

CHAPTER 18

A Qualitative Step from e-Communication to e-Procurement: the Estonian e-Procurement Model

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1. Introduction

In recent years, the topic of electronic public procurement has been in the centre of attention, mostly in the light of the duty to transfer to fully electronic procurement procedures that were introduced under the 2014 public procurement directives.⁽¹⁾ While the inherent positive notions accompanying such transfer are evident,⁽²⁾ the potential benefits and purposes that are usually credited to an electronic mode of procurement had been subject to some critical approach as well.⁽³⁾ Nonetheless, resorting to electronic communication, publication and record keeping cannot be avoided in this day and age in most areas of life, including in the field of public procurement.

However, as several Member States are still reported to show insufficient progress in this area,⁽⁴⁾ estimation of the possibilities as well as the challenges associated with different systems of e-procurement is an equally logical step. The Estonian model of e-procurement might hopefully serve as one possible example.

(1) Dir. 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Art. 34; Dir. 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Dir. 2004/18/EC, Art. 22, 90; Dir. 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Dir. 2004/17/EC, Art. 40, 73, 106. A prior version of this piece was published through the Ius Publicum Network Review (www.ius-publicum.com), issue 2, 2017.

(2) See, e.g. R. BICKERSTAFF, “E-procurement under the new EU procurement Directives”, *PPLR*, 2014, 3, pp. 134-147; V. EIRO, “E-Procurement: the Portuguese experience”, *PPLR*, 2016, NA1 – NA16.

(3) P. FERK, “Can the Implementation of Full E-Procurement into Real Life Address the Real Challenges of EU Public Procurement?”, *EPPLR*, 2016, pp. 327-339, *passim*.

(4) *Ibid.*, p. 329.

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Estonia has been moving towards a fully electronic public procurement environment since the year 2001, with 92% of procurement procedures conducted electronically in 2016.⁽⁵⁾ The following is a short overview of the Estonian electronic procurement system, with attention to some legal issues that have been associated with e-procurement.

We submit that while single steps in electronic communication in public procurement do not constitute a jump to a new level, the fully electronic procurement as required pursuant to the 2014 directives can be associated with the added quality expected to support the strive for more cross-border competition, transparency and non-discrimination. Further, resorting to *e-procurement* as a system itself is a way of supporting innovation that can be viewed as a “cornerstone”⁽⁶⁾ of EU public procurement policy.

2. Background and Recent Developments

2.1. Time-line of developing e-procurement in Estonia

A web-based electronic public procurement register of Estonia commenced in April 2001, at that time merely facilitating electronic submission and publication of contract notices. In 2009, the function of sharing electronic procurement documents was added to the register. For instance, the new function provided the public access to contract documents – contracting authorities (entities) could now publish contract documents on the register’s web site instead of sending them to tenderers via e-mail.

In 2011, an innovative e-Procurement environment was launched. The environment consists of two parts: the e-Procurement Register (hereinafter ‘the ePR’ or ‘the Register’⁽⁷⁾) and an information portal of public procurement.⁽⁸⁾ The database for processing public procurement data, the Register, currently performs the following functions: publication of contract notices and forwarding them to the Publications Office of the EU; provision of information on results of complaints procedures; electronic processing of public procurement procedures, gathering of statistical data and publishing any other

(5) *Rahandusministeerium*, 2016, *aasta riigihangete kokkuvõte*, *Avaldatud* 17 March 2017, available at www.rahandusministeerium.ee/et/system/files_force/document_files/riigihankemaastiku_esmane_kokkuvote_2016_1.pdf?download=1, lk 1 (last visit 5 December 2017).

(6) L. BUTLER, “Innovation in Public Procurement: towards the ‘Innovation Union’”, in *Modernising Public Procurement: the New Directive* (F. LICHÈRE, R. CARANTA and S. TREUMER eds), Copenhagen, Djøf Publ., 2014, p. 337.

(7) Available at riigihanked.riik.ee/rhr-web/#/ (last visit 1 March 2019).

(8) Available at www.rahandusministeerium.ee/et/riigihangete-politika (last visit 1 March 2019).

procurement related information.(9) The Register thus provides the workspace for conducting an actual fully electronic procurement, *i.e.* submission of tenders and performance of all the steps within a procurement procedure electronically. The information portal on the other hand gathers all the relevant public procurement related information.

