

CHAPTER 1

Process Innovation

Under the New Public Procurement Directives

BY

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1. *Introduction*(1)

With public expenditure on goods, works, and services representing approximately 14 % of European Union Gross Domestic Product with an annual value of nearly €2 trillion, public procurement is critical to the European economy. Transparent, fair, and competitive public procurement across the Single Market creates business opportunities for European enterprises and contributes to economic growth and job creation.

To create a level playing field for all businesses across Europe, EU law sets out minimum harmonised public procurement rules. These rules organise the way public authorities and certain public utility operators purchase goods, works and services. They are transposed into national legislation and apply to tenders whose monetary value exceeds a certain amount while for tenders of lower value, national rules apply (but these national rules must also respect the general principles of EU law).

From 18 April 2016, new rules have changed the way EU countries and public authorities procure. This date was the transposition deadline for three directives on public procurement and concessions adopted in 2014.(2) The new rules aim at making it easier and cheaper for small and medium-sized enterprises (SMEs) to bid for public contracts, ensuring best value for money for public purchases and respecting the EU's principles of transparency and competition. To encourage progress in terms of public policy objectives, the new rules also

* The views expressed are the author's alone and do not necessarily correspond to those of the European Commission.

(1) I would like to thank Isabel da Rosa for her valuable comments on this paper.

(2) The public procurement Directives are 2014/24/EU on public procurement (the Classical Directive), Directive 2015/25/EU on procurement by entities operating in the water, transport, energy and postal sectors (Utilities Directive), and the new 2014/23/EU on the award of concession contracts (Concessions Directive). The reference of the provisions in this article refers to the Classical Directive only. The three Directives were published in the *OJEU*, L 94 of 28 March 2014.

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allow for environmental and social considerations, as well as innovation, to be taken into account when awarding public contracts.

These new rules simplify public procurement procedures – drastically reducing the number of documents needed for selecting companies – and introduce e-procurement. This will benefit public purchasers and businesses, particularly SMEs. The new rules also open up new forms of joint procurement, clarifying the norms applicable to aggregation. This can spur innovation or/and green procurement, which are hard to implement for the individual and small buyer.

2. Joint Cross-Border Public Procurement

A different kind of process innovation has been introduced by the new Public Procurement Directives to those assessed so far. This refers rather to nationality of the parties involved in the process and aims at addressing limitations and lack of clarity of rules in place under the ‘old’ Directives of 2004.

The Directive itself acknowledged that under the previous regulatory regime (Directive 2004/18/EC) joint cross-border public procurement (JCBPP) contracting authorities were still facing considerable legal and practical difficulties in purchasing from central purchasing bodies in other Member States or jointly awarding public contracts by contracting authorities from different Member States. Recital 73 of the Directive is even more explicit, stating that “Joint awarding of public contracts currently encounters specific legal difficulties concerning conflicts of national laws”.

The provisions on JCBPP set out by Directive 2014/24/EU provide for a new legal framework at the EU level.⁽³⁾ Under the previous EU legislation, the possibility for JCBPP was implicit and consequently failed to grant buyers sufficient legal stability. The new rules create a framework that contributes significantly to creating legal certainty for all parties involved and are a significant innovation from a regulatory point of view. In particular, the Directive clarifies the applicability of national measures, determining the applicable procurement legislation.⁽⁴⁾

In short, the regulatory framework provides for two different options for joint cross-border procurement: i) procurement via a CPB; and ii) joint procurement involving two or more contracting authorities from different Member

(3) G.M. RACCA, “Joint Procurement Challenges in Future Implementation of the New Directives”, in *Modernising Public Procurement: the New Directive* (F. LICHÈRE, R. CARANTA and S. TREUMER eds), Copenhagen, Djof Publ., 2014, pp. 225-254; S. PONZIO, “Joint procurement and innovation in the new EU Directive and in some EU-funded projects”, *Ius Publicum Network Rev.*, f. 2/2014, pp. 1 and ff.

(4) Parallel provisions are included in Art. 55-57 of the Utilities Directive 2014/25/EU.

States. This latter case includes a further option, relating to the creation of a joint entity.

2.1. Joint cross-border procurement using a CPB

Joint cross-border procurement via a CPB is regulated by Articles 39(2) and (3) of the Directive. The provisions set out the terms of the cooperation between a contracting authority and a CPB in another Member State; essentially, they mirror those governing the relations between contracting authorities and CPBs operating within the same Member State in Article 37. The Directive stipulates that Member States should not prohibit the contracting authorities from buying from CPBs located in another Member State. However, in implementing the Directive, Member States are granted the power to specify which type of centralised purchasing activity of the foreign CPB (wholesaler or intermediary⁽⁵⁾) can be used by the contracting authority. The wholesaler type is apparently far less common across the EU. Therefore, if a Member State determines in the transposition law that its contracting authorities can only buy from foreign CPBs acting as wholesalers, the chances that its contracting authorities will become involved in joint cross-border procurement are likely to be low. In any event, the provision of centralised purchasing activities via a CPB shall be conducted in accordance with the national provisions of the Member State where the CPB is located; the same logic is applied to the applicable rules on the award of contracts under framework agreements, a Dynamic Purchasing System (DPS) managed by the CPB, or mini-competitions under a framework agreement and the rules governing a multi-supplier framework agreement.⁽⁶⁾ The objective of this provision is to avoid applying different national legislations to mini competitions when the JCBPP project involves several contracting authorities from different Member States. As regards the rules governing contract management, the Directive is silent and therefore this aspect is to be established by between the parties in a specific agreement.

2.2. Joint cross-border procurement between contracting authorities from different Member States

The second case covered by the Directive concerns the case of two or more contracting authorities from different Member States, who jointly award a contract, conclude a framework agreement or operate a DPS. The Directive

(5) The two roles of CPBs are described in more detail in section 3 of this article.

(6) See Art. 39(b) and (c). The principle therefore is that applicable law for the procurement procedure is that of the host CPB; this also applies to remedy procedures.

provides for two different options in order to allocate specific responsibilities among participating buyers: i) an international agreement between the Member States concerned including the necessary elements, or ii) an agreement between the participating contracting authorities setting out the responsibilities of the parties and the relevant applicable national provisions (to be explicitly referred to in the procurement documents); and the internal organisation of the procurement procedure. A ‘safe harbour’ clause concludes the paragraph, making clear that a participating contracting authority fulfils its obligations when procuring from a contracting authority which is responsible for the procurement procedure.

As indicated above, the Directive provides for an alternative way for contracting authorities willing to engage in joint cross-border procurement: the creation of a joint entity established under national or EU law. This entity may include European Groupings of Territorial Cooperation under Regulation 1082/2006 or other entities established under Union law. The Directive sets out the conditions for determining the applicable national procurement rules while the relevant choice is to be made by the participating contracting authority via a decision by the joint entity’s competent body.

2.3. Joint cross-border procurement: the policy dimension

The use of joint cross-border procurement is going to be rare, especially if considered as a share of total public procedures run yearly in the Member States. In broad terms, these provisions are intended for niche cases, as they require administrative capacity and resources. Conducting JCBPP involves managing a number of legal and administrative complexities, especially for the coordinating organisation. The challenges to be faced by contracting authorities can be legal, cultural, linked to the coordination effort required, the use of a foreign language in the procedure etc.

Despite these challenges, JCBPP is gaining unexpected interest from a range of stakeholders:⁽⁷⁾ large cities, cross-border projects involving administrations near borders, projects aiming at using public procurement to develop innovative products or services, inherently cross-border applications such as satellite services etc. In the end, most buyers operating in the EU have similar needs in terms of procurement (schools, providing health services to

(7) An interesting case is the one of European Procurement Coordination Office (EPCO) hosted by the Luxembourg Central Bank, which supports joint procurement by the central banks of the Eurosystem since 2008. The case is described by S. KAISER, “International joint public procurement. A new initiative hosted by the Luxembourg Central Bank”, 2010, www.ippa.org/IPPC4/Proceedings/01ComparativeProcurement/Paper1-15.pdf.

its citizens, building roads, etc.) and establishing a partnership with another buyer may provide new opportunities.⁽⁸⁾

In any event, the new rules on joint cross-border procurement represent a major process innovation in public procurement procedures. They set the conditions for cross-border use of CPBs and between contracting authorities, for the applicable public procurement law, including the applicable legislation on remedies. From a policy point of view, the main innovative aspects of JCBPP are the following:

- i) JCBPP contributes to exploiting the whole of the internal market from the demand side. Pooling buyers across the single market can more effectively strengthen buyers' bargaining power in oligopolistic markets and contribute to reducing market segmentation.⁽⁹⁾ For instance, the BBG-SKI case⁽¹⁰⁾ compelled the supplier to adjust its pricing policy and to prepare one offer for two separate markets. The larger volume was one key negotiating bargaining chip of the two CPBs to challenge the market with regard to selling and pricing policy (large price differences existed for the same product in the two Member States concerned). Besides, exploiting this demand side dimension of the internal market creates new opportunities for generating savings via economies of scale and process efficiency. The cross-border dimension may also lead bidders to offer higher discounts in order to win a contract with a certain prestige (such as an international one).
- ii) JCBPP allows involving a larger number of buyers and this can facilitate risk sharing, for instance in the case of Public Procurement for Innovation (PPI) projects. As pointed out in Recital 73 of Directive 2014/24/EU, this is relevant to innovative projects involving "a greater amount of risk than reasonably bearable by a single contracting authority". In practice, demand aggregation involving two large cities can be used to leverage

(8) With regard to cooperative and joint cross-border procurement, *see* in particular G.M. RACCA, *Joint Procurement Challenges in Future Implementation of the New Directives*, *op. cit.*, who well identifies the opportunities and challenges deriving from partnering in procurement both from a national and cross-border perspective.

