

Outside the Procurement Directives - inside the Treaty?
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The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers

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1 The relevance of IT solutions in the future of public procurement

It is normally reported that in Europe public authorities spend around 19% of GDP on works, goods and services.¹ Less well known is that the public procurement Directives cover only a small percentage of such expenditure. It is possible to argue from the EU data that currently only 20% of the value of public contracts awarded in Europe are above threshold or fully inside the scope of the public procurement Directives. The value of this market (at around 19% of EU GDP) strongly decreases if we consider that approximately only 4% of EU GDP is fully awarded according to the Directives and only around 2% is below thresholds, the remainder of which is not or not fully covered by the Directives.² From this perspective, the need to find new solutions to create an effective internal market for EU public procurement becomes evident.

IT solutions seem to become strategic in order to better enforce non-discrimination and transparency principles to favour participation, particularly in list B services and below threshold procurements.³

Electronic means can be fundamental to ensure the application of the EU Treaty principles required outside the scope of the Directive.⁴ It is evident that any rule providing for the mandatory use of IT tools in

¹ Commission (EC) 'Public Procurement indicators 2010' (2011), with reference to 2010, the total expenditure on works good and services is over € 2,400 billion spent annually.

² Commission (EC) 'Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation Part 1', SEC(2011) 853 final, June 27, 2011, <http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf>.

³ Commission (EC) 'A strategy for e-procurement' April 20, 2012 COM(2012) 179 final. D. SORACE – A. TORRICELLI 'Monitoring and Guidance in the Administration of Public Contracts' in R. NOGUELLOU – U. STELKENS *Droit compare des contrats publics - Comparative law on public contracts* (Bruylant, Bruxelles, 2010), 199 et seq.

⁴ R. BICKERSTAFF 'E-communication Regulation in Public Procurement: the EC and UK perspective' in S. ARROWSMITH (edited by) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 287 et seq. For a German law perspective see: M. BURGI 'The policy on regulating Electronic

the procurement procedure can be more easily complied with by central purchasing bodies or procuring entities with a greater range of professional skills and adequate IT facilities.⁵

The substantial number (250.000)⁶ of smaller procuring entities in Europe preclude the possibility to significantly and quickly develop their skills. As a result, such entities either enlarge the joint procurement or leave this task to professional buying organizations.⁷ Significantly, in Italy it has been recently provided that municipalities with a population not exceeding 5,000 inhabitants must either entrust the acquisition of works, services and supplies to a single central purchasing body or purchase through joint procurement.⁸ Any form of joint procurement could limit below threshold procurement since the award procedure is likely to be conducted under a framework agreement, or with the potential to split a contract into a number of lots but normally above the threshold at least for goods and services procurements.

Such re-organization could favour the wider development and implementation of IT solutions that is definitely *the solution* for the future of public procurement.⁹ This idea has been well established for a number of years, especially considering the ambitious policy vision underpinning the 2004 Commission Action Plan aiming to create a situation where "... any business in Europe with a PC and an internet connection can participate in a public purchase conducted electronically".

However the adoption of e-procurement solutions was not so easy to devise and implement in practice.¹⁰ As indicated above,¹¹ electronic procurement presently accounts for only a small percentage (around 5%¹²) of all procurement carried out in Europe in contrast to the much more optimistic EU forecast¹³ of 2005 which estimated that at least 50% of procurement would be conducted by such means by 2010. Realistically, given the complexity of the change required and the inherent challenges in moving towards electronic systems, "these objectives were always unlikely to be achieved in such a short time-frame – it is perhaps fairer to ask if greater progress could have been expected".¹⁴

The importance of the improvement of the use of IT solutions throughout the entire procurement process is more and more evident.

It seems useful to define the different possible uses of IT solutions, as they can form a wide and variable spectrum, from a simple advertising to a complete on line award and execution procedures. It is possible to suggest that it was perhaps too ambitious to expect quick implementation of complete e-procurement procedures in particular in light of the fact that IT solutions have not yet been sufficiently improved as means for publicity and transparency of public contracts. It should be stressed that electronic means of

Communications in Germany' in S. ARROWSMITH (edited by) *Reform of the UNCITRAL model law on procurement*, cit. 305 et seq.

⁵ N. DIMITRI, F. DINI, G. PIGA 'When should procurement be centralized?' in N. DIMITRI, G. PIGA, G. SPAGNOLO (edited by) *Handbook of procurement* (2006) Cambridge, 47; Commission (EC) 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts' COM(2011) 897 final, December 20, 2011.

⁶ Commission (EC) 'Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation Part 1', cit., iii.

⁷ G.M. RACCA - S. PONZIO 'La mutualisation des achats dans le secteur de la santé publique: les centrales d'achat et les accords-cadres dans une perspective comparative' (2011) *Droit Administratif*, 2011, 7 et seq.

⁸ Law decree December 6, No. 201, converted in law December 22, 2011, No. 214, Article 23, § 4, implementing Article 33 of Italian Public Contracts Code.

⁹ J. ROBERTS *The Modern Firm* (Oxford University Press, Oxford, 2004), 112.

¹⁰ It recognised the need to take into account an EU level dimension, without which the switch-over could be hampered and resources could be wasted as the wheel was constantly re-invented.

¹¹ G.M. RACCA 'Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement' (2010) *P.P.L.R.*, 119; Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC(2010) 1214 final October 10, 2010.

