G. Ferrari and L. Tarantino, Gara pubblica e costo del lavoro, in *Urbanistica e appalti*, 2009, 248.

R. Invernizzi, '*Specifiche tecniche*' in M.A. Sandulli, R. De Nictolis e R. Garofoli (curr.) *Trattato sui contratti pubblici* (Milano, Giuffré, 2008) vol. III, 2073 ff.

C. Lacava. 'I contratti pubblici tra Stato e regioni e la tutela della concorrenza' note Corte cost., 23 novembre 2007, n. 401, *Giorn. dir. amm.*, 2008, 624.

M. Miglioranza, 'Inquinamento elettromagnetico e limiti alle competenze regionali: standard di protezione nazionali e legalità sostanziale', note Corte cost., 7 novembre 2003, n. 331, *Foro it.*, 2004, I, 1364.

S. Treumer, 'The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exceptions?' in PPLR, (2008), 103.

VI. Aggregate Models of Public Procurement and Secondary Considerations: An Italian Perspective

by Gabriella M. Racca

1 Relevance of aggregation of public demand on sustainable procurement policies

Aggregation of public demand may have positive effect on the demand for green and socially conscious goods. The exemplary role of procuring entities in fostering sustainable procurement is automatically accentuated by the mass of aggregated procurement. The economies of scale possible through the aggregation might also more than offset the possible higher cost of sustainable products and services compared with traditional ones. Moreover, sustainable procurement is fraught with difficulties, not least because of the legal uncertainties surrounding it. Small buyers might be discouraged to go down this path. Aggregating demand and procuring larger quantities makes it easier for the buyer to invest the resources necessary to draft contract documents which incorporate sustainable considerations without breaching general provisions protecting competition and free movement of goods and services.

These general considerations apply in Italy as well. However, a considerable emphasis on saving money through aggregated demand is not going without the risk of making it more difficult for individual procuring entities to pursue sustainable procurement policies.

2 Aggregated demand and central purchasing bodies under Directive 2004/18/EC

The urge to save costs led to the establishment of models of collaborative procurement and central purchasing bodies at national and regional levels. Many models of collaborative procurement can be used, such as joint procurements for the purchase of goods and services without any structural

change, procurements awarded on the basis of a framework contract, or the setting up of a dedicated corporation. In the latter case, an entity with a separate legal personality, such as a central purchasing body, is created.[1]

A central purchasing body is a public purchaser from or through which other purchasers can acquire goods, works or services without having to comply with the public procurement rules.[2] The directive on public procurement[3] only recently took into account that certain centralised purchasing techniques have been developed in Member States. Several contracting authorities are responsible for making acquisitions or awarding public contracts/framework agreements on behalf of other contracting authorities.[4] In view of the large volumes purchased, those techniques favour the increase of competition and the streamlining of public purchasing.[5]

1. R. Caranta '*Le centrali di committenza*', in M. A. Sandulli – R. De Nictolis – R. Garofoli (edited by) *Trattato sui contratti pubblici*, (Milano, 2008), Vol. II, pp. 607 et seq.; G. Della Cananea '*Le alternative all'evidenza pubblica*', in P. Rescigno – E . Gabrielli (edited by) *Trattato dei contratti*, (Torino, 2007), Vol. I, pp. 381 et seq.; N. Dimitri – G. Piga – G. Spagnolo (edited by) *Handbook of Procurement* (Cambridge, 2006), pp. 47 et seq.; C. H. Bovis *EU Public Procurement Law* (Chaltenhan, 2008), pp. 94 and 315 et seq.; J. Chard – G. Duhs – J. Houlden, 'Body beautiful or vile bodies? Central purchasing in the UK' (2008) 1 PPLR NA26; for a global perspective see S. Arrowsmith *Reform of the uncitral Model Law on Procurement: Procurement Regulation for the 21st Century* (Danvers, 2009), pp. 204 et seq. and L. Knight – C. Harland – J. Telgen – K.V. Thai – G. Callender – K. McKen (edited by) *Public Procurement. International Cases and Commentary* (Oxford, 2007), pp. 176 et seq.
2. If the arrangement is between a purchaser and an 'in-house entity' which satisfies the Teckal line of ECJ case law, case 107/98 *Teckal v Comune di Viano* [1999] E.C.R. I-8121 at [51]; then the public procurement rules will not apply, otherwise, it will be necessary to consider whether the procuring entity can make purchases from a central purchasing body (CPB) or under a framework agreement. R. Cavallo Perin – D . Casalini 'Control over in-house providing organizations' (2009) 5 PPLR 227 et seq.; M. Comba – S. Treumer (edited by) *The In-House Providing in European Law* (Copenhagen, 2010), pp. 2 et seq. See art. 11 (2) of Council Directive (EC) 18/2004: 'Contracting authorities which purchase works, supplies and/or services from or through a central purchasing body in the cases set out in Article 1(10) shall be deemed to have complied with this Directive insofar as the central purchasing body has complied with it'. To the same effect art. 29 (2) Council Directive (EC) 17/2004.
3. Whereas n. 15, Council Directive (EC) 18/2004.
4. S. Arrowsmith 'Framework Purchasing and Qualification Lists under the European Procurement Directives' (1999) 8 P.P.L.R. 115-146 and 168-186.
5. L. Albano – L. arpineti – F. Dini – L. Giamboni – F. Russo – G. Spagnolo 'Riflessioni sull'impatto economico degli istituti innovativi del codice dei contratti pubblici relativi a lavori, servizi e forniture' (2007) 4 Quaderni CONSIP 13 et seq.