In 2013, the law made e-procurement (including e-submission) partially mandatory in Estonia, requiring all contracting authorities (entities) to accept electronic submission of offers or electronic requests to participate in the procurement in at least 50% of all the procurement procedures planned for acquiring supplies, works and/or services in a fiscal year.(10) This requirement applied to any and all public (utilities) procurement procedures that were subject to the duty of publication, including procurement procedures for contracts below the national thresholds that were conducted as “simplified procedures.”(11) The Ministry of Finance (the body liable for overseeing the field of public procurement in Estonia) performed regular and systematic supervision over contracting authorities following the 50% e-procurement duty.(12)

This partially mandatory e-procurement practice seems to have been rather successful as by 2016, electronic procurement procedures made up slightly over 90% of all published public (utilities) procurement procedures,(13) in comparison to 80% of e-procurements in 2015.(14)

With a view to the above figures, transfer to 100% electronic procurement is not expected to pose considerable difficulties. In fact, many contracting authorities in Estonia have already been in the habit of practicing 100% electronic procurement for years. The entire electronic procurement practice has been credited with leading to a reduction of costs related to conducting procurements for both contracting authorities (entities) and tenderers; a

(9) Riigihangete seadus (RHS) RT I, 1 July 2017, 1, in force since 1 September 2017, hereinafter RHS, § 181 lg 1, §§ 183-184.

(10) Riigihangete seadus (RHS 2007) RT I 2007, 15, 76 ... RT I, 25.10.2016, 20, § 55 lg 7.

(11) At the time, the duty to publish a contract notice in the ePR generally began from the estimated value of €10,000 for a supply or service contract and €30,000 for a works contract. – RHS 2007 § 15 lg 3, § 18². The current Act on Public Procurement (RHS § 125 lg 1) subjects contracting authorities to publish a contract notice if the value of the procurement equals or exceeds that of a threshold for a ‘simplified procedure’ (§ 14 lg 1): €30,000 in the case of supplies or services, 60 000 euros for works and certain concessions.

(12) Rahandusministeerium, 2015, *aasta riigihangete plaanilise järelevalve kokkuvõte, Struktuursed probleemid riigihanke-eeskirjade kohaldamisel*, May 2016, available at www.rahandusministeerium.ee/system/files_force/document_files/2015_plaaniline_jv_31.05.2016.pdf?download=1, lk 29 (last visit 1 March 2019).

(13) Rahandusministeerium, 2016, *aasta riigihangete kokkuvõte*, lk 1.

(14) Rahandusministeerium, 2015, *a riigihankemaastiku kokkuvõte, Poliitika kujundamine, nõustamis- ja koolitustegevus, riiklik ja haldusjärelevalve, riigihangete register ja statistiline ülevaade*, September 2016, available at www.rahandusministeerium.ee/et/system/files_force/document_files/riigihankemaastikukokkuvote2015_4.pdf?download=1, lk 32-33 (last visit 3 January 2019).

reduction of administrative and labour costs as well as an increase in the quality of conducting procurement procedures that in turn can lessen the number of complaints and court cases.(15)

The new Act on Public Procurement, in force since 1 September 2017, raised the part of mandatory electronic procurement: at least 70% of all procurement procedures published in the Register by any one contracting authority (entity) must now be conducted electronically, including electronic publication of contract documents, submission of requests, tenders or explanations.(16) Any electronic means employed in a procurement procedure are subject to strict technical criteria in order to allow unrestricted and nondiscriminatory access of tenderers as well as interoperability with generally used IT products.(17)

From 18 October 2018, public procurement is to be 100% electronic as a rule.(18) Exceptions apply for technical (e.g. due to specific file formats or sizes), physical (e.g. samples must be enclosed to tenders) or security reasons or in the case of negotiations or dialogue that form a part of a particular award procedure – these do not have to take place in the electronic format.(19) Any exchange of information related to a public procurement must take place electronically,(20) except for information concerning unsubstantial elements of a procurement procedure that can be communicated orally, provided that the content of such information is sufficiently documented. Some parts of a procurement procedure – namely contract documents, tenders or requests – are always regarded as substantial elements of the procedure that can never be subject to an oral exchange of information.(21)

With the view to the above transition period and the actual high percentage of e-procurements, the transfer to a 100% electronic procurement is not expected to pose considerable difficulties.

