the potentially following execution of the public works contract for the economic operator planning to participate in the public works procurement procedure. The sentence even provides further detail of the required qualification class rules by stating

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[91] *Ibid*, para 3.
[92] *See*, subchapter 2.4. Differences in the legal requirements for the construction process within the EU which affect the public procurement, pp. 13-16.
[93] *Supra* note 41, Article 23 para. 1.
[94] *Supra* note 90, Article 44 para. 3.
[95] *Ibid*.

that the specific classes should be determined with regard to the specific groups of constructions.

The existence of such provisions of the Law on public procurements clearly hinders the participation of foreign economic operators as well as the participation of small local market participants. The need to undertake special registration which requires several steps and requirements on its own obviously is joined with additional expenses to the potential tenderer.

The need for such provisions is justified by the Law of the Republic of Latvia on public procurement itself. The introduction of the qualification classes of the construction companies simplifies the public procurement procedure in a way that the contracting authority is not allowed to require any qualification requirements which have been evaluated by the classification process. In this way the objective of reduction of the administrative burden is achieved by not requiring the submission of the same proof of qualification more than once. However, the same provisions state that the contracting authority is allowed to require additional proof of qualification which has not been evaluated in the classification process. The fact that the contracting authority is allowed to require additional proof of qualification contests the objective to harmonize these requirements.

Furthermore, since it could obviously be possible to submit the documentation required by the authority performing the assignment of the qualification classes as well as the documentation needed for the registry of the construction companies directly to the contracting authority, the requirement of evaluation of possible less restrictive measures has not been met.[96]

3.5 Additional hurdles hindering the transposition of the Directive 2014/24/EU into the legal system of Latvia

The legal system of the Republic of Latvia is providing another issue connected to the rules provided in article 44 of the law on public procurement of the Republic of Latvia. The issue at hand is included in the complexity in which the third paragraph of the article is constructed.

The need for the construction company to be registered in the construction company registry of the Republic of Latvia is provided in the law on construction of the Republic of Latvia. Where it is also explicitly stated that in order to participate in any kind of construction process which is partly or entirely financed by the public, the construction company should have acquired an appropriate class of qualification.[97] However, in the rules governing the transitional process of the construction law it is stated that the article governing the requirements on qualification classes for construction companies participating in the public works contracts are to enter into force only after the appropriate amendments to the law on public procurement and the law on defence and safety sector public procurement are made and not sooner than the first of January, 2016.[98] The law on construction entered into force on the first of October, 2014.

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[96] *Supra* note 21, para. 111.
[97] *See* Subchapter 2.4. Differences in the legal requirements for the construction process within the EU which affect the public procurement, pp. 13-16.
[98] *Supra* note 41, Transition rules para. 8.

The law on public procurement entered into force on first of March, 2017. It could be assumed that the final amendment to the law on public procurement should have taken into consideration the provisions stated in the previously adopted law on construction. With regard to the previously mentioned provisions of the law on public procurement, the need for qualification classes of the construction companies has been taken into account by the legislator when amending the law on public procurement.

However, the provisions governing the transition process of the law on public procurement of the Republic of Latvia state that the rules required by the third paragraph of 44 four of the law shall be provided by the Cabinet of Ministers of the Republic of Latvia not later than April 30th, 2019. Before the said rules enter into force, the provisions governing the requirements for classification of the construction companies participating in the public procurement procedures for public works contracts are not technically enforceable.

The rules for the classification of construction companies required from the Cabinet of Ministers of the Republic of Latvia have entered into force on Aril 16th, 2016. However, the said rules do not provide the necessary regulation on the qualification class needed to perform public works contracts in accordance to the law on public procurement. Amendments to the current rules governing the requirements for acquisition of a particular qualification class have been submitted to the state secretary assembly of the Ministries of the Republic of Latvia. The assembly has obliged the Ministry of Economic of the Republic of Latvia to receive agreements from a variety of state and non-governmental institutions on the proposed amendments. It has also noted that the Chamber of Comers of the Republic of Latvia will also provide its opinion on the proposed amendments. These agreements shall be received before the approval of the amendments at the state secretary assembly of the Ministries of the Republic of Latvia.[99] After the approval has been received, the proposed amendments will be provided to the Cabinet of Ministers of the Republic of Latvia for revision, evaluation and approval. It is safe to say that these amendments still have a long process ahead of them before their entry into force.

The proposed amendments contain the provisions which set requirements of a particular qualification class in accordance with a specific threshold set by the rules. The thresholds are to be determined in accordance to the provisional value of the public works contract. Since there are five qualification classes, there are five distinct thresholds. The rules do not provide for a possibility of a construction company to participate in a public works contract without a qualification class assigned to it by the classification body since the lowest threshold shall require at least the lowest qualification class. The amendments leave out any kind of regulation on the specific qualification class required in order to perform construction on a particular group of constructions, thus leaving the requirement set by the last sentence of the third paragraph of article 44 of the law on public procurement of the Republic of Latvia without notice.[100] This defect of the proposed amendments provides the obligation for the contracting authority to set unreasonably high qualification criteria for professional abilities

[99] State secretary assembly of the Republic of Latvia, *Minutes no. 11 from 21st of March, 2019*, para. 1, available on: http://tap.mk.gov.lv/mk/vsssanaksmes/saraksts/protokols/?protokols=2019-03-21, accessed May 19, 2019.

[100] Noteikumu projekts ""Grozījumi Ministru kabineta 2016. gada 12. aprīļa noteikumos Nr. 211 "Būvkomersantu klasifikācijas noteikumi"" (Project of rules "Amendments to the rules of the cabinet of Ministers from 12th of April, 2016 "Rules on classification of the construction companies""), available on: http://tap.mk.gov.lv/lv/mk/tap/?pid=40470934, accessed May 19, 2019.

of the potential contractor without the possibility to take into consideration the actual complexity of the particular construction process. Furthermore, since the formal requirement set by the corresponding provision of the law on public procurement to provide for specific regulation on the required qualification class in accordance to the specific construction group is not met, it is questionable whether the amendments will achieve the compliance with the rules requested by the provisions of the law on public procurement, thus whether the provisions of the law on public procurement will become enforceable together with the entry into force of the proposed amendments.

