

# Introduction

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Public procurement is a powerful exercise. It carries the aptitude of acquisition; it epitomizes economic freedom; it depicts the nexus of trade relations amongst economic operators; it represents the necessary process to deliver public services; it demonstrates strategic policy options. Public procurement as a discipline expands from a simple topic of the common market, to a multi-faceted tool of European regulation and governance covering policy choices and revealing an interesting interface between centralized and national governance systems. This is where the legal effects of public procurement regulations are felt most.

The regulation of public procurement in the European Union has multiple dimensions, as a discipline of European law and policy, directly relevant to the fundamental principles of the common market and as a policy instrument in the hands of Member States. The purpose for the regulation of public procurement is to insert a regime of competitiveness in the relevant markets and eliminate all non-tariff barriers to intra-community trade that emanate from preferential purchasing practices which favour national undertakings. Apart from reasons relating to accountability for public expenditure, avoidance of corruption and political manipulation, the regulation of public procurement represents best practice in the delivery of public services by the state and its organs.

In addition, the regulation of public procurement is a priority in public policy matters for the European Union. A combination of legal, macro and micro-economic objectives correspond to public sector management principles such as transparency, accountability, fiscal prudence and competition and make public procurement regulation a necessary ingredient for the EU integration process. The commonly accepted assumption is that public procurement is not subject to the same commercial pressure or organizational incentives for sound management as private sector procurement which is underpinned by the foundations of strong competition. This has prompted the imposition, not only by the EU but by many jurisdictions around the world, of legal and regulatory disciplines to encourage the better use of public financial resources, to introduce greater efficiency and to reduce the risk of favouritism or corruption in public purchasing.

The stakes cannot be higher for the EU. Currently, the total public expenditure directed by the Member States in procuring goods, works and services

accounts for over €2 trillion. Public procurement in the Member States is a highly fragmented and complex process, notably in relation to the extent of centralization or decentralization which varies amongst Member States as a function of the organization of their public administration. There is a large and heterogeneous range of over 250 000 contracting authorities across the EU which annually conclude in excess of 2 million procedures for the award of public contracts.<sup>1</sup>

EU public procurement rules exist in order to introduce a discipline of regulation in the relevant markets and in particular, to ensure that undertakings from across the Single Market and beyond have the opportunity to compete for public contracts by removing legal and administrative barriers to participation in cross-border tenders, for ensuring equal treatment and by abolishing any scope for discriminatory purchasing through enhanced levels of transparency and accountability.

The European Union, after a considerable amount of debate and consultation<sup>2</sup> adopted a detailed set of rules in the form of EU Directives which govern the award of public contracts in the supplies, works and services sectors, as well as in the public utilities<sup>3</sup> in 2006. The Directives reflect on the 1996

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<sup>1</sup> An approximate 20% of total public expenditure on goods, works and services is covered by the EU public procurement Directives. The estimated value for these contracts is €420 billion in 2009–10. Three quarters of the value of procurement advertised in accordance with EU rules is for construction work and services. Supplies make up only a quarter of all procurement.

<sup>2</sup> See the proposal from the European Commission, OJ C 29 E, 30.1.2001, p. 11 and OJ C 203 E, 27.8.2002, p. 210; the opinion of the Economic and Social Committee OJ C 193, 10.7.2001, p. 7; the opinion of the Committee of the Regions OJ C 144, 16.5.2001, p. 23; the opinion of the European Parliament of 17 January 2002 (OJ C 271 E, 7.11.2002, p. 176), Council Common Position of 20 March 2003 (OJ C 147 E, 24.6.2003, p. 1) and Position of the European Parliament of 2 July 2003. See also the Legislative Resolution of the European Parliament of 29 January 2004 and Decision of the Council of 2 February 2004.

<sup>3</sup> See Directive 2004/18, OJ L 134, 30.4.2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and Directive 2004/17, OJ L 134, 30.4.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. The new Directives amend the existing regime which is applicable until 31 January 2006 and includes the following instruments: the Public Supplies Directive 93/36/EC, OJ L 199, as amended by Directive 97/52/EC OJ L 328 and Directive 2001/78/EC, OJ L 285; The Public Works Directive 93/37/EC, OJ L 199, amended by Directive 97/52/EC, OJ L 328 and Directive 2001/78/EC, OJ L 285; The Utilities Directives 93/38/EC, OJ L 199, amended by Directive 98/4/EC OJ L 101; The Public Services Directive 92/50/EEC, OJ L 209, amended by Directive 97/52/EC, OJ L 328 and Directive 2001/78/EC, OJ L 285; The Remedies Utilities Directive 92/13/EEC, OJ L 076, 23.03.1992; The Public Remedies Directive 89/665/EEC, OJ L 395, 30.12.1989.

