



Federal Ministry
for Economic Affairs
and Energy

The transposition of the new EU Public Procurement Directives in Germany



Single Market Forum, Rome,
- Benjamin von Engelhardt -

A. Overview

▶ The modernisation package includes three directives:

- Directive 2014/24/EU on **public procurement**
- Directive 2014/25/EU on utilities
- Directive 2014/23/EU on the **award of concession contracts**

The greatest reform of public procurement since 2004 in Germany

▶ **Transposition deadline:** until April 18, 2016

▶ **If transposition is incomplete** or has not been done properly:

- **Infringement proceedings** by the EU Commission
- **Direct effect** of large parts of the Directives

B. Strategy paper of January 7, 2015

1. Schedule of implementation

17 April 2014	Entry into force of the new directives
7 January 2015	Federal cabinet decision on a strategy paper on the modernisation of the German public procurement legislation
Spring 2015	Cabinet decision on the legislative amendment
Autumn 2015	Legislative process in the German Parliament and the Federal Council of Germany
Autumn 2015	Following: Cabinet resolution on the regulations
Winter 2015/2016	Consent of the Federal Council to the Regulations
April 2016	Entry into force, implementation

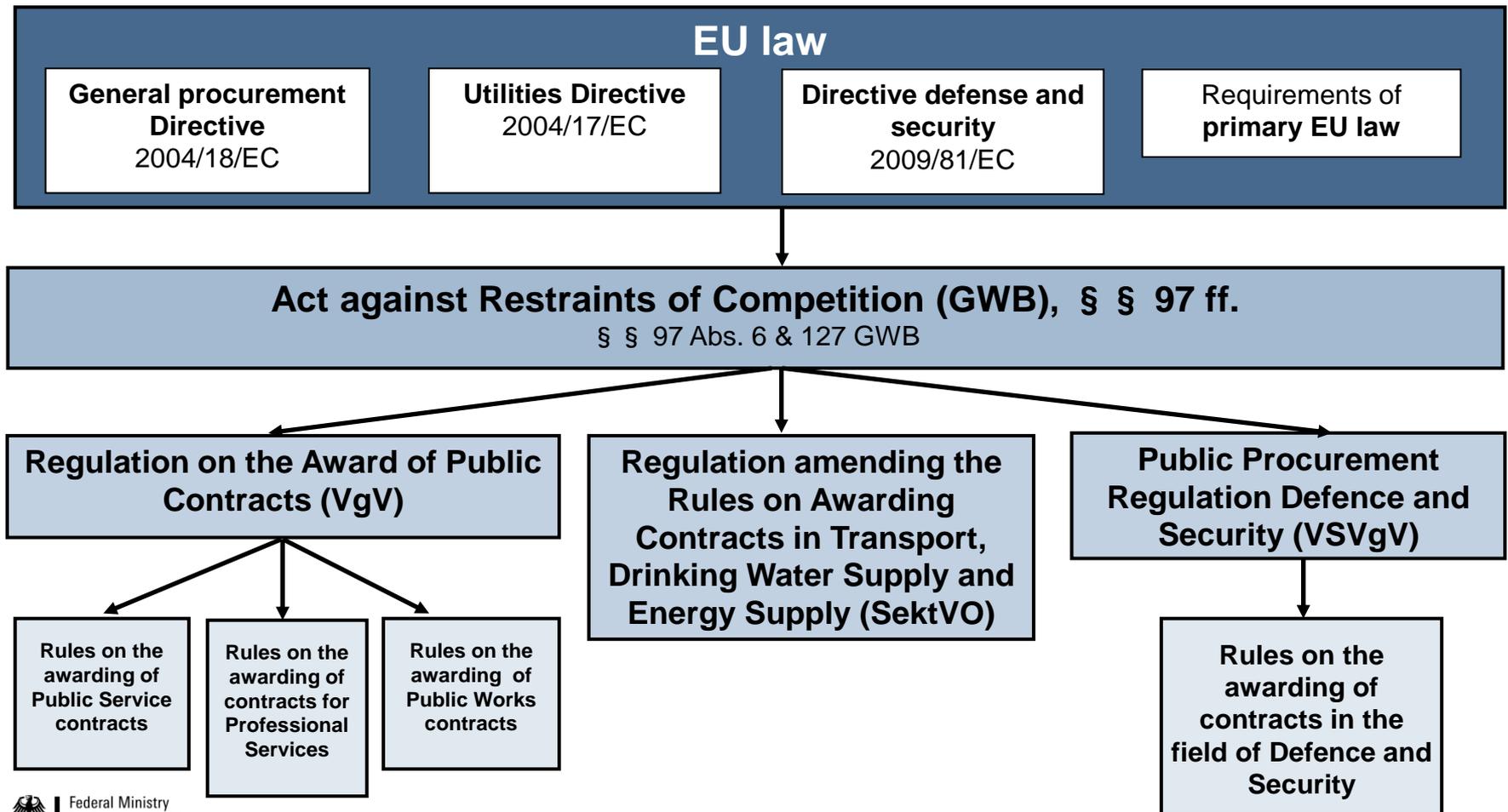
B. Strategy paper of January 7, 2015

2. Objectives of the modernisation of the EU public procurement law

- ▶ Simple and user-friendly public procurement
- ▶ Limitation of bureaucracy
- ▶ Preservation of margins for manoeuvre to local governments
- ▶ Reinforce the possibility of taking strategic objectives into account
- ▶ Preferential treatment of interests of SMEs
- ▶ Procurement process in largely digital form (E-procurement)
- ▶ Prevention of economic crime and corruption
- ▶ Principle of „one to one“ implementation

