ENACTMENTS OF URBAN COMMONS
LEGAL GUIDELINES FOR MUNICIPALITIES

When a municipality is faced with the enactment of urban commons (see Q&A→ "urban commons" and "commoning") many legal hurdles emerge. These legal hurdles are mostly related to the core of the structure of administrative law proper of most European legal systems. Indeed, administrative law is mostly rooted around the idea of hierarchy and competition, while urban commons are founded on the logic of horizontal subsidiarity, co-design, collaborative administration (see Q&A→ "horizontal subsidiarity", "co-design", "collaborative administration").
These legal hurdles can be summarized in the following topics:

1) Selection of the manager of public goods or services after a process of co-design in which public administrations and private individuals or entities work together to co-define objectives and solutions of management;

2) Direct attribution of the management of public goods or services to non-profit entities without the organization of a competitive selection;

3) Attribution of the management of public goods or services to informal communities, namely groups of persons not incorporated in specific legal vests.

This report aims at supporting public administrations willing to promote one or more projects of urban commons, analysing the aforementioned topics in the light of EU law. EU law is in fact the law applicable to all Member States, and it represents the general framework shaping all the legal systems of the European Union with respect to the issues at stake. This will allow us to design guidelines useful for all public administrations, independently of their country of operation.

The analysis will rely on the following pillars.

Analysis of the regulatory framework. The regulatory framework will be described and, in particular, relevant EU Directives and Regulations will be selected and analyzed. Points of strength and weaknesses will be highlighted in relation to the forms of collaborative management.

Public procedures in theory and praxis. The analysis of the regulatory framework will allow to summarize public procedures described at EU ground and to compare them with the ones implemented by municipalities to design collaborative forms of management.

Guidelines for municipalities, Guidelines will be prepared in order to help public administrations in finding possible solutions to the critical issues raised. To facilitate the use of the guidelines, they will be structured as practical recommendations.

A. In the first part of the guidelines, the first two issues mentioned in the above will be analysed, namely: i) Selection of the manager of public goods or services after a process of co-design in which public administrations and private individuals or entities work together to co-define objectives and solutions of management; ii) Direct attribution of the management of public goods or services to non-profit entities without the organization of a competitive selection.

The transformation of public neglected open areas and of public buildings which need to be rehabilitated is often delegated from local authorities to non-profit entities who obtain the management of these public spaces through a direct attribution. This model of reuse and of regeneration raise questions of compatibility with both the regulation of concession contracts and public procurement.
In paragraph 1.1, basic principles of public procurement will be summarized and stages normally implemented to award contracts will be described. Then, paragraph 2 will show the reason why direct attribution of public spaces to non-profit entities can clash with the legal arrangement; basic principles and the stages in the process of attribution will be pointed out in paragraph 3. Finally, in paragraph 3 the issue of reimburses and State aid will be faced.

1. Analysis of the regulatory framework – identification of the legal challenges

1.1 Public procurement basic principles

To regulate the field of public procurement the EU has adopted three important procurement Directives:

- Utilities Directive 2014/25/EU;
- Public Sector Directive 2014/24/EU; and
- Concessions Directive 2014/23/EU.

With regards to the topic analyzed in this report, Directives 2014/24/EU and 2014/23/EU will be taken into consideration.

Both the Directives have been introduced to harmonize the Member States national regulations in the field of procurement; nevertheless, Member States can maintain or adopt substantive or procedural rules not in conflict with the EU Directives.

A set of core principles inspires the EU regulation.

> **Competition** operates as a principle ensuring efficient and economic procurement results. Economic operators can present their tenders communicating the price at which the goods or the services are available on the market. Competition aims at giving public administrations the greatest possible choice in the provision of a certain service.
>
> **Equal treatment and non-discrimination** indicate two different but converging strategies to maintain equality between economic operators who shall be evaluated exclusively for the tenders they have presented; no other elements can influence the award decision of public administrations. Thus, equal treatment means objective assessment of tender prices and tender qualities. The principle of non-discrimination adds to this consideration that economic operators' nationality is irrelevant in the common procurement market.
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> **Transparency** is one of the core principles of public procurement and at the same time, as we will show later on in this report, it is one basic principle in the EU context which operates independently of the application of a specific legislation. It forces public administrations to

advertise requirements and technical specifications relevant for the selection process, as well as to adopt all the means to ensure the full assessment of the public action.

Most economically advantageous tender criterion to award contracts requires that all contracts shall be awarded by considering cost-related and non-cost related factors.

Beyond these principles specifically working in the field of public procurement, public administrations shall always respect a set of general principles which inspire all public actions. In addition to **transparency**, this list is composed as follows:

Equality of treatment: The general definition of this principle establishes that all the suppliers/service providers shall be treated at the same conditions.

Mutual recognition: In the EU, reports and certificates issued by the authorities of any member state shall also be valid in all other EU states.

Proportionality: Public authorities shall establish requirements and conditions that are reasonably proportional to the object of their public action.