2.2. Characteristics of the Estonian e-Procurement Register

The Estonian Electronic Procurement Register is a centralised national platform designated for the mandatory use in procurement procedures

(15) *Rahandusministeerium*, 2015, *aasta riigihangete plaanilise järelevalve kokkuvõte*, lk 27; *Seletuskiri riigihangete seaduse eelnõu juurde*, available at www.riigikogu.ee/tegevus/eelnoud/eelnou/d8709d7d-cf5c-45c6-8576-1b7e86c80a8a, lk 7.

(16) RHS § 220 lg 1. As a rule, this concerns procurements from the estimated value of €30,000 for a supply or service contract and €60,000 for a works contract. RHS § 14 lg 1, pp. 2-3, § 125, lg 1.

(17) Following RHS § 45, lg 8, criteria as to electronic means of communications in public procurement are introduced by the ministerial decree: *Riigihalduse ministri määrus, Nõuded elektroonilisei teabevahetuse seadmele*, *Vastu võetud* 9 August 2017, No. 61, RT I, 15 August 2017, 3.

(18) RHS § 45, lg 1, § 238, lg 3.

(19) RHS § 45, lg 2, pp. 1-5.

(20) RHS § 45, lg 1, § 238, lg 3.

(21) RHS § 45, lg 5.

conducted by all contracting authorities and entities. The central platform solution is one of the globally established good practice examples, even though it is not very common in the EU.(22) (On the other hand, it is probably the only reasonable solution for a tiny nation such as Estonia). While the current ePR was introduced in 2011, a new version of the ePR is currently in the final stages of development. Parts of the new platform opened for use in September 2107, and the entire new platform is to be launched in two parts by 2018 and 2019.(23) The main improvements of the new ePR include the faster and more automatic options for both tenderers and contracting authorities (entities), better search options, more flexibility in the sequence and the conduct of steps of a procurement procedure as well as certain innovative tools featuring the changes brought about by the 2014 directives.(24) The new version is expected to provide more efficiency and lower the costs of conducting or participating in a public (utilities) procurement. The users of the current Register can now separate the different parts of the same procurement and have the ability to change the sequence or time-line of such parts.(25)

The ePR is financed and developed by the State and is free for use by any contracting authority or entity when conducting public or utilities procurement procedures. As such, it can be classified as a mandatory one-platform solution supported by a government office.

As an exception to the mandatory use of the ePR, contracting authorities (entities) can either develop their own individual platforms for conducting electronic auctions, dynamic purchasing systems or electronic catalogues or use such platforms as offered on the market(26) – a possibility that has found some use in practice.(27)

In the ePR, contracting authorities (entities) can prepare public procurement procedures, draft notices and contract documents (information) to be published in the ePR, choose the members (officials) for the contracting authority's team in that particular procurement, keep lists of tenderers, correspond with tenderers, incl. responding to any requests for information by tenderers or sending any other procurement related notices to the tenderers. Tenders are accepted, opened and evaluated within the e-environment, requests for

(22) P. FERK, "Can the Implementation of Full E-Procurement into Real Life Address the Real Challenges of EU Public Procurement?", *op. cit.*, pp. 335.

(23) www.rahandusministeerium.ee/et/eesmargidtegevused/riigihangete-politika/riigihangete-register/registerite-arendamine.

(24) *Rahandusministeerium*, 2016, *aaasta riigihangete kokkuvõte*, lk 9.

(25) *Täieliku e-hangete võimekuse loomine, Eelanalüüs*, AS Datel 2016, available at www.rahandusministeerium.ee/sites/default/files/Riigihangete_politika/register/rhr_eelanaluus_1.0.pdf, lk 9-10 (last visit 1 March 2019).

(26) *Seletuskiri riigihangete seaduse eelnõu juurde*, lk 58.

(27) E.g. www.mercell.com/en/67127880/leading-e-tender-system-and-tender-offer-provider.aspx.

additional explanations can be sent to tenderers (e.g. in the case of mistakes discovered in a tender if these can legally be made good), requests for information can be sent to other registries to cross-check the information submitted by tenderers – e.g. to check on tax debts of tenderers, to verify the rights of an agent to represent a tenderer, to look at an annual report of a company etc.