For the above reasons the Directive provided a Community definition of central purchasing bodies specifically directed at contracting authorities. A definition has also been given of the conditions under which, in accordance with the principles of non-discrimination and equal treatment, contracting authorities purchasing works, supplies and/or services through a central purchasing body may be deemed to have complied with the Directive.[6] The Directive allows Member States to choose whether to create central purchasing bodies and leaves them the choices on the use of these instruments.[7]

3 Aggregated demand and central purchasing bodies in Italy

In Italy, the process of centralization of demand began only recently and the country cannot not yet show the experience or the efficient results already achieved by other Member States.[8]

The Italian national central purchasing body (Consip s.p.a.) has been entrusted with the tasks of entering into contracts on behalf of other contracting authorities,[9] and only recently also into framework agreements.[10] Central

6. Art. 1, para. 10 Council Directive (EC) 18/2004: 'a 'central purchasing body' is a 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'.
7. Whereas n. 23 Council Directive (EC) 17/2004.
8. For the UK System see: UK Government's Operational efficiency programme: collaborative procurement report, May 2009, which lists more than 40 central puchasing bodies; Uk Office of Government Commerce, 'Central Purchasing Bodies in the Public Contracts and Utilities Contracts Regulations' <http://www.ogc.gov.uk/ documents/OGC_Guidance_on_Central_Purchasing_Bodies.pdf> accessed March 2008; S. Arrowsmith 'Some problems in delimiting the scope of the Public Procurement Directives: privatisations, purchasing consortia and in-house tenders' (1997) P.P.L.R. 198 et seq.; J. Chard – G. Duhs – J. Houlden 'Body beautiful or vile bodies? Central purchasing in the UK' (2008) P.P.L.R. NA26; For the Italian system: 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. About the German experience see: Beschaffungsamt des Bundesministeriums des Innern 'Tätigkeitsbericht 2008/2009' <http://www.bescha.bund.de> accessed December 2009.
9. D.lgs. November 19, 1997, n. 414, about the foundation of Consip, but only with D.M. (Ministry of Tresaure) February 24, 2000 Consip S.p.A. has been mandated to stipulate conventions. For further reference see D. Broggi *Consip: il significato di un'esperienza, Teoria e pratica tra e-Procurement ed e-Government* (Roma, 2008), pp. 9 et seq.

purchasing bodies may recur to information and communication technology tools to carry out e-procurement and electronic auctions, besides ensuring full digitalisation of all procurement documents.[11] The implementation of e-auctions across a broad spectrum of public sector expenditure could be particularly useful. There is indeed scope for increased collaboration and regular recourse to e-auctions could provide a regular stream of benchmark data and a repository of re-usable tools.

Following the implementation of Financial Act 2006 (Law no. 266/05) Consip s.p.a. has to cooperate with a network of regional central purchasing bodies which are starting their activities.[12] This should assure interoperability with regional central purchasing bodies' platforms, as a basis for a wider co-operation in the procurement process. Moreover, 'Difesa servizi s.p.a.', a new national central purchasing body has recently been created for the military sector.[13]

10. L. December 29, 2009, no. 191 art. 2, para. 225, (l. n. 191/2009), *Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2010).* See also: R. Caranta '*L'accordo quadro'* in M. A. Sandulli – R .De Nictolis – Garofoli (edited by)*Trattato sui contratti pubblici*, (Milano, 2008), Vol. III, pp. 1942 et seq.
11. L. Bertini, A. Vidoni, 'Il Mercato Elettronico della Pubblica Amministrazione – MEPA. Scenario, funzionalità e linee di tendenza' (2007) 6 Quaderni CONSIP 37 et seq. From an economic perspective G. Piga – K.V. Thai (edited by), *Economics of Public Procurement* (Palgrave Macmillan, 2007), pp. 63 et seq.; L. Knight – C. Harland – J. Telgen, K.V. Thai – G. Callender – K. McKen (edited by) *Public Procurement. International Cases and Commentary* (Oxford, 2007) pp. 216 et seq.; J. Bulow – P Klemperer 'Auctions versus Negotiations' (1996) 1 *American Economic Review* 180-194; P. Klemperer 'What Really Matters in Auction Design' (2002) 1 *Journal of Economic Perspectives*, 169-189; Y. K. Che 'Design Competition through Multidimensional Auctions' (1993) 4 *Rand Journal of Economics,* 668-680.
12. Art. 1, para. 158 of Law n. 266 of December 23, 2005.
13. L. no. 191 art. 2, para. 27, of December 29, 2009, envisages the establishment of the limited company 'Difesa Servizi Spa', in Rome, with the purpose of the acquisition of goods and services closely linked to the performance of institutional duties of the Defence Administration. Such activities shall not be directly related to military operations, except those of management and sale of military property. The share capital of the company is Euro 1 million. Any subsequent capital increases shall be ruled by decree of the Minister of Defence,. The company's shares are fully subscribed by the Ministry of Defence and cannot be released to third parties. See also Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009, *on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 200 4/18/EC.* Member States have two years to transpose the Directive into national legislation. B. Heuninckx 'A Primer to Collaborative Defence Procurement in Europe: Troubles, Achievements and Prospects' (2008) PPLR 17.