European Commission's Green Paper on Public Procurement<sup>4</sup> and the following 1998 Commission's Communication.<sup>5</sup> The Directives have been seen as an integral part of the Commission's 2000 Work Programme, which pledges to modernize the relevant legislation for the completion of the internal market and at the same time implement the Lisbon European Council's call for economic reform within the internal market.

The degree and level of importance of public procurement in the European Union and the constant evolution of its regulation which reveals indissoluble links with Community law, prompted the European Commission during 2011 to launch a Green Paper<sup>6</sup> to review the substantive public procurement Directives. The vision and aspirations of European Institutions towards a Single Market Act<sup>7</sup> have identified public procurement reforms as essential components of competitiveness and growth<sup>8</sup> and as indispensable instruments in delivering public services.<sup>9</sup>

The European Commission has been always keen to stress the significance of public procurement as an essential component of the single market.<sup>10</sup> Public procurement has been identified as a considerable non-tariff barrier and a hindering factor for the functioning of a genuinely competitive single market. Economic justifications for its regulation are based on the assumption that by introducing competitiveness into the relevant markets of the Member States, their liberalization and integration will follow. This result, in theory, would increase import penetration of products and services destined for the public sector, would enhance the tradability of public contracts across the common market and would bring about significant savings and price convergence.

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<sup>4</sup> See the Green Paper on Public Procurement in the European Union: Exploring the way forward, European Commission, 1996.

<sup>5</sup> See European Commission, Communication on Public Procurement in the European Union, COM(98) 143.

<sup>6</sup> See *Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market*, COM (2011) 15/47.

<sup>7</sup> See European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

<sup>8</sup> See European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

<sup>9</sup> See European Commission, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, 7.12.2010, SEC(2010) 1545 final. See European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010) 1258, final.

<sup>10</sup> See European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

However, Member States retain full discretion for the regulation of public procurement outside the scope of the EU Directives.<sup>11</sup> Several Member States regulate public procurement below EU thresholds within the same act as the contracts covered by the EU Directives and also require the use of open, fair and competitive procedures, which have similar features to those laid down in the Directives. There are areas where national rules and procedures are often similar for contracts above and below the EU thresholds, such as rules for qualitative selection, evaluation of tenders, award criteria, abnormally low tenders, technical specifications, framework agreements and electronic procurement. Other Member States provide a lighter regime for contracts below the EU thresholds, which may take the form of administrative guidance rather than formal legislation and offer shorter time limits for submission of applications and tenders and less demanding rules for publication and for selection of tenders.

Historically, two strategic plans have facilitated the economic integration of the EU Member States. These plans were enacted by European institutions and have been subsequently transposed into national laws and policies by Member States. The first plan included a series of actions and measures aiming at the abolition of all tariff and non-tariff barriers to intra-community trade. The second plan has focused on the establishment of an effective, workable and undistorted regime of competition within the common market, in order to prevent potential abuse of market dominance and market segmentation, factors which could have serious economic implications in its functioning. The first plan, the abolition of all tariff and non-tariff barriers to intra-community trade, reveals a static effect which aimed at eliminating all administrative and legal obstacles to free trade and had as its focal point Member States and their national administrations. The second plan, the establishment of an effective, workable and undistorted regime of competition within the common market, has been implemented at industry level and has a dynamic effect.

The regulation of public procurement in the European Union has been significantly influenced by the internal market project. The White Paper for the Completion of the Internal Market<sup>12</sup> and the Single European Act represent the conceptual foundations of the regulation of public markets of the

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<sup>11</sup> Large amounts of public expenditure on goods and services to provide health, education and social services (over 6% of GDP) are spent in ways which are not covered by the EU public procurement Directives. Also, Public contracts below the EU thresholds fall outside the scope of the EU public procurement Directives but they are of significant importance. Below-threshold procurement was estimated at around €250 billion in 2008 or around 2% of EU GDP. Finally, the EU procurement Directives provide certain explicit exemptions for expenditure on defence equipment.