Any potential tenderer, on the other hand, has access to all published contract notices, contract documents and the contracting authorities' replies to any requests for information or clarification. A tenderer also has an option to order specific information packages from the electronic environment. When interested in a particular procurement, a tenderer must register with the contracting authority in order to be able to submit questions or to submit an electronically-signed tender. Via the ePR, tenderers will receive notifications of decisions made in the course of the procurement procedure.(28)

Thus, the ePR fulfils all requirements established under the Directive 2014/24(29) for the scope of a full e-procurement, namely that it must cover all activities in the pre-award phase of public procurement: publication of notices, access to tender documents, submission of tenders and the award of contracts.(30) Also, it corresponds to the requirement that potential tenderers must have *unrestricted and free direct access* to documents – a criterion that has been interpreted to mean accessibility through the internet as opposed to sending the documents via e-mail.(31)

At the end of a procedure, the ePR offers the option to automatically submit the public contract to the successful tenderer for signing and to transfer the contract data into the report following the signing.(32) In this stage of procurement, it is however not mandatory under the Directive 2014/24(33) or the law to use electronic means of communication to carry out electronic processing of tenders or use electronic evaluation or automatic processing. Similarly, electronic communication is not mandatory during the phase of negotiations or dialogue where applicable, or in the post-award (contract performance) phase.(34)

(28) *Seletuskiri riigihangete seaduse eelnõu juurde*, lk 37-38.

(29) "Preamble", p. 52, Art 22.

(30) See also S. ARROWSMITH, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, London, Sweet and Maxwell, 2014, p. 639; R. BICKERSTAFF, "E-procurement under the new EU procurement Directives", *op. cit.*, p. 138; V. EIRO, "E-Procurement: the Portugese experience", *op. cit.*, N48.

(31) R. BICKERSTAFF, "E-procurement under the new EU procurement Directives", *op. cit.*, p. 144.

(32) *E-hanke läbiviimine riigihangete registris, Abimaterjal Hankijale, Koostatud 31 August 2017*, available at rhis.koolitus.ee/userfiles/E-hange%20RHRis_abimaterjal%20hankijale_II%20poolaasta.pdf, lk 4, 7 (last visit 3 January 2019).

(33) Dir. 2014/24 whereas No. 52 and Art. 22.

(34) Also S. ARROWSMITH, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, *op. cit.*, pp. 639-640.

2.3. Comprehensive e-procurement environment

While resorting to e-procurement is expected to simplify the conduct of award procedures, reduce the impact on environment through cutting costs on paper and transportation, and achieve a better price-quality ratio (different numbers have been published on the EU level, referring to a 5-20% reduction of costs(35)), it still is vital that e-procurement should mean more than a simple change from paper-based to electronic communication systems. Only as such can an e-procurement system enhance the efficiency of public procurement in general and benefit the functioning of public procurement markets as a whole.(36)

Perhaps it is the comprehensive nature of the whole electronic procurement environment that has been the crucial factor in the hitherto development of the Estonian electronic procurement system. Besides the electronic Procurement Register for conducting (fully) electronic award procedures, the same web page contains the electronic register of complaints(37) as well as access to user help and the information portal.

The electronic register of complaints provides references to all complaints submitted to the Complaints Board (the review body in public procurement matters(38)) and the decisions made in these matters. Submission of complaints is however not conducted within the ePR. In the course of preparing the latest update to the electronic procurement environment, the possibility of integrating the Complaints Board cases more closely with the ePR has been discussed but has not been decided as of present.(39)

The presence of user help facilitates direct and immediate assistance in case of facing any problems with the ePR. Equally vital are trainings offered by the Ministry of Finance, regularly offered to both contracting authorities and entities.(40) As a part of user preparation, the ePR provides a training environment(41) that offers video instructions for conducting different actions in the register and allows trying out various scenarios (different award procedures) in the role of either a tenderer or a contracting authority. Both parties can thus exercise their skills or acquire an experience similar to that of the other side,

(35) EU Comm., "A Strategy For E-Procurement", COM/2012/0179 final, eur-lex.europa.eu/legal-content/ET/ALL/?uri=CELEX:52012DC0179, p. 2.

(36) EU Comm., "Green Paper on expanding the use of e-Procurement in the EU", COM (2010) 571 final, pp. 2-3, available at eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52010DC0571 (last visit 3 January 2019).

(37) *Vaidlustuste register*, riigihanked.riik.ee/rhr-web/#/search-links (last visit 3 January 2019).

