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The Nature and Character of the Public Markets and Their Effects on Public Procurement in the European Union

Natura i charakter rynków publicznych oraz ich wpływ na zamówienia publiczne w Unii Europejskiej

ABSTRACT

The regulation of public procurement in the European Union focuses on the internal market and its function in accordance with the fundamental freedoms. It aims at installing a behaviour for the public sector which is similar dynamics to the function of private markets. However, the regulation of public procurement reflects a characteristic of the relevant markets which is *sui generis* and has as main feature the pursuit public interest. These markets are referred to as public markets, which are distinct from private markets in their driver. Public markets exist to deliver public interest, whereas private markets exist to allow operators pursue profit. The regulation of public procurement rests on harmonisation which as a legal and policy process has been selected by European institutions to convey such regulation through directives. The latter are legal instruments which provide frameworks for implementation of the *acquis communautaire* but allow the required flexibility through discretion which is afforded to Member States in relation to the forms and methods of their implementation.

Keywords: public procurement; flexibility; discretion; harmonisation; internal market

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INTRODUCTION

Public markets must operate within a competitive environment which safeguards the principles of transparency and accountability. Nevertheless, the regulation of public markets through public procurement rules presents a challenge to policy and law makers to establish a system which provides outputs towards social equilibrium, sustainable prices, excess profit, whilst maintaining private sector incentives for efficiency and innovation in the delivery of public services.

The integration of public markets in the European Union has been an instrumental feature of the design and function of the internal market. Integrated public markets in the Member States of the EU support economic and policy grounds for creating a competitive environment within which trade patterns provide economic growth.

The principles of transparency, non-discrimination and objectivity in the award of public contracts will form a competitive environment which will help increase import penetration of products and services destined for the public sector, improve the tradability of public contracts across the internal market, bring about price convergence and rationalise the European industrial base.

The European institutions wanted to establish a set of trade patterns between the public and private sectors which are homogenous. To achieve such objective, they have relied upon neo-classical economic theories on public sector regulation. Liberalising the European public markets required an influx of anti-trust policy. Although anti-trust has been critical in determining the conditions of competitiveness for the supply side of public procurement, it has provided little help in regulating the demand side of public procurement.

The relevant markets which are referred to as public markets do not respond sufficiently to anti-trust regulation to achieve the envisaged policy objectives. Public markets need a regulatory approach which has positive dynamics to enhance market access potential and allow for tradability of contracts. Anti-trust and the underlying neo-classical theory to economic integration rely on price competition. On the other hand, public markets require a system which promotes market access. Such regulatory system reveals the first departure from the strictly neo-classical perspective of public procurement and the arrival at an ordo-liberal zone which promotes policy and reflects on inherent flexibility of the rules.

The neo-classical versus the ordo-liberal approach of public markets reflects a choice for regulatory design and implementation which reveals the rigidity of the neo-classical influence and its gradual dilution with policy considerations, which are often attributed to national policies. The Court of Justice of the European Union has proactively instilled a flexible, policy-oriented application of public procurement, which balances the strict neo-classical approach to market integration.

The article presents the foundation that the *sui generis* character of public markets leads to certain premises: first, public markets rely on administrative/public

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law in their regulation; secondly, because of such reliance, directives are utilised as legal instruments and the exhaustive harmonisation and porosity of the Public Procurement Directives are revealing *lex lacunae*; thirdly, exhaustive harmonisation and porosity introduced judicial activism as the method to preserve the integrity of legal framework whist maintaining a certain degree of discretion, which as a principle embedded in public law, emerges as the driver and distinct characteristic of EU public procurement regulation.

THE CONCEPT OF PUBLIC MARKETS

In public administration theory and practice, the public choice paradigm underpinned the emergence of New Public Management[1] which, as a regulatory system, has pointed towards a type of mixed economy. Under such a system, the public sector manages the relevant public markets where the private sector and other stakeholders provide public services[2] on its behalf.

The New Public Management reveals a division of roles in the economy which could bring about substantial efficiency gains. This premise assumes that the use of market-competitive mechanisms resulting from the externalisation of public services could bring quality improvements for public interest.

The state and its organs join the market to deliver public interest.[3] Nevertheless, in the pursuit of public interest, their activities do not resemble the commercial nature and characteristics of private enterprise, which focus on profit maximisation. The state and its organs have as sole objective observance and delivery of public interest.[4]

This environment emerges as the foundation of ground for the existence of public markets where public interest substitutes profit maximisation.[5] Further factors distinguish private from public markets and focus on structural elements of

[1] R. Wettenhall, I. Thynne, *Emerging Patterns of Governance: Synergies, Partnerships and the Public-Private Mix*, "International Journal of Public-Private Partnerships" 2000, vol. 3(1).

[2] R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*, Philadelphia 1997.