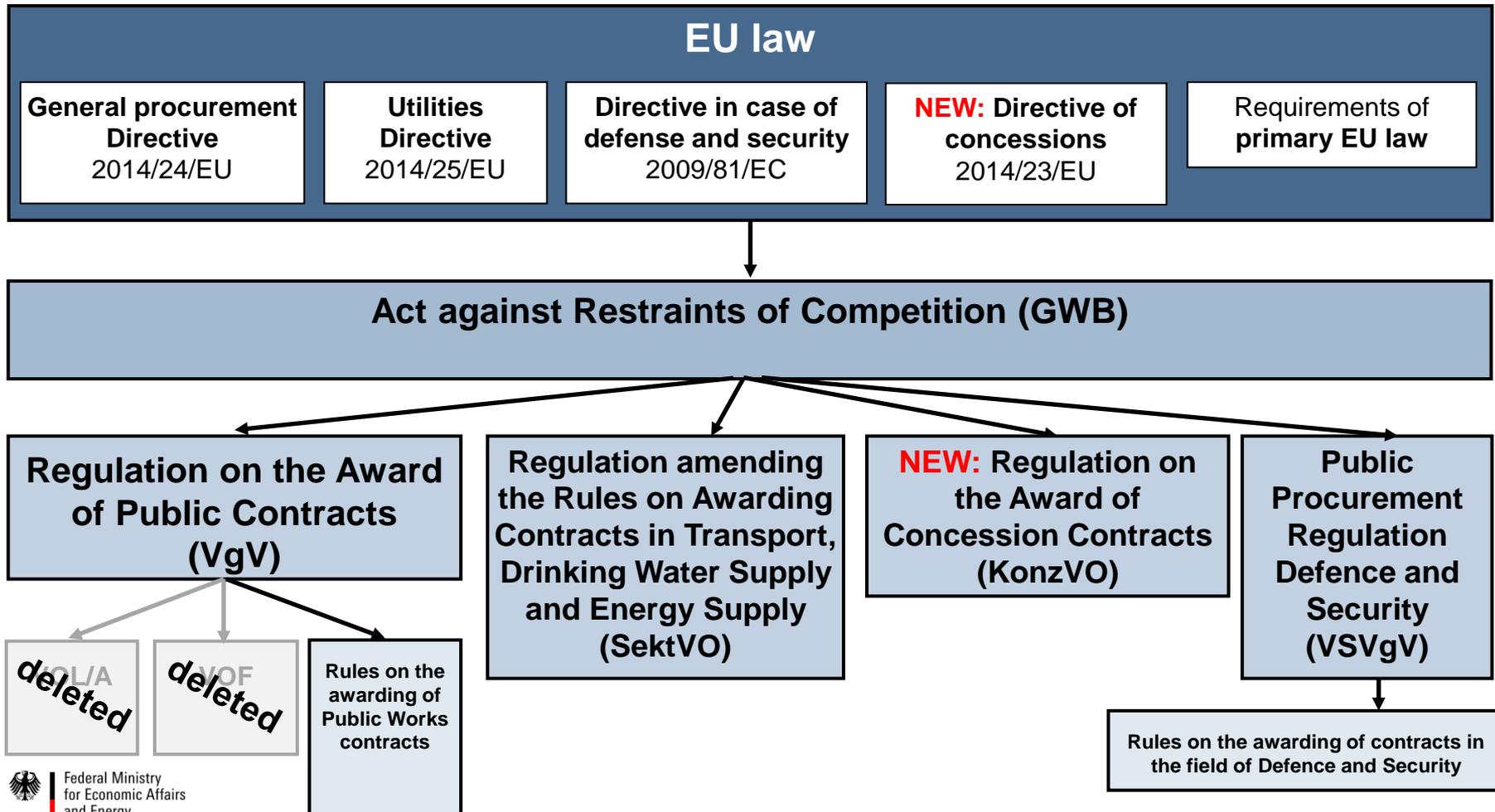
B. Strategy paper of January 7, 2015

3. Structure of the upper threshold range – Today



B. Strategy paper of January 7, 2015

3. New Structure of the upper threshold