¹² Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC(2010) 1214 final October 10, 2010, 9. "The EU average figure is estimated to be less than 5% of total value, other than in Portugal, where the mandatory approach results in nearly 100% use of e-Procurement. France and Italy, notwithstanding being first mover countries in e-Procurement, estimate that only 4% and 2.5% respectively of their total procurement is conducted electronically

¹³ The Manchester ministerial declaration of 24 November 2005 defines the following target: "By 2010 all public administrations across Europe will have the capability of carrying out 100 % of their procurement electronically and at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically". The PEPPOL project is strongly supporting this target.

¹⁴ Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC(2010) 1214 final October 10, 2010, 11.

information and communication can greatly simplify advertising and increase the efficiency and transparency of the procurement processes.¹⁵ They should therefore to the greatest extent possible be given precedence over traditional means of communication and information exchange. The use of electronic means also leads to savings in time. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at EU level. Obviously, the tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and must not restrict economic operators' access to the procurement procedure. Otherwise such electronic tools could create new e-barriers.¹⁶

The new Directive proposal strongly promotes IT solutions.¹⁷ It recognizes that the use of electronic communications and transaction processing by public purchasers can deliver significant savings and improved procurement outcomes while reducing waste and error.¹⁸ The proposal aims at helping Member States to achieve the switchover to e-procurement, enabling suppliers to take part in online procurement procedures across the internal market. For this purpose it provides for the mandatory transmission of notices in electronic form, the mandatory electronic availability of the procurement documentation and imposes full electronic communication on Central Purchasing Bodies,¹⁹ that, as indicated above, could have a significant role for below threshold procurement.

Central Purchasing bodies are “*contracting authority which: acquires supplies and/or services intended for contracting authorities, or awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities*”.²⁰ Such professional contracting entities can have a significant role in the conversion to the use of IT solutions in public procurement due to the significant quality and number of skills and of IT facilities.

2 IT solutions as means to advertise tender notices: a strong enforcement of transparency outside the scope of the Directives

A first step can be the use of IT solutions for the drawing up, and transmission of, notices and for sending and publishing data with the aim of advertising an intention to award a contract, regardless of the need of the publication of a formal notice in the OJEU.

The use of websites for publicity could be extremely useful if the data can be easily found, particularly for list B services. However, the problem is that often there is not a single institutional designated web portal in each country and contracts may be published on an individual institutional website or on a non-governmental, business run, website. The latter can be particularly expensive for a procuring entity, and more importantly does not provide an absolute assurance that all possible interested tenderers are made aware of the contract opportunities.

According to recent research,²¹ below threshold contract notices are published in official publications (hard copy) and in national portals or websites in Austria, Cyprus, Italy,²² Lithuania and Spain. Bulgaria, the

¹⁵ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’, cit., whereas no. 23.

¹⁶ S. KALLAS ‘The challenge of e-signature for e-procurement’ (2008) Conference on the cross-border use of e-signatures in the e-procurement process - Brussels, 18 September 2008.

¹⁷ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, see artt. 19, 31-38, 51, 58, 59.

¹⁸ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, whereas 19.

¹⁹ The strategic role of CPBs was already underlined in G.M. RACCA ‘Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective’ in R. CARANTA and M. TRYBUS (eds) *The Law of Green and Social Procurement in Europe* (Djøf publishing, Copenhagen 2010), 165 et seq.

²⁰ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Article 1, § 10.

²¹ Such data are reported on OECD (Sigma papers) ‘Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives’ (2010) 16.

Czech Republic, Finland, Hungary, Latvia, Luxembourg, Romania and the Slovak Republic only publish their notices on national online portals in electronic formats. In Romania, about 66,000 invitations were published by contracting entities on the electronic system for public procurement (ESPP) in 2008.²³ In Poland, contracting authorities are also required to publish notices on their websites for both contracts above and below the national thresholds. In Denmark, the regulation²⁴ sets out requirements for notices for goods and services contracts, but there are no specific rules for publication, which is either online or in newspapers; commercial website on the other hand are very expensive for the procuring entities. In Germany there is no requirement to publish notices for below threshold contracts on electronic media.²⁵ In France, the contracting entities can, below a threshold of 90,000 euro, decide how to publish; above that threshold, notices have to be published by public authorities in the Official Bulletin (BOAMP) or in a newspaper entitled to publish legal notices.²⁶ It is provided that after January 1st 2012, contracting authorities may not refuse to receive the bidder's documents transmitted electronically for contracts above € 90,000.00.²⁷ There are many different websites and the procuring entity must only ensure adequate access. In the Netherlands, contracting authorities can decide where to publish and usually do so on their own website. In Sweden, publication on “generally accepted databases” with free admission is required.

In Italy,²⁸ for contracts below threshold, the procuring entity has the choice as to the means of publicity. Procuring entity may just publish the post-award notice on the buyer profile website but they may also use electronic catalogues through a previous notice, using a kind of market analysis to identify an appropriate economic operator to invite.²⁹ For contracts worth more than €150,000.00, Italian contracting entities have to send to the *Autorità di vigilanza sui contratti pubblici* data on the content of the contract notice, minutes of the award procedure, the economic operators participating in the award procedure, the amount of the contract and the name of the contractor.³⁰ An “*Osservatorio*” has been created to collect data on all Italian public procurement in order to consolidate them in an electronic archive.³¹

In order to increase transparency and also possibly cross-border participation for below threshold contracts, it should be provided that any Member States should designate specific websites where economic operators can easily access information relating to the publication of the contract.