<sup>12</sup> See European Commission, *White Paper for the Completion of the Internal Market*, (COM) 85 310 fin., 1985.

Member States. The identification of public procurement as a significant non-tariff barrier has offered ample evidence on the economic importance of its regulation.<sup>13</sup> Savings and price convergence appeared as the main arguments for liberalising the trade patterns of the demand (the public and utilities sectors) and supply (the industry) sides of the public procurement equation.<sup>14</sup> The regulation of public procurement exposes an economic and a legal approach to the integration of public markets in the European Union. On the one hand, the economic approach to the regulation of public procurement aims at creating an integral public market across the European Union. Through the principles of transparency, non-discrimination and objectivity in the award of public contracts, it is envisaged that the public procurement regulatory system will bring about competitiveness in the relevant product and geographical markets, will increase import penetration of products and services destined for the public sector, will enhance the tradability of public contracts across the common market, will result in significant price convergence and finally it will be the catalyst for the needed rationalization and industrial restructuring of the European industrial base.<sup>15</sup>

The legal approach to the regulation of public procurement, on the other hand, reflects on a medium which facilitates the functions of the common market. In parallel with the economic arguments, legal arguments have emerged supporting the regulation of public procurement as a necessary ingredient of the fundamental principles of the Treaties, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on nationality grounds.<sup>16</sup> The legal significance of the regulation of public procurement in the common market has been well documented through the Court's jurisprudence. The liberalization of public procurement indicates the wish of European institutions to eliminate preferential and discriminatory purchasing patterns by the public sector and create seamless intra-community trade patterns between the public and private sectors. Procurement by Member States and their contracting authorities is often

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<sup>13</sup> See Commission of the European Communities, *The Cost of Non-Europe, Basic Findings, Vol.5, Part A; The Cost of Non-Europe in Public Sector Procurement*, Official Publications of the European Communities, Luxembourg, 1988. Also the Cechinni Report, *1992 The European Challenge*, Aldershot, Wildwood House, 1988.

<sup>14</sup> The European Commission has claimed that the regulation of public procurement could bring substantial savings of ECU 20 bn or 0.5% of GDP to the (European) public sector. See European Communities, *The Cost of Non-Europe*, op. cit.

<sup>15</sup> See Commission of the European Communities, *Statistical Performance for keeping watch over public procurement*, 1992. Also the *Cost of Non-Europe, Basic Findings, Vol.5, Part A; The Cost of Non-Europe in Public Sector Procurement*, op. cit.

<sup>16</sup> See Bovis, *Recent case law relating to public procurement: A beacon for the integration of public markets*, 39 *Common Market Law Review*, 2002.

susceptible to a rationale and a policy that tend to favour indigenous undertakings and *national champions*<sup>17</sup> at the expense of more efficient competitors (domestic or Community-wide). As the relevant markets (product and geographical) have been sheltered from competition, distorted patterns emerge in the trade of goods, works and services destined for the public sector. These trade patterns represent a serious impediment in the functioning of the common market and inhibit the fulfilment of the principles enshrined in the Treaties.<sup>18</sup>

Legislation, policy guidelines and jurisprudence have all played their role in determining the need for integrated public markets in the European Union, where sufficient levels of competition influence the most optimal patterns in resource allocation for supplying the public sector as well as the public utilities with goods, works and services. Public procurement has now been elevated as a milestone of the vision of the European Union in becoming a competitive economy in the world by 2010.<sup>19</sup>

The European Court of Justice has viewed the public procurement legal framework through two approaches: a positive one, revealing the flexibility of the regulatory regime and at the same time a restrictive one reflecting on the interpretation of the regime. The Court's approaches provide intellectual assistance to the efforts of European institutions in order to strengthen the three principles (non-discrimination, objectivity and transparency) underlying the regulation of public procurement.<sup>20</sup> The positive approach of the Court comprises its attempts to eliminate discrimination and non-tariff barriers in the fields of technical standards (product specification and standardization) and

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<sup>17</sup> The term implies a firm with more than a third of its turnover made in its own country and has enjoyed formal or informal government protection. The term has been defined by Abravanel and Ernst (1992), 'Alliance and acquisition strategies for European national champions', *The McKinsey Quarterly*, no. 2, pp. 45–62.

<sup>18</sup> See Nicolaidis (ed.), *Industrial Policy in the European Community: A Necessary Response to Economic Integration*, Martinus Nijhoff, 1993.