range – based on the strategy paper of January 7, 2015



B. Strategy paper of January 7, 2015

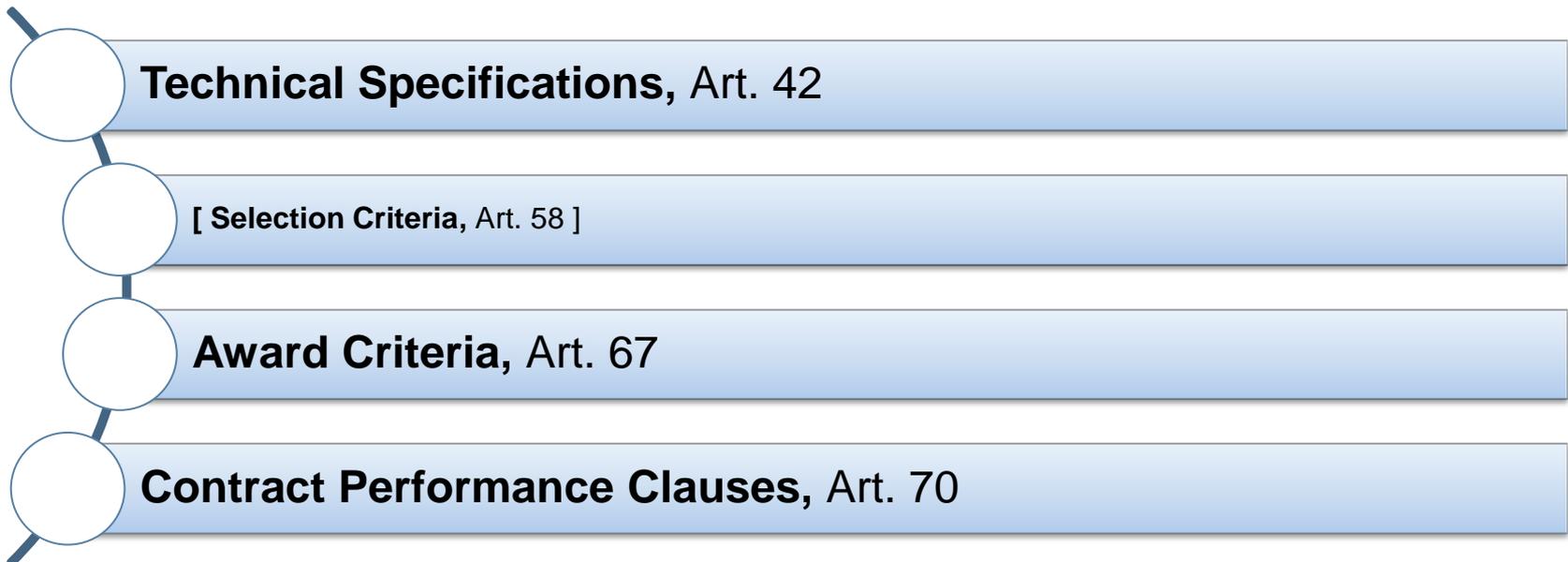
4. To simplify procurement procedure and to make it more flexible

