1. Introduction to *Centralising Public Procurement*

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Every year 250,000 public authorities in the EU spend around 14 per cent of GDP on the purchase of services, works and goods.¹ Some of these authorities are central purchasing bodies (CPBs) who purchase goods and services for other contracting authorities, which have combined their purchasing (aggregated procurement).

CPBs play a great role in some EU Member States such as, for example, Denmark, Portugal, Italy, Finland and Sweden and the tendency is gaining traction across different EU Member States. The increased use of CPBs is based on the theory that large procurement volumes generate better prices and increase competition in the market, thus affecting prices and other terms in ways that are favorable for the contracting authority and ultimately for the taxpayers.² On top of this, the individual contracting authorities will save a significant amount of transaction costs as they do not need to conduct procurement procedures themselves as well as benefitting from the fact that CPBs are often more experienced with procurement procedures (professionalisation). Thus, particularly for contracting authorities, which do not have the capacity to conduct procurement procedures (nor the buying power) for all types of contracts, these agreements can be useful tools in purchasing. Taking the advantages of joint procurement into account, it is not surprising that the Commission also wishes to promote more joint cooperation among contracting authorities.³

¹ See the Commission's website: https://ec.europa.eu/growth/single-market/public-procurement_nn (accessed 6 April 2021). The Commission estimates that 11 per cent of procurement procedures in the EU are carried out through joint procurement.

² See e.g. OECD (2011), *Centralised Purchasing Systems in the European Union*, SIGMA Papers, No. 47, OECD Publishing, Paris, <https://doi.org/10.1787/5kgkgqv703xw-en>, Directive 2014/24/EU, Recital 59 in particular.

³ In the EU Commission's 2017 communication, "Making public procurement work in and for Europe", joint procurement is one of the Commission's six strategic policy priorities. See further: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A572%3AFIN> (accessed 6 April 2021).

There are, however, also threats related to joint procurement, such as preferences for contracts with a single supplier in order to lower transaction costs, which puts economic operators in a position in which they need to work together in order to be able to bid for the agreement. Cooperation among undertakings can be problematic, as they risk their cooperation being seen as an anticompetitive agreement (Art. 101 TFEU). Other potential negative effects of aggregation are linked to excessive concentration of purchasing power and collusion, as well as a reduction in market access opportunities for SMEs. The potential closure of the market for a given time period can result in less innovation and perhaps less competition in the long run (for the next contract).

The aim of this book is to analyse in particular the use and structure of CPBs in different EU Member States. The study shows that how Member States have organised themselves in relation to joint procurement varies significantly across the EU. The book contains 13 national chapters, written by scholars and practitioners from the 12 selected EU Member States and the UK. Contributors answered a questionnaire, which is reproduced at the end of this introduction.

Besides the national chapters, the book consists of a general part on CPBs, exploring the legal rules and selected economic issues relevant to CPBs. This part of the book also contains a number of comparative chapters based on the national chapters.

In Chapter 2 Comba and Risvig Hamer give an introduction to the EU perspective on CPBs. The chapter explores the legal background in the Procurement Directives on CPBs and analyses the general EU legal framework, including elements such as joint cross-border procurement, liability and CPBs' relationship to the EU competition rules.

In Chapter 3 Comba analyses the legal nature of CPBs from a comparative perspective. The chapter looks closer at the possible clash between the scope of national CPBs – cost efficiency and professionalisation, against the scope of the Directive – fostering competition and avoiding discrimination on the basis of nationality. Moreover, the chapter tries to classify the different models of CPBs introduced in Member States, taking into account the major divide between the private law and public law approaches to the law of public procurement.

In Chapter 4 Andhov and Vornicu examine the different procurement techniques used by CPBs. The preferred technique is framework agreements, but in some Member States dynamic purchasing systems (DPS) have started gaining attention. Most Member States do not have additional rules relating to framework agreements, but practices vary and purchasing systems in those Member States that frequently use framework agreements are becoming more advanced.

In Chapter 5 Scotanus shares some economic insights to CPBs. Scotanus points out some of the advantages of joint procurement in terms of economies of scale, economies of knowledge or information and economies of process. Scotanus also discusses different impediments to joint procurement such as, for example, insufficient collaboration experience or insufficient procurement skills.

Sanchez-Graells, in Chapter 6, takes a closer look at issues relating to competition and SMEs from a comparative perspective. This chapter focuses on the competition law challenges arising when contracting authorities aggregate their needs by using a CPB and create large-scale procurement schemes with the risk of closing the market or generating long-term distortions that may reduce incentives to innovate or damage market structures in a way that makes them particularly prone to collusion or coordination (i.e. oligopolistic competition).