(9) It is worth noting that procurement alliances have also been established by large multinational firms. For instance, several relevant cases operate in the telecommunications sector: BuyIn (Deutsche Telekom – France Telecom), Vodafone Procurement Alliance, and Telefonica Global Services. The main objectives of these alliances are: strengthening negotiating power; reducing costs; and changing supplier behaviour. Although private firms operate in a completely different environment and the cases cited here are not subject to public procurement rules, these objectives are not substantially different or in contradiction with those of most public buyers.

(10) BBG – SKI, Study commissioned by the European Commission, DG GROW, "Support of the internal market policy for growth: Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States", Ref. No. 492/PP/GRO/IMA/15/15111e.

the development of new products or services (for instance, an innovative street lighting system which is more energy efficient).

- iii) JCBPP can stimulate cross-border bidding, *i.e.* contribute to the consolidation of the internal market from the supply side. It can be observed, in fact, that the larger volume resulting from combining two or more (originally) separate markets has the potential to attract foreign bidders and increase competition in general terms. For example, in the Brenner Base tunnel project, the cross-border nature of the project and its volume attracted more interested companies than initially expected by the contracting authority. Furthermore, an accurate tender strategy in JCPBB projects(11) can also push economic operators from the countries concerned to cooperate and bid together, which in some cases represents a novelty challenging traditional selling patterns.
- iv) JCBPP can be a driver for the improvement of national procurement practices. Improving knowledge about markets and procedures, and sharing best practices, are a significant value-add of JCBPP projects, as reported by the 'Feasibility study'. In most of the cases analysed, the know-how gained by exchanging strategies and best practices was considered useful not only for possible future JCBPP projects, but also for national tenders. In some cases, this experience gained led to an improvement in contractual terms and conditions.
- v) JCBPP may potentially contribute to reducing the risk of corruption. In this respect, involving a larger number of parties in the procedure acts against possible malpractices by any of them.

3. Cooperative procurement

Another important novelty that has been introduced by the Directive concerns aggregated purchasing. The provisions of Directive 2014/24/EU introduce new provisions(12) defining centralised purchasing activities as those conducted on a permanent basis in one of the two following forms:

“(a) the acquisition of supplies and/or services intended for contracting authorities;

(b) the award of public contracts or the conclusion of framework agreements for works, supplies or services intended for contracting authorities”.

(11) *See* the BBG-SKI case, in which the buyer strategically decided not to divide the market into 2 separate geographical lots.

(12) *See* respect. Art. 2(1) (14), (15) and (16) of Dir. 2014/24/EU for the definitions of centralised purchasing activities, and ancillary purchasing activities and central purchasing body.

The same Article in the Directive on definitions also introduces that of ‘central purchasing body’ as a “contracting authority providing centralised purchasing activities and, possibly, ancillary purchasing activities” consisting in the provision of support to purchasing activities, such as technical infrastructure (typically IT) enabling contracting authorities to award public contracts or to conclude framework agreements; advice on public procurement procedures; and preparation and management of procurement procedures for the contracting authority concerned.

Recital 69 of the Directive clarifies the different functions carried out by these bodies. The first category corresponds to the role of wholesalers which stock and resell what is then procured for the contracting authorities. This role is rather peculiar and has significant implications for the organisation of the CPB itself. It is less often used in practice in Member States, as in the case of UGAP, the national French CPB with a large staff located all over France to ensure that what is procured is sold to the contracting authorities.

The second category of centralised purchasing corresponds to bodies acting as “intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities”, as stated in Recital 69. In this context, the CPB might conduct “the relevant award procedures autonomously, without detailed instructions from the contracting authorities concerned”. In a few cases the CPB conducts “the relevant award procedures under the instructions of the contracting authorities concerned, on their behalf and for their account”, as they imply a full delegation of the purchasing role to the CPB.

The relevant provisions regulating the techniques for aggregated procurement are at Article 37 on central purchasing activities and central purchasing bodies. Those provisions are significant as they set out the key elements of the relations between CPBs and contracting authorities.

The first paragraph of this article leaves it to the discretion of Member States to define the type of CPBs which may be used by the contracting authorities, *i.e.* a wholesaler or a CPB acting as intermediary as defined at Article 2(1) referred to above. This is a significant since it allows for a defining of the conditions in which CPBs operate in the relevant Member State.

The second paragraph clarifies that the contracting authorities fulfil their obligations pursuant to this Directive when they acquire works, supplies or services by using contracts awarded by a CPB, typically a framework agreement. This same principle applies to both types of CPBs, wholesalers and intermediaries. In short, this is a sort of ‘safe harbour’ clause for the contracting authority, creating a significant incentive for contracting authorities to

delegate to a third party (*i.e.* the CPB) the burden and the risk of conducting public procurement procedures.

However, the contracting authority retains several responsibilities with regard to the parts or stages of a public procurement procedure it conducts itself, for example when awarding an individual contract under a Dynamic Purchasing System operated by a CPB, or when reopening competition under a framework agreement. In practice, as cooperative procurement necessarily involves more than one party in the procedures, it is necessary to clearly establish the responsibility of each specific party (the CPB and the individual contracting authority using one or more of the tools made available by the CPB to procure goods or services) in relation to the fulfilment of the obligation deriving from the Directive. As stated in recital 72, “where the central purchasing body has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures”. This has significant implications in terms of liability and legal challenges in procurement procedures.

The third paragraph of Article 37 concerns the use of electronic procurement by CPBs. As pointed out in Recital 72, “Electronic means of communication are particularly well suited to supporting centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs”. Not by chance does the legislator include in the same chapter the rules concerning electronic techniques and those on aggregation. Some of these were already covered by the previous Directive (like those on e-auctions and framework agreements), while others, such as those on Dynamic Purchasing Systems (DPS, Art. 34) and e-catalogues (Art. 36), are also new and provide innovative tools for running procurement procedures. Consequently, an earlier deadline for the transition to e-procurement is set for CPBs (*i.e.* April 2017) which are supposed to be better equipped (in terms of IT infrastructure, staff, and resources in general) to cope with the digitisation of the process.

Finally, the Directive clarifies the regime for awarding a contract for the provision of centralised procurement activities to a CPB; in practice, the contracting authorities can award this type of public service contract without applying public procurement procedures, also with regard to the support activities referred to above (*i.e.* ancillary purchasing activities). However, contracts for the provision of ancillary purchasing activities are subject to provisions of the Directive when performed by other parties than a CPB.

3.1. CPBs and process innovation in public procurement

Several issues should be noted here, which highlight the innovative features introduced by the Directive in terms of process.

- The Directive acknowledges the importance of Central Purchasing Bodies (CPBs), and this requires defining their main role and the allocation of responsibility between them and the contracting authority.
- Such functions are to be carried out on an institutionalised and systematic basis, and therefore a distinction is made between cooperative procurement carried out by CPBs and occasional joint procurement.⁽¹³⁾ In fact, CPBs are semi-permanent or institutionalised bodies.
- These norms clarify the legal framework regulating the activity of CPBs which have operated in the Member States for several years or decades (the oldest dates back to 1927, although there have been several subsequent phases in which Member States have decided to establish or merge existing bodies with different characteristics).⁽¹⁴⁾
- The provisions on CPBs themselves, combined with the new specific techniques on Dynamic Purchasing Systems and e-catalogues, and the clarifications to the provisions on framework contracts, bear the potential of increasing competition and streamlining the process for buyers and suppliers alike. The digitisation of public procurement is an essential element of the simplification of the process, as illustrated in section 1.
- CPBs can play many different parallel roles and have different functions: wholesaler, intermediary, expert centre, provider of IT infrastructure, buyer (on behalf of the individual contracting authorities) etc., “with or without remuneration”. The provision of IT infrastructure is typical of certain type of tools (e.g. e-catalogues). As a result, CPBs play a different role than merely aggregating demand, and operate in areas bordering private markets sheltered from competition, as we have seen earlier.
- CPBs are positively associated with the professionalization of public purchasing and procurement management, as explicitly stated in Recitals 59 and 69 of the Directive. Their staff includes experts specialised in relevant product markets. They are regularly trained and subject to internal rules aiming at preventing malpractices.