According to this legal framework, procedures compliant with basic principles are generally organized as follows.

1. **Specification stage.** Public administrations describe the requirements needed for the selection. The description shall fulfill the principle of equality and non-discrimination, so that the list of requirements does not favor or eliminate particular providers. The new Directive admits requirements specifically devoted to deal with social and environmental issues.
2. **Assessment and selection.** Tenders are evaluated according to cost-related and non-cost related factors; technical capacity and ability to provide the good or the service shall be taken into consideration.
3. **Award stage.** The award of contract is established according to the MEAT criterion; social and environmental requirements are included if needed.

2. Public procedures in theory and praxis

In general, the attribution of the management of public spaces permits to achieve one of the objects of a **'public contract'** according to Directive 2014/24/EU, and in particular the **provision of services**.
In fact, non-profit entities use to organize in the public space the provision of different services – such as cultural activities, inclusive practices for migrants and other underrepresented groups, initiatives in the field of education or training, etc. – which are generally devoted to the collectivity and are of general interest.

The non-profit nature of the provider does not avoid the application of procurement principles and rules, since "economic operators should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate"[1]. According to the CJEU ("Court of Justice of the European Union"), running an economic activity within an existing or potential market is the necessary and sufficient condition to apply competition law[2].

[1] Directive 2014/24/UE Recital 16.
[2] CJEU 23 April 1991, Klaus Höfner and Fritz Elser v Macrotron GmbH, C-41/90.

Thus, in this scenario, public administrations should manage a public action inspired by the basic principles of procurement based on a competitive and selective process for assign the public space.
However, in the last few years in the praxis of many European local public administrations, important divergences related to both principles inspiring the procedure and management of this latter can be pointed out.

Several European municipalities are organizing **collaborative procedures** to attribute the management of public spaces. These procedures generally are not regulated by specific national laws; sometimes, local acts have been adopted to regulate these processes (See Q&A → "Regulation for the co-management of urban commons"; "Uso civico"; "Civic management"; "Collaboration pact").

This process is generally based on the following principles (see Q&A → "Horizontal subsidiarity" and "Co-design").

> **Cooperation**: municipalities work together with non-profit entities, without managing a selective procedure.
>
> **Transparency**: municipalities ensure that all the materials related to the co-design phase are available for the evaluation. Thus, reports are collected and shared.
>
> **Qualitative criteria**: municipalities can highlight particular qualitative criteria for defining the process of rehabilitation of the public space employed for the provision of the service.

All the general criteria inspiring the public action as defined in par. 1.1 can be applied to these procedures.

The process starts with the **identification of the public spaces** which is generally promoted by the municipality; sometimes, it can result from a bottom-up identification through which citizens can point out abandoned open areas or neglected public buildings. Municipalities often organize a **co-design process** during which they involve non-profit entities in planning the future of the space and in defining the services that can be helpful for the local community. At the end of this process, **the public space is attributed directly to the non-profit entity** involved in the co-design process and an **agreement** between the parties is signed.

3. Guidelines for municipalities and EU bottlenecks

The compatibility of direct attributions of the management of public spaces can be justified as follows.
First, there is general argument: both the EU directives on procurement and concessions leave Member States free to assess which is the juridical person more able to provide a certain service between a non-profit and a for-profit entity.
Second, the legal reasoning developed by the CJEU in the decision of the "Spezzino" case[3] represents an interesting tool for demonstrating the compatibility of direct attributions with public procurement principles.

The "**Spezzino" judgment** faced the issues of exemptions to the principle of competition in the case of provision of social services.

[3] CJEU, 11 December 2014, Azienda sanitaria locale n. 5 'Spezzino' and Others v San Lorenzo Soc. coop. Sociale and Croce Verde Cogema cooperativa sociale Onlus.

The Azienda Sanitaria Local n. 5 based in the Liguria Region (Italy) established an agreement for the provision of urgent and emergency health transport service with non-profit associations. However, according to the claimants promoting the legal action before the Italian administrative court, this agreement was not-compatible with EU law in particular with regards to the principles of competition, equal treatment and non-discrimination. The claimants argued that the reservation of the provision of the services to non-profit associations discriminated entities working in the same sector but pursuing profit.
A **second problematic issue** related to the direct attribution was represented by the fact that the service was delivered for free, since the associations received only a reimbursement of the expenses suffered in the contract execution. The doubt of compatibility in this case derived on classification of such reimbursement as a State aid.

The **CJEU held that reservation of contracts for the provision of social services to non-profit entities could be admitted if two conditions occur**.
First, the reservation to non-profit entities must not modify the financial balance of the social security system and must maintain "on grounds of public health, a balanced medical and hospital service open to all" (par. 57).
Second, the reservation must contribute to "the social purpose and the pursuit of the objectives of the good of the community and budgetary efficiency on which that system is based" (par. 60).