²² Legislative Decree No. 163 of 2006, cit., Article 122, § 5 for works and Article 124, § 5 for goods and services below thresholds. An exception to this rules concern the “*acquisizioni in economia*” (Article 125).

²³ See DACIAN C. DRAGOS ‘Public Procurement Outside Eu Directives In Romania: Is Voluntary Compliance Leading To Effectiveness?’ in this volume.

²⁴ See S. TREUMER ‘On the Development of a Danish Public Procurement Regime outside the Scope of the EU Public Procurement Directives: EU Principles of Law do not Come Easy’ in this volume.

²⁵ See M. BURGI – F. KOCH ‘Contracts below the thresholds and list B services from a German Perspective’ in this volume.

²⁶ See F. LICHÈRE ‘Public procurement contracts below EU thresholds and Annex II. B services in France’ in this volume.

²⁷ Décret n° 2011-1000 August 25, 2011, amending Article 56 of the *Code des marchés publics*.

²⁸ A. MASSERA – M. SIMONCINI ‘Basic of public contracts in Italy’ (2011) in *Ius Publicum Network Review* <http://www.ius-publicum.com/repository/uploads/21_02_2011_14_41_Massera%20inglese.pdf>.

²⁹ P.R.d. October 5, 2010, No 207, concerning “il regolamento di attuazione ed esecuzione del codice dei contratti pubblici di lavori, servizi e forniture”, replaced the P.R.d. December 21, 1999, No 554 (referring to L. February 11, 1994, No. 109 on public works), Article 331 (for goods and services) related to “acquisti in economia” excludes the application of the publicity requirements established in the Article 124 of the Italian Public Contract Code, requiring only the compliance with the principle of transparency, balancing the interest of efficiency of the contracting authority with the principles of equal treatment, non-discrimination and competition among economic operators. The regulation of Article 173 (for “*in economia*” works), § 2 and 331 (for “*in economia*” goods and services), § 3 requires only the publication of the post award notice in the ‘buyer profile’.

³⁰ Legislative Decree No. 163 of 2006, cit., Article 7, § 8. President of Authority for public contracts, December 14, 2010, ‘trasmissione dei dati dei contratti pubblici di lavori, servizi e forniture – settori Ordinari e Speciali – estensione della rilevazione ai contratti di importo inferiore o uguale ai 150.000 Euro, ai contratti “esclusi” di cui agli artt. 19, 20, 21, 22, 23, 24 e 26 del D.lgs n. 163/2006, di importo superiore ai 150.000 Euro, e agli accordi quadro e fattispecie consimili’, <http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4457>. The submission of data about the award of the contract of work between 40,000 and 150,000 euro, and contracts for goods and services between 20,000 and 150,000 euro, are required too, within 60 days from the date of the signature of the contract.

³¹ Legislative Decree No. 163 of 2006, italian public contracts code, Article 7, § 4, let. a). G. M. Racca ‘Public contracts. Annual Report - Italy’ (2010) in *Ius Publicum Network Review* <http://www.ius-publicum.com/repository/uploads/06_12_2010_10_17_Raccaeng.pdf>.

The recent UK experience with *contract finder* could potentially be an example of a unique portal for below threshold contracts, even though indications suggest that it is not yet being used as an exclusive point of reference for below threshold contracts.³²

As recently reported by the Commission,³³ there is now a single accepted and established system for the publication of above threshold notices across the EU (Tenders Electronic Daily), supported by compatible infrastructure at national level. In 2009, just over 90% of forms sent to TED were received electronically and in a structured format. “The electronic publication of notices for below threshold procurement has also advanced at national or regional level”,³⁴ but substantial efforts are still required. Such efforts could be coordinated to improve transparency and competition below threshold and for list B services too.

An important issue concerns the consequences of such extension of advertising through websites. Does it allow any economic operator to be admitted to the negotiation or to submit an offer? One could say not; it is only a means by which the procuring entity can achieve a greater degree of transparency than when it publishes the notice in a paper bulletin. Outside the scope of the Directives the key problem is that the procuring entity can choose the contractor among the invited tenderers, the market can be closed and the undertakings not invited have no right to be invited and to submit an offer.

Transparency concerning the choices made by the procuring entity with regard to contract conditions and prices could be one way to let other economic operators and end-users or the public more generally know whether best value for money was achieved. In the long term such effects can improve the sound and efficient use of public funds.

In Italy for example, the Authority for public contracts³⁵ provides that even when the negotiated procedure is allowed without the publication of a notice, it is good practice to publish the contract conditions on an institutional website. This could allow an economic operator to ask to be invited to the negotiation. It is evident that this could become similar to an open procedure, losing the benefits of simplification, but can also open markets and limit, if not prevent, possible favouritism. In any event, the procuring entity can always provide reasons as to why a tender has not been admitted and could be challenged, including in an infringement procedures. In this regard, transparency is improved, particularly for high value list B services contracts.