(13) Occasional joint procurement is addressed in Art. 38 of the Directive which is intended to be less institutionalised and less systematic, as stated in Recital 71.

(14) The original bodies which more recently led to the creation of CPBs date back to the end of the 1960s. A first wave of CPBs was created around the year 2000 (in Italy, Austria, Belgium and Finland). A second phase took place starting from 2007-2010 and ran until 2014 (Portugal, Sweden, Slovenia, Croatia and Bulgaria).

3.2. Current state of play

As we saw in the previous section, the legislation leaves to the discretion of Member States the definition of CPBs' scope (national, regional, sectoral etc.), markets in which they operate, organization,⁽¹⁵⁾ financing, set up etc. Their legal status varies significantly across the EU, ranging from internal departments of ministries (e.g. Croatia, Slovenia, Spain), to State agencies (as in Austria, Germany and Italy); the variety of cases is too broad to include profit-making bodies distributing dividends to their members. The latter case raises interesting questions as to possible interest from large private players in offering competing services as a result of the digitisation of procedures. At least one CPB operates in almost all Member States at the national level; the exceptions are Luxembourg, Netherlands, Romania, the Czech Republic, and Slovakia, where there are no CPBs procuring for the central administrations.

CPBs most often establish framework agreements for standardised goods and services. Those operating for the central administration at the national level typically operate in office equipment and furniture, telecommunications services, energy, cleaning services, facility management etc. Some cover more advanced types of services, including architectural and engineering consultancy, audit services, or purchase sophisticated goods such as helicopters. Health procurement, which represents a large share of public procurement expenditure, is often managed by sectoral CPBs.

According to a recent study, based on data extracted from TED, centralized purchasing constitutes nearly 20% of the total value of contracts awarded in the EU over the last few years (corresponding to only 4% of contracts awarded in number).⁽¹⁶⁾ This data is influenced by the UK (55%) where the largest CPBs in the EU operate; this value is not representative of the situation in most EU countries – in half of the Member States, the level of aggregation is estimated at no higher than 10% of total public procurement value. According to the same source, there are about 50 CPBs which award more than 15 contracts each year, with 200 CPBs awarding between 5 and 15 contracts annually.

Unfortunately, it is difficult to quantify the impact of CPBs and centralised procurement with exact precision, due to the lack of precise micro data identifying all CPBs. Such difficulty is coupled with the lack of accurate data

(15) CPB organisational models are extremely diverse: for example, the Swedish central purchasing system consists of a set of specialised CPBs, all of which are organised as divisions within government agencies; in most other countries, the CPB is a single and independent government agency. UGAP, the French CPB, is *de facto* a large wholesaler buying goods and reselling them to the individual contracting authorities.

(16) PWC, ICF GHK and ECORYS (Study commissioned by the EU Commission, DG MARKT), "SMEs' access to public procurement markets and aggregation of demand in the EU", 2014.

on the total value of public procurement (including above and below the EU thresholds) in many countries.

Table 1 below illustrates the place of national CPBs in the total value of public procurement, as extracted from TED. It does not include procurement of utilities and in defence and works, since national CPBs generally do not operate in these markets. It covers the main CPBs operating at the national level only in the EU and therefore procuring a range of goods and services mainly for the central administration bodies (ministries, State agencies etc.).⁽¹⁷⁾ The data relating to the CPB volume cover the total of their activities; it may include procurement below the EU thresholds⁽¹⁸⁾ as well as other ancillary services supporting individual buyers.⁽¹⁹⁾ Therefore, the data on the share of CPB are only indicative and tend to overestimate the level of public procurement conducted via such bodies.⁽²⁰⁾

(17) In some cases, however, many buyers subscribe to the framework agreements of the CPB from other parts of the public administration and end up being a large share of the CPB volume.

(18) For example, this is the case of Consip, which operates a large electronic marketplace MEPA for below-threshold procurement. The value of purchases through Consip's framework agreements in 2014 reached 3.457 million euro.

(19) The data on CPB volume are extracted from public sources and refer to the years between 2012-2016, available online.

(20) Another significant element leading to overestimation is the fact that in some Member States TED data do not capture all the procedures above the EU thresholds taking place at the national level.

(21) These data refer to the volume of public procurement called off via the framework agreements set out by the CPB and other contracts. The data do not refer to the value of the framework contracts, but rather to the amount actually procured by the contracting authorities. This also includes projects in which the acquisition is carried out by the CPB.

(22) DG GROW G4, "Public Procurement Indicators 2014", 2 February 2016; DG GROW G4, "Public Procurement Indicators 2015", 19 December 2016

(23) EU Comm., Commission Staff Working Document, "Annual Public Procurement Implementation Review 2013", SWD (2014) 262 final, 1 August 2014.

Table 1. CPB procurement volume, share in the relevant procurement markets, and number of contracting authorities in a number of Member States

Member State	CPB	CPB procurement volume(22) (million euro)	Value of public procurement above EU thresholds(23) (million euro)	CPBs' share of procurement above EU thresholds (%)	Number of contracting authorities(24)
Austria (2015)	BBG	1.400	3.220	43,5	5.600
Croatia (2015)	State office for Central Public Procurement	83	1.660	5,0	1.811
Finland (2015)	Hansel	932	4.930	18,9	540
France (2015)	Ugap	2.714	32.730	8,3	132.652
Germany (2015)	Beescha	1.100	15.930	6,9	30.000
Ireland (2014)	OGP	357	1.800	19,8	3.319
Italy (2014)	Consip	5.600	20.690	27,1	34.000
Lithuania (2012)	CPO	69	850	8,1	7.703
Portugal (2014)	ESPap	538	1.030	52,3	4.467
Spain (2015)	DGRCC	740	11.420	6.5	8.339
Sweden (2016)	National Procurement Service	1.400	9.960	14.1	3.900
UK (2015)	CCS	18.053	66.070	27,3	30.000

The share of public procurement is influenced by various factors, such as the mandate and scope of the sector in which they operate or the existence of one or more CPBs operating at the national level (for instance, in Germany four CPBs operate at the federal level, each covering different areas). The institutional setup of the Member States has a significant impact on the devolution of public

procurement to the different levels of government. Bodies that have been in operation for a longer period of time also seem to record a higher share of the total amount of public procurement above the EU thresholds; in the case of Consip, the data are largely affected by the significant volume of procurement below EU thresholds, which inflates the numerator of the ratio. As a result of these many differences, the resulting share is not meaningful in terms of comparison between them.

Overall, at the EU level, it is estimated that the volume of procurement purchased by national CPBs is around 35 billion euros, *i.e.* approximately 18% of the total value of public procurement above the EU thresholds in the sectors in which those bodies operate; this value is largely concentrated in the activity of the British CPB, the Crown Commercial Service, which makes up almost half of the total.

As can be seen from the table above, in some Member States CPB weight is relevant both in absolute and relative terms and in many cases further aggregation is conducted at the regional or sectoral level. In the next section, we will consider some aspects of the systemic relevance of CPBs. This should however not lead us to forget the importance of how CPBs design their calls⁽²⁴⁾ (mostly framework agreements) and the characteristics of their IT platforms, the measures necessary to ensure that markets remain competitive and open, how to prevent possible malpractices by such pivotal bodies, or how to ensure access to SMEs.

3.3. The systemic relevance of CPBs

Centralised procurement is a process wherein one administrative organisation, representing the collective needs of other departments, carries out procurement functions. In most Member States, public procurement is mainly conducted on a highly decentralised basis (*i.e.* at the level of individual spending ministries, local authorities, or other public bodies) by hundreds or sometimes thousands of procuring entities/bodies.

Therefore, the Public Procurement landscape is characterised by high dispersion in all its key dimensions, *i.e.* the number of contracting authorities (estimated at least 350,000 across the EU⁽²⁵⁾), the amount of tenders above the EU tenders published annually (close to 170,000 in 2015

(24) G.L. ALBANO and C. NICHOLAS, *The Law and Economics of Framework Agreements – Designing Flexible Solutions for Public Procurement*, Cambridge, CUP, 2016; G.L. ALBANO and M. SPARRO, “Flexible Strategies for Centralized Public Procurement”, *Rev. Econ. & Instit.*, 2010, 1(2), Art. 4.