(38) RHS, § 117, lg 4; *Riigihangete vaidlustuskomisjoni põhimäärus*, Rahandusministri määrus, RTL 2007, 34, 599 ... RT I, 15 September 2015, 12.

(39) *Täieliku e-hangete võimekuse loomine*, 2016, lk 96.

(40) rnskoolitused.pubicon.ee/kasutajatoe-koolitus/.

(41) *E-riigihangete koolituskeskkond on leitav aadressil*: rhrkoolitus.fin.ee/rhr-web/#/.

possibly helping to avoid some of the problems that might happen in the course of actual award procedures.

The information portal focuses on all things related to public procurement and contains information on legal regulation on both the EU and national levels, references to court cases and summaries of case law of both the CJEU and Estonian Supreme Court, research conducted on the request or by the Ministry of Finance as well as recommendations by the Ministry, information on trainings and seminars, FAQs, news etc.(42)

We submit that collecting a comprehensive body of procurement-related information in one information portal can be a part of boosting user-friendliness and thus supporting the popularity of e-procurement solutions.

3. Legal Challenges and Possibilities Attributed to Electronic Procurement

3.1. Does the e-procurement system support the primary goals of the EU public procurement policy?

The importance of transferring to electronic public procurement has been emphasised by the European Commission since 2010.(43) Electronic procurement is expected to assist in advancing the primary goals of the EU public procurement law – competition, transparency and non-discrimination. Presumably, any e-procurement system should be launched with these primary values in mind.

Technical functions of the Estonian ePR are created with a view to increasing transparency and accountability: in order to participate in an e-procurement procedure, all users – including tenderers and well as contracting authorities' agents – must authenticate themselves. Authentication of Estonian citizens or e-residents(44) takes place via the ID card while foreign users are identified with the help of a specifically created username and password.

All steps made in the ePR are logged and, as such, can later be verified. For instance, members of the Complaints Board can verify if and when a challenged decision is delivered to tenderers. When a complaint about a procurement procedure is on-going in the Complaints Board, members of the Board are vested with special rights with regard to that particular procurement

(42) www.rahandusministeerium.ee/et/riigihangete-poliitika.

(43) *Euroopa Digitaalne tegevuskava, Euroopa Komisjoni teatis*, 26 August 2010, pp. 33-34, available at [eur-lex.europa.eu/legal-content/ET/TXT/PDF/?uri=CELEX:52010DC0245R\(01\)&from=ET](http://eur-lex.europa.eu/legal-content/ET/TXT/PDF/?uri=CELEX:52010DC0245R(01)&from=ET) (last visit 3 January 2019).

(44) Information about the Estonian e-residency program can be found here: e-resident.gov.ee/ (last visit 5 December 2017).

procedure. These rights differ from those of the public or the tenderers: for instance, unlike the tenderers, the Complaints Board members have access to the content and price of the tenders.⁽⁴⁵⁾ On the other hand, these rights are specifically tied to the on-going case and cease with regard to the concerned procedure once the Complaints Board makes its decision.⁽⁴⁶⁾

In the course of the proceeding, the Complaints Board can routinely access any document or information that exists within the challenged procurement procedure in the ePR and is relevant to the on-going review. As a result, the actual burden of submitting proof in public procurement cases is significantly reduced, both in terms of reducing the emerging paper trail and making the review proceedings more efficient. Evidence must only be submitted if it is not available in the Register and not accessible via other public records.⁽⁴⁷⁾ For instance, a tenderer naturally still has to submit proof of damages as well as evidence that the value of the tender is not abnormally low.

Tenders are submitted through safe HTTPS channels and saved in the ePR. In addition, the persons authorised by the Ministry of Finance guarantee the safe keeping of tenders. Authorized persons representing the contracting authority have access to the tenders only after the deadline for tender submission. Security related to submitting tenders is naturally critical for creating trust and thus increasing competition.⁽⁴⁸⁾

A challenge referred to by Ferk concerns the need to establish national e-procurement systems in such a way that instead of straying away from the primary objectives of the EU public procurement policy and serving the interests of local purchasing, the systems would in fact increase cross-border procurement. Without such increase, the e-procurement reform cannot be considered to fulfil its objectives.⁽⁴⁹⁾ For instance, an overly restrictive approach to e-procurement can be a technical solution that is not easily available to the nationals of the other States.