<sup>19</sup> See Communication from the European Commission to the Council, the European Parliament, the Economic and Social Committee, and the Committee of the Regions, 'Working together to maintain momentum', 2001 Review of the Internal Market Strategy, Brussels, 11 April 2001, COM(2001)198 final. Also European Commission, Commission Communication, Public procurement in the European Union, Brussels, 11 March 1998, COM (98) 143.

<sup>20</sup> See the recital of Directive 89/440, OJ L 210/1 1989 amending the original works Directive 71/305 concerning co-ordination of procedures for the award of public works contracts, stating that '...it is necessary to improve and extend the safeguards in the directives that are designed to introduce transparency into the procedures and practices for the award of such contracts, in order to be able to monitor compliance with the prohibition of restrictions more closely and at the same time to reduce disparities in the competitive conditions faced by nationals of different Member States'.

the selection procedures (quantitative and qualitative suitability criteria). The Court's jurisprudential positivism through the observance of non-discrimination and objectivity principles epitomizes the integral role of public procurement in the attainment of the fundamental principles of the Treaty, specifically the right of establishment and the freedom to provide services. On the other hand, the Court's restrictive approach serves the principle of objectivity, with particular reference to the use of the award procedures for public contracts.

The above pattern which is revealed through the jurisprudence of the Court also reflects on a strategic goal of the European judiciary: to vest the regime wherever possible with direct effect. Arming the public procurement rules with direct effect will enhance access to justice at national level, improve compliance, increase the quality of the regulatory regime and finally streamline the public procurement process across the common market by introducing an element of uniformity. By conferring direct effect upon the public procurement directives and inviting national courts to play a prominent role in future public procurement litigation, the Court has hinted towards its preference for a decentralized enforcement of the public procurement regime. However, the most important lesson law and policy makers have learnt from the Court's approaches to public procurement is the potential of its regulation with regard to policy formulation at national and European levels.

In its jurisprudence, the Court has reflected on the relative importance of public procurement to the fundamental freedoms of the common market, namely the right of establishment and the freedom to provide services. The approach taken by the Court revealed a positive yet restrictive interpretation of the Directives. By conferring direct effect upon their provisions, where appropriate and inviting national courts to play a prominent role in future public procurement litigation, the Court has hinted towards its preference for a decentralized enforcement of the Directives.

The Court's jurisprudence has also played an important function in delineating key concepts within the public procurement legal framework, such as *contracting authorities* and *award criteria*. This has exposed a significant characteristic of the Directives: *flexibility*. The Court developed a *ratione*, which recognizes discretion in the hands of contracting authorities, discretion which is integral to the legal framework, compatible to the attainment of the fundamental freedoms of the common market and complementary with other policies.

The Court abandoned the *formality test* in determining the relationship between an entity and the state and instead adopted *the functionality* and *dependency tests* to define contracting authorities. In addition, *dualism* and the dual capacity of contracting authorities are irrelevant to the applicability of public procurement Directives. The Court also suggested that *commerciality* and *competitiveness* might lift the veil of compulsory tendering, thus rendering the

public procurement rules inapplicable. Finally, the Court accepted, in principle, the complementarity of relevant policies of the European integration process, such as social policy and the protection of the environment, by conferring discretion to contracting authorities to award public contracts by reference to employee protection as well as socio-economic and environmental considerations.

The influence of neo-classical economic theory on public procurement regulation has taken the relevant regime through the paces of the liberalization of public markets within the European Union and with reference to the World Trade Organization (WTO). Anti-trust and its remedies have played a seemingly important role in determining the necessary competitive conditions for the supply side to service the public sector. However, we have seen the emergence of a *sui generis* market place where the mere existence and functioning of anti-trust is not sufficient to achieve the envisaged objectives. Public markets require a positive regulatory approach in order to enhance market access. Whereas anti-trust and the neo-classical approach to economic integration depend heavily on price competition, public procurement regulation requires a system which primarily safeguards market access. Such a regulatory system could be described as public competition law. The above represents the first departure from the *stricto sensu* neo-classical perspective of public procurement. A policy orientation has emerged mainly through the jurisprudential approach of the regime and the willingness of the Court to expand on the element of flexibility that is inherent in the Public Procurement Directives.