(25) However, this number is only to provide an approximate estimation; there is not a standard way to count a contracting authority; each internal division of the same body (e.g. a Ministry) could be counted individually or the Ministry as one single contracting authority. The difference of scale between the number of contracting authorities in Germany and France (four times the German number) suggests that Member States used a different metric to define contracting authority.

– procurement by utilities and in the defence sector included(26)) and many economic operators which actively participate or could participate in public procurement.

Such fragmentation is highly inefficient:(27) i) it leads to potentially higher prices; ii) the launch and management of a procurement procedure implies significant process costs;(28) iii) small buyers often lack the administrative capacity to deal with complicated cases; in short, professional buyers are also needed to deal with big players; iv) fragmentation deters the rollout of standards in areas like IT, and can be an obstacle to interoperability of solutions in use by different departments of public administration.

Driven by the need for further control over public spending, several Member States have set up CPBs to achieve savings through economies of scale and reduce transaction costs.(29) This is of increasing importance in the context of the severe budgetary constraints experienced by many EU countries.

At the same time, public procurement is increasingly seen as a tool to carry out a wide range of political and economic priorities. In addition to the need to create savings, procure and manage contracts efficiently, procurement handles a number of sensitive, often conflicting policy objectives. The combination of growing demands on the public authorities generates a need to specialise and increasingly professionalise procurement bodies.(30) Most buyers, in particular

(26) If below-threshold procurement is included, the number of procedures run annually escalates significantly. In Italy alone, about 5m procedures are run annually including above- and below-threshold for goods and services alone.

(27) C. COTTARELLI, *La lista della spesa. La verità sulla spesa pubblica italiana e su come si può tagliare*, Milan, Feltrinelli, 2015.

(28) As reported in the study from PWC *et al.*, centralized purchasing requires 30 person-days on average, more than the average for a non centralised procurement (22 person-days). However, when disaggregating the results by the number of individual buyers the contract involves, the average staff time per buyer decreases as the number of buyers involved increases. Therefore, centralized purchasing has significant cost saving. EsPap, the Portuguese CPB estimates that process savings deriving from aggregation count for 8.6% of total savings.

(29) SIGMA, “Organising Central Public Procurement Functions”, Brief 26, Public Procurement, 2013; SIGMA Papers No. 47; OECD, “Centralised Purchasing Systems in the European Union”, 24 April 2011, p. 58; P. HOPKINS, *Building the case for centralisation in public procurement*, CIPSA Australia, 2006; OECD, “Becoming a Central Purchasing Body: communication and change management strategies for an effective implementation. The case of the Greek secretariat General of Commerce (SGC) at the Ministry of Economic Development”, Meeting of the Working Party of the Leading Practitioners on Public Procurement (LPP), Paris, 27-28 April 2015; G.M. RACCA, *Professional buying organisations, sustainability and competition in public procurement performance*, 4th International Public Procurement Conference (IPPC 2010), Seoul, 2010; N. DIMITRI, F. DINI and G. PIGA, “When should procurement be centralised?”, in *Handbook of Public Procurement* (N. DIMITRI, G. PIGA and G. SPAGNOLO eds), Cambridge, CUP, 2006. K. KARJALAINEN, “Estimating the cost effects of purchasing centralisation – Empirical evidence from framework agreements in the public sector”, *J. Purchasing & Supply Management*, 2011, Vol. 17, Iss. 2, pp. 87-97.

(30) OECD, Recommendation of the Council on Public Procurement, Directorate for Public Governance and Territorial Development, 2015. See in particular Recommendation V.

the smaller ones, may lack the necessary capacity and competence to manage these new requirements.

Because of their size, their expertise and their specific role in the public procurement landscape, CPBs can play a significant role in the implementation of policy. Issues such as the professionalization of public buyers, rationalisation of the public procurement system,⁽³¹⁾ digitisation or the implementation of strategic procurement can hardly be addressed without involving CPBs.

This is neatly pinned down by the OECD. According to the OECD, “CPBs are increasingly becoming the core knowledge hubs in the country’s public procurement frameworks, not only for consolidated procurement but also for the implementation of e-Procurement, the dissemination of capacity and monitoring of the performance of procurement systems”.⁽³²⁾ CPBs therefore contribute to overcoming fragmentation and lack of any coordination between public buyers, improving the governance of public procurement. Experience has shown that policy coordination in public procurement is weak in many Member States. One emerging trend observed in some cases (e.g. the UK and Ireland) is to integrate procurement policy, advice, and operations – including the CPBs’ buying function – into a single organisation. This development is aimed at strengthening spend analytics, monitoring procurement and generating further savings.

In some countries, CPBs manage an ever-increasing share of public procurement and this has also some downsides. In fact, aggregation of procurement also carries a number of potential risks,⁽³³⁾ such as potentially reduced access for SMEs due to larger contracts, centralisation in procurement decision making, and excessive standardisation. These aspects are to be carefully monitored by the State.

Finally, there is another advantage to CPBs. They work independently of the electoral process, as their decisions do not depend on the mood of the electorate. This is not the case for many individual buyers whose decisions take into account the timing of the next elections (which represents the pay-back period for patronage).

(31) G.M. RACCA, “Le prospettive dell’aggregazione nell’amministrazione dei contratti pubblici”, *ApertaContrada*, 2014. G.M. RACCA and G.L. ALBANO “Collaborative Public Procurement and Supply Chain; the European Union Experience”, in *The SAGE handbook of strategic supply management* (C. HARLAND, G. NASSIMBENI and E. SCHNELLER eds), Los Angeles, SAGE, 2013.

(32) OECD, “Working Party of the Leading Practitioners on Public Procurement”, Paris, 27-28 April 2015.

(33) G.L. ALBANO and M. SPARRO, “Flexible Strategies for Centralized Public Procurement”, *op. cit.*, p. 53.

3.4. The Commission's policy on cooperative procurement

The European Commission services have drafted an Action Plan on cooperative procurement aiming to capture the innovative effects of smart aggregation of public buyers' purchasing power. The main objectives are to maximise the benefits of cooperative procurement by addressing systemic weaknesses, stimulating growth by advancing innovation-oriented practices (including linking innovative SMEs and startups with large buyers), supporting SMEs' access to public procurement through cooperative procurement, and supporting JCBPP.

The actions fit in with the overall objectives of the Commission: achieving best value for money for buyers, greater opportunities for business and SMEs and modernising public administration. The rationale behind this development is the aim of creating more efficient, simple and cost-effective procurement processes, but also addressing potential risks which may derive from the poor implementation of aggregation practices.

4. The digitisation of public procurement

4.1. The phases of the transition to e-procurement

The first significant process innovation introduced by the new public procurement Directives is the transition to e-procurement. The Directives provide for a gradual, mandatory transition to e-procurement in terms of the phases and actors involved, rolling in over time.⁽³⁴⁾

The impact of this transition will be significant, and, if properly managed, may largely contribute to improving and simplifying the process, re-designing it, and increasing the efficiency and transparency of public procurement. In its Communication on end-to-end e-procurement of 2013, the European Commission stated that "the transition to end-to-end e-procurement can generate significant savings, facilitate structural re-thinking of certain areas of public administration, and constitutes a growth enabler by opening up the Internal Market and by fostering innovation and simplification. It can also facilitate SME participation in public procurement by reducing administrative burden, by increasing transparency over business opportunities, and by lowering participation costs".⁽³⁵⁾

The initial phases concerned by the transition to e-procurement (*see figure 1*) are as follows:

(34) EU Comm., "A strategy for e-procurement", 20 April 2012, COM (2012) 179 final, 2012.

(35) EU Comm., "End-to-end e-procurement to modernise public administration", 26 June 2013, COM (2013) 453 final, 2013.

- ‘e-notification’ (meaning the electronic transmission of notices⁽³⁶⁾) as provided by Article 51(2) of Directive 2014/24/EU. Notices should be drawn up and transmitted by electronic means to the Publications Office of the EU for publication in the EU portal Tenders Economic Daily⁽³⁷⁾ (TED). They should be published within 5 days after they are sent;
- ‘e-access’ concerns the electronic availability of procurement documents. The documents should be available in an unrestricted manner and with full direct access free of charge, as set out in Article 53.

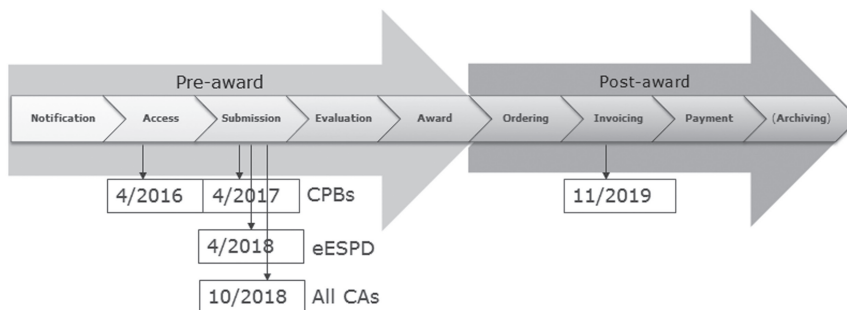
The deadline for the completion of these two phases was 18 April 2016, in accordance with the guidance set out in Article 90(1) on transitional measures.