In addition the amendments provide a provision which states that the provisions governing the necessary qualification class of the construction company with regard to the specific threshold shall be applied starting from September 1st, 2021. Since the provisions are not applicable before the set date, the relevant provisions provided in the law on construction and the law on public procurement are also inapplicable until the set date. This fact provides for a high level of legal uncertainty because of the unreasonably long transition time of the laws.

Moreover it should be noted that the previously described provision of the transition of the construction law of the Republic of Latvia states that the provision governing the requirement of acquisition of a qualification class by a construction company shall not enter into force until the day when the relevant amendments of the law on public procurement and the amendments to the law on public procurement in the area of defence and security enter into force. It is questionable whether the provision of the law on construction shall enter into force if amendments to one of the laws indicated in the transition rules have not entered into force. This question should be studied further in case the relevant changes in the law on public procurement in the area of defence and security will not enter into force before September 1st, 2021 which is the date from which the rules governing the requirements of qualification classes should be applied. The planed amendments to the law on public procurement in the area of defence and security have not been published in any form. The most recent amendments are regulating other provisions of the law. There are no publicly available indications which suggest that the necessary amendments are planned for the near future.

In addition it should be noted that the annotation of the Law on public procurement of the Republic of Latvia does not provide for any evaluation of the necessity of the qualification classes or the registration of construction companies, thus it does not meet the requirements set by the relevant case law of the Court of Justice of the European Union.[101] It rather provides the information that the article 64 of the Directive 2014/24/EU will be transposed only partially, reasoning this failure with the fact that the law on construction requires the existence of such qualification classes and registration.[102]

[101] *Supra* note 21.
[102] Dana Reizniece-Ozola, Minister of Finance of the republic of Latvia, *Annotation of the public procurement law of the Republic of Latvia*, table 1, available on: http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/7D0A717033CEF737C2257FF5004267AF?OpenDocument, accessed May 19, 2019.

3.6 Implementation and effectiveness of the current legislation

Taking into consideration the arguments mentioned in subchapters 3.4 and 3.5 of this research, it becomes obvious that while the relevant EU legislation has set out to provide for a harmonized framework for the legislators of the member states to adhere to, the individual member states have different approaches to interpretation of the legal requirements set by the EU legislation, as well as the transposition of the rules into the individual legal systems of the member states.

While some EU member states choose to transpose the provisions of the Directive 2014/24/EU directly into the relevant legal acts without any significant alterations[103], others choose to interpret and adjust the rules of the EU legislation with regard to the existing legal acts of the member state.[104] The adjustment and interpretation of rules leads to the creation of chaos especially in the case of the legal system of Latvia. The complexity of the system of interconnection between the different Laws of the Republic of Latvia provides for a substantial burden for any market participant including the contracting authorities. The burden provided by such a system has a significant crippling effect on the potential competition of the market.

Firstly, it provides for an additional and excessive administrative burden for the potential participants of the public procurement procedure for public works contracts. There is no unified approach to recognition of professional qualification. The potential tenderers are obliged to undergo additional approval procedures although the Directive 2014/24/EU explicitly states the minimisation of any such burdens as one of its objectives.[105] These objectives have been lost in the overly complicated transposition process of the Directive 2014/24/EU into the legal system of the Republic of Latvia. Furthermore, the existence of risk for additional administrative burdens has been admitted already in the annotation of the law on public procurement of the Republic of Latvia,[106] which is completely contrary to the objectives set out to be achieved by the Directive 2014/24/EU.[107]

Secondly, the additional administrative burdens provides for an additional financial burden especially for any foreign economic operators wishing to participate in the public procurement procedures for public works contracts within the territory of Latvia. The additional expenses arise from several factors. The legal chaos and uncertainty requires for additional legal fees for lawyers and consultants which can correctly explain and guide the potential tenderer to the particular public procurement requirements of the specific member state. In the case of the Republic of Latvia such expenses can even be regarded as unpredictable since the need for legal advice can manifest itself at different stages of the process. It could be argued that this does not provide for disadvantages to the foreign tenderers since the system of the existing legal requirements is so complicated that the local tenderers are equally unable to fully grasp all the different aspects and potential interpretations of it, yet they are equally obliged to fulfil the requirements set by the legal

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[103] Republic of Ireland, *S.I. No. 284/2016 - European Union (Award of Public Authority Contracts) Regulations 2016*, available on: http://www.irishstatutebook.ie/eli/2016/si/284/made/en/print, accessed May 19, 2019.
[104] *See* Subchapter 3.4Transposition of the Directive 2014/24/EU in the legal systems of Latvia and Lithuania, pp. 25-28.
[105] *Supra* noote 28, Recital 84.
[106] *Supra* note 102.
[107] *Supra* note 28, Recital 84.

rules. The argument of equal treatment is valid; however, if all are treated equally by imposing unnecessary burdens, the principle of equal treatment losses its value.

Thirdly, the complexity of the system of the legal rules provides for additional problems to the contracting authorities as well. Since the contracting authorities are the primary end-users of the legal rules, it is important that the rules are adequate and easily applicable. Since the legal rules of the Republic of Latvia are as complicated as they are, even the most competent authorities who are responsible for execution of the public procurement procedures of major public works contracts make mistakes in the process of the development of the regulating documents of the public procurement procedure. Such mistakes lead to delays in the execution of the projects in general which can lead to different kinds of liabilities, damages or additional costs.[108]

In general the possibility provided to the member states of the EU to transpose the Directive 2014/24/EU into their legal systems, has created additional space for different interpretation of the rules set down in the Directive. The different approaches to the transposition process have resulted in differences of the way the Directive 2014/24/EU is applied in different individual member states. This provides for additional burdens for the economic operators, which counters the original objectives set by the Directive 2014/24/EU itself. The administrative burden has been increased significantly, additional burdens have been set for small and medium enterprises for participation in the public procurement market and no support for the principle of the single market has been established especially in the case of the Latvian legal system. Furthermore, there are no signs provided by the Latvian legislator of the will to ensure the principle of mutual recognition and to consider the relevant practice of the Court of Justice of the European Union.