The network between all these central purchasing bodies is not yet operative in Italy,[14] and the number of contracts awarded by them is still very low in comparison with others counties,[15] reaching only around 8 % of all supplies and services.[16]

Recourse to framework contracts signed by central purchasing bodies is mandatory for State authorities, while other public administrations (such as regional or local) can chose whether to use this possibility or to carry out their own separate procurement procedure to buy the same product. But the real problem is that the central purchasing bodies' framework agreements still cover only a very limited range of goods and services.

14. Autorità per la Vigilanza sui contratti pubblici di Lavori, Servizi e Forniture 'Censimento ed analisi dell'attività contrattuale svolta nel biennio 2007-2008 dalle Centrali di Committenza Regionali e verifica dello stato di attuazione del sistema a rete' January 27-28, 2010, 7 et seq.
15. See: Government's Operational efficiency programme: collaborative procurement report, May 2009: the Government currently spends around £220bn on goods and services – that's about £1 in every £4 spent in total by the Exchequer. It is our aim to ensure that Government – both central Whitehall departments and the wider public sector – maximises the value it achieves from this expenditure through a variety of approaches: championing and facilitating collaboration across the major areas of third party spend; making the procurement process more efficient through the use of frameworks and e-procurement tools; reducing the negative environmental impact of goods and services purchased and working with suppliers to improve their sustainability performance; improving spend data to assist better decision making, and engaging with Government's strategic suppliers to foster greater innovation and value within the supply chain.
16. One possible strategy to build a 'centralization index' for the acquisition of goods and services is the following. Consip SpA is the Italian Public Procurement Agency awarding National Frame Contracts (NFCs), basically, Framework Agreements with one economic operator and all conditions laid down at the outset – and managing the Electronic Marketplace (MEPA) on behalf of the Ministry of Economy and Finance (MEF). One measure of centralization in year t can be defined as follows: CI_t = V_t / Max V_t where, V_t = value of purchases through (NFC + MEPA) in year t; Max V_t = public sector's overall purchases of goods and services that could be handled by the NFCs and MEPA system. By using raw data from the Italian National Statistical Institute (ISTAT) and MEF, Consip's Research Unit computed the following ranges for the 2007 and 2008 centralization indeces: CI_2007 is between 4.2 % and 5 %; CI_2008 is between 7.4 % and 8.9 %.

Thus the process of procuring commonly used goods and services across the Italian public sector is still dispersed, resulting in a very wide range of prices for similar goods and services.[17]

Italy is presently dealing with all the main difficulties in the enhancement of collaborative procurement, namely digital convergence, sharing of information and archives as well as the definition of needs. The joint management of aggregated demand, the creation of new tools for undertakings to access in an easier way public procurement and the definition of common procedures have yet to be achieved.[18] Nonetheless, the foreseeable and considerable advantages deriving from collaborative procurement will surely determine and guide future public policies in this direction.[19] The aim of limiting and rationalizing public expenditure, whilst ensuring the utmost quality, is to enhance and develop the different forms of collaborative procurement.[20]

The advantages of the collaborative procurement model becomes evident when the issue of sustainable procurement is taken into consideration. The incorporation of social and environmental clauses acquires greater importance when these clauses are incorporated by purchasing bodies that award many high value contracts. For a single contracting authority the incorporation of such clauses is not only complex but also has a limited effect. On the other hand, the incorporation of such clauses by Consip s.p.a. and other central purchasing bodies has a wider effect and can also influence the economic and production choices of bidders. Therefore, public organizations with their

17. R. Caranta 'Country Legal and Policy Review for SRPP in Italy – Study on social consideration in Public Procurement' March 20, 2008 2 et seq.
18. G.M. Racca 'Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement' (2010) PPLR 119. Permanent Conference for Relations between State, Regions and the Autonomous Provinces of Trento and Bolzano, 24 January 2008 approved the 'Accordo tra Governo, Regioni e Province Autonome per la costituzione del sistema a rete'.
19. Forum for the future 'buying a better world' <http://www.forumforthefuture.org/> accessed December 2007, 7 et seq.
20. Uk Government's Operational efficiency programme: collaborative procurement report, May 2009, 4, 'it is realistic to achieve a total of around £6.1 billion of annual value for money savings by the end of 2013-14 *provided that the Government acts swiftly to implement the recommendations of this report.* This level of savings is compared to the 2007-08 baseline of the £89 billion government procurement spend that has been categorised to a commonly-procured commodity. A further £1.6 billion value for money savings could be achieved through the collaborative procurement of IT, and are included in the savings figures set out in the *Operational Efficiency Programme: back office operations and IT* report.4 This gives a total collaborative procurement savings figure of £7.7 billion by 2013-14'.