The next phase concerns the electronic submission of tenders (e-submission), including the electronic transmission of requests for participation. The Directive provides for a gradual introduction over time to the bodies involved. The obligation is imposed as a first step to Central Purchasing Bodies (CPBs). According to Article 90(2), Member States can postpone its implementation until 18 April 2017. As pointed out in Recital 72, e-submission is well suited to use by CPBs, whose purchasing practices and tools are, generally speaking, more advanced in implementing e-procurement than traditional contracting authorities. The obligation to use e-submission is then extended to all contracting authorities. According to the transitory provisions, Member States may postpone the obligation to submit tenders online until 18 October 2018. If they decide to do so, bidding would take place by post, fax, electronically or by any of these means combined.

As pointed out in Recital 52, the mandatory use of electronic means of communications does not include the electronic processing of tenders, electronic evaluation or automatic processing. Furthermore, pursuant to this Directive, the provisions of the Directive relating to e-procurement and the obligation to use electronic means of communication cover only the pre-award process: this means, in practice, that the obligation to use electronic means of communication does not refer to any elements of the public procurement process after the award of the contract. Moreover, the internal communications within the contracting authority are, quite reasonably, also outside the scope of the Directive.

(36) This applies to the prior information notice, the contract notice and the contract award notices provided respectively by Art. 48, 49 and 50 of the Directive.

(37) TED is the online version of the *Supplement to the Official Journal* of the EU, dedicated to European public procurement. It is the EU portal for publication of procedures above the EU thresholds.

Figure 1 – EU directives milestones and the process life cycle

To ensure that e-procurement is not used as a means to restrict access to procurement markets, Article 22(1) provides that the tools and devices to be used, as well as their technical characteristics, are non-discriminatory, generally available and interoperable with the ICT products in general use.

In broad terms, similar provisions are included in Utilities Directive 2014/25/EU. Under the Concessions Directive 2014/23/EU, e-submission is voluntary. Under the terms of the Concessions Directive (Art. 29(1)), communication between bidders and the contracting authorities would take place using traditional means such as post, fax and hand delivery. It is left to the discretion of Member States to make e-procurement mandatory. In general terms, the provisions relating to electronic communication are very few and the legislator drafted only a ‘light regime’ in this area. The provisions (at Art. 29(2)) refer to the general principles, such as openness, general availability and non-discrimination of the systems used, in addition to the preserving the integrity and confidentiality of the communications between the relevant parties.

4.2. Exceptions to the use of electronic communications

In certain cases, the Directive allows the contracting authorities to avoid requiring the use of e-submission. These cases are contemplated in the following six exceptions.

- i) When the use of electronic means requires specialised tools, devices or file formats that are not generally available or supported by generally available applications.
- ii) Regarding IP-related issues, where making the applications or the software available for download would entail a breach of the copyright related to the software by the contracting authority. The relevant provisions illustrate the case explaining that the applications suitable for

the description of the tenders use file formats that cannot be handled by open or generally available applications or are under a proprietary licensing scheme.

- iii) Electronic communications could only be handled using specialised office equipment, such as wide-format printers used in certain works/architectural projects.(38)
- iv) The submission of a physical or scale model which obviously cannot take place electronically. In such a case, the scale model would have to be submitted by post or using other carriers.(39)
- v) When not using such means of communication is necessary in order to protect the particularly sensitive nature of the information.(40) However, to meet the confidentiality requirement, the buyer may use specific or dedicated electronic tools (not generally available to users) allowing the necessary level of protection; in such a case the procedure could still be run electronically.(41)
- vi) Due to a breach in the system in the e-procurement system, as it would put the regularity of the procedure at serious risk.

The first three exceptions are related to technical issues, while the last two concern security issues.

Furthermore, to ensure the openness of the tender, the contracting authorities have to offer alternative means of access in case it is not possible to use electronic means which are not generally available. For instance, a provisional token or password is to be provided to the supplier. While derogating to the use of electronic procurement may be justified in specific cases, in general terms this is not problematic if the contracting authorities avail themselves of the services of an e-procurement services provider. Ugap, the French national CPB, has conducted its procurement procedures solely electronically since 2014 without having to resort to exceptions.

(38) It would not be proportionate to require the contracting authority to buy a specific printer to be used in only one tender.

(39) This exception would apply to the transmission of the scale model itself, while the rest of the procedure is to be conducted electronically.

(40) The case of sensitive information could apply, for instance, to the contract to the advisor for the privatisation of a company. Such information could affect the market value of the company on the stock market.

(41) For instance, this would be the case where the contracting authority requires the use of a dedicated secure means of communication such as dedicated leased lines not connected to the public telecommunications network.

4.3. The procurement of works and e-procurement

Although the provisions of the Directives apply neutrally to all types of procurement (goods, supply or services), in practice, a number of provisions would concern works, or architectural projects, almost exclusively. For instance, this is the case of some of the exceptions outlined above, such the submission of a physical or scale model, and that relating to the use of special equipment (respectively points iii) and iv) in the list in the previous section).

Another issue relating to work projects⁽⁴²⁾ is mentioned in Recital 53. This concerns the possibility for buyers to set out the maximum size of file formats to be submitted. Works project files are often large; setting out a maximum volume is justified by the fact that the larger the size, the greater the risks of delays or cuts during upload; moreover, bigger files occupy greater storage space.⁽⁴³⁾

Furthermore, Article 22(5) provides that Member States may require the use of specific electronic tools, such as building information electronic modelling (BIM) tools or similar, for work projects or design contests. As the use of such tools is not generally widespread in all Member States, if BIMs are used the contracting authorities should offer alternative means of access to suppliers in order not to restrict their opportunity to access the procedure.

4.4. Interoperability of digital solutions across the Single Market and adjustments to technological development

Article 22(7) empowers the Commission to adopt delegated acts in three specific cases, essentially to cater for technological developments (in the first two cases) and to address technological obstacles to the internal market (the last case, covering interoperability).

The first case allows the Commission to amend the technical details and characteristics set out in Annex IV to take account of technical developments. Annex IV is important as it sets the requirements for tools and devices for the receipt of tenders, requests for participation and plans and projects in design contests conducted in an electronic environment. These requirements tie in with many significant issues which – if improperly managed – may affect the impartiality of

(42) Obviously, this could also be applied to other types of procurement; however, experience shows that it would be more likely to occur with works.

(43) See K. Schaub, “The Fourth Industrial Revolution”, World Economic Forum, 2016. The cost of storing information electronically is approaching zero (1 GB costs on average less than USD0.03 a year). Moreover, the space occupied by the relevant IT equipment (servers, PCs, etc.) is a fraction of the space occupied by storage for the paper versions of the same documents, as illustrated by a number of contracting authorities which have already completed the transition to e-procurement. It is therefore assumed that the buyer would store the files in electronic format, applying ‘end-to-end e-procurement’.

the procedure, such as the timing for the receipt of tenders, access by authorised persons to the tenders, opening tenders, and traceability of any possible breach of such elements. Traceability represents one significant advantage of electronic procedures compared to paper, since a record of the activity would be available to courts to verify specific situations in case of legal challenges.

The second possibility allows the Commission to amend the first four exceptions and to adjust them in case technological developments render the use of such exceptions inappropriate or, exceptionally, where new exceptions are to be added due to further technological developments.

The last case allows the Commission to set mandatory technical standards to ensure interoperability in a cross-border context. The use of specific standards may be imposed in certain areas such as e-submission, e-catalogues and means for electronic authentication. The threshold for applying this power is rather high. In fact, this would be possible only where technical standards have been thoroughly tested and have proved their usefulness in practice for both buyers and suppliers; stakeholders should be consulted on these points. Before making the use of any technical standard mandatory, the Commission is also asked to carefully consider the costs that this may entail, in particular in terms of adaptations to existing e-procurement solutions, including infrastructure, processes and software. These requirements make the use of such powers rather difficult.