The legal status of the current EU legislation on public procurement hinders the achievement of the objectives defined by the legislation itself as well as the objectives provided by the European Commission to be achieved by the provision of the legal acts. The main reason for the inefficiency of the legislation is the vast amount of possible interpretations on several levels of users of the legislation. These users include the legislators of the individual member states who are obliged to transpose the EU legislation into their national legal systems, the contracting authorities which are obliged to apply the provisions defined in the national legal acts and the economic operators which are participating in the public procurement procedures for public works contracts as well as the courts of all instances which have to provide for the final interpretation of the true meaning and objectives of the legislation.

[108] *See* the public procurement procedure with numerous amendments to the procurement rules for the public works contract of the rebuilding of the Latvian television tower, available on: https://www.eis.gov.lv/EKEIS/Supplier/Procurement/15564, accessed may 19, 2019.

4 INTERPRETATIONS OF THE "ULTIMATE GOAL" OF THE EU PUBLIC PROCUREMENT RULES

Recital 1 of the Directive 2014/24/EU states the three main goals which shall be achieved by the legal rules on public procurement of the individual member states in order to comply with the Treaty on Functioning of the European Union. These goals are the ensuring of the three principle freedoms defined in the Treaty such as freedom of movement of goods, freedom of establishment and freedom to provide services. It also states that these goals are to be achieved by complying with the principles of transparency, equal treatment, non-discrimination, proportionality and mutual recognition.[109]

These principles are defined in the paragraph as self-evident and deriving from the provisions of the Treaty. It also directly suggests that these goals should be applied to any kind of public procurement regardless of the value of the contract to be awarded or the type of such contract.[110]

In reality the possibility provided by the EU legislation for the individual member states, to apply their own rules governing the public procurement procedures beneath the thresholds defined by the Directive 2014/24/EU[111] and the possibility to transpose the Directive 2014/24/EU into their legal systems for public procurement procedures valued above those same thresholds, not always allows for efficient achievement of the objectives across the EU set by the same legislation. The possibility of interpretation causes the national legislators to use the provided common rules for the achievement of their own objectives by requiring a single path for the achievement of these objectives rather than providing a path without discriminating those wishing to achieve the same goal by a different path. [112] In the case of the public procurement law of the Republic of Latvia the same has been done even without the regard for the objectives set by the common rules provided by the EU legislation.[113]

The recital 1 of the Directive 2014/24/EU also sets the scope of the Directive 2014/24/EU itself by proposing that regardless of the fact that the basic principles are provided by the Treaty, in order to provide practical effect to these principles, harmonized rules should be provided to the legislators of the individual member states for coordination of the procurement procedures performed within the individual member states.[114] The proposition that such harmonization is needed only for public contracts which are above a certain value provides for the opportunity to the member states to sustain their sovereignty and individually decide on the rules applicable to public procurement procedures which result in the award of a contract with less value; however, the previous wording still reminds that these rules should also comply with the Treaty regardless of other objectives of the individual member state.

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[109] *Supra* note 28, Recital 1.
[110] *Ibid.*
[111] *Supra* note 28, Article 4.
[112] Gareth Davies, *Nationality Discrimination in the European Internal Market* (The Hague: Kluwer Law International, 2003), p. 50.
[113] *See* Subchapter 3.4Transposition of the Directive 2014/24/EU in the legal systems of Latvia and Lithuania, pp. 25-28.
[114] *Supra* note 28, Recital 1.

However, the last part of the final sentence of the recital provides for an additional possibility of interpretation of the goals of the Directive 2014/24/EU. It states that by providing the harmonized rules for the legislators of the member states to transpose into their legal systems the public procurement should become more open to competition.[115] This wording suggests that the practical effect of the principles defined in the rectal before and in the Treaty should be achieved by opening the public procurement market to more competition.

Although, the first recital is organized in a way which suggests a reasonably clear hierarchy of the overall vision, goals to be achieved and tasks to be performed, it also provides for a broad spectre of possible interpretations as to which of the principles are prior to others and what should be the correct path of actions in order to achieve these principles.

Two different approaches for the achievement of the principles defined by the principle of the internal market, manifest in the possible interpretations of the meaning of recital 1 of the of the Directive 2014/24/EU.

The first approach implies that the ultimate necessity of the internal market is the provision of explicit rules prohibiting discrimination, ensuring transparency and providing for the removal of barriers to trade and that the provision of these rules are the main functions of the EU legislation on public procurement.[116] Although, this approach has been described with sufficient detail, since it has been done with regard to the previous EU legislation on public procurement, a comparison of the existing description with regard to the Directive 2014/24/EU will be provided in the following subchapter.[117]

The second possible approach for the ensuring of the effectiveness of the principles of the internal market is the reduction of all possible hurdles which can affect the openness of the public procurement market.[118] This implies that the rules governing the public procurement procedures are in fact aimed and to be interpreted as to provide the possibilities for the public procurement market to become more similar to the private sector market by ensuring the maximum possible amount of competitiveness.[119]

While the first approach suggests that the principle of the internal market will be achieved only by removing the barriers to trade, the second approach suggests that the removal of the barriers to trade is necessary; however, without further encouragement of competition within the public procurement market, the goal of a single market cannot be achieved.

4.1 The regulation of discrimination, transparency and barriers to trade

The more regulatory approach suggests that the EU rules on public procurement shall provide the requirements for prohibition of discrimination, ensuring transparency and removal of barriers to be met in order to ensure the principles of the single market and sets this goal as

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[115] *Supra* note 28, Recital 1.
[116] Sue Arrowsmith, "The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies" *Cambridge Yearbook of European Legal Studies* 14 (2012): pp. 1-47. doi:10.5235/152888712805580390.
[117] *See* Subchapter 4.1 The regulation of discrimination, transparency and barriers to trade, pp. 34-39.
[118] Graells, *supra* note 4.
[119] *Ibid*, p. 13.

the ultimate function of the existing legislation.[120] The idea of the purely economic competition within the public procurement market is thus set aside by this approach.