As observed in the OECD documents, an unsuccessful tenderer should have a role in checking the execution phase of the contract together with associations of end-users and public representatives.³⁶ By automating and strengthening the flow of information about individual tender opportunities, providing greater publicity, it could be possible to increase participation by economic operators and as a consequence, increase competition.³⁷

The experiences of Member States that have adopted and develop specific IT facilities indicate that there is at least a perception that use of web sites/portals has meant that a substantial proportion of below threshold procurement is subject to transparent competition, to the extent that this is possible. For instance, the UK position is that there seems little need to further clarify public authority obligations with regard to below threshold contracts and there is clearly no political or legal policy initiative to adopt specific legislation in this field. Experiences of this kind suggest that it may be helpful if a link could be made from the OJEU to below threshold opportunities advertised on various portals and internet sites in each Member State.

³² See LUKE R.A. BUTLER ‘Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach’ in this volume.

³³ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 54.

³⁴ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 9.

³⁵ Authority for Public Contracts ‘Indicazioni operative inerenti la procedura negoziata senza previa pubblicazione del bando di gara nei contratti di importo inferiore alla soglia comunitaria dopo le modifiche introdotte dal decreto-legge 13 maggio 2011, n. 70, convertito in legge dalla legge 12 luglio 2011, n. 106’ Determinazione n. 8 December 14, 2011.

³⁶ Organisation for Economic Co-operation and Development, ‘Guidelines for fighting bid rigging in public procurement’ (2009), <<http://www.oecd.org/dataoecd/27/19/42851044.pdf>>; Organisation for Economic Co-operation and Development, ‘Principles for integrity in Public procurement’ (2009), <http://www.oecd-ilibrary.org/governance/oecd-principles-for-integrity-in-public-procurement_9789264056527-en> , 70.

³⁷ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 7.

An additional advantage of I.T. solutions is that because publicity has also to be given *ex post* of the award, if such an obligation was fulfilled through electronic tools it would be possible to map the undertakings who are awarded such contracts in each country. Especially for below threshold procurements such publicity could also enable the gathering of significant data on the type and value of such contracts. Further, such instruments could also put in evidence the possible infringements connected with an artificial splitting of contracts.³⁸

3. IT solutions for the qualification phase of the award procedure: evaluation of the tenderers requirements

One of the main obstacles in participating in public procurement consists in administrative burdens deriving from the need to produce a substantial number of attestations, certificates or other documents evidencing the tenderer's suitability.

Some Member States have already endorsed pre-qualification services to avoid repeating the evaluation of the participation requirements. For instance, in the U.K. certain public-private partnerships have created specific websites with regard to the management of pre-qualification requirements.³⁹ Italy has just approved the creation of a database to be operated by the Authority for public contracts that will update such data in order to facilitate the procurement process.⁴⁰

The prior evaluation of most of the qualification requirements of the suppliers could eliminate the burden, costs and delays imposed on procuring entities for all types of public procurement. National official lists of approved economic operators can be very useful and a network should be created between Member States, and the EU Commission in order to increase cross border participation. Moreover, such instruments could also favour the implementation of the mandatory exclusions of contractors convicted for corruption, providing lists of offences falling within the definition of the Directive.⁴¹

At the EU level, the recent introduction of the e-CERTIS project, a free on-line information tool indicates the increased focus on this issue, providing details of the various certificates and attestations frequently requested in procurement procedures across the 27 Member States.⁴²

It aims to help interested parties to understand what information is being requested or provided and to identify mutually acceptable equivalents. Initiatives of this kind also reveal how complicated and variable tenderer requirements can be within Europe.

It is clear that self declaration and a drastic simplification and standardization of such documents would be more desirable to facilitate participation. The voluntary up-dating and verification by national authorities has been insufficient to ensure that e-Certis delivers its full potential for simplification and facilitation of documentary exchanges for the benefit of both the contracting authorities and the suppliers. Constant updating should therefore be made mandatory so that recourse to e-Certis may become mandatory at a later stage.⁴³

The draft of the new Directive⁴⁴ provides for a European Procurement passport, that is a standardized document, which is a means of proof of absence of the grounds for exclusion. According to the proposed

³⁸ See LUKE R.A. BUTLER 'Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach' in this volume.

³⁹ See LUKE R.A. BUTLER 'Below Threshold and Annex II B Service Contracts in England, Wales and Northern Ireland: A Common Law Approach' in this volume.

⁴⁰ Law decree February 9, 2012, Article 20, providing Article 6 *bis* in the Italian Public Contract Code.

⁴¹ S. WILLIAMS, 'The mandatory exclusion for corruption in the new EC Procurement directives' (2007), in <http://www.nottingham.ac.uk/pprg/documentsarchive/fulltextarticles/sope_exclusions_in_proc.pdf>, 38.

⁴² Report on the "Uptake of pre-awarding phases in eProcurement" Workshop – Vienna, February 22, 2010, <http://www.epractice.eu/files/eProc%20Ws%20Vienna%202010-%20Report_2010.pdf>, 6

⁴³ Commission (EC) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 58.

⁴⁴ Commission (EC) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, annex XIII, *Content of European procurement passport*, "The European Procurement Passport contains the following particulars: (a) Identification of the economic operator; (b) Certification that the economic operator has not been the subject of a conviction by final judgment for one of the reasons listed in Article 53 (1); (c) Certification that the economic operator is not the subject of insolvency or winding-up proceedings

provision, “[n]ational authorities shall issue, upon request of an economic operator established in the relevant Member State and fulfilling the necessary conditions, a European Procurement Passport in the format of the standard form adopted by the Commission”.⁴⁵ The European Procurement Passport must be recognised by all contracting authorities as proof for the fulfilment of the conditions for participation covered by it and may not be questioned without justification. The simplification potential of such a document is evident and can be reached only through fully interoperable electronic solutions.

