



# European Public Procurement: *Time for Reform?*

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## Introduction\*

In examining recent initiatives at European level, the EU2020 strategy and the relaunch of the single market, public procurement figures prominently as an important tool for modernising the European economies and reducing costs for the public sector. Due to the mere size and economic relevance of public procurement markets in Europe estimated at nearly 2300 billion Euros in 2009 and 19% of EU GDP, it is no wonder that public procurement has come to the fore in times of economic crisis and budgetary cuts as the panacea for many problems or as a promising policy tool whose benefits appeared to have been overlooked or not sufficiently taken into account in the past. Looking at the various strategy papers, public procurement is being identified as a tool for promoting innovation, stimulating SMEs, opening up markets in third countries for European businesses, promoting social inclusion, fair trade and environmental protection.

This paper will first provide some factual information on European public procurement and then go through some recent initiatives and highlight their procurement context. The argument brought forward in this article is that the reform of procurement rules is premature and that the European public procurement rules are in general very flexible and innovative, which provide for the integration of other policy objectives. Professionalising procurement practice and doing away with prescriptive and bureaucratic rules at the national level would be recommended.

## Procurement indicators: the economic importance

Economic studies and data on European public procurement are scarce. The public procurement indicators for 2009<sup>1</sup> show that the estimated value of tenders published in the Official Journal had increased steadily between 2005 and 2009 and reached about 420 billion Euros in 2009, equivalent to 3.6% of GDP. This was estimated to amount to 18.3% of the total expenditure on public works, goods and services of the EU27. Direct cross-border procurement was estimated to account for only 1.5% in 2009. No recent data is available on indirect cross-border procurement, which includes contracts awarded to locally established subsidiaries of other EU countries. In the past, various estimates pointed to a range of between 10-30%. The publication of contract notices and contract award notices increased considerably between 2005 and 2008<sup>2</sup>. This indicates that transparency and post-award transparency have increased in the last couple of years. According to the

available data, savings range between 5-8% if contracting authorities and entities publish in the Official Journal<sup>3</sup>. According to Vogel, procurement related savings could translate into tangible macro economic benefits in terms of increases in employment and GDP, relax budgetary pressures and create fiscal space<sup>4</sup>.

### New initiatives

Starting with the Monti report, it recognises the economic importance of public procurement and the achievements of European public procurement law in terms of notices published at EU level, its competitive impact and the savings made by public authorities; yet it also acknowledges the low level of direct cross-border procurement. Two questions are then addressed: '...whether public procurement policy should be reformed and whether such a review should lead to a greater integration of horizontal policy objectives into public procurement<sup>5</sup>'. The report advocates the need to simplify and modernise the public procurement rules in terms of considering applying the procurement rules to Part B services<sup>6</sup> while providing some flexibility for social services and addressing complexity, administrative burden and SME unfriendliness. As regards simplification it is stated, 'Member States should also be asked to scrutinise their own national public procurement legislation which, in many instances, is responsible for the complexity and the administrative burden on contracting authorities and small businesses<sup>7</sup>'. Professor Monti also argues that the rules concerning in-house provisions should be further clarified, the use of negotiated procedure with prior publications should be included as a standard procedure in the classical directive, and that mandatory requirements relating to policy objectives should be set so as to, 'Make public procurement work for innovation, green growth and social inclusion...'<sup>8</sup>

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The Commission then announced in the Single Market Act (SMA) of October 2010, as proposal number 17, that '...it will make legislative proposals in 2012 at the latest with a view to simplifying and updating the European rules to make the award of contracts more flexible and to enable public contracts to be put to better use in support of other policies<sup>9</sup>'. This resulted in the publication of a green paper on the modernisation of EU public procurement policy in January 2011 which then entailed wide-ranging consultation based on roughly 115 questions and suggestions. The consultation was open until 18 April<sup>10</sup>. It is not, however, the purpose of this short article to go into the detailed proposals and questions of the green paper, or to cover the legislative initiative on service concessions which will be adopted by the Commission this year. In addition, the Single Market Act, in proposal number 24, states that '...the Commission will present a legislative proposal in favour of a Community instrument... in order to enhance its capacity to ensure improved symmetry in access to public procurement in the industrialised nations and the major emerging economies<sup>11</sup>'. There are further references to public procurement relating to stimulating the development of energy efficiency markets, stimulating electronic procurement and socially innovative corporate projects.

### Sequence and timing of the reform

The Commission is currently undertaking a comprehensive evaluation of the impact and cost-effectiveness of EU public procurement rules. The results of this study will be published in the summer. In terms of sequencing the reform process, the results of the economic evaluation and the impact of the European public procurement directives should have been available prior to starting the consultation on the overall reform.