substantial purchasing power can influence sustainable procurement policies, thus also driving innovation from the demand side.[21]

Considering the recent new evaluation criteria for well-being in Europe, no more linked solely to the GDP growth,[22] more attention to social issues will also have to be paid in public procurement policies. This consideration led Europe to allow the incorporation of secondary considerations in public procurement, even limiting the emphasis on the value for money principle.[23] This implies that secondary considerations may be legally incorporated in public procurement, in compliance with the transparency and non-discrimination principles.[24]

Secondary considerations can entail additional costs that the contracting entities accept to pursue public interests that go beyond strictly economic considerations.[25] In the case of sheltered workshops, for instance, secondary

21. S. Arrowsmith – P. Kunzlik (edited by) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, 2009) 9 et seq. for an analysis of the implications about secondary consideration policy in public procurement.
22. J. E. Stiglitz – A. Sen – J. P. Fitoussi '*Measurement of Economic Performance and social Progress*' September 14, 2009. 'The Commission on the Measurement of Economic Performance and Social Progress' (CMEPSP) was made up of 21 members in addition to Prof. J. E. Stiglitz (Chair), Prof. A. Sen (Chair Adviser), Prof. J. P. Fitoussi (Coordinator of the Commission), and 9 rapporteurs. The Commission's aim has been: '- to identify the limits of gross domestic product (GDP) as an indicator of economic performance and social progress, including the problems with its measurement; – to consider what additional information might be required for the production of more relevant indicators of social progress; – to assess the feasibility of alternative measurement tools, and to discuss how to present the statistical information in an appropriate way'.
23. Whereas n. 46 Council Directive (EC) 18/2004, according to which 'In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract. Under the same conditions, a contracting authority may use criteria aiming to meet social requirements, in response in particular to the needs – defined in the specifications of the contract – of particularly disadvantaged groups of people to which those receiving/using the works, supplies or services which are the object of the contract belong'.
24. Case C-31/87, *Beentjes* [1988] ECR I-4635, Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG.* [2000] ECR I-10745.
25. C. McCrudden Buying social justice equality, government procurement, & legal change, (Oxford, 2007); S. Arrowsmith, P. Kunzlik (edited by), *Social and Environ-*

considerations may be considered as a subsidy to the benefit of those disadvantaged, with the view of improving their quality of life.

On the other hand, secondary considerations may be considered fully compatible with the value for money principle, when their incorporation does not involve additional costs compared to a 'normal' procurement. For example, a product with environmental characteristics does not necessarily cost more than a product without such features. The choice of the public administration to require such characteristics has the power to direct innovation and the spread of such kinds of products within the public procurement market and the general market as well.[26] The incorporation of social clauses in a framework agreement of considerable value[27] common to a relevant number of public administrations has significant policy consequences. Collaborative procurement becomes instrumental in the effort to spread the social effects of sustainable procurement as a whole, as the choice to incorporate such clauses becomes a model for the other public administrations.

This is particularly true in Italy where, as we will see, contracting authorities choosing not to adhere to framework agreements must attain a better quality/price ratio than the one found in the central purchasing bodies' framework agreements, to justify their choice.

mental Policies in EC Procurement Law: New Directives and New Directions (Cambridge University Press, 2009), 108 et seq.

26. For some examples of this choice in Italy see: 'Protocollo di intesa per la promozione della sicurezza sui luoghi di lavoro e possibili misure di intervento per le aziende dei pubblici servizi' Confservizi Piemonte e Valle d'Aosta e le organizzazioni sindacali confederali della Provincia di Torino, February 25, 2008; 'Protocollo di intesa tra il Comune di Roma e le organizzazioni sindacali CGIL, CISL e UIL in materia di appalti e di affidamento di lavori pubblici, forniture di beni e servizi', September 28, 2007; 'Patto per lo sviluppo territoriale – Provincia di Vercelli' December 2, 2005; 'Protocollo di intesa tra il Comune di Bologna e le organizzazioni sindacali CGIL, CISL e UIL in materia di lavori, servizi e forniture' November 24, 2005.
27. S. Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement' [2004] 41 CMLR 1.

4 Secondary considerations in the selection criteria of central purchasing bodies and the influence on the bidder's organization

It is commonly known that secondary considerations can be incorporated in the contract documents at different levels,[28] included in the definition of the technical or professional capacity of the bidder.[29] Secondary considerations may enter into the definition of the subject-matter of the contract, including the technical specifications of the product, work or service, and the contract performance conditions.[30]

The choice of requiring a specific quality of the bidder for the safeguard of social and environmental objectives must not infringe free competition and must be reasonable and proportionate to the subject-matter of the contract.[31]

When central purchasing bodies define such bidders' participation criteria they take into due account the reference market and may also issue a contract notice divided in lots so as to avoid the exclusion of SMEs.[32] All potential contractors, including both large and small and medium-sized enterprises, would benefit from a coherent approach to sustainable procurement.[33] Furthermore, the sustainability criteria required in procurement contracts may gradually increase with time, so that undertakings will gradually prepare themselves to satisfy the same, thus avoiding issues of limitation to free competition or discrimination. In the long term this will influence the bidder's organization towards aims of sustainable development.