The previously mentioned requirements are provided by the current EU legislation on public procurement in the form of specific articles governing these issues.

4.1.1 Provisions on prohibiting discrimination

The prohibition of discrimination is described in recital 1 of the Directive 2014/24/EU as one of the main principles to be observed in application of the Directive.[121] Recital 37 of the Directive 2014/24/EU further details the prohibition of discrimination with specific regard to labour laws. These shall not be applied in a way that they could possibly discriminate not only the workers but also economic operators originating from different member states.[122] Further emphasis on the counter-discriminatory nature of the legislation is provided in paragraphrecital 53 of the preamble of the directive 2014/24/EU which in general explains the need for use of electronic means of communication in public procurement procedures; however, this recital as well as other recitals, discussing the questions of electronic means of communication, specifies that the use of any such electronic mean of communications shall be non-discriminatory.[123] Recitals 96 and 98 of the directive 2014/24/EU explain the objectives of non-discrimination to be achieved with regard to life cycle costs as the criteria of most economically advantageous tender and the social and production process conditions and criteria.[124]

Two recitals of the Directive 2014/24/EU should be especially emphasised with regard to the non-discriminatory policies of the Directive 2014/24/EU.

Firstly, recital 104 of the Directive 2014/24/EU states that the contractual conditions for the execution of the public contract awarded thru a public procurement procedure governed by the Directive 2014/24/EU should be non-discriminatory.[125] This provides for a broader scope of the Directive 2014/ 24/EU which reaches out of the public procurement process itself into the process of execution of the contract awarded by such public procurement procedure. However, the extension of the scope of the Directive 2014/24/EU with regard to the scope of previous public procurement directives is intended to regulate the changes of contract conditions or the termination of a contract which implies that the scope of the Directive 2014/24/EU does not include the contractual conditions as such.[126] Nevertheless, the implication that the contractual conditions should not have a discriminatory purpose has been explicitly provided by this recital.

Secondly, recital 90 of the Directive 2014/24/EU provides for a dually interpretable provision. It states that the award criteria should be defined in a non-discriminatory way; however, the objective of this requirement is given as the need to ensure that the contracting

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[120] Arrowsmith, *supra* note 116, p. 6.
[121] *Supra* note 28, Recital 1.
[122] *Supra* note 28, Recital 37.
[123] *Supra* note 28, Recital 53
[124] *Supra* note 28, Recital 96 *also* 98.
[125] *Supra* note 28, Recital 104.
[126] European Commission Public procurement guidance for practitioners on avoiding the most common errors in projects funded by the European Structural and Investment Funds, p. 15, available on: https://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018, accessed May 19, 2019.

authority can evaluate the provided tenders taking into consideration that they have been submitted to it in compliance with conditions that ensure an effective competition.[127] This paragraph supports both of the approaches mentioned previously. Furthermore, it suggests that an effective competitiveness is the condition to be achieved by setting the rules for non-discrimination, equal treatment and transparency. And that the conditions of effective competition are the conditions necessary to be provided in order to effectively determine the economically most advantageous tender. Since further in the same recital the need to use the criteria of economically most advantageous tender as the main criteria for the award of public contracts in any kind of public procurement procedures is emphasised, the previous consideration of effective competition conditions becomes even more significant. It is even proposed in the same recital that the member states should be allowed to restrict or even prohibit the criteria of lowest price or lowest cost as the only criteria for award of the public contract in any public procurement procedure where they deem it to be appropriate.[128] This condition even further favours the criteria of economically most advantageous tender and puts more emphasis on the public procurement process as a more economic rather than legal tool for the ensuring of the principle of the single market.

The provisions of the current EU legislation governing the prohibition of discrimination on the basis of nationality have been further supported by the Treaty on the Functioning of the European Union as well as the World Trade Organization Agreement on Government Procurement.[129] It is also argued that the provisions on prohibition of discriminatory requirements set by the member states or the contracting authorities were not included in the original legal acts governing the public procurement procedures in the EU since the principle requirement of prohibition of discrimination was already stated in the primary legislation.[130] In essence the non-discrimination provisions explicitly stated in the current EU legislation on public procurement have an explanatory role as well since the main principle of prohibition of discrimination is provided in article 18 of the Treaty on the Functioning of the European Union.[131]

An interpretation of the provisions of the Treaty on the Functioning of the European Union suggests that the contracting authority should accept any tender as an appropriate offer if it meets the previously specified needs of the contracting authority regardless of the origin of the product or supplier.[132] This interpretation further proves the intention of the current EU legislation on public procurement to open the boundaries set by the individual member states for cross-border competition of the economic operators originating from other member states.

Although, the provisions on prohibition of discrimination are without any reasonable doubt one of the corner stone rules for the success of the principle of the single market, the mere existence of such provisions as a tool in order to achieve the objectives set by the legislator do not abolish the possibility of an intermediate objective to be achieved by the same provisions which in turn predispositions the successful achievement of the primary objectives. Such intermediate objective can be the objective to ensure that the rules provide

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[127] *Supra* note 28, Recital 90.
[128] *Ibid*.
[129] Arrowsmith, *supra* note 116, p. 7.
[130] *Ibid.*
[131] *Supra* note 86, Article 18.
[132] Sue Arrowsmith, *The law of public and utilities procurement regulation in the EU and UK volume 2* (London: Sweet & Maxwell, 2018), p. 576

for a possibility for the public procurement market within the EU to become as competitive as possible.