The Directive 2014/24, Article 22 (1) second sentence addresses this concern as follows: “The tools and devices to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the ICT products in general use and shall not restrict economic operators’ access to the procurement procedure”. An example of a discriminatory requirement, fulfillment of which is not

(45) RHS § 181, lg 6, Riigihangete registri põhimäärus RT I, 1 September 2017, 13, § 21, lg 18.

(46) *Täieliku e-hangete võimekuse loomine*, 2016, lk 20.

(47) RHS § 190, lg 7.

(48) More information with regard to the security protocol of the updated ePR can be found here: *Täieliku e-hangete võimekuse loomine*, 2016, lk 12-15, 16.

(49) P. FERK, “Can the Implementation of Full E-Procurement into Real Life Address the Real Challenges of EU Public Procurement?”, *op. cit.*, pp. 327-328, 332 -333.

generally possible, would be the request to sign a tender electronically with a digital signature. While digital signing via the national ID-card is a routine practice in Estonia in private as well as in business affairs,(50) it would not be possible without an Estonian ID-card. Therefore, this requirement is never applied to foreign companies.

While the share of public contracts awarded to tenderers from other Member States in public and utilities procurements in Estonia in 2015 is not a particularly high at 2.6% of the total number of awarded contracts or ca 7.3% in terms of total contract values,(51) the share of cross-border procurement cannot be criticized too much either. It must be taken into account that this share is based on all the conducted procurement procedures of which only 17.3% are for contracts above the EU threshold(52) – those are the contracts that presumably have any cross-border interest and that the EU public procurement rules of cross-border competition is aimed at.(53)

In 2015, tenderers from other Member States participated significantly more in e-procurement procedures (63%) than in other, non-electronic procedures (37%).(54) In general, the average number of tenderers in e-procurement procedures is higher (3.7) than that in award procedures that are not conducted electronically (2.6).(55) That can be attributed to the fact that through a central ePR platform, information simply reaches potential tenderers better.(56) The above seems to be in harmony with the global experience where transparency and added participation of tenderers have been noted,(57) and the overall high indicators describing procurement ‘performance’ in Estonia in 2016.(58) In view of the above, the Estonian model of e-procurement cannot be heading in the wrong direction.

(50) Information and assistance on application of digital signing is available here: www.id.ee/?lang=en&id= (last visit 3 January 2019).

(51) *Rahandusministeerium*, 2015, *a riigihankemaastiku kokkuvõte*, lk 49. In the EU, the share of direct cross-border activities was indicated as 1.3% in 2012, in terms of total contract value the share was 3.5% in 2012. Z. KUTLINA-DIMITROV and C. LAKATOS, “Determinants of direct cross-border public procurement in EU Member States”, *Trade*, Iss. 2, July 2014, available at trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152700.pdf, p. 5 (last visit 3 January 2019).

(52) *Rahandusministeerium*, 2015, *a riigihankemaastiku kokkuvõte*, lk 48.

(53) Furthermore, the number includes a fair amount of so-called ‘simplified’ award procedures for public contract with a relatively minor financial value, see *Rahandusministeerium*, 2016, *aasta riigihangete kokkuvõte*, lk 1.

(54) *Rahandusministeerium*, 2015, *a riigihankemaastiku kokkuvõte*, lk 47.

(55) *Rahandusministeerium*, 2016, *aasta riigihangete kokkuvõte*, lk 1.

(56) *Ibid.*

(57) P. FERK, “Can the Implementation of Full E-Procurement into Real Life Address the Real Challenges of EU Public Procurement?”, *op. cit.*, p. 331.

(58) EU Comm., “Single Market Scoreboard, Performance per Policy Area”, Public Procurement (Reporting Period January 2016-December 2016), available at ec.europa.eu/internal_market/scoreboard/_docs/2017/public-procurement/2017-scoreboard-public-procurement_en.pdf, pp. 3-4.

3.2. Does the e-procurement system support secondary EU public procurement policy goals?

Besides the primary objectives, electronic procurement can as well benefit the secondary policy goals, e.g. green and socially responsible procurement, as well as boost innovation.⁽⁵⁹⁾ With regard to secondary objectives, an interesting feature of the new e-procurement environment to be launched in Estonia in 2018 is a function offering default green public procurement criteria as grounds for exclusion, selection and award.⁽⁶⁰⁾ Developed to facilitate the inclusion of green requirements in public contract documents, the default green public procurement criteria were drafted by the Ministry of Environment based on criteria offered by the European Commission for certain groups of products or services.⁽⁶¹⁾ It should be mentioned that currently, green public procurement can generally be described as rather underexploited in Estonia. The default inclusion of suitable green procurement criteria can perhaps bring about some increase of such practice.