Almost in parallel to the publication of the regulatory framework for public procurement, EU Member States and the European Commission decided to introduce a European Standard for e-invoicing⁽⁴⁴⁾ to address interoperability issues regarding e-invoices received by buyers, issued as a result of the performance of public procurement contracts.⁽⁴⁵⁾ This initiative was taken in response to the many e-invoice formats used or being developed across the EU, leading to increasing costs for public buyers and suppliers wishing to carry out cross-border activities. These varied formats cause unnecessary complexity and high costs for businesses and public entities. As a result of the Directive, buyers will have to accept e-invoices that comply with a forthcoming European norm to be developed by the European Committee for Standardisation (CEN), although nationally specific rules will remain valid. In addition, this Directive provides for a gradual transition to allow buyers to prepare for the change. The implementation deadline is set in relation to the publication of the reference of the European standard in the *OJEU* (*i.e.* 18 months afterwards). In order to facilitate the take-up of e-invoicing for local and regional contracting authorities, Member States may postpone the application of this

(44) Dir. 2014/55/EU of 16 April 2016 on electronic invoicing in public procurement.

(45) The scope of application includes contracts under the classical Directive, the Utilities Directive 2014/25/EU, the Concessions Directive 2014/23/EU, and the Defence Directive 2009/81/EU.

Directive to sub-central contracting authorities and contracting entities for up to 30 months following the publication of the reference indicated above. In practice, this brings the effective implementation of seamless e-invoicing communication across the EU to the end of 2019 or beginning of 2020.

4.5. Security levels and electronic signature

Some considerations are to be made in relation to the use of electronic signatures.⁽⁴⁶⁾ The Directive assigns Member States the power to specify the level of security required in relation to the use of electronic communications in the various stages of the procurement procedure. Interestingly, the legislator provided that Member States should assess the proportionality between the level of security and the risks attached, which suggests that certain tools may not always be necessary.

Thus, the level of security may change depending on the phase of the procedure and the associated needs. A higher level of security may be required in relation to e-submission, since it is necessary to preserve the integrity of the document or to identify the sender with no ambiguity. On the contrary, a lower level of security would be needed regarding the request for confirmation of the address at which an information meeting is to be held and access to procurement documents, in relation to the resubmission of e-catalogues. In practice, this means that the use of electronic signatures can be considered unnecessary in the cases above, requiring a low level of security.

It is worth pointing out that Member States tend to assess the level of security necessary to the (e-) signature of bids differently. For instance, in Ireland, Finland, Sweden and the UK, bids are not required to be (electronically) signed, while this requirement is in place in other Member States such as France, Greece, Italy and Portugal. It is worth highlighting that in some Member States the requirement of signing bids electronically has been or is being reconsidered with a view to simplifying the procedures for economic operators. As pointed out in the EXEP paper on “Regulatory Aspects and Interpretation”,⁽⁴⁷⁾ the problem may lie with the use of e-signature for economic operators and in the validation of e-signatures for contracting authorities.

In short, there is no legal requirement stemming from the Directive requiring the use of e-signatures. In this respect, the provisions on the use of advanced electronic signature lay down conditions when such requirement

(46) eIDAS Regulation (EU) No. 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, *OJEU*, L 257 of 28 August 2014, sets out the framework for eID and trust services, including e-signatures, e-seals and electronic time stamps.

(47) EXEP – Multistakeholders Expert Group on electronic procurement – Subgroup report, *Governance and Capacity building – Effective transition to e-procurement. Useful tips*, October 2016.

must be accepted in a cross-border context. The Directive states that buyers should accept advanced electronic signatures supported by a qualified certificate, irrespective of the Member State in which the service provider issuing the qualified certificate and/or the signatory is established, as long as the electronic signature is supported by a certificate issued by a service provider on a trusted list provided by the Commission Decision 2009/767/EC(48) as amended.

4.6. E-procurement:

A tool to re-engineer the public procurement process

As stated above, the introduction of ICT is an opportunity to overhaul public procurement processes, in addition to improving efficiency, transparency and traceability and reducing the administrative burden on buyers and suppliers.(49)

As indicated in the EXEP paper on governance and capacity building, “changing from old processes (for example, paper based) in public procurement to digital solutions is much more than an ICT usage matter. It is a matter of reorganizing functions and rethinking ways of carrying out the same activities”.(50)

The shift to e-procurement therefore represents a unique window of opportunity to review process and organisation in public procurement for the following reasons:

- it enables the automation of certain phases of the procedure;
- it enables conducting the procedure remotely (this applies both to the buyer, but especially to the bidder);
- it supports rapid and paperless transactions;
- it increases transparency and traceability of the process;
- it facilitates the modernization of procurement workflow;
- it promotes the use of structured data;
- it enables access to the data in real time.

One example is the creation of a single national portal for the publication of all notices and awarded contracts. Gathering all this information in one place enhances transparency and greatly simplifies economic operators’ access

(48) EU Comm. Decision of 16 October 2009 “setting out measures facilitating the use of procedures by electronic means through the ‘points of single contact’ under Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market”, *OJEU*, L 299/18 of 14 November 2009.

(49) Moreover, the digitisation of public procurement can also generate significant spillover effects in other areas of public administration. In fact, the digitisation and automation of verification of compliance (e.g. absence of conviction or company data on turnover) are used in other administrative procedures requiring an authorisation from the State – this is for example the case of business mobility.

(50) As explained in the same paper, the governance of digital transformation is key to successful implementation.

to information about procurement markets. Furthermore, interoperability between the portal, TED and the national *Official Journal* allows contracting authorities to enter the data on the procedure only once. This enables states to save time and money, as well as ensuring the reliability of the data generated by different IT systems.

Another example is information exchange. During the tender, it may be necessary to update the tender documents or reply to questions from economic operators. Updates and questions and answers can be posted on the e-procurement platform. The replies and new information will be automatically sent to the economic operators which have expressed an interest in the procedure. This will ensure that all bidders have access to the same information. Moreover, an electronic audit trail can be generated, to help ensure transparency in the procurement process.

Another case concerns the qualification process. Information that is presented in a structured format allows an automated or semi-automated evaluation of bidders' compliance with exclusion or selection criteria. This saves a significant amount of time, reduces typographical errors and cuts out the discretionality of the buyers in the process. As we will see in the next section, the ESPD is the essential element to ensure the implementation of automation in the qualification process.

Finally, the overall objective of digitisation is to achieve 'end-to-end' e-procurement, starting from planning and preparation up until archiving. Achieving such an ambitious objective requires a comprehensive approach, which implies the interconnection of various IT systems composing the 'e-procurement ecosystem,' such as databases of certificates, pre-qualification services, e-procurement services, the portal(s) for the publication of the calls, etc. Therefore, the digitisation should go far beyond the phases of public procurement covered by the Directives and include post award phases such as e-invoicing, e-payment etc. Establishing such a seamless exchange of data is a multidisciplinary challenge. Technical aspects of legal frameworks, and operational issues, must be coordinated to ensure that all systems involved are able to process and reuse the relevant data.

5. The European Single Procurement Document (ESPD)

An important process innovation introduced by the new Directives on public procurement is the European Single Procurement Document (ESPD), a self-declaration to be regarded as preliminary evidence in replacement of certificates.

The main elements of the ESPD are defined in Article 59 of Directive 2014/24/EU. It was established by the Commission's implementing Regulation 2016/5 (2016) in January 2016⁽⁵¹⁾ (hereafter referred as 'the Regulation') which entered into force on 26 January 2016. The entry into force of the ESPD is linked to the transposition of Directive 2014/24/EU into national legislation and, as stated in Article 1 of the Regulation, must take place at the latest by 18 April 2016.

Alongside the classical procurement sectors, the ESPD is to be used by contracting entities subject to Directive 2014/25/EU when applying exclusion and selection criteria provided by Directive 2014/24/EU. With regard to concessions on procedures and procurement whose value is below the EU thresholds, the use of the ESPD is left to the discretion of Member States.

The objective of the ESPD is to reduce the administrative burden on economic operators "deriving from the need to produce a substantial number of certificates or other documents related to exclusion⁽⁵²⁾ and selection criteria".⁽⁵³⁾ Therefore, the ESPD was introduced with the aim of simplifying procedures for both buyers and suppliers and reducing the administrative burden.

In short, the ESPD is a self-declaration of companies' suitability, financial status and abilities, used as preliminary evidence in all public procurement procedures above the EU thresholds. A few general aspects of the ESPD are as follows.

- The ESPD enables participating companies or other economic operators to state that they are not in one of the situations in which they must be excluded or may be excluded from the procedure.
- Only the winner will have to submit certificates or other means of proof requested as evidence by the buyer and this cuts the volume of documents needed in the procedure.
- While self-declaration is deemed to be sufficient a priori, the buyer can request some (or all) of the documents in cases of doubt when selecting candidates, especially in the case of two-stage procedures; this is to avoid contracting authorities inviting candidates which later prove unable to submit their supporting documents at the award stage, depriving otherwise qualified candidates from participation.
- Technical specifications are not part of the ESPD; it covers only the conditions for participation (pre-qualification) in terms of exclusion and selection criteria.

(51) Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document, *OJEU*, L3 of 6 January 2006.

(52) Examples of exclusion criteria are criminal convictions, grave professional misconduct, etc. Examples of selection criteria are financial, economic and technical capacity.