4.1.2 Provisions on ensuring transparency

The necessity of the ensuring of transparency in any kind of public procurement procedure arises from the objective to ensure non-discrimination. The transparency provisions provide for the option of monitoring of the public procurement market. And such provisions have been enforced in all of the previous EU legislative acts on public procurement.[133]

The Directive 2014/24/EU uses the same approach to transparency principle and applies it as a complimentary requirement needed mainly in order to monitor the efficiency of prohibition to discriminate and ensuring of equal treatment. Article 18 of the Directive 2014/24/EU provides a very clear definition on how important the principle of transparency is with regard to the general principles of public procurement. It States that the contracting authorities shall act in a transparent manner without providing any additional limitation, possible exceptions or any other conditions which could lessen the significance of the need for transparency.[134]

However, it could be argued whether the monitoring function is the only function of the transparency provisions. The term is used in a different meaning in recital 90 of the Directive 2014/24/EU which states:

> To ensure compliance with the principle of equal treatment in the award of contracts, contracting authorities should be obliged to create the necessary transparency to enable all tenderers to be reasonably informed of the criteria and arrangements which will be applied in the contract award decision.[135]

In this meaning the function of the transparency is oriented towards the necessity to provide for sufficient information from the contracting authority to the potential economic operators participating or wishing to participate in the public procurement procedure. It is argued that this is also a provision of monitoring function by the transparency principle.[136] In part this function correlates with the primary monitoring function of the transparency requirements; however, it broadens the scope to the obligation to provide all the technical information to the potential economic operators planning to participate in the public procurement procedure. This information is required by the economic operators in order to provide a reasonable and adequate tender not only to evaluate the potential discriminatory provisions or unequal treatment.

A further meaning of transparency used in the Directive 2014/24/EU is provided in recital 105 of the Directive 2014/24/EU. In this paragraph the term is used to describe the potential obligation of the economic operator to provide information on its subcontractors which will participate in the execution of the public contract awarded by the public procurement procedure.[137] Although, the process of provision of information about the potential subcontractors also has a monitoring function, the main objective for the collection of such information is to ensure the compliance with the public interests such as the payment

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[133] Arrowsmith, *supra* note 116, pp. 8-13.
[134] *Supra* note 28, Article 18.
[135] *Supra* note 28, Recital 90.
[136] Arrowsmith, *supra* note 116, p. 16
[137] *Supra* note 28, Recital 105.

of taxes which should be done not only by the general contractor but rather by every economic operator involved in the execution process of a public contract. In essence the requirement for the general contractor to provide information on its subcontractors has no correlation with the principles of equal treatment or non-discrimination.

The need for transparency in public procurement procedures has its benefits with regard to the overall competition within the internal public procurement market. Provisions implying the recommendation to the contracting authorities to publish the information even about potential public procurement procedures on EU wide databases or other means[138] ensure a more open access to the public procurement market for the economic operators especially to those who have other member states as their states of origin. However, it can be argued that the transparency requirements can have negative effects on the competition within the market as well as positive. The negative effects can be observed when the possibilities of collusion or unwillingness of the potential tenderer to disclose its price policies are studied more closely.[139] These possible negative effects of the transparency measures set by the EU legislation on public procurement put the transparency objective in a slight contradiction to the overall objective of ensuring more openness to competition of the public procurement market.[140]

4.1.3 Provisions on removing barriers to market access

The provisions which regulate the reduction of any possible barriers to trade other than discriminatory barriers which have been discussed previously, in general have not been changed significantly by the legislator by introduction of the Directive 2014/24/EU with regard to the previous EU legislation on public procurement.

However, there are some indications of further opening up of the domestic public procurement markets to foreign economic operators. In particular one such example is the provision governing the mutual recognition of professional lists which is especially interesting with regard to this research.

The second part of paragraph 5 of article 52 of the Directive 2004/18/EC states that the contracting authorities shall recognise equivalent documents originating from bodies of other member states or other means of proof which prove the professional capabilities of the foreign economic operator wishing to participate in the public contract.[141] In fact the wording of the last sentences of the paragraph is identical to the wording of the same provision of the Directive 2014/24/EU.[142]

However, there is a significant difference in the wording of the first sentence of the relevant provisions. While in the Directive 2004/18/EC it is provided that:

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[138] *Supra* note 28, Section 2.
[139] Graells, *supra* note 4, pp. 73-74.
[140] *Supra* note 28, Recital 1.
[141] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts *OJ L* 134, 30.4.2004, pp. 114–240, Article 52, para. 5.
[142] *Supra* note 28, Article 64, para. 7.

> However, economic operators from other Member States *may* not be obliged to undergo such registration or certification in order to participate in a public contract. [Emphasis added][143]

The relevant provision of the Directive 2014/24/EU has been worded differently:

> Economic operators from other Member States *shall* not be obliged to undergo such registration or certification in order to participate in a public contract. [Emphasis added][144]

Another difference between the two provisions is that while the previous one was stated as an addition to paragraph concerning the issue of registration on special lists in more general terms, the later one has included this provision in a paragraph of its own. Nevertheless, the more important fact is that the word "may" has been replaced by the word "shall" which provides for a completely different meaning of the provision. While previously it was left to the legislators of the individual member states to decide whether such registration is necessary or not, the Directive 2014/24/EU provides for a clear prohibition of such requirements.

It is clear that the current EU legislation on public procurement has followed the previously defined path of its predeceasing legal acts for the removal of barriers to market access and has adopted the same approach by defining the need for the removal of these barriers as one of its core functions.[145] It has gone further in the objective to remove barriers to access of the foreign public procurement markets by further opening the domestic markets for international competition. This again implies that the current EU legislation is oriented towards the increasing of competition within the internal market.

Although, the provision of rules governing the reduction of barriers for market access is without any reasonable doubt one of the core functions of the EU legislation on public procurement[146], the main objective of these rules should be the openness of the public procurement market to competition.