28. Study on the incorporation of Social Considerations in Public Procurement in the EU, Proposed Elements for taking account of the Social Considerations in Public Procurement, 54 et seq.
29. S. Arrowsmith – P. Kunzlik (edited by) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, 2009), 109 et seq.
30. S. Arrowsmith – P. Kunzlik (edited by), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, 2009), 121 et seq.
31. Commission (EC), 'Public procurement for a better environment' SEC(2008) 2126, 16 July 2008. See also Commission (EC) 'Buying green – A handbook on environmental public procurement' (Office for Official Publications of the European Communities, 2004) 9 et seq.
32. For EC policies about small and medium-sized enterprises see: Commission (EC) ''Think Small First' A 'Small Business Act' for Europe', 25 June 2008.
33. R. Caranta 'Country Legal and Policy Review for SRPP in Italy – Study on social consideration in Public Procurement' March 20, 2008, 12 et seq.

5 Secondary considerations in the award criteria of central purchasing bodies and their effect in driving the market

The incorporation of secondary considerations in the definition of the subject-matter of the contract entails a precise choice of the public entity involving possible additional costs.[34] This might be considered a subsidy to producers. In Italy this choice made by central purchasing bodies influences and legitimizes the other procuring entities which are required not to exceed the same quality/price ratio. When a sustainable subject-matter can be defined without any additional costs, the central purchasing body's choice will influence the choice of other procuring entities anyway.

If secondary considerations are incorporated in the technical or professional capacity of the bidder or in the subject-matter of the contract, they will impose themselves to all participants. When procuring entities define a specific subject-matter with sustainable features, that will be obtained at the end of the awarding procedure. On the other hand, when secondary considerations are incorporated in the award criteria, they become part of the overall evaluation leading to the award, but the winning bid will not necessarily be the most sustainable one.

When they are foreseen as parameters for the evaluation of the offer of the bidders, they can influence the award of a contract according to the weight given to each evaluation criteria and the overall sum of the points awarded. The participant that presents an offer with social and environmental characteristics is not sure to win, nor is the procuring entity sure to choose an offer with these features. In fact, a lower price can lead to the victory of a bidder who did not include secondary considerations in his or her offer. Thus, the broad incorporation of secondary considerations by central purchasing bodies both in the qualitative selection criteria and in the definition of the subject-matter of the contract ensures the full pursuance of sustainable procurement policies.

To drive innovation from the demand side and orient the market towards sustainability, such clauses should be incorporated by central purchasing bodies in all their framework agreements, benefiting from their public procurement network synergies.[35]

34. For an analysis of economic impacts see. Commission (EC) 'Public procurement for a better environment' SEC(2008) 2124, 16 July 2008. See also Commission (EC) 'on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan' COM(2008) 397 final, 16 July 2008, about incentives of Member States.
35. Commission (EC) 'Joint procurement – Fact sheet' (2008), 3 et seq.

This choice may influence, in turn, also individual contracting authorities that do not adhere to central purchasing bodies' frameworks agreements. In awarding their contracts they will be driven towards similar sustainable choices.

6 The 'congruence assessment' and the definition of a benchmark in public contracts defined with not purely economic values: a 'social' value for money

The Italian law prescribes a 'congruence assessment' (*valutazione di congruità*)[36] of the quality/price ratio, to be compared to the prices obtained by central purchasing bodies through their framework agreements.[37] In other words, to limit public expenditures, non-State procuring entities are free not to have recourse to framework agreements entered into by Consip s.p.a. only in so far as they are able to get better conditions than those provided in the framework agreements themselves. Such conditions define a sort of benchmark that must be complied with by all procuring entities, even when they decide to have recourse to their own awarding procedure with a view to try and obtain better conditions. The concern for financial stability is as such that the procuring officer might be held liable in front of the Court of auditors for 'incongruous' buying decisions.[38]

In so far as sustainable procurement might entail higher costs as compared with traditional best value for money, the 'congruence assessment' makes it

36. Art. 26, clause III, law 488 of 1999, in replacement, first, of art. 3, clause 166, of *Law no. 350 of December 24, 2003,* and later of art. 1, *L.D. no. 168 of July 12, 2004*, as amended by the relative law of conversion no. 191 of 30.7.2004: 'Public administrations may resort to the agreements stipulated pursuant to clause 1, or use its parameters of price-quality, as maximum limits, for the purchase of goods and services pursuant to *Presidential Decree no. 101 of April 4, 2002*. Stipulation of a contract in violation of this clause is cause of administrative liability; for purposes of calculation of the fiscal damage account shall be taken of the difference between the price foreseen in the agreements and that indicated in the contract'.
37. S. Ponzio 'La verifica di congruità delle offerte rispetto alle convenzioni Consip negli appalti pubblici di forniture e servizi' (2009) *Foro amm. – C. d. S.*, 2355 et seq.
38. Art. 26, clause III, law 488 of 1999: 'Public administrations may *(...)* use its parameters of price-quality, as maximum limits, for the purchase of goods'. 'Stipulation of a contract in violation of this clause is cause of administrative liability; for purposes of calculation of the fiscal damage account shall be taken of the difference between the price foreseen in the agreements and that indicated in the contract'.

more difficult – but not impossible – for Italian procuring entities to have recourse to it.