More importantly, a reform of the procurement rules (Directives 2004/18/EC and 2004/17/EC)<sup>12</sup> is premature. The two directives had to be transposed by 31 January 2006 and quite a number of Member States were late with the transposition. The time-span for evaluating the impact of the directives is rather short and includes exceptional years due to the economic crisis. Furthermore, the new amending remedies directive (Directive 2007/66/EC)<sup>13</sup> had to be transposed by December 2009. Examining the notifications of transposition to the European Commission, it is apparent that most Member States transposed it during the course of 2010, but at this point in time, one Member State has not yet provided notification. The reform introduced with the remedies and in particular the ineffectiveness of contracts will have implications for transparency and the opening up of the procurement markets.

Besides the recent remedies reform, the new European defence and security procurement directive (Directive 2009/81/EC)<sup>14</sup> entered into force in 2009 and needs to be implemented by the Member States by August this year. Changing directive 2004/18/EC and directive 2004/17/EC will have implications for the defence and security directive, as most of the provisions, tools and wording are based mainly on the public sector directive, while taking account of the specificities of the sector. This new directive will hopefully lead to a real departure from the old practice and result in more transparency, the opening up of competition in a significant sector of the economy and value for money.

### Simplification and integrating other policy issues into European public procurement

There is room for simplification, updating, clarification and streamlining of the procurement procedures. Yet, the complexity of the procurement rules is very much related to the national and regional levels. Various layers of legislation and bureaucratic processes do not facilitate efficient, innovative and sustainable procurement, but instead add costs to the

public and private sector. A scrutiny of national and sub-national procurement legislation is required as recommended by Professor Monti. A scrutiny of procurement practices at those levels would also be desirable. Some of the questions to be addressed could be for example: what are the costs of running a procurement procedure for the contracting authorities and for business? To what extent does procurement practice take account of stimulating innovation, SME inclusion, social and environmental considerations and value for money?

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The current procurement rules provide the possibility of integrating other policy considerations such as innovation, environmental and social considerations. Further stimulation of SMEs to participate in procurement procedures can be achieved with the current rules. Contracting authorities have the freedom to use the available tools for integrating other policy considerations into the various stages of the procurement process, starting with the definition of the subject matter of a contract up to the award, including lifecycle costing. These are issues which need to be tackled through raising awareness and exchange of best practices. Further progress in green, ethical and socially responsible procurement could also be achieved *via* mandatory requirements in environmental, energy, social and transport legislation.

With regard to the asymmetry of access to third country procurement markets for European industry, additional initiatives are required. New trade legislation in this field may, however, require compensation for some trading partners in other sectors. European companies should also comply with socially responsible supply chain management in third countries.

### Conclusion

At this juncture a legislative change to Directive 2004/18/EC and Directive 2004/17/EC is premature. The time-span for an evaluation is rather short and more time needs to be available for the application of the new remedies directive and the phasing in of the new defence and security directive. Contracting authorities and entities are just coming to grips with what are still called the 'new rules' and may not have been sufficiently aware of the new provisions and tools available or may be hampered by administrative barriers. Raising awareness, increasing cooperation and exchanging best practices on smart procurement could be a way forward. There is also room for further monitoring and enforcement of the rules at European level.

Looking at European public procurement in the longer-term, there is no justification for not fully applying the procurement rules to Part B services, perhaps with the exception of social services. An overall, perhaps even radical, review of the rules and procedures in a couple of years would have the advantage of streamlining the provisions concerning the public sector, utilities, concessions and defence and security procurement. At that point an evaluation could be undertaken to assess progress achieved with integrating mandatory requirements in other policy areas and whether this should lead to a legislative change in the public procurement area. Further streamlining of the rules and compatibility with the European procurement rules, including remedies could also be recommended for the European institutions, agencies and bodies.

## Notes

- \* This article was written in March 2011.
- <sup>1</sup> European Commission, Public procurement Indicators 2009, 11 November 2010.
- <sup>2</sup> European Commission, Internal Market Scoreboard, No 19, July 2009.
- <sup>3</sup> *Ibid*, p.27.
- <sup>4</sup> Vogel, L., *Macroeconomic effects of cost savings in public procurement*, European Economy, Economic Papers 389, November 2009, p.2.
- <sup>5</sup> Monti, M., 2010, *A New Strategy for the Single Market at the Service of Europe's Economy and Society*, 9 May 2010 p. 76.
- <sup>6</sup> Part B services are those services listed in Annex II B of the Directive 2004/18/EC and are only subject to a few rules of the directive (technical specification and contract award notice), they are governed by the general principles of the Treaty.
- <sup>7</sup> *Ibid*, p. 77.
- <sup>8</sup> *Ibid*, p. 78.
- <sup>9</sup> European Commission, Commission communication, *Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another*, COM (2010) 608 final of 27 October 2010, p. 15.
- <sup>10</sup> European Commission, Green Paper, on the modernisation of EU public procurement policy – *Towards a more efficient European Procurement Market*, COM (2011) 15/4 of 27 January 2011.
- <sup>11</sup> *Op cit*, p. 18.
- <sup>12</sup> 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. Official Journal of the European Union, L 134 of 30 April 2004 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector. Official Journal of the European Union, L 134 of 30 April 2004.
- <sup>13</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20 December 2007.
- <sup>14</sup> 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 2004/18/EC, OJ L 216, 20 August 2009.