4.2 Competition in the public procurement market

The more economy based approach of the ensuring of undistorted competition within the EU internal market of public procurement suggests that the best efficiency of the contracts awarded by public procurement procedures in terms of value for money can be achieved by minimising the distortion caused by the nature of the public procurement procedure with the help of the rules governing the public procurement process.[147]

This approach generally suggests that the provisions of the EU legislation on public procurement should be interpreted with regard to the existing EU competition rules. Furthermore, the emphasis should be put on the competition rules and a general assumption should be made that the current EU public procurement market has more space for competition.[148]

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[143] *Supra* note 28, Article 52, para. 5.
[144] *Supra* note 28, Article 64, para. 7.
[145] Arrowsmith, *supra* note 116, pp. 20-22
[146] Arrowsmith, *supra* note 116, p. 6
[147] Graells, *supra* note 4, p. 241.
[148] Graells, *supra* note 4, p. 13.

Such approach would regard any kind of possible hurdle to open competition as a crucial factor which disallows the proper functioning of the internal market. In particular, with regard to the EU wide internal market, the previously mentioned hurdles manifest in the unequal treatment of cross-border tendering.[149]

The approach implies that any professional certification or registration should be organized in such a way that it provides for a more open access to the public procurement market rather than restricts the opportunities for unregistered economic operators regardless of their national origin to take part in public contracts.[150] This approach has clearly not been taken into account when the drafting of the Latvian public procurement law and construction law was performed.

This approach to the legal rules governing the EU public procurement market closely correlates to the doctrine of proportionality. The doctrine suggests that the legal rules applied should always be proportionate with the goal which they try to achieve and that there can be no legal justification for otherwise unreasonable actions. [151] By interpreting the doctrine with regard to the current rules governing the public procurement process within the EU, it should be presumed that the provisions are aimed at a particular goal and that the interpretations or applications of the rules should be aimed at achieving this goal and not more. This can be more precisely explained with the particular example of unreasonable interpretation of the provisions on official registration list for professionals by the Latvian legislators.[152]

[149] *See* subchapter 3.4 Transposition of the Directive 2014/24/EU in the legal systems of Latvia and Lithuania, 25-28.
[150] Graells, *supra* note 4, p. 325.
[151] Davies, *supra* note 112, p. 34.
[152] *See* Subchater 3.4 Transposition of the Directive 2014/24/EU in the legal systems of Latvia and Lithuania, pp. 25-28.

5 POSSIBLE EVOLUTION PATHS OF THE EU LEGISLATION ON PUBLIC PROCUREMENT

The European Commission has set out to improve the Regulatory framework within the EU by introducing the notion of smart regulation. This notion implies that the complete policy of the legislation should be taken into consideration from the design of the legislative act till its implementation and revision. Secondly, it requests that the EU legislation has to be the responsibility of both supranational and national levels of legislators. Thirdly, it is noted that the legislation should not be separated from stakeholders and their views and opinions should be taken into consideration.[153] In a broader aspect the notion of smart regulation has been described by the second paragraph of the Communication from the Commission:

> Our approach to regulation must promote the interests of citizens, and deliver on the full range of public policy objectives from ensuring financial stability to tackling climate change. EU regulations also contribute to business competitiveness by underpinning the single market, eliminating the costly fragmentation of the internal market because of different national rules.[154]

This paragraph even more emphases the necessity of harmonized national rules in order to fully reach the goals of the single market. The notion of smart regulation was adopted with the aim to provide the necessary legislative tools for the objectives set out by the Europe 2020 Strategy of the European Commission.[155]

Regardless of the fact that the necessity of a strong internal market has been provided already in the Treaty for the establishment of the European Coal and Steel Community,[156] the fact that there is no complete harmonization of the understanding of this principle with regard to the interpretation of the EU legislation by the national legislators, contracting authorities and economic operators is further evident in the relevant case law.

5.1 Relevant case law on interpretation of EU legislation on public procurement

The Court of Justice of the European Union is the institution responsible for the ensuring of the harmonization of interpretations and applications of the EU legislation within the EU as well as the ensuring of the obedience of the EU legislation by the member states and the EU institutions.[157]

The Court of Justice of the European Union has shown a rather significant support for the principle of the single market[158] and the objective to achieve it as efficiently as possible by trying to find the legal support for it rather than the opposite as shown in judgement of case C-470/13. This case primarily concerned the obligation for a contracting authority to apply

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[153] European Commission, *Smart Regulation in the European Union /* COM/2010/0543 final */*, p. 3, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0543&from=EN, accessed May 19, 2019.
[154] *Ibid*, p. 2.
[155] *Ibid.*
[156] *See* Subchapter 2.1 The principle of the single market in the EU, pp. 8-11.
[157] European Union, *Court of Justice of the European Union*, available on: https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en, accessed May 19, 2019.
[158] Arrowsmith, *supra* note 2, p. 383.

the provisions of the Directive 2004/18/EC to a public procurement procedure for a contract which was valued below the thresholds indicated in the articles governing the scope of the Directive 2004/18/EC. In its judgement the court concluded that regardless of the fact that the scope of the Directive 2004/18/EC is defined by setting a specific threshold, the Treaty of the Functioning of the European Union can still be applied and that it is applicable to any kind of contract which has a cross-border interest.[159] Thus, it can be concluded that the provisions of the Directive 2004/18/EC are still usable as a tool for interpreting the provisions of the Treaty of the Functioning of the European Union since the Directive 2004/18/EC itself is designed to comply with the objectives of the Treaty of the Functioning of the European Union.[160]

In cases where the interpretation of a specific provision of the EU procurement legislation has been sought for, the Court of Justice of the European Union has provided for a rather direct and narrow interpretation.

As, for example, in case C-234/14 where a direct question was asked by the Supreme Court of the Republic of Latvia on whether the provisions of the Directive 2004/18/EC should be interpreted in a way which allows the contracting authority to require the conclusion of subcontractor agreements before the award of the public works contract. The Court of Justice of the European Union provided for an almost direct quotation of the relevant provision of the Directive 2004/18/EC by stating that the contracting authority has no right to require the conclusion of any kind of subcontractor contracts before the award of the contract.[161] The issue of different interpretations of the provisions of the EU legislation manifests itself in this case by the fact that the competition limiting provision of the tender documents was supported by the Latvian Office for the Supervision of Public Contracts which is the first instance to revise any claims against the public procurement procedures within the Republic of Latvia.[162] In this particular case the affected economic operator had the capacity and the interest to object the unreasoned requirements in further instances; however, it can be speculated that for other requirements which have not as significant economic impact, the economic operators choose to comply with the requirements rather than to contest them.