In this situation the best way to sustainable procurement is to include green and social considerations in the definition of the subject-matter of the contract and the technical specification. This may mean that the good or service procured is simply different from the one (eventually missing the same characteristics) bought under the framework agreements signed by Consip s.p.a. The 'congruence assessment' will instead come into play when including sustainable award criteria.

Normally, it is the same contracting authority that decides whether the offer is 'congruous' or 'incongruous' with reference to the conditions established in the framework agreement of Consip s.p.a. In this context having recourse to the most advantageous bid award criteria may lead to the identification of a winner whose offer does not ensure a better quality/price ratio than that set in the framework agreement. This may happen when the same quality specified in the framework agreement is obtained at a higher price than that found in the same framework agreement. If this is the case the contracting entity will either award the contract to the subsequent bidder whose offer has a better quality/price ratio compared to the one specified in the framework agreement, or cancel the procedure and have recourse to the framework agreement. Of course this may easily lead to litigation. Italian courts will limit their review to assess the coherence of this evaluation from a logical point of view.

For example, a private supplier recently challenged an Italian health agency's evaluation of 'incongruence' of its offer for 'diapers', but the court agreed with the public administration's assessment.[39]

39. State Council, Sect.V – February 2, 09-no. 557 *Artsana S.p.A. (Attorneys Longo, Patelli and Tumbiolo) vs. Local Health Service Unit of Ferrara (Attorney Pazzaglia Piccoli)* and S.I.L.C. S.p.A. et al (n.c.) – confirmation of the Regional Administrative Court of Emilia Romagna – Bologna, Sect. I, June 8, 2007, no. 1054) 1. The procuring entity was right in deciding not to assign the supply contract to the company declared the provisional winner due to lack of congruence of the offer price with respect to those of the agreement stipulated by Consip s.p.a., considering that art. 26, clause 3, of law no. 488 of December 23, 1999 establishes (with charging it with administrative liability in case of violation of the relative obligation) the requirement to purchase goods and services after assessing the congruence of the offer. The law also establishes the criteria for making such assessment, providing that it shall be made on the basis of the price-quality parameters of the agreements with the same subject already stipulated by the Ministry of the Treasury and Economic Programming, applying the procedural methods and guarantees indicated in the first clause of the same art. 26. In all those cases in which the competition is not assigned to the competitor classified in first place (as in the case of offers ascertained as abnormally low in spite of the justifications), the contracting administration acts correctly in assigning the contract to competitors that follow in the classification. Legitimately, therefore, the contracting authority assigns the supply of some lots to the companies that follow the winner, which has been excluded because the offer is judged inappropriate, after having made the compulsory assessments of congruence of the relative offers.

7 Conclusions as to the role of central purchasing bodies in fostering SPP in Italy

The 'congruence assessment' does not contribute nor drive individual contracting authorities to incorporate secondary considerations; actually, it is hampering trade unions, or consumer groups, efforts to promote such incorporation.

Consequently, the role of central purchasing bodies becomes more essential than ever in fostering SPP. It is true in Italy too that, in consideration of the overall amount of their purchases, central purchasing bodies can better influence and stimulate the market for sustainable products and services. In fact, they can award framework agreements assuring a 'social' value for money according with the discretionary choices of the Member States and in a more efficient way compared to individual procuring entities.[40]

Moreover, embracing sustainable clauses, Italian central purchasing bodies would legitimize the incorporation of the same clauses by individual contracting authorities, thus creating a new efficient 'model' that avoids claims and helps them to overcome difficulties and problems of compliance with EU Directives.

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VII. Sustainable Public Procurement in Poland

by Marcin Spyra

1 Introduction

The question of secondary considerations has never been at the centre of the debate about public procurement regulation in Poland. Due to the mandatory character of many environmental and social provisions, public procurement has never been immune from their influence. It is, however, clearly visible in practice that although the application of non- economical criteria to select candidates and to award contracts is evidently admissible under the Public Procurement Law of 2004 (PPL)[1] as it was under the old Public Procurement Act of 1994, a vast majority of public authorities in their contractual choices concentrate on limiting their expenses and on economic efficiency. There is a significant body of case law of the National Appellate Chamber (NAC)[2] decisions concerning non- financial considerations of an award. Most of them, however, pertain to technical merits and functionality characteristics. Cases involving a dispute about environmental or social considerations are rare. Similar conclusion has been prompted by the research performed in the course of preparation of the National Action Plan for Green Public Procurement for 2007 to 2009.[3] The reason for this phenomenon is not obvious. One