Devices for the electronic transmission and receipt of tenders and for electronic receipt of requests to participate will have to assure information on specifications for the electronic submission of tenders and requests to participate. This must include the availability of encryption and time-stamping to interested parties as well as devices and methods for authentication and electronic signatures.⁴⁶

The new draft Directive provides that the use of electronic means of communication may be rendered obligatory for the submission of tenders for some or all award procedures when the technological development is sufficiently advanced in the Member States.⁴⁷ This recognises that actually this state of development is not yet the case throughout the EU.

4 IT solutions to award the contract: e-procurement, e-auction, e-catalogues dynamic, purchasing systems, framework agreements, and joint procurement

The most significant change in public procurement procedures occurs when the entire process is on line, and the submission and evaluation of tenders is entirely done through electronic tools.⁴⁸

Whilst the provision of such instruments has been implemented in the Member States, routine recourse to such methods is still generally very poor.⁴⁹

Many Countries, such as Austria, Cyprus, the Czech Republic, Finland, Luxembourg, Latvia, Romania, Slovenia, the Slovak Republic and Sweden have identical rules for electronic procurement for above and below threshold.⁵⁰ Bulgaria provides for the use of e-auctions and dynamic purchasing systems in its Public Procurement Law under certain rules and conditions.⁵¹ In addition, it is provided that contracting authorities and entities may perform e-auctions in design contests where the technical specifications are clearly defined.⁵² In Estonia, all notices are made available on the central electronic register, and plans are underway for e-auctions and dynamic purchasing systems. The Lithuanian law on public procurement obliges contracting authorities to conduct at least 50% of public procurement electronically. Poland provides an option for a special electronic auction procedure but it only applies below the EU thresholds. The

as referred to in Article 53 (3) (b); (d) Where applicable, certification of enrolment in a professional or trade register prescribed in the Member State of establishment, as referred to in Article 54 (2); (e) Where applicable, certification that the economic operator possesses a particular authorisation or is member of a particular organisation within the meaning of Article 54 (2); (f) Indication of the period of validity of the Passport, which shall be not less than 6 months”.

⁴⁵ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 59, *European Procurement Passport*.

⁴⁶ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 19, § 5.

⁴⁷ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 19.

⁴⁸ C.H. BOVIS *EU Public Procurement Law* (Elgar European Law, Cheltenham, 2007), 99; S. ARROWSMITH ‘Electronic Auctions under the EC Procurement Rules: Current Possibilities and Future Prospects’ (2002) *PPLR* 299 et seq.; O. SOUDRY ‘Promoting Economy: Electronic Reverse Auctions under the EC Directives on Public Procurement’ (2004) *JPP*, 340. With specific reference to the electronic markets, P. TREPTE ‘Electronic Procurement Marketplaces: The Competition Law Implications’ (2001) *PPLR*, 260 et seq.

⁴⁹ A. EYO ‘Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom’ (2012) *PPLR*, 1-17, in 2008 only 38 contract notices published on OJEC used such tool. In other member States the use of eAuctions seems even much lower: Denmark (1); France (1); Hungary (1); Netherlands (3); Poland (8) and Romania (10).

⁵⁰ OECD (Sigma papers) ‘Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives’ (2010), 18.

⁵¹ OECD (Sigma papers) ‘Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives’ (2010), 18.

⁵² In the Small Value Ordinance (OASPC).

procedure is launched by the contracting authority through the placement of a notice on its website and on the website of the Public Procurement Bulletin. Economic operators can then use an online form to submit successive, more advantageous tenders.⁵³

Italy adopted an e-procurement regulation in 2002 allowing the public sector to perform below-threshold acquisitions of good and services through the e-procurement platform electronic marketplace (MEPA),⁵⁴ established by the Italian Central Purchasing Body (CONSIP).⁵⁵ The marketplace is open to qualified suppliers based on non-restrictive selection criteria. Following qualification, suppliers' catalogues are uploaded on the MEPA and displayed on a dedicated website, which renders them available to the entire community.⁵⁶ Contracting authorities can browse catalogues, compare products and prices, and request quotations or purchase directly from the e-catalogue. The MEPA allows for both direct purchase orders, or requests for quotations. In the first case the goods offered in the e-catalog are irrevocable for the supplier and can be purchased online through the issuance of the purchase order. In the second case requests can be sent to suppliers selected from those qualified for products with particular characteristics or conditions of supply which differ from the standard.⁵⁷ The entire transaction process is digital and digital signatures are required.⁵⁸ The value of such contracts in 2011 was € 243 million (0.18 % of Italian contracts for goods and services); over 70.000 contracts involving more than 3000 suppliers (98% are SMEs) and more than 10.000 procuring entities were awarded through MEPA.⁵⁹

In Germany, the platform *evergabe-online.de* permits full management of the procurement process electronically, also requiring a digital signing of the contract.⁶⁰

In Spain, *Contratacion* provides the platform for publicizing notices of award procedures carried out in either electronic or in traditional format.