Another policy goal emphasised in the 2014 directives is the purpose of better engagement of SMEs in public procurement. The question of suitability of electronic procurement systems for an efficient SME participation has been subject to some conflicting arguments.⁽⁶²⁾ We submit that *per se*, the presence of e-procurement cannot be said to have negatively influenced SME tenderers in Estonia as in 2016, 87% of all public contracts were awarded to SMEs. (As referred to above, 92% of all procurement was e-procurement.) However, an e-procurement might in fact create obstacles for SME participation in certain instances, e.g. when the e-platforms are not user-friendly enough, i.e., no assistance or training is available or when multiple platforms are creating confusion as to the potentially available award procedures.

Identified as a 'cornerstone' of EU policy, the importance of pursuing innovation in general for EU public procurement law should not be underestimated although it has not yet gained the deserved recognition in public procurement systems.⁽⁶³⁾ When developing and launching an improved electronic public procurement system (an updated platform), the process itself is regarded as a form of direct procurement of innovation: all the end users (contracting

(59) EU Comm., "Single Market Scoreboard, Performance per Policy Area", *op. cit.*, p. 329.

(60) *Täieliku e-hangete võimekuse loomine*, 2916, lk 50-51.

(61) ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm.

(62) See, e.g., R. BICKERSTAFF, "E-procurement under the new EU procurement Directives", *op. cit.*, p. 136; P. FERK, "Can the Implementation of Full E-Procurement into Real Life Address the Real Challenges of EU Public Procurement?", *op. cit.*, p. 332.

(63) L. BUTLER, "Innovation in Public Procurement: towards the 'Innovation Union'", *op. cit.*, pp. 337, 343, 346.

authorities as well as tenderers) can directly or indirectly benefit from that innovation. In addition, any state or office that is engaged in establishing or ordering a state-of-the-art e-procurement system can serve as a catalyst that actively promotes and introduces innovative electronic systems, creating an example possibly to be followed.(64)

3.3. Does the e-procurement system support the objective of effective review proceedings?

Even though in general, e-procurement systems have not been shown to cause special circumstances or specific obstacles with regard to review procedures in public procurement, an issue can be highlighted that concerns electronic procurement in particular. A procedural issue related to e-procurement concerns calculating the moment when a limitation period for review starts to run when the review concerns a contract document. Here, the national legislator might face the question, if the limitation period should be calculated to start to run exactly from the moment of *publishing* the concerned contract document that contains an allegedly unlawful (e.g. discriminatory) term as is referred to in the Remedies Directives,(65) or from the moment when that document was *actually accessed* by the person initiating the review procedure, provided that the period remains in harmony with the 10-day period prescribed by the Remedies Directives.

In public procurement matters, Member States may establish limitation periods for review procedures, and the triggers and lengths of those limitations periods are, as a rule, subject to the procedural autonomy of Member States.(66) However, the Remedies Directives as well as the case law of the CJEU provide some guidelines in this respect. In view of the principle of effectiveness, for instance, *the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law*.(67) According to the EU public procurement law, therefore, the limitation period may not

(64) On innovation taxonomy, incl. direct and catalytic procurement, see L. BUTLER, "Innovation in Public Procurement: towards the 'Innovation Union'", *op. cit.*, pp. 348-349.

(65) Art. 2c of Council Dir. 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Art. 2c of Council Dir. 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

(66) S.-J. OTTO, "The Starting Point of Limitation Periods for Remedies in Public Procurement Procedures. Annotation on the Judgements of the European Court of Justice of 28 January 214 in Case C-161/13, *Idrodinamica Spurgo Velox and Others v Acquedotto Pugliese SpA*", *EPPPLR*, 2014, p. 209.

(67) ECJ, *Uniplex (UK) Ltd v NHS Business Services Authority*, case C-406/08, ECLI:EU:C:2010:45, par. 40.

start until the concerned party *knows or ought to know* of the alleged breach of procurement law.(68)

When the contracting authority publishes contract documents in the electronic public procurement register, such actual or presumed knowledge can be determined in two ways. First, one can presume that the time of limitation starts to run at the moment the contract documents are published. Second, one can start counting the time from the moment it can be established that a particular concerned party actually downloaded these documents or registered to participate in a particular procurement procedure.