The neo-classical versus the *ordo* approach reflects the frequently rehearsed debate about the origins of anti-trust law and policy *per se*. The European integration has benefited from a system where the neo-classical approach has contributed to the functioning of an environment of workable competition. However, consistently the rigidity of the neo-classical influence has been diluted with policy considerations, often attributed to national policy requirements. The reflection of the above picture is presented in public procurement regulation, although there are certain differences: the Court has allowed for a flexible policy-oriented application of public procurement, where in anti-trust the Commission has eroded the strict neo-classical approach of Article 81(1) EC (now 101(1) TFEU) with the plethora of policy considerations under 81(3) EC (now 101(3) TFEU). Nevertheless, the similarity of balancing an economic exercise with policy choice is remarkable.

The new generation of legal instruments intends to simplify and modernize a regulatory regime which aims at establishing gradually a public market in the European Union. This regime seeks to accomplish unobstructed access to public markets through transparency of public expenditure relating to procurement, improved market information, elimination of technical standards



capable of discriminating against potential contractors and uniform application of objective criteria of participation in tendering and award procedures. The new regime has three principal objectives: simplification, modernization and flexibility.

The objective of simplification has been met to a large extent. The new public sector Directive represents a notable example of codification of supranational administrative law. The objective of modernization is partly met, mainly as a result of the enormity of the newly introduced concepts. The ability of bodies governed by public law to tender for public contracts along private undertakings is a significant development. The use of framework procurement could assist in bringing the public sector closer to a seamless supply chain management. The introduction of electronic procurement and the use of information technology in public purchasing could process the logistics of public sector purchasing faster and more efficiently. However, the introduction of the competitive dialogue to facilitate the award of complex projects such as public-private partnerships and trans-European networks leaves many practical questions over its nature and conduct unanswered. This represents the biggest problem for the new regime. The exceptional nature of the competitive dialogue and its hierarchy with other award procedures (the wording of the public sector Directive puts the procedure at a par with the negotiated procedures with prior advertisement), the discretion of contracting authorities to initiate the procedure (who is to determine the nature of a particularly complex contract and the inability of the contracting authorities to draw precise specifications and the contract's financial and legal make-up), the internal structure and conduct of the procedure (the confusion surrounding the different stages pre-tender and post tender), the response of the private sector (the predictably very high costs in participating), the degree of competition achieved (there is great potential for post tender negotiations) and finally the overall value for money results (in many instances the competitive dialogue is less flexible than the negotiated procedures) are pertinent questions that have not been addressed by the new public procurement regime.

The objective of flexibility is the surprise element of the new regulatory package. The relaxation of the competitive tendering regime and the disengagement of the public procurement rules in industries that operate under competitive conditions in the utilities sectors indicate the links between procurement regulation and anti-trust. The non-applicability of the regime to telecommunications entities is an important development indicative of the future legal and regulatory blueprints. A rather disappointing feature of the new regime is the lack of clarity over the potential use of socio-economic and environmental considerations as part of the award criteria. Contrary to the Court's jurisprudential inferences, the new Directives do not confer the much-needed flexibility in this matter to contracting authorities, thus inviting the

Court to continue its *rule of reason* approach into the legitimacy of policies, other than economic ones, through public procurement regulation.

The regulation of public procurement reflects on two opposite dynamics: one of a community-wide orientation and one of national priorities. The influence of neo-classical economic theory on public procurement regulation has taken the relevant regime through the paces of the liberalization. However, we have witnessed the emergence of a *sui generis* market place where the mere existence and functioning of anti-trust is not sufficient to achieve the envisaged objectives. Public markets require a positive regulatory approach in order to enhance market access. Whereas anti-trust and the neo-classical approach to economic integration depend heavily on price competition, public procurement regulation requires a system which primarily safeguards market access. In the author's argument, such regulatory system could be described as public competition law.

The above scenario represents a departure from the *stricto sensu* neo-classical perspective of public procurement. A policy orientation has emerged mainly through the jurisprudential approach of the regime and the willingness of the Court to expand on the element of flexibility that is inherent in the public procurement Directives. The Court has allowed for a flexible policy-oriented application of public procurement, where in anti-trust the Commission has eroded the strict neo-classical approach of controlling market power with the plethora of policy considerations.

Litigation and jurisprudential inferences will be extremely important in understanding the thrust of the new regime. The role of the Court has been instrumental in shaping many of the newly introduced concepts and in the future will be invaluable in interpreting the new regime and pronouncing on the compatibility of national provisions with *acquis communautaire*.