The provisions which are not transposed and implemented correctly by the member states are contested by the European Commission and the tools for the evaluation of the transposed provisions have been integrated into the current EU legislation on public procurement as well.[163]

The European Commission has brought an action to the Court of Justice of the European Union against the Federal Republic of Germany for defining minimum and maximum tariffs for services of architects and engineers.[164] In the opinion of the European Commission these tariffs are violating the rules provided in the Directive 2006/123/EC which

[159] Judgement in *Generali-Providencia Biztosító Zrt* v *Közbeszerzési Hatóság Közbeszerzési Döntőbizottság*, C-470/13, ECLI:EU:C:2014:2469.
[160] *Supra* note 141, first sentence of the preamble.
[161] Judgement in *Ostas celtnieks SIA* v. *Talsu novada pašvaldība and Iepirkumu uzraudzības birojs*, C-234/14, ECLI:EU:C:2016:6.
[162] *Supra* note 90, Section 9.
[163] *Supra* note 28, Article 121.
[164] *Supra* note 21.

govern the existence of specific requirements set by the member states for any kind of provision of services within the internal market.[165]

In the case C-377/17 the Court of Justice of the European Union issued an opinion that the contested rules were in fact in violation of the community rules provided in the Directive 2006/123/EC. The reasoning of the Court of Justice of the European Union was that the Federal Republic of Germany did not provide for sufficient evidence that the questioned provisions are supported by reasons of public interest, are proportional to their objectives and cannot be supplemented by other, less restrictive measures.[166]

By applying the reasoning of the Court of Justice of the European Union from the case C-377/17 to the provisions of the construction law of the Republic of Latvia it can be speculated that the provision requiring a special registration of a legal person in order to provide construction services is also violating the community rules.

In order to fully grasp the strong position of the Court of Justice of the European Union on the obedience of the principle of the single market some other judgements should be examined. Advocate general Jacobs has provided for a rather clear and direct statement in his opinion on the case C-412/93:

> There is one guiding principle which seems to provide an appropriate test: that principle is that all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole of the Community market, unless there is a valid reason for denying them full access to a part of that market. In spite of occasional inconsistencies in the reasoning of certain judgments, that seems to be the underlying principle which has inspired the Court's approach from Dassonville through "Cassis de Dijon" to Keck. Virtually all of the cases are, in their result, consistent with the principle, even though some of them appear to be based on different reasoning.[167]

This statement provides for a direct link between the freedom to provide services and the free movement of goods. In essence this statement does not distinguish any differences between the different kinds of economic activities and thus it presents a uniform idea of the ensuring of the single market. The statement itself is justified with such milestone cases like “Cassis de Dijon” which in essence has provided for the fundamental understanding that if a product can be lawfully produced and sold in one member state it should have the same possibilities in other member states as well as long as it does not interfere with the public interests.[168] It should be argued that the same principle could be applied to the provision of services such as the performance of construction contracts. If a construction company is performing adequately in one member state, there should be no reasonable doubt that it can do the same in any other member state.

Although, the relevant case law provides for a reasonable interpretation of the EU legislation, thus providing the necessary clarifications in a rather efficient manner, the need for further harmonization of the community rules should be evaluated. In particular the need

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[165] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ L* 376, 27.12.2006, pp. 36–68, Article 2.
[166] *Supra* note 21, paras. 82 - 113.
[167] Judgement in *Société d'Importation Edouard Leclerc-Siplec* v *TF1 Publicité SA and M6 Publicité SA*, C-412/93, ECLI:EU:C:1995:26.
[168] *Supra* note 14, para. 14.

for a directly implementable legislation on EU public procurement together with further harmonization of the rules governing the connected sectors of economy should be discussed.

5.2 The potential advantages and disadvantages of a Regulation on public procurement for public works contracts in the EU

The adoption of a regulation instead of a directive on public procurement within the EU would eliminate at least one level interpretation. This level would be the legislators of the individual member states. This would provide for a narrower field of interpretations and thus, ensure a more efficient legislative framework. Theoretically this should provide for a more efficient regulation which should lead to the more efficient ensuring of the objectives provided by the legislator.

The notion of smart regulation is definitely a step towards this direction since it implies that the whole life-cycle of the legislation should be considered as a complex in order to evaluate its efficiency.[169] It does not, however, imply that the only way in achieving this would be to draft directly binding legislative acts which would be applicable across the EU in their entirety.[170] Nevertheless, the more diligent monitoring of the efficiency of the EU legislation regardless of its legal status, would most certainly at least partially achieve a similar effect as legislation with a direct binding force. In general the notion of smart regulation would suggest a more pro-active approach to the application and enforcement of the EU legislation by stimulating the communication between the institutions of the EU, the national legislators and the stakeholders.[171]

A regulation on public procurement would definitely provide for a more efficient harmonisation of the rules across the EU because of its direct applicability as opposed to twenty eight relatively close and yet different approaches of the legislators of the individual member states. However, it would impose a further chain of events which should result in the harmonization of all the affected fields of economic activity as the rules governing the construction industry in order for it not to become as complicated as the current legislation on public procurement of the Republic of Latvia.[172]

The current difficulties faced by the national legislators of the member states should definitely be taken into consideration when discussing the possibility to provide for a harmonised legal framework of the EU with a direct applicability. The difficulty to execute an accurate transposition of the current EU legislation on public procurement manifests itself in the interconnectedness of the legislation on public procurement and the construction industry in the case of the Republic of Latvia.[173] This suggests that without the prior harmonization of the construction industry, further harmonization of the public procurement sector is inadvisable because it could create more distortion with regard to legal certainty.