In Chapter 7 Risvig Hamer analyses the consequences for contracting authorities in case of breaches of the procurement rules in the different Member States. In most Member States, CPBs are not treated any differently to other contracting authorities and few issues regarding liability and enforcement in relation to joint procurement have been raised. However, in the Scandinavian Member States some questions have been raised and the *Autorità* case has gained significant attention. The chapter takes a closer look at different Member States' approaches to the case and the recent preliminary reference in Case C-23/20, *Simonsen & Wehl*, is discussed.

Procurement centralisation is no longer an emerging practice, but the way in which most public procurement – and potentially even large-scale cross-border procurement – will be carried out in the future, as we have seen with the joint procurement at EU level regarding, for example, medical equipment in relation to the COVID-19 crisis. Thus, in Chapter 8 Yeuh Ling Song compares the different approaches taken in the Member States regarding purchases during the COVID-19 pandemic.

As a whole, the book analyses the rules and complications derived from the regulatory framework created by the Public Procurement Directive 2014/24 throughout the EU in a coherent way. It gives a comparative analysis of the rules on CPBs and the procurement techniques they use and we hope that this can be an inspiration to achieve better joint procurement in the future.

QUESTIONNAIRE

1 Introduction

The introduction should cover an overview of the use of CPBs and other forms of joint procurement in the Member State. This includes elements such

as the number of CPBs, the type of cooperation arrangements, the “owners” and users of the CPBs. The chapter should also answer general questions such as: is there any specific regulation which covers CPBs? What is the political environment in respect of CPBs? Historic aspects, such as when was the first CPB established and the development/tendency regarding joint procurement, are also addressed.

2 Structure and Use of CPBs and Other Forms of Joint Procurement

This part looks closer at how CPBs are structured and used in the Member State. This includes elements such as:

Question 1(a)

How are CPBs structured? (i) Geographical jurisdiction: is there only one national CPB or more national CPBs and/or regional or municipal CPBs? (ii) Functional jurisdiction: are CPBs – at any geographical level – only providing certain goods or services? (iii) Legal structure: provided that CPBs must be contracting authorities (Art. 2(1)(16) of Directive 24/2014), what kind of contracting authorities are they: State, central local authorities, or associations formed by such authorities, or bodies governed by public law? In case of bodies governed by public law, are there CPBs with private partners/shareholders? If not, is that because the national law forbids it or just because it didn't happen? (iv) Activity: do they act also as wholesalers or only as agents? Do they also provide ancillary purchasing activities and, if so, what are the most common? Do they also provide public works? If so, do they provide public works for a single work (e.g. building a new hospital or a new school) or do they “centralise” public works? In the case of public works, do they only award the contract or do they also monitor the execution of the contract for the contracting authority?

Question 1(b)

Who are the users of the CPBs? Are there any mandatory requirements to use a given CPB? Please refer to the geographical and functional jurisdiction of CPBs (above, Question 1(a)(i) and 1(a)(ii)). What is the model followed by your legislation? (i) Free adherence model: each contracting authority can choose any CPB – in this case, how is the “contract” between the contracting authority and the CPB legally qualified? Is it enforceable? Is the contracting authority bound to give reasons why it chooses that specific CPB? Can you say there is competition among CPBs? (ii) Compulsory adherence model: what are the compulsory links? All members and only members of the CPB must/can buy through the CPB; or all contracting authorities based in a certain

territory must use the CPB having jurisdiction in that territory; or all contracting authorities wanting to buy a certain good/service must use a specialised CPB? Other (iii) Conditioned compulsory adherence: contracting authorities must use a CPB unless they prove they can purchase the same good/service at a lower price. What are the consequences of a contract awarded in violation of the obligation to adhere to a CPB? Is the contract ineffective/void?

Question 1(c)

How are CPBs financed, e.g. through the general budget, through rebates from suppliers, through fees from users and/or suppliers? Provided that CPBs are contracting authorities and therefore cannot be for-profit entities: (i) do they get public funding from taxpayers' money (taxpayers' money model)? (ii) Do they get fees from their members (consortium model)? (iii) Do they get fees from non-members' contracting authorities they are working for (quasi commercial model/1)? (iv) Do they get fees from the awardees (quasi commercial model/2)? In this case, are you aware of any complaint/litigation from economic operators against the duty to pay a fee?