In the first case, the length of the limitation period ends earlier, making the option of contesting the contract documents (e.g. based on discriminatory award conditions) somewhat shorter. However this option provides the concerned parties with somewhat more legal certainty, as after a certain date all the concerned parties can be sure that review of contract award conditions is no longer possible, as a rule. (An exception could be a situation where the concerned clause is so ambiguous as to allow different interpretations. In such cases, it is possible that, having relied on one possible version of interpreting the clause, a concerned party later learns of a different interpretation given to the clause by the contracting authority. Even when a limitation period for requesting review of the clause has already ended, the complaint should be accepted by the review body when the delay was caused by a mistake or difference in understanding in good-faith by the complainant.) The first alternative can be criticized for failing to provide adequate protection to the rights of interested parties as well as for failing the essential purpose of providing effective review options in public procurement matters. As such, the harmony of the solution with the remedies directives is questionable. Making the deadline depend on the date of publishing the contract documents can also put a disproportionate burden upon the concerned parties, particularly in the case of complex award procedures.(69)

In the second case, the opposite is true: tenderers' rights can be said to receive somewhat more protection, while reducing the legal certainty.

Until now, the case law of the Estonian Complaints Board has favoured the second option: as a rule, the Board established the exact moment when the particular tenderer learned or had the opportunity to learn that certain terms of contract documents violated its rights on a case-by-case basis. Often, either

(68) S.-J. OTTO, "The Starting Point of Limitation Periods for Remedies in Public Procurement Procedures. Annotation on the Judgements of the European Court of Justice of 28 January 214 in Case C-161/13, *Idrodinamica Spurgo Velox and Others v Acquedotto Pugliese SpA*", *op. cit.*, pp. 211-212.

(69) *Seletuskiri riigihangete seaduse eelnõu juurde*, lk 128.

the moment of downloading the contract documents or registering with the particular procurement was considered to be the moment of learning that these documents violated the tenderer's rights.⁽⁷⁰⁾

However, the Act on Public Procurement now provides a new, 'compromise' version, tying the limitation period for review of contract documents to the term for submitting tenders. Depending on the value of the contract, a complaint must be submitted no later than two or five working days prior to the deadline for submitting tenders for 'simplified' (under national threshold) or ordinary procedures and not after the deadline for submitting tenders in procedures with shortened tender submission deadlines.⁽⁷¹⁾ The explanatory letter accompanying the draft for the new Act refers to the fact that published contract documents can mostly be freely accessed without logging into the ePR, making it futile to connect the time limit for submitting complaints to the fact of the interested party actually learning about the alleged breach. Taking into account that under the new regulation, the limitation period for submitting a complaint on a contract document in a cross-border procurement is always at least ten days from the moment of publishing the documents, the regulation must be considered to be in harmony with the Remedies Directives.

4. Conclusions

In the case of Estonia, a centralised e-procurement platform has succeeded in bringing the share of electronic procurement to 92% by 2016, and hopefully will facilitate a smooth transfer to 100% e-procurement very soon. The percentage of public contracts awarded to tenderers of other Member States as well as the relatively large average number of participants in e-procurements can be seen as a positive indicator of the benefits attributable to the Estonian ePR. One of the reasons for the success of the Estonian e-procurement system may be the comprehensive nature of the whole electronic procurement environment: in addition to the procurement register, the same webpage contains the register of the review decisions, a training site and an information portal. As a next step, further modernisation of the public procurement review system and the introduction of additional e-review functions should be considered.

(70) This is established for instance in the following cases of the Complaints Board: *Vaidlustuskomisjoni otsus*, 8 July 2016, No. 153-16/174535, pp. 7-8; *Vaidlustuskomisjoni otsus*, 13 May 2016, No. 99-16/172874, pp. 4-5; *Vaidlustuskomisjoni otsus*, 10 February 2016, No. 23-16/170047, p. 5; *Vaidlustuskomisjoni otsus*, 11 April 2014, No. 82-14 /150647, p. 5; *Vaidlustuskomisjoni otsus*, 11 July 2014, No. 161 /152349, pp. 4.2-4.3.

(71) RHS § 189, lg 2, pp. 1-3.