Achatpublic.com is one of the French platforms that offers a full range of online coverage of the selection process (award procedure documents, legal publicity, documents relating to complaints, exchange of administrative and financial documents and e-archives). France has also carried out an experiment for the dematerialization of the award procedures which ended in December 2009. The *Direction des affaires juridiques* (DAJ) in the *Ministère de l'Economie* published at the end of May 2010 the first version of a practical guide for the electronification of award procedures.

A significant problem is the persisting differences between Member States' national e-procurement systems and solutions that may "create barriers for economic operators to participate in electronic procedures, especially from across the borders". This necessitates the adoption of common standards and

⁵³ OECD (Sigma papers) 'Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives' (2010), 18.

⁵⁴ P.R.d. April 4, 2002, No 101, Regulation laying down the criteria and procedures for e-procurement procedures for goods and services, Article 11. L. BERTINI, A. VIDONI 'Il Mercato Elettronico della Pubblica Amministrazione - MEPA. Scenario, funzionalità e linee di tendenza' (2007) in Quaderni Consip <<http://www.consip.it/online/Home/Pressroom/QuaderniConsip/QuaderniConsip2007.html>>.

⁵⁵ G.M. RACCA 'Public contracts. Annual Report - Italy' (2010) in *Ius Publicum Network Review* <http://www.ius-publicum.com/repository/uploads/06_12_2010_10_17_Raccaeng.pdf>; G.L. ALBANO, F. DINI, R. ZAMPINO and M. FANA 'The determinants of Suppliers' Performance in E-Procurement: Evidence from the Italian Government's E-Procurement Platform' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151505>, 5 et seq.; G.M. RACCA 'Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement' cit.

⁵⁶ P.R.d. October 5, 2010, No 207, Article 328 and 335. M.S. MAROTTA 'Le best practice Consip nel contesto del Codice dell'Amministrazione Digitale' (2011) in *Quaderni Consip* <<http://www.consip.it/online/Home/Pressroom/QuaderniConsip/QuaderniConsip2011.html>>, 76 et seq.

⁵⁷ <http://www.acquistinretepa.it/>.

⁵⁸ OECD (Sigma papers) 'Public Procurement in EU Member States: The Regulation of Contract Below the EU Thresholds and in Areas not Covered by the Detailed Rules of the EU Directives' (2010), 19.

⁵⁹ D. CASALINO 'Obiettivi e prospettive per la razionalizzazione degli acquisti della PA' [2012] <<http://www.sspa.it/wp-content/uploads/2012/01/Intervento-CASALINO.pdf>> accessed 2 February 2012. For the official data of 2010 Consip S.p.A. 'Bilancio Consip relativo all'esercizio 2010' <http://www.consip.it/online/Home/Pressroom/PubblicazioniIstituzionali.html>. N. HATZIS 'The legality of SME development policies under EC procurement law' in S. ARROWSMITH and P. KUNZLIK (eds.) *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press, Cambridge, 2009), 345 et seq.

⁶⁰ Siemens 'Study on the evaluation of the Action Plan for the implementation of the legal framework for electronic procurement (Phase II). Country Profiles' [2010] <http://ec.europa.eu/internal_market/consultations/docs/2010/e-procurement/siemens_country_profiles_en.pdf>, accessed February 2012, 133 et seq.

requirements for formats as well as processes and messaging in procurement procedures conducted using electronic means of communication.⁶¹

Limited cross border participation (1.6% according to EU data)⁶² could be overcome through specific administrative assistance to economic operators intending to participate in an award procedure in another Member State. Such assistance should cover linguistic aspects, compliance with administrative requirements in the Member States of reference, as well as possible obligations related to e-procurement. Language can be a significant barrier. E-advertising and e-procurement intelligent systems providing translations in another language could strongly encourage participation in below threshold award procedures.

E-Procurement could also promote cross-border procurement, not just through greater publicity of contracts, but also by enabling a certain degree of language independence (through the use of e-Catalogues for example) and standardising certain practices. Equally, e-procurement presents an opportunity to introduce greater scrutiny within procurement systems, providing ways to apply more objectivity in selecting suppliers and support better governance.⁶³

This set of tools should improve the use for example of Dynamic Purchasing Systems (DPS)⁶⁴ that were virtually unused because of flawed and unnecessarily onerous procedural rules, such as the obligation to advertise every specific contract under the DPS in the OJEU, regardless of its value (which would include below thresholds contracts of very low value e.g. € 1000). It seems inappropriate and unhelpful for such low value contracts to be required by law to be advertised in the OJEU even with a simplified notice.

The proposal for a revised Directive streamlines and improves Dynamic Purchasing Systems and electronic catalogues, full electronic procurement tools that are specifically adapted to highly aggregated procurement done by Central Purchasing Bodies.⁶⁵ The role of Central Purchasing bodies, as with any form of joint procurement, becomes strategic for the implementation of new IT solutions and the establishment of new award procedures.

It is no coincidence that the new Directive provides that contracting authorities will have at their disposal a set of six specific procurement techniques and tools intended for aggregated and electronic procurement: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement. Compared to the existing Directive, these tools have been improved and clarified with a view to facilitating e-procurement.

5 IT solutions for the signing of the contract: e-signature

Electronic Signatures were defined by Directive 1999/93/EC but their use in public procurement is still very limited.⁶⁶ Contracting entities must accept signatures supported by a qualified electronic certificate referred

⁶¹ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Whereas no. 54.