This last point shall be stressed for supporting the direct attribution of the management of public spaces to non-profit entities.
In case of an administrative contentious, municipalities before national courts shall be able to proof that the direct attribution contributes:

1) to achieve social purposes;
2) to pursuit objectives of the good of the community; and
3) to ensure the budgetary efficiency.

Accordingly, the legal act establishing the direct attribution shall deal with all these three points; it is worth noticing that to strengthen this evaluation, solidarity services managed by non-profit entities shall not substitute public services provided by local authorities, but enrich the public offer.

The demonstration of the budgetary efficiency could require a significant effort, considering that this element can be difficult to be assessed with regards to the management of public spaces. However, in this case, municipalities shall enhance the social impact and the community benefits of the direct attribution more than the economic efficiency. In this sense**, it could be helpful to establish legal framework fixing criteria for a common assessment of the social impact**.

Municipalities are recommended to adopt a legal act to introduce special criteria to evaluate the social impact, or to promote at least a regional legal framework.

By the way, municipalities shall always fulfill the general principles governing their action, namely equality of treatment, transparency, proportionality, and mutual recognition, so that all the legal acts and the procedures devoted to carry out a direct attribution shall be correctly communicated and always available for the public. **Publication of the materials produced during the co-design procedure**, as well as the **preferential criteria according to which the choice is finalized** is warmly required. **Recording and reporting** shall be taken into consideration.

Thus, to summarize:

1) the direct attribution of the management of public spaces shall be justified in a public act stressing that this choice ensures **to achieve social purposes; to pursuit objectives of the good of the community; and to ensure the budgetary efficiency.**
2) in the case of a co-design stage, all the activities developed in this phase shall be documented: reports or audio registrations of the meeting are recommended. Documents and materials shall be easily accessible, so that their publication on a specific webpage is encouraged.

A last clarification shall be advanced.

In the Directive on public procurement**, articles 74-77 establish a special regime for social services** (so called "light regime) which are more lenient than the general one. The rules introduce the possibility to reserve the right to participate in public procurement procedures to those entities defined in art. 77 "Reserved contracts for certain services" who are both non-profit and for-profit entities responding to the hybrid definition of social enterprises. However, the special regime establishes a process of selection with its own rules about the publication of notices and its own principles of awarding the contract.
In particular, the light regime has two different sections depending from the value of contracts.

- In case of contracts below EUR 750.000, national authorities are entirely free to regulate and conduct tendering procedures for these same services.
- Above that value, "EU rules require contracting authorities to comply with rules on transparency by making their intention to tender out one of these services known at EU level, prior to the start of the procedure, and to equally announce its conclusion and outcome through a contract award notice".

In the **field of urban regeneration** and especially for awarding contracts for the provision of educational and cultural services, community, social and personal services furnished by youth associations[4] the light regime could be interesting; however, the Directive does not establish particular rules of procedures, but requires Member States to introduce specific national regulations related to these general provisions.

4. Reimburses and State aid

To support the provision of these services which are generally neighborhood-based, municipalities use to assign the public space for free, even if these open areas or buildings have a pecuniary value. Moreover, public administrations use to reimburse expenses sustained by non-profit entities to manage the space, if correctly documented.

Reimburses can raise the issue of their compatibility with the EU regulation of state aid. According to art. 107 TFUE, State aid is defined as "'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods […], in so far as it affects trade between Member States".

Some notions included in this definition or deriving from it shall be clarified:

- **undertakings** are entities engaged in economic activities, regardless of their legal status. Thus, national distinctions based on the non-profit/for profit dichotomy are not relevant;
- an **economic activity** consists in offering goods or services on a market;

[4] These three services are mentioned in the Annex XIV of the Directive 2014/24/EU with regards to the application of the light regime.

- the **existence of a market** for offering services depends on political choices, and in particular on the way in which Member States have organized these services. For this reason, a list of economic activities is not provided in EU law, even if some clarifications are collected in Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union.

According to this definition, non-profit entities managing public spaces are undertakings if Member States introduce a market mechanism for the corresponding services.

By the way, **the management of public spaces cannot be considered as an economic activity by showing that it is part of the essential functions of the state or it is connected with those functions by its nature, its aim and the rules to which it is subject**.
In the above-mentioned Commission Notice, a list of examples is provided and among these activities, the development and revitalization of public land by public authorities is claimed. This latter can include an activity such as urban regeneration, considering that the management of local urban and spatial development plans represents one of the essential functions of public authorities[5]. Moreover, regenerating and taking care of abandoned buildings and neglected areas can be conceived as two activities apt to ensure environmental protection that is another essential public function[6].

Thus, to avoid the application of State aid law, **municipalities** shall clarify in the legal act establishing the attribution of the management of public spaces the **main public function** that the activity carried out by non-profit associations permit to ensure.

Fore more visit:
https://generative-commons.eu/

[5] Commission decision of 27 March 2014 on State aid SA.36346 — Germany — GRW land development scheme for industrial and commercial use
[6] Court of Justice of 18 March 1997, Calì & Figli, C343/95