Question 1(d)

Do CPBs have other roles, e.g. technical advisory services, training services, any other policymaking role in promoting procurement policy or legislation?

Question 2

What is the experience with cross-border procurement? Is there any formal and informal cooperation? Do CPBs have any users from outside the Member State? What is the legal model chosen, among the three provided by Art. 39 of Directive 2014/24/EU?

Question 3

Efficiency and policy issues. How effective are the CPBs in terms of costs (transaction costs as well as value for money), and are the agreements transparent? Do CPBs have a particular role in the fight against corruption or in achieving strategic procurements, etc.? Has there been any research or analysis in your Member State regarding economic aspects relating to CPBs (transaction costs, efficiency or competition aspects)?

3 Procurement Techniques

This part looks closer at the procurement techniques that CPBs use. This includes:

Question 4

What types of techniques and agreements do CPBs use and create? What are the experiences with e-procurement, DPS and e-catalogues? Please comment on each of the three. In relation to techniques please also elaborate on the following: (i) please describe national practices and provisions on DPS and indicate challenges or limitations in the establishment of DPSs in your country. (ii) Please describe national practices and provisions on e-catalogues and indicate challenges or limitations in the establishment of e-catalogues in your country. (iii) Are there any specific issues in relation to evaluation for CPBs (how are large framework agreements with many product lines evaluated)? Can new award criteria be introduced in the mini-competition in a framework agreement?

Question 5

What types of framework agreements do CPBs create? Are there any specific regulations in relation to framework agreements (for example, national mandatory framework agreement)?

Question 6

What do users use the agreements (e.g. call-offs, direct purchasing, etc.)? Please describe national practices and provisions on performance of framework agreements and refer to any relevant case law and practices on the consideration of principles like transparency and competition.

Question 7

Please state how changes in framework agreements/DPSs are tackled at a normative level and describe national practices.

Question 8

Are there any requirements in relation to estimates for the purchase and what are the consequences of wrongful estimates? Does the framework agreement expire when the estimate has been reached (national reflection on Case C-216/17, *Autorità Garante della Concorrenza e del Mercato – Antitrust and Coopservice*)?

4 Competition and SME Aspects

Question 9

Have any concerns been raised regarding competition law aspects in your Member State regarding the agreements by CPBs – if so which and how are they tackled?

Question 10

Are CPBs solely for the use of public sector entities, or can they also sell to private users? If the latter, how are prices determined (is there a single price for public and private buyers)? Does the type of buyer have an impact on the way the CPB is remunerated (e.g. are there commissions, or different fees, for private sector sales)?

Question 11

Are SMEs being taken into account by CPBs? Do SMEs bid for contracts at CPBs? Are there any requirements to divide a contract into lots?

5 Liability between CPBs and their Users**Question 12**

Issues on contract management. Does the CPB follow up on requirements in the framework agreement/DPS? Do the users? Please refer to relevant national practices and case law. Are there any e-procurement tools available for contract management?

Question 13

What are the rules regarding enforcement and remedies for the agreements established by CPBs? Are there any specific regulations or case law that address the issues of liability between a CPB and its users? Or case law regarding ineffectiveness, annulment and damages for procurement conducted by a CPB? Does the framework agreement expire when the estimate of the value of the framework agreement has been reached and does this mean that purchases can be declared ineffective once the estimate has been reached?

Question 14

What are the consequences for the users of using a CPB agreement if the CPB has entered into the agreement unlawfully?

6 COVID-19 and Joint Procurement**Question 15**

Has COVID-19 had any impact on the joint procurement of products needed in the fight against COVID-19, e.g. medical equipment, protective equipment, respirators or similar? How has your Member State organised the procurement of these products – nationally as well as internationally? In particular:

Question 15(a)

Apart from the massive application of Art. 32(2)(c) Directive 2014/24, were the usual procedures applied by CPBs in your Member State modified due to the COVID emergency? And was the structure of CPBs, as described under section 2 of this questionnaire, modified?

Question 15(b)

If you have a structure with central and local CPBs, was the balance of competences between them modified due to the COVID emergency? In other words, did COVID imply a trend towards nationalisation or, on the contrary, regionalisation of centralised procurement?

Question 15(c)

Did the COVID emergency entail the creation of new CPBs, or was it tackled with the already-existing CPBs?

Question 15(d)

Were the powers of the CPBs' employees increased in consideration of the urgency of decisions to be taken under the COVID emergency? And would this also increase the potential liability/responsibility?