1. An English translation of PPL is available at www.uzp.gov.pl.
2. National Appellate Chamber (*Krajowa Izba Odwoławcza*) is a non-judicial body established by the President of the Public Procurement Office (*Prezes Urzędu Zamówień Publicznych*). The Chamber is competent at the first stage of the public and utility procurement review procedures. All decisions of NAC are published at www.uzp.gov.pl (in Polish).
3. According to the research performed by the Public Procurement Office (hereinafter PPO) only 4 % representatively chosen supply specifications and 6 % of works specifications include environmental criteria. The analysis of contract notices published in TED shows that 32 % of notices published by Polish awarding authorities in 2005 included environmental considerations. PPO: Action Plan for Green Public Procurement for 2007 to 2009. p. 5-7.

reform, concentrating on the enforcement of UK environmental legislation. The "Macrory system of sanctions" is by now well known in the United Kingdom and will, without doubt, strongly influence the evolution of UK administrative law in the coming years. The content of this reform is not to be described here; suffice it to indicate that Macrory invested in this reform project his experience of thirty years as academic teacher, practising lawyer at the Bar, and adviser to several public bodies and agencies.

Anyone interested in the evolution of environmental law in Western Europe during the last four decades will read this collection with profit. The comments are – perhaps with the exception of the notes on the judgments of EU and British courts (p. 439) – topical far beyond the year of their generation. Younger lawyers, Internet-oriented and less inclined to consider the evolution of law, might well learn from this inter-generational reflection on environmental law at the turn of the 20th to the 21st century, where we come from, where we are going and, what is most important, where we should and could go in order to keep this planet in an environmental state that is not worse than that of the 1960s or 1970s.

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Roberto Caranta and Martin Trybus (Eds.), *The Law of Green and Social Procurement in Europe*. Copenhagen: Djøf publishing, 2010. 229 pages. ISBN: 978-8757-42325-9. DKK 336.

This is a thoroughly worthwhile book. For years the crucial question about environmentally sensitive or socially responsible procurement (together now known as "Sustainable Public Procurement") was whether European Law allowed it at all and, if so, subject to what conditions. In time, however, the ECJ established that as a matter of principle there is no *inherent* conflict between EU Law and the use of public purchasing to help achieve social and environmental goals. Thus early, rather ambiguous, decisions in cases involving social clauses (Case 31/87, *Beentjes* and Case C-225/98, *Commission* v. *France* ("*Nord Pas-de-Calais*")) were followed by clearer pronouncements in the context of "green" purchasing in Case C-513/99, *Concordia Bus Finland,* the principles of which were re-iterated in Case C-448/01, *EVN AG* v. *Austria*. As well as signalling that there was no objection of principle to "green" procurement, these cases clarified the circumstances in which environmental criteria – and other horizontal criteria (often misleadingly called "secondary" criteria) – might generally be taken into account in public procurement under the European directives. Thus the particular sustainability criterion or requirement in question must be "linked to the subject matter of the contract;" be objectively defined and not so vague as to give the contracting authority unlimited discretion; not infringe the Treaty or principles derived therefrom (e.g. principles of non-discrimination); and must be applied in conformity with procedures etc. laid down by any applicable procurement directive (e.g. as regards publishing the requirement in a contract notice.)

Furthermore, in 2004 new directives (Public Contracts Directive, 2004/18; Utilities Procurement Directive, 2004/17) were explicitly based on this case law, and for the first time expressly referred to environmental and social aspects of procurement. Thus, although the complexity of the procurement process, and of procurement law, is such that there will no doubt remain scope for argument, in many cases, as to whether it is lawful for an authority to seek to advance a particular environmental or social goal *in a particular way*, at a particular stage of the procurement process, the general principle has now been established: EU law has no general *a priori* objection to the use of the power of the public purse to advance environmental or social goals.

That being the case the discourse must move on. The important questions are now not "can it be done?" but "how can it be done?" This involves understanding not only how the Member States are using the possibilities which are open to them under the current law, but also

understanding what specific tools and techniques have been – or need to be – developed to assist contracting authorities in their endeavours. This excellent book makes a major contribution to the former and, indirectly, an important contribution to the latter question. It starts with a scholarly overview by Caranta of the development of European Law's approach to sustainable procurement. This is followed by an examination of the extent to which, and the ways in which, various Member States engage in sustainable public procurement. The selected countries have been chosen well. They include Member States from the North as well as the South; and long-standing Member States as well as former Warsaw pact countries. Thus Denmark, France, Germany, Italy, Spain, the UK, Poland, and Romania are all covered. The book closes with a comparative synthesis by Comba.