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[169] *Supra* note 153, p. 3.
[170] European Union, *Regulations, Directives and other acts*, available on: https://europa.eu/european-union/eu-law/legal-acts_en, accessed May 19, 2019.
[171] *Ibid.*
[172] *See* subchapter 3.4 Transposition of the Directive 2014/24/EU in the legal systems of Latvia and Lithuania, pp. 25-28.
[173] *See* subchapter 3.5 Additional hurdles hindering the transposition of the Directive 2014/24/EU into the legal system of Latvia, pp. 28-31.

The solution to the issue can be found in the proposed smart regulation by allowing more intervening of the European Commission in the legislative process of the individual member states in a form of a pro-active monitoring and guidance.[174]

The complete abolishment of national discretion could also result in unreasonably high sacrifices of the constitutional regime of the European Community which could possibly not be reasonably balanced by the benefits of the single market.[175]

In order to avoid such sacrifices it would be reasonable to continue the gradual acceleration of harmonization without imposing any sudden changes in the path established since the adoption of the first directives on public procurement of the EU; however, carefully evaluating the potential cost to benefit ratio on every step.[176]

[174] European Commission, *Strengthening the foundations of Smart Regulation – improving evaluation /* COM/2013/0686 final */*, p. 10, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0686&from=EN, accessed May 19, 2019.
[175] Arrowsmith, *supra* note 2, p. 384.
[176] *Ibid*.

6 CONCLUSION

The current EU legislation on public procurement has been evolving for almost half a century since the adoption of the first EU directives on public procurement in year 1971. Since then the main objective of the openness of the public procurement market has not been changed, thus it is to conclude that the consistency and legal certainty has been provided.

However, this thesis has indicated that, although, the objectives have been reached in their general meaning, there still exists a list of minor issues which, taken separately, do not impose a reasonable obstacle for the achievement of the general objectives of the legislation; however, if taken into consideration as a correlating group, these issues pose a valuable threat for the efficient achievement of the overall objectives of legislative framework for the ensuring of the principle of the single market.

The issues manifest themselves in the differing interpretations of the EU legislation on public procurement by the different parties involved at more than a single level. Although, the legislation clearly provides the reasoning for the need of a more efficient public procurement market which should be achieved through the openness of it, provisions of the national laws like the mandatory construction company registry and qualification classes of the Republic of Latvia, still provide barriers for the free movement of services and minimisation of administrative burdens which in turn reduces the possibilities for a more open and less restrictive common market. Such burdens are especially restrictive for the internationality elements of the sector as well as the smaller market participants. These burdens are still existent regardless of the fact that the Court of Justice of the European Union in its opinion in the case C-377/17 has provided for the necessity to analyse any kind of such restrictions which are aimed at the protection of the public interest, by their proportionality to the aim as well as by evaluating all kinds of possibly less restrictive measures which could be as efficient in reaching the aim as the more restrictive measure in question.

Thus the first question proposed in the introduction of this thesis cannot be answered in the completely affirmative or denying way. The current EU legislation on public procurement is effective as long as it is used by the national legislators in the intended manner for the achievement of the common objectives. However, the ineffectiveness of the legislation manifests itself by the opportunity left to the national legislators to interpret the details of the legislation. The faults hindering the achievement of the common objectives caused by the difference of the interpretations lead to a partial inefficiency of the whole system. Nevertheless, these faults are not caused by the defects of the EU legislative acts. They are caused by the different interpretation and application of the legislation by the nationals of the individual member states. These differences are attributable to the differences in national, social and political policies as well as, in some borderline cases, lack of understanding of the basic principles of the EU by the end users of the EU legislation.

The influence of the EU legislation on public procurement on the construction industry within the EU can be best described by the economic activities with a cross border nature. In the case of such relation between Latvia and Lithuania, it is observable that since the cross-border trade of construction services is practically non-existent, it is possible to conclude that the objectives of the legislation have not been reached and the construction market is not open enough to facilitate the cross-border tendering process.

However, it should be emphasised here that the low levels of foreign activities within the construct industry are not the only determinants of the influence of the legislation since it has at least an indirect influence which requires more time in order to reach its full potential.

The indirect influence of the EU legislation on public procurement sector of the construction industry is predefined by the nature of the indirect applicability of the EU directives. There is no reasonable doubt that the EU legislation has influence on each individual economic operator; however, the level of influence is minimised by the intervention of the national legislators. Thus, the answer to the second question should be formulated in the way that it affirms the existence of the influence of the EU legislation on public procurement sector of the construction market; however, the influence cannot be overemphasised because of the limitations set to it by the intermediate step of the legislative process which is operated by the legislators of the individual member states.

The increase of the influence of the EU legislation can be achieved in more than one way; however, it should be emphasised that in order for any change to have a positive and efficient effect it should be reasoned and well proportioned. The past has proven that it is not sufficient to describe a principle in one document in order for it to become a general principle which is accepted by all the involved parties in an equal manner. The European Commission has strived to provide the legislative framework and the Court of Justice of the European Union has equally provided for the necessary clarifications of this framework; however, the objectives still have not been fully reached for more than sixty years. This proves that it is not enough that only the supranational level accepts the principles, the principles have to be accepted and applied by the national levels as well as on the individual level, in order for them to reach the full capacity. This requires for a broad involvement of all kinds of stakeholders in the process of defining and formulating the principles, rather than just requiring the application of these same principles.

Thus, the answer to the third question is much more primitive than the answers to the first two questions. Since the European Commission has defined the principle of “smart regulation” in a rather efficient manner and this definition corresponds to the conclusions derived from this thesis, the evolution of the EU legislation on public procurement should follow the path of further engagement of the stakeholder into the legislative process set out by the principles of the “smart regulation”.

In general it can be concluded that the impact of the EU legislation on public procurement on the construction industry within the EU is insufficient due to the lack of common understanding of the principles of the common market by the different users of the EU legislation on public procurement. This should be improved by the process of involvement and education of the different levels of stakeholders, in order for them to fully grasp the potential benefits of the principle of the single market within the EU.

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