- ▶ In principle equality between open or restricted procedures (in contrast of the existing law in Germany prioritising the open procedure)
- ▶ Enhancing the negotiated procedure, Art. 26 of the Directive
- ▶ **New:** Innovation partnership, Art. 31 of the Directive

B. Strategy paper of January 7, 2015

5. Sustainable and innovative procurement

- ▶ Extending the possibilities for contracting authorities to require the observation of sustainable and innovative aspects on different levels:



- ▶ General reference to labels as means of proof for the required properties, Art. 43

B. Strategy paper of January 7, 2015

5. Sustainable and innovative procurement

Important:

Award criteria and contract performance conditions **must be linked to the subject-matter of the contract**, Art. 67

B. Strategy paper of January 7, 2015

6. Simplification of the rules on selection criteria

- ▶ The European Single Procurement Document (ESPD), consisting of an updated **self-declaration** as preliminary evidence in replacement of certificates issued by public authorities or third parties, Art. 59(1)
- ▶ Contracting authorities are **obliged** to accept the ESPD
- ▶ The ESPD shall be provided **exclusively in electronic form**, Art. 59(2)

B. Strategy paper of January 7, 2015

6. Simplification of the rules on selection criteria

- ▶ COM shall develop a **standard form**, by means of implementing acts (examination procedure), Art. 59(2)
- ▶ Probably high practical relevance

Challenges:

- many questions have occurred in Germany
- **ESPD has to be user-friendly**
- **coherence with existing prequalification systems**

B. Strategy paper of January 7, 2015

7. Compliance with obligations in the field of environmental, social and labour law

- ▶ Art. 18(2): Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with **applicable** obligations in the fields of **environmental, social and labour law**

- ▶ Control takes part in different parts of the procurement procedure:
 - Choice of participants, Art. 56(1)
 - Exclusion grounds, Art. 57(4)
 - Abnormally low tenders, Art. 69(2)

- ▶ **In the strategy paper explicitly named:** nationwide legal minimum wage, minimum wages in collective agreements which have been declared as generally binding

B. Strategy paper of January 7, 2015

8. Preservation of margins for manoeuvre to local authorities

- ▶ For the first time codification of the **ECJ jurisprudence**, Art. 12
 - **Inhouse contract award**
 - **Public-Public cooperation** (horizontal cooperation agreement)

- ▶ **Exceptions**: concession for the supply of drinking water, award of certain rescue services

B. Strategy paper of January 7, 2015

9. Taking greater account of interests of SMEs

- ▶ Preservation of the obligation in German law to **divide into lots**
- ▶ **Minimum yearly turnover** shall not exceed **two times** the estimated contract value (exceptions in duly justified cases), Art. 58(3)