(53) See Recital 84 of the Directive 2014/24/EU and Recital 1 of the Regulation.

- It can be used for both one- and two-stage procedures (restricted procedures, competitive procedures with negotiation, competitive dialogues and innovation partnerships).
- Bidders can be excluded if the ESPD is not properly filled in, as for any other formal requirement. Buyers may however provide an opportunity to correct minor issues.
- The ESPD is also to be provided by subcontractors so that the verification of the information regarding such entities can be carried out together with and in the same conditions as the verification of the main economic operator.
- The ESPD can be reused in different procedures, in particular in digital format, or updated.

This possibility is linked to the availability of the ESPD in electronic format. The design of the ESPD (structured information) allows automatic processing. Under the Directive, the shift to an entirely electronic solution can be postponed until 18 April 2018.

5.1. The ESPD and the “winner only” principle

The use of the ESPD is to be viewed together with the ‘winner only’ principle, whereby the relevant supporting documents (certificates, attestations, declarations on oath etc.) should be requested from the potential winner of the procedure only, *i.e.* the tenderer to which the contracting authority has decided to award the contract. This represents a significant simplification of the process for all parties involved. Indeed, self-declaration was already in use in some Member States (for instance, in the Netherlands, Germany and Spain) while in many others it was a novelty. The objective of the ESPD is to replace the diverging self-declarations in use across the EU, and to introduce it as a common procedure across the EU, which in some cases is a radical shift away from the way the procurement process has been organised heretofore.

This represents a significant change and a potential relief for most suppliers, who will now be able to submit only the offer, without having to take care of looking for and collecting the relevant certificates demonstrating that they meet the relevant exclusion and selection criteria set by the contracting authority. This means process savings for the economic operators, allowing them to focus on the preparation of the technical and financial aspects of the offer. The process simplification is also relevant for the buyers, as they may verify the conformity of the evidence provided by only one operator – the potential winner – instead of all the bidders.

5.2. The ESPD and the Single Market dimension

From the perspective of consolidating the internal market, the ESPD represents a significant innovation with the potential of increasing cross-border participation in public procurement procedures. From this perspective, the main innovative aspects of the ESPD are the following:

- It clarifies – by ‘standardising’ them – the exclusion and selection criteria to be used by all buyers across the EU, in an almost exhaustive manner (some national criteria are still allowed).⁽⁵⁴⁾ This point also has a relevant national dimension, since in many cases different contracting authorities in the same Member State were previously applying non-homogeneous criteria although operating under the same national legislation.
- The ESPD simplifies procedure for both buyers and bidders, as it replaces different and diverging self-declarations with one standard form established at the European level, available in all official EU languages.
- The establishment of a standard self-declaration contributes to increasing legal certainty in the procedure. This is quite relevant since it increases bidders’ confidence on some aspects of the applicable public procurement rule, and may potentially increase business interest in public procurement.
- The ESPD allows for making the ‘winners only principle’ the standard principle to be used in procurement procedures across the EU. This greatly simplifies matters for bidders and public administrations alike taking part in procurement procedures in all the EU.
- The ESPD – being thought to be available in electronic format – allows the presentation of the information requested in structured format, paving the way for automatic verification of data (and paving the way for the so-called ‘once-only’ principle). In this respect, it provides a strong push for the digitisation of public procurement procedures.

As a complement to the creation of the ESPD, the new Directives in Article 61 establish eCertis, an online database enabling mapping the means of proof (certificates, declarations on oath etc.) issued in any EU Member State, to demonstrate compliance with exclusion or selection criteria.⁽⁵⁵⁾ The Directive requires Member States to keep the information included in eCertis up to date. It is important to stress that eCertis is not only a tool simplifying procedural aspects but it also has multiple functions: as a clearing house, it allows checking the reliability of certificates and attestations provided; it is

(54) See Part III D of the Regulation which allows the contracting authority (or the contracting entity) to include other exclusion grounds that may be foreseen in its national legislation. An example of such national exclusion grounds is the AntiMafia declaration requested in Italy.

(55) eCertis also includes information on countries from the European Economic Area: Iceland, Liechtenstein and Norway. Other European States are considering joining eCertis.

an information one-stop-shop on means of proof requirements used in public procurement in the EU, and it allows benchmarking of the regulatory practices of Member States in the field of certificates requested for public procurement.

5.3. The ESPD as a driver for the introduction of the ‘once-only’ principle

According to Article 59(1) and (5) of the Directive, when the contracting authority can obtain the supporting documents directly by accessing a database, the ESPD should include the relevant information (e.g. the link to the website of the database storing the information and the code necessary to access it) to make this possible. The bidder should not be required to provide the supporting documents insofar as the buyer can access a national database available free of charge in any Member State. These provisions are complemented with the requirement aiming at ensuring that foreign buyers obtain the same conditions of access with regard to the databases.

Therefore, the ESPD is rightly considered a building block in the development of the ‘Once-Only Principle’ (OOP) meaning that suppliers should not be asked (or asked once at the most) to provide information in order to demonstrate that they meet the requirements set out in an administrative procedure, since this information is already available in databases owned by public authorities. Obviously, the implementation of e-procurement is one of the preconditions for the seamless flow of data between the registry or databases containing the certificates and the contracting authority. In this respect, it is to be noted that the suppliers give buyers consent to retrieve the relevant information from the database. This allows addressing data protection requirements⁽⁵⁶⁾ and the processing of personal data contained in the ESPD relating to natural persons who are members of an administrative, management, or supervisory body of the supplier.

Thus, one significant simplification in the public procurement procedure is to integrate the ESPD with databases and/or a system for the pre-qualification of suppliers. This integration would allow automatic verification of bidders’ compliance with exclusion or selection criteria. The Commission’s recent report on the practical application of the ESPD indicates that two thirds of Member States plan to proceed with such integration, acknowledging the importance of the ESPD as a building block for the digitisation of public administration.

The level of OOP readiness is rather variable in the Member States, as reported by the Commission. A large group of Member States indicated that the databases are not open to access by other parts of the administration for direct consultation or for interconnection. On the other hand, eleven Member

⁽⁵⁶⁾ Art. 83(6) and 86(2) of Dir. 2014/24/EU refers to the need to observe data protection rules (both EU rules and national ones). This issue is also addressed by Recital 5 of the ESPD Regulation.

States have reported that all contracting authorities can access national databases to retrieve certificates directly, although this possibility is applicable only to certain types of documents, such as those relating to exclusion grounds. The three Baltic States already have a system in place allowing all buyers to automatically retrieve and verify the compliance of suppliers for certain types of requirements. These Member States plan to link the ESPD to all registries so as to cover all points, allowing for the simplified verification of data.

5.4. Initial implementation of the ESPD

Given the importance and innovative character of the ESPD, the EU legislator provided for the Commission to “review the practical application of the ESPD taking into account the technical development of databases in the Member States and report thereon to the European Parliament and the Council by 18 April 2017”.⁽⁵⁷⁾ The Report, which included a survey of Member States and a survey of targeted stakeholders, was published on 17 May 2017.⁽⁵⁸⁾

In view of the innovative nature of the ESPD and the number of parties involved in the requirement of using the ESPD (all buyers in the EU), the Commission has put in place accompanying measures to support Member States in its implementation, including various IT solutions,⁽⁵⁹⁾ workshops in the Member States, and funding.

The report referred to above came too early to appreciate in full the practical application of the ESPD. As pointed out by the Commission in its report, some Member States indicated that the number of contracts awarded was still very small, for instance due to budgetary restrictions or due to the still-recent transposition of the Directive at the time of the survey. As reported by the Commission, only two Member States provided a quantitative estimation of the impact on companies: according to Denmark, the benefits accrue to 12 million euros per year, while Croatia reported an 83% reduction of costs in preparing bids with regard to means of proof. This provides only a partial estimation of the benefits since it does not include those benefits deriving from a reduced administrative burden for buyers. It is also true that such a huge change, implying moving from a paper-based transaction to a structured data transaction, is quite difficult to measure and at the same time requires some time for the parties concerned to adjust. Overall, in qualitative terms, the Commission reported that most Member States expressed favourable views on

(57) Art. 59(3). This is 2 full years earlier than the ‘ordinary’ date, 18 April 2019, foreseen for the general review of the Directive pursuant to its Art. 92.

(58) EU Comm., “Report to the European Parliament and the Council on the practical application of the European Single Procurement Document”, COM (2017) 242 final, 17 May 2017.

(59) The online service developed by the Commission aims at helping Member States in the transition to e-procurement, until they have fully integrated an ESPD. It is therefore a transitional tool.

the ESPD; nonetheless, some of them raised some concerns with regard to the complexity of the document, its wording, and the need to adjust from use of a simpler self-declaration, where in use.