⁶² Commission (EC) ‘Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market’ COM(2011) 15 final January 27, 2011. “Only 1.6% of public contracts are awarded to operators from other Member States. Indirect cross-border participation – via corporate affiliates or partners situated in the Member State of the contracting authority – is more frequent. Nevertheless, even the rate of indirect cross-border awards remains relatively low (11%)”.

⁶³ Commission (EC) ‘Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU’ SEC(2010) 1214 final October 10, 2010, 7.

⁶⁴ C.H. BOVIS ‘EU Public Procurement Law’ cit., 99-101.

⁶⁵ Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 32, 34 and 35. A. SÁNCHEZ GRAELLS *Public Procurement and the EU Competition Rules* (Oxford University Press, Oxford, 2011), 299 – 301.

⁶⁶ Commission (EC) ‘Report on the operation of Directive 1999/93/EC on a Community framework for electronic signatures’ March 15, 2006, COM(2006) 120 final. Commission (EC) ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Action plan on e-signatures and e-identification to facilitate the provision of cross-border public services in the single market’ November 28, 2008, COM(2008) 798 final, § 1.2.1.: “The e-Signatures Directive was adopted in 1999 to promote the legal recognition of electronic signatures and to ensure the free circulation within the single market of e-signature products, equipment and services. However, a legal and technical analysis of the practical usage of e-signatures shows that there are interoperability problems that currently limit the cross-border use of e-signatures. The analysis highlights the need for a more effective mutual recognition approach. Fragmentation due to the lack of cross-

to in the Trusted List.⁶⁷ Moreover contracting authorities must specify the level of security required for electronic means of communication in the various stages of the award procedure. The level must be proportionate to the risks attached. Further, Member States must provide that electronic tenders are to be accompanied by an advanced electronic signature.⁶⁸

The main problems with electronic signature is no longer its viability as a technical solution, but rather the lack of a strong political commitment to ensure mutual recognition between Member States.⁶⁹

6. IT solutions in the execution of the contract: e-ordering, e-invoicing and e-payment.

The real, often hidden, limit to cross border participation concerns the different rules regarding the performance phase, invoicing and payment, that could be addressed through e-documents.

The Commission is aware of this and has recently strengthened the commitment to achieve a single digital market⁷⁰ ensuring the removal of the regulatory and technical barriers which prevent widespread adoption of e-invoicing.⁷¹

The need to enforce such instruments is becoming clear. For instance, the recent draft of the new Directive provides that:

“Member States shall in particular make sure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality in which the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract”.⁷²

7. Towards the standardisation of the entire procurement procedure: PEPPOL.

A standardization of the entire procedure through e-documents is essential and the EU pilot project PEPPOL (*Pan-European Public eProcurement On-Line project of Borderless e-procurement*) is representative of the direction of recent developments. PEPPOL is a major cross-border project intended to provide large-scale, standards-based IT infrastructure and services to set up and run on-line pan-European public procurement operations. The aim of this project is to create a pan-European pilot solution to facilitate EU-wide interoperable public e-Procurement for SMEs and to improve the opening of the market for goods and services in light of the fact that the lack of common standards for electronic data exchange is considered an obstacle at present to cross-border participation. The goal of the project is to offer European companies the ability to provide goods or services to any public sector buyer, anywhere in Europe. The project has created software specifications, open source software sample implementations, establishing standards-based business processes and an open transport infrastructure for electronic documents. Such

border interoperability is likely to affect e-government services in particular, which today are the largest channel of transactions using e-signatures”.

⁶⁷ Commission (EC) Decision October 16, 2009, No. 2009/767/EC, 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.

⁶⁸ Commission (EC) ‘Action Plan on e-signatures and e-identification to facilitate the provision of cross-border public services in the Single Market’ November 28, 2008 COM(2008) 798 final, 4.

⁶⁹ S. KALLAS ‘The challenge of e-signature for e-procurement’ (2008) Conference on the cross-border use of e-signatures in the e-procurement process - Brussels, 18 September 2008.

⁷⁰ According to the Europe 2020 strategy, for a digital agenda for Europe.

⁷¹ Commission (EC), ‘Communication from the commission to the European parliament, the council, the European economic and social committee and the committee of the regions. Reaping the benefits of electronic invoicing for Europe’ COM(2010) 712 final.

⁷² Commission (EC) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ cit., Article 87, § 3.

electronic solution could become the fundamental structure for e-Procurement in Europe and could assure annual savings of more than 50 billion euro.⁷³

The obstacles to effective e-Procurement have been the lack of common business process standards and solutions that can make e-procurement complex and costly. Market fragmentation has resulted in technologically isolated experiences in Europe, hampering interoperability⁷⁴ and creating e-barriers. Differing legal requirements make tendering across borders difficult for suppliers, in particular SMEs, and lead to the reduced percentage of cross border procurement.

Since 2008, the PEPPOL project has been developing and implementing the validation of eSignatures issued by certifying authorities from any European country; a Virtual Company Dossier to provide standardised company information and mutually recognised evidences; eCatalogues to exchange information about goods and services in a standardised format and eOrdering and e-Invoicing⁷⁵ using a defined set of processes to share common business information.⁷⁶ The PEPPOL Transport Infrastructure (eDelivery) interconnects eProcurement systems. Access to the PEPPOL infrastructure takes place through access points, which are currently provided by both government agencies and private companies. From spring 2011, PEPPOL started its production pilot phase with organisations using PEPPOL enabled solutions and components in real life transactions. It is expected that PEPPOL usage will continue to expand through a combination of public and private sector adoption. The Italian Central purchasing Body Consip has sought to implement such a system as a standard feature.⁷⁷

The European Commission has also developed and deployed e-PRIOR⁷⁸ pilot project to allow the exchange of structured e-Catalogues, e-Ordering and e-Invoicing documents between the Commission and its suppliers. Open e-PRIOR publicly provides this solution in a re-usable open-source format.