B. Strategy paper of January 7, 2015

10. Combating economic crime and corruption

Implementation of Exclusion grounds, Art. 57:

- ▶ **Mandatory** grounds of exclusion, Art. 57(1, 2): et al
 - Corruption
 - Money laundering, Fraud, Trafficking in human beings
 - **New:** Breach of the obligations relating to the payment of taxes or social security contributions

- ▶ **Facultative** grounds of exclusion, Art. 57(4): et al
 - Violation of applicable obligations referred to Art. 18(2)
 - Misconduct in the procurement procedure, collusion etc.
 - **New:** because of significant or persistent deficiencies in a prior procurement procedure

- ▶ **New:** for the first time specifications for the **Self-Cleaning**
 - Obligation to audit and state reasons
 - Implementation is obligatory

B. Strategy paper of January 7, 2015

11. Combating economic crime and corruption

The German government will examine whether to introduce a nationwide central „corruption register“

- Idea of establishing a register which has to be consulted by contracting authorities before awarding a contract.
- Courts and prosecution would have to report certain convictions related to economic offences and contracting authorities would have to report actual exclusions to a central register
- Such a register would facilitate the decision of a contracting authority whether to exclude an economic operator due to an exclusion ground
- The central register could replace registers already existing on the level of some of the Länder
- Many problems have to be solved prior to the introduction of such a register: e.g. the question which offences should be registered, the recourse to the courts, how self-cleaning will be reflected in the register

B. Strategy paper of January 7, 2015

11. Using electronic communication

The new directives prescribe the use of electronic communication in procurement procedures

- Huge challenge for municipalities and Länder
- Federal Ministry for Economic Affairs and Energy and Federal Ministry of the Interior have initiated conferences in order to inform contracting authorities about the changes in respect of e-procurement
- On federal level (not Länder-level): move towards the mandatory use of **only one federal e-plattform**

C. Governance

Specific challenge in Germany: the federal structure: necessity of coordination

- There is no „central supervision authority“ on national level.
- The Federal Ministry for Economic Affairs and Energy invites the Länder on a regular basis to meetings (up to 4 times a year) in order to discuss and if necessary to coordinate questions linked to the application of procurement law
- The meetings comprise representatives from the central municipal associations as well.
- Regular meetings with the Commission services in order to discuss infringement proceedings or pilot cases and horizontal issues involving representatives from the Länder and if needed the municipalities. The frequency of the meetings depends on the topics and the number of specific cases which are discussed.

C. Governance

The Federal Ministry for Economic Affairs and Energy works towards a **common understanding of certain provisions of procurement law**.

- E.g. circular of the Ministry sent to all federal ministries and the Länder giving guidance in which cases the negotiated procedure without prior publication for reasons of extreme urgency could be used.
- The circular was triggered by a pilot case which had been discussed intensively with the Commission services (planning services, which had not been tendered out).
- In this context the Ministry advised contracting authorities to apply the four-eyes principle (check by a separate entity, e.g. supervising authority, legal service division).

C. Governance

Better statistics: The Federal Ministry for Economic Affairs and Energy intends to establish a **database on public procurement**.

- Up to now **valid statistics** on the volume of procurement, number of procurement procedures, choice of procedures etc. **do not exist**.
- As a first step the Federal Ministry for Economic Affairs and Energy awarded a contract to develop a theoretic concept for a future database (including procurement below and beyond EU-thresholds).
- As a next step this concept has to be implemented in practice (legal and technical implementation, responsible authority etc.)



Federal Ministry
for Economic Affairs
and Energy

Thank you for your attention!



Benjamin von Engelhardt

Permanent Representation of the Federal Republic of Germany to the EU

8-14, rue Jacques de Lalaing

B-1040 Brüssel

Tel: 0032 (0) 2 787 1204

E-Mail benjamin.engelhardt@diplo.de