6. Conclusions

This paper has briefly illustrated the main innovations in the public procurement process introduced by the Directives on public procurement of 2014. These are the digitisation of procurement, the use of self-declaration via a standard form (the ESPD), joint cross-border procurement (JCBPP) and cooperative procurement via institutional bodies, CPBs.

While some of the innovations are compulsory (the use of the ESPD, as well as the digitisation of certain phases of the procurement procedure), others are voluntary, such as the establishment of CPBs or the use of JCBPP. Regardless of whether or not they are mandatory, these elements also have a significant systemic effect on the organisation of public procurement and its dynamic functioning. To fully exploit the transformative character of these changes, Member States should go beyond what is required by the Directives while respecting their requirements. This will require making policy choices in the setting of the public procurement system, so as to generate efficiencies and savings, which, if translated into tax reduction, could contribute to economic growth.

For instance, this implies using the window of opportunity for the transition to e-procurement provided by the EU rules (which covers e-notification, e-access and online submission) to digitise the full procurement process from planning to archiving.⁽⁶⁰⁾ Also, it implies using ESPD as leverage to connect with national databases and with a view to automating the verification of compliance with exclusion and selection criteria. At this point in time, it is key for Member States to set the right regulatory conditions (legal and technical) in which the various parties (buyers and bidders, providers of e-procurement solutions, providers of national IT systems such as databases, etc.) operate. This will prevent the creation of an IT legacy which is a significant obstacle to interoperability. Some Member States are taking a comprehensive approach to the transition to e-procurement, demonstrating political will, vision and the administrative capacity to enable digital transformation. The potential impact of e-procurement as a contributor to digital transformation is huge and may result in solutions going beyond what can be anticipated today.

The digital age is about accessing and processing data. To allow this to happen, e-procurement requires ‘datafication’ of information, in order for it to

(60) Recital 52 of Directive 2014/24/EU states explicitly that “Member States and contracting authorities remain free to go further if they so wish” with regard to the phases to be made electronic.

be tabulated and analysed.(61) Using electronic platforms for the transition to e-procurement is a necessary pre-condition. The requirements on traceability and auditing stemming from the Directive support this view: Annex IV of Directive 2024/24/EU sets out minimum requirements for tools and devices for the electronic receipt of tenders, requests for participation and plans and projects in design contests. The process may be properly audited and traced to meet the requirements of Annex IV only when e-procurement platforms are used. In other words, it is not possible to ensure that these requirements are met by sending bids via e-mail (e.g. with the bid attached) as this may not guarantee sufficiently secure storage of bids and access to their content.

For a policymaking or monitoring body this means being able to assess and control what has been procured, how, and from whom. Contract registers(62) covering the life cycle of the contract(63) are an efficient tool for the promotion of good governance through enhanced transparency.(64) This also means open data made available to non-State actors. Data mining tools enable benchmarking the performance of individual buyers, or spotting anomalous behaviour out of thousands of datasets. Furthermore, the creation of a seamless flow of data also makes it possible to reconcile procurement (purchase orders by individual contracting authorities), payment and accounting data. From the perspective of managing public expenditure this is a significant step forward.

Data analysis helps make sense of the landscape and taking fact-based policy decisions. Further, CPBs gather market intelligence which is produced from a single source. This is not only relevant for operational tasks relating to the calls, but also in relation to demand and supply. This point has led some Member States to integrate procurement policy, strategy and CPBs (including some sectorial ones) in one office with the objective of strengthening spend analytics and data management; and, at the same time, securing savings. As clearly explained by Blomberg,(65) “there is a need to develop national strategies on the development and organisation of the procurement system where the

(61) V. MAYER-SCHÖNBERGER and K. CUKIER, *Big Data. A Revolution That Will Transform How We Live, Work and Think*, Boston, Houghton Mifflin Harcourt, 2013.

(62) EU Comm., “Upgrading the Single Market: More opportunities for people and business”, COM (2015) 550 final, 28 October 2015. As indicated in the EU Commission's Staff Working Document (SWD [2015] 202 of 28 October 2015) accompanying the Communication on the Upgrading of the Single Market, contract registries store digitalized contracts, their structured summaries as well as full wording, including contract performance conditions, terms of delivery, and subsequent modifications. Ideally, an enforcement mechanism is in place to ensure the publication of the contract (e.g. the contract is void in case it is not published in the register).

(63) OECD, aforesaid, 30. In particular Recommendation II which refers explicitly to transparency in all stage of public procurement cycle.

(64) See BASE <http://www.base.gov.pt/Base/pt/Homepage>

(65) P. BLOMBERG, “Future trends of CPBs and the role of the European Commission”, follow up note to brainstorming meeting, 2015.

goals, visions and priorities, are outlined and communicated to the administrations”. In other words, this calls for steering public procurement, lacking so far in most Member States.

Another relevant aspect – still connected to the above – concerns the mainly dual role of CPBs: platform providers, and organizers of the marketplace for buyers and sellers alike, happy to delegate procurement tasks, responsibility and litigation risk. In practical terms, these roles imply the provision of IT platforms and/or the procedural ‘platform’ for the purchase itself (the framework agreement, a dynamic purchasing system, or an e-catalogue) so as to overcome the fragmentation deriving from infinite individual award procedures to procure similar goods or services. In this respect, data analysis and the new techniques for CPBs complement each other.

Each of the novelties introduced by the new Directives has value on its own; however, the combination of e-procurement and aggregation techniques may result in more than proportional changes. In every field digital platforms have dramatically reduced transaction costs for both buyers and suppliers.⁽⁶⁶⁾ These platforms match buyers and sellers of a huge variety of products and services and thereby enjoy an increasing return to scale since adding a new product on an e-catalogue has a very low marginal cost.⁽⁶⁷⁾ At the same time, digital platforms have the potential of harnessing highly competitive markets, which can significantly cut process cost for the contracting authority with lower prices. Consumer habits are changing and public procurement is unlikely to remain indifferent to the effect of technological change on procurement modalities. Thus, it may be argued whether in the future contracting authorities might be tempted to resort to privately-owned platforms operating in business-to-consumer services, or whether the legislation would adjust to allow the development of innovative organisational models, including “outsourcing” IT platforms to private operators.

Obviously procurement will remain essentially a national issue. Nonetheless, JCBPP stands out in terms of process innovation as it creates the conditions for cooperation between administrations in the Single Market; from the buyer’s perspective, JCBPP implies being open to evaluating and even awarding a contract to a foreign bidder, and being ready to accept means of proof delivered by a foreign administration. JCBPP can thus be seen from another perspective: anticipating the possibility of choosing a foreign supplier at the stage of preparation of the procedure (*ex ante*); this differs significantly from the traditional procedure, wherein foreign suppliers might be selected

(66) K. SCHWAUB, “The Fourth Industrial Revolution”, World Economic Forum, 2016.

(67) The e-catalogue of eSPap include 23.000 products, Ugap and BBG catalogue includes 300.000; Consip’s 8 million.

only after the evaluation (*ex post*) if it offers the best value for money and thus prevails over other localistic considerations.

Public procurement remains a highly regulated activity and at least in the initial phase of implementation JCBBB does not seem sufficient to stimulate competitive dynamics between buyers (*i.e.* public bodies) from different Member States. However, it opens up the possibility of co-operation between large buyers (CPBs or large cities) in areas of mutual interest (for instance, to share the cost and the risk linked to innovation projects) or between buyers located in bordering areas building infrastructure linking the two adjacent territories.

The new standard forms for publication of notices in TED – being implemented in the EU – allow identifying JCBPP projects for both entities (under the Utilities Directive) and contracting authorities (under the Classic one). The 2017 data confirm the interest of buyers in applying this new tool. It can be assumed that the increase of legal certainty produced by the new rules led to an increase of cases; however, this cannot be ascertained definitively due to the lack of data for the previous years.

Results seem to confirm that JCBPP via centralised purchasing is extremely rare; the reasons for this are to be researched (perceived insufficient legal certainty e.g. with regard to applicable law in review procedures, lack of motivation of CPBs, etc.). In most cases the countries concerned share the same border; the geographical nature of the goods or services or works to be procured (e.g. maritime navigation aids, construction of a tunnel or a bridge between two countries, air navigation systems) pushes them to award the contract jointly. In these situations, the need for close coordination between parties from different Member States is a valid reason for implementing JCBPP. The same holds true for projects concerning utilities (purchase of connectors, cables etc.); in addition, those companies operate in a different context than public buyers, with efficiency-driven operations. In some others there is no common border (purchase of electric cars, software) and parties have decided to award jointly the contract. This is likely due to sharing (transaction and purchasing) costs and knowledge and procuring innovative goods or services. In either case the voluntary use of this innovative process looks to be a good deal for the procuring bodies.