Such IT solutions are important to overcome effective e-barriers and requires that the EU does not shut its eyes as to what happens after the award of a public contract even though at present there is not presently a necessary degree of political consensus to ensure their effective adoption and implementation.⁷⁹

8. Conclusions

⁷³ As an open standardised platform, PEPPOL's infrastructure has been designed to interconnect existing networks and bridge individual eBusiness islands in Europe. PEPPOL increases business opportunities for participants and supports interoperability across borders. It facilitates electronic communication among European companies and government institutions in the pre-award and post-award procurement process: http://www.peppol.eu/about_peppol.

⁷⁴ S. SHEPPARD 'The new European interoperability framework: opening competition in public procurement to both proprietary and open source software solutions and reinstating compliance with European Union procurement and competition law' (2012) *PPLR*, 47-67.

⁷⁵ Commission (EC), 'Communication from the commission to the European parliament, the council, the european economic and social committee and the committee of the regions. Reaping the benefits of electronic invoicing for Europe' COM(2010) 712 final.

⁷⁶ PEPPOL opens up a new dimension in public eProcurement with extended market connectivity and EU-wide interoperability, facilitating seamless electronic communication across borders. PEPPOL defines 3 user groups as typical PEPPOL pilot participants. Together, they form an eProcurement community: A contracting authority means a state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law; an economic operator: in the PEPPOL context means a company which supplies goods and/or services to contracting authorities in the EU; an ICT solution or service provider: providing software or services to support the PEPPOL technology. For more information see: http://www.peppol.eu/about_peppol/user_groups.

⁷⁷ Consip S.p.A. 'Cataloghi e ordini elettronici: due gare Consip aprono le porte agli standard PEPPOL' (2011) <<http://www.consip.it/on-line/Home/articolo1774.html>>.

⁷⁸ Open e-PRIOR is a cross-border e-procurement solution developed by the European Commission (DIGIT) for the European Union Member State Administrations. These MSAs can use Open e-PRIOR to exchange catalogues, orders, invoices and credit notes with their suppliers over the PEPPOL infrastructure. For MSAs, Open e-PRIOR is an opportunity to reuse the open-source version of a solution that is already operational at the EC. It is also a great way to share practical experiences and lessons learned with the aim of accelerating uptake of e-procurement across Member States. http://forge.osor.eu/docman/?group_id=188

⁷⁹ Commission (EC) 'Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation Part 1', cit.; Commission (EC) 'A strategy for e-procurement' April 20, 2012 COM(2012) 179 final. G. M. RACCA, R. CAVALLO PERIN, G. ALBANO 'Competition in the execution phase of public procurement' (2011) *PCLJ*, 99.

The use of IT tools appears to offer a strategic advantage in public procurement generally and particularly outside the scope of the Directives. In advertising an intention to award a contract electronic media can ensure a stronger implementation of transparency. Further, IT publication can ensure a broader control by a wider principal (not only unsuccessful tenderers, citizens, and public interest organizations) over the efficient and sound use of public resources by its agents (the procuring entities).⁸⁰ Awards through IT procedures can break down barriers to participation and competition thereby increasing the otherwise extremely low percentage of actual cross border procurement.

In this regard networks of central purchasing bodies could play a significant role in ensuring change which could foster a real internal market by using their purchasing power to drive the market toward efficient, sound and sustainable procurement⁸¹ which favours the grow of innovative European SMEs. The challenge is to develop a stronger political commitment and adequate professional skills to mandate and implement the changes that electronic procurement necessitates.

The reform of public procurement legislation is one of the twelve priority actions set out in the Single Market Act⁸². Indeed, the efficiency of public tendering has become a priority for all Member States in view of the current budgetary constraints. It is essential to conclude transparent, competitive contracts as easily as possible and at the best value for money. Ambitious measures on electronic procurement aiming at full electronic communication in public procurement within a limited period are therefore essential.

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⁸⁰ G. M. RACCA, R. CAVALLO PERIN, G. ALBANO ‘Competition in the execution phase of public procurement’ (2011) PCLJ, 99. C. Yukins ‘A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model’ (2010) PCLJ, 63 et seq. S. L. Schooner – D. I. Gordon – J. L. Clark ‘Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations’ in *George Washington University Law School Working paper*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234>.

⁸¹ G. M. RACCA ‘Professional Buying Organisations, Sustainability and Competition in Public Procurement’(2010) <<http://www.ipa.org/IPPC4/Proceedings/18TransparencyAccountabilityinProcurement/Paper18-13.pdf>>; G. M. RACCA ‘L’aggregazione dei contratti pubblici per la sostenibilità, la concorrenza e la qualità delle prestazioni’ (2011) in *Studi in onore di Alberto Romano*.

⁸² Commission (EC) ‘Single Market Act. Twelve levers to boost growth and strengthen confidence "Working together to create new growth" April 13, 2011 COM(2011) 206 final, 19.

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