[3] C. Bovis, *La notion et les attributions d'organisme de droit public comme pouvoirs adjudicateurs dans le régime des marchés publics*, Contrats Publics, Septembre 2003; P. Valadou, *La notion de pouvoir adjudicateur en matière de marchés de travaux*, "Semaine Juridique" 1991, no. 3.

[4] M.-A. Flamme, P. Flamme, *Enfin L'Europe des Marchés Publics: La nouvelle directive travaux*, "AJDA – L'Actualite Juridique Droit Administratif" 1989, vol. 45(11).

[5] On the issue of public interest and its relation with profit, see cases C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605; C-360/96 *Gemeente Arnhem Gemeente Rheden v BFI Holding BV* [1998] ECR 6821; C-44/96 *Mannesmann Anlangenbau Austria AG et al. v Strohal Rotationsdurck GesmbH* [1998] ECR I-73.

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the market, competitiveness, demand conditions, supply conditions, the production process, pricing, and risk.

These factors signal the methods and approaches employed for the regulation of public markets[6] which lead to their regulatory convergence with the operation of private markets.[7]

The European policy making has registered the idiosyncratic character of public markets which cover the public sector, the utilities and network industries and established regulatory convergence conditions like those that safeguard the operation of private markets by introducing a detailed framework of procurement regulation.[8] The public markets occupy an economic equation where the public sector, the network industries and the utilities represent the demand side whereas the supply side is represented by the private sector operators and undertakings.

The structure of private markets reflects competitive pressures emanating from the buyers-suppliers interface. Their interrelation may configure between monopoly or oligopoly conditions to advanced competition models. In private markets, demand emerges from heterogeneous buyers, is multiple for each product and is based on specific needs and expectations. On the other hand, supply is met by a variety of products, where standardisation and known technology help markets to function, through the research and development process which improves quality of outputs. Mass-production patterns dominate the production process, choice, and substitutability of the product range reflect on market characteristics. Cost is a critical production factor where pricing policy is defined by competitive forces. The purchasing action is based on the price-quality relationship. The risk factor appears high through the development cycle, which is based on short to medium-term considerations, where technology of products destined for the private markets is evolutionary. Purchases are made on the grounds of acceptable balance between price and quality.

On the other hand, public markets are structured differently. They reveal monopsony characteristics. The state and its organs often represent the sole outlet for the output of a sector or an industry. Public markets function in different ways from private ones. The demand origins are institutionalised and bound by budgetary considerations. Demand in public markets is always linked with the pursuit of public interest and is single, in contrast to the multitude nature of demand within private markets. The supply side in public markets is based on limited product range. It possesses limited origins which assume close relations between the public sector

[6] C. Bovis, *Public Procurement: Case Law and Regulation*, Oxford 2006, Chapter 2.

[7] A.S. Graells, *Public Procurement and the EU Competition Rules*, Oxford 2011. See also P. Nowicki, *Aksjologia prawa zamówień publicznych. Pomiędzy efektywnością a instrumentalizacją*, Toruń 2019.

[8] Communication from the Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final.

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and supplying industries. In public markets, products are seldom innovative and technologically advanced. The purchasing decision is based on pricing which is defined through tendering and negotiations primarily based upon considerations for life cycle and reliability. Often policy, rather than price/quality considerations, determine the public market foreclosure.

Public procurement regulation in the EU draws intellectual inferences from neo-classical economic theories[9] and aims primarily at the purchasing patterns of the demand side (the public sector). However, beneficial effects for the supply side (the industry) could emerge which include the optimal allocation of resources within European industries, the rationalisation of production and supply, the promotion of mergers and acquisitions and the creation of globally competitive industries. The cyclical dynamics of public procurement offer a unique proposition to its regulation, which reveals a bi-focal purpose of behavioural and structural perceptions applied to both the demand and supply sides.

The integration of public markets in the EU is based on regulating the purchasing behaviour of the demand side (the public sector and the contracting authorities). Although it is of equal importance, the behaviour of the supply side (the industry) is not subjected to procurement regulation but rather left to the regulatory remit of anti-trust. Anti-competitive behaviour or collusive tendering are mere discretionary grounds for disqualification from the selection procedures.

The primary assumption by European institutions has been that the adoption of a homogenous behaviour of the public sector, the network industries and the utilities which is based on the principles of openness, transparency and non-discrimination, will lead to substantial efficiency gains and savings ranging from 10% to 30% of the contract value.[10] In addition, the elimination of domestic preferential purchasing could result in three major effects which would primarily influence the supply side. These include a trade effect, a competition effect and a restructuring effect.[11]

The trade effect[12] reflects the potential savings for the public sector through lower costs as a result of awareness. The trade effect is the outcome of the application of principle of transparency (compulsory advertisement of public contracts above certain thresholds) in public markets. However, the trade effect has a static

[9] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Single Market Act Twelve Levers to Boost Growth and Strengthen Confidence: "Working Together to Create New Growth"*, COM(2011) 206 final.