The unifying theme of the book is that an understanding of EU procurement law must be informed by knowledge of the ways in which the Member States and their contracting authorities actually apply the law. For this reviewer, however, the book also emphasizes the importance of context: to understand the way in which EU procurement law applies in real life one must understand the radically differing situations obtaining in the various Member States. All the more so given that, since the last accession, the EU now encompasses a heterogeneous group of States, experiencing markedly different economic and social conditions. Thus, as Caranta and Richetto's account of procurement in Italy makes clear, the approach to public procurement there is heavily influenced both by an awareness of the ever-present threat of Mafia involvement in public contracts and by an ongoing process of devolution of autonomy to the regions. Similarly as Dragoş et al. explain in their extensive chapter on Romania, procurement regulation there has to focus on combating corruption and other illegal or unethical practices, so efforts to advance sustainable public procurement must be understood in that light. Similarly, Spyra's chapter on Poland emphasizes that economic conditions there have meant that, whatever the position in EU Law, sustainable procurement has not been a priority: environmental and social protection is expensive and economies in transition have more directly pressing needs. Denmark, Germany, France and the UK by contrast, although each having their own characteristic approaches, all share certain important characteristics. They have long-established and robust institutions whose functioning is not fundamentally threatened by corruption or crime; they enjoy a comparatively high standard of living and can afford the "luxury" of pursuing environmental protection and the strengthening of social cohesion through procurement.

One phenomenon which seems to be common across all of the countries covered in this excellent book has been the *recent* nature of the development of legal frameworks as regards sustainable procurement. This is largely because such frameworks have tended to follow from the process of transposing the 2004 Directives themselves. It may also be driven by the heavy demands of EU energy policy. This requires an enormous shift away from reliance on fossil fuels, a shift which is required not only by the "environmental" need to reduce CO2 emissions but also upon the "economic" and "national security" needs to ensure energy security. It is absolutely inconceivable that the EU and its Member States will be able to achieve their critically important targets in this regard unless "green" procurement becomes mainstreamed – at least as regards energy efficiency.

That brings us to the second important question: if sustainable procurement is in principle unobjectionable, and in environmental cases may be essential, what tools and techniques are needed to facilitate its development? Sustainable public procurement will only be lawful if it conforms to the *Concordia Bus* criteria and to the other technical rules of applicable directives, yet these rules are complex and often very fact-sensitive. Individual contracting authorities may lack the necessary expertise to draft their own environmental technical specifications, selection and/or award criteria. In any event for them to do so individually may involve disproportionate costs. This will be bound to have a chilling effect on the up-take of sustainable procurement. One way forward, which the Commission has pioneered in recent years, is to develop European standards and systems to which contracting authorities can refer (albeit that

in doing so they will still have to be alive to the need to avoid discrimination). Examples in the environmental field include, in particular, the EU eco-labelling scheme and the promulgation of energy-use standards for a range of products. Future developments might usefully include the publication of model environmental clauses for technical specifications, selection or award criteria. The importance of facilitation measures such as these is mentioned from time-to-time in this book.

For this reviewer, however, a "stand-out" chapter (amongst so many excellent contributions) is Racca's chapter on the importance of "aggregate models of public procurement" which is based on the Italian experience. Aggregation refers to "central purchasing" – whereby a central purchasing authority (which is itself, of course, subject to EU and domestic procurement laws) makes purchases on behalf of a number of public authorities. The common justification for central purchasing is that it helps deploy the aggregate purchasing power of several authorities so as to achieve better value for money in terms of lower prices. As Racca argues, however, central purchasing also has a part to play in creating the tools and techniques which are necessary to engage, on a legally secure basis, in sustainable procurement. To develop such tools costs money and, by spreading the cost over a greater volume of purchases, and by creating centres of expertise, central purchasing may facilitate their development. Furthermore, EU environmental policy recognizes the "exemplary" role of public purchasing and its ability to influence patterns both of supply and of private-sector demand. For this to happen, however, the message which the public sector gives to the market must be consistent: if every separate authority were to adopt its own standards there would not be a coherent approach upon which supply could align and which private demand could emulate. The adoption of legislative standards can, of course, address this issue, but the adoption of standards, tools and techniques by central purchasing bodies might also have a major contribution to make. Of course, central purchasing can have problems of its own. As well as economies of scale there can be diseconomies of scale including e.g. excessive bureaucracy and unresponsiveness to the needs of end-users. Nonetheless, at a time of austerity in which politicians are making extravagant claims as to the savings that could be achieved by "more efficient" procurement (as e.g. in the UK) central purchasing is likely to be "of the moment." It is therefore worth remembering, as Racca's contribution makes clear, that such purchasing, if sensibly implemented, could bring additional benefits. As well as pushing down prices it could perhaps facilitate the practical development of the tools needed to achieve other important policy goals: none more important, I would suggest, than enabling the public sector to meet the enormous challenge that the generationally vital question of energy security now poses.

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Maher Dabbah, *International and Comparative Competition Law*. Cambridge: Cambridge University Press, 2010. 714 pages. ISBN: 9780521516419. GBP 90.

While the International Competition Network (ICN) can now celebrate being operational for almost a decade, significant questions are still left unanswered as to whether internationalization of competition law is achievable. Whether we in fact should strive to achieve a uniform competition law/ enforcement for the whole (or majority) of the world and importantly what are the consequences? Above all, what is the effect upon developing countries if competition rules are forced upon them – is there really a need for every country to have competition rules, particularly, to trade with other countries? What role do international organizations such as the WTO and ICN play in strengthening competition policy globally? And can regional trade agreements aid in the quest for internalization of competition law?

The book reviewed here takes the reader through the world of internationalization of competition law step by step. It commences by outlining or rather discussing the core principles