[10] J. Lunsdgaard, *Competition and Efficiency in Publicly Funded Services*, OECD Economics Department Working Paper 2002, p. 7.

[11] WS Atkins Management Consultants, *The "Costs of Non-Europe" in Public Sector Procurement*, 1988, http://aei.pitt.edu/47968/1/A9312.pdf (access: 8.12.2022).

[12] P. Cecchini, *The European Challenge, 1992: The Benefits of a Single Market*, Aldershot 1988.

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dimension[13] because the principle of transparency cannot on its own safeguard the creation of competitive conditions in the relevant markets. Market access in public markets is reflected by the award of a public contract and could be obstructed hindered by discriminatory behaviour of contracting authorities in the selection stages and the award stages of public procurement,[14] although the principle of transparency is present.

The competition effect focuses on changes in industrial performance because of changes in the price behaviour of national firms which had previously been protected from competition through preferential or discriminatory practices.[15] The competition effect relies also on the principle of transparency and has static dimensions.[16]

Transparency in public markets demolishes information and awareness barriers and promotes price competitiveness and long-term contestability in aspects other than price (research and development, innovation, customer care). The competition effect will bring about price convergence of goods, works and services destined for the public sector both nationally and EU-wide.

Last, the restructuring effect reflects on the re-organisational dynamics in the supply side as the result of increased competitiveness in the market. The restructuring effect is reactionary to the principles of openness and transparency and sequential to the trade effect[17] revealing the effectiveness of the supply side (industry) to merge, diversify, or abandon the relevant markets and reflecting upon national industrial policies.[18]

[13] F. Ilzkovitz, A. Dierx, V. Kovacs, N. Sousa, *Steps Towards a Deeper Economic Integration: The Internal Market in the 21st Century – A Contribution to the Single Market Review*, Brussels 2007.

[14] D. Holland, R. Barrell, T. Fic, I. Hurst, I. Liadze, A. Orazgani, R. Whitworth, *Global Prospects and Sources of Economic Growth*, "National Institute Economic Review" 2010, vol. 212, pp. F4–F11.

[15] European Commission, Communication to the European Council and the European Parliament, the European and Economic and Social Committee and the Committee of Regions, *Sustainable Consumption and Production and Sustainable Industry Policy Action Plan*, (2008) 397/3.

[16] K. Head, T. Mayer, *Non-Europe: The Magnitude and Causes of Market Fragmentation in the EU*, "Review of World Economics" 2000, vol. 136(2), pp. 284–314.

[17] Report from the Commission Concerning Negotiations Regarding Access of Community Undertakings to the Markets of Third Countries in Fields Covered by the Directive 2004/17/EC, COM(2009) 592 final, 28.10.2009.

[18] Communication from the Commission, *Europe 2020*... See also European Commission, *The Opening-up of Public Procurement to Foreign Direct Investment in the European Community*, CC 93/79, 1995.

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THE EFFECTS OF THE NATURE OF PUBLIC MARKETS ON PUBLIC PROCUREMENT REGULATION

The rationale for regulating public procurement in the EU is based on the necessity to introduce competitiveness into the relevant public markets to increase cross-border trade and to achieve price transparency and price convergence across the internal market, resulting in significant savings.[19] The regulation of public procurement is considered as a safeguard to fundamental Treaty principles, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality and emerged because of necessity in completing the function of the internal market which is hindered by discriminatory purchasing practices and policies of Member States.[20]

Public procurement in the EU and its Member States has not been subject to the same commercial incentives or organisational pressures as private sector procurement. Public procurement regulation has established a legal discipline which promotes effective use of financial resources, introduces greater efficiency and competition, and roots out favouritism and corruption in the award of public contracts. Public procurement regulation aims at integrating public markets through the most optimal resource allocation patterns for contracting with the public and utilities sectors.

Public procurement regulation projects competence on three jurisdictional facets. First, an international one, where extra-territorial effects are produced subject to the WTO Agreement on Government Procurement, which renders reciprocity in market access for public contracts to its signatories. Secondly, an EU/centralised facet, where EU competence covers all procurement which is triggered by monetary value thresholds. Thirdly, a national competence facet covers procurement below certain monetary thresholds which is excluded from the application of the Public Procurement Directives, although subject to the fundamental principles of EU law. National competence in public procurement regulation also covers judicial review of administrative acts and public contract awards.

Public procurement regulation acquired strategic importance for the European integration process by virtue of the 2011 Single Market Act.[21] Reforms of the EU public procurement *acquis*[22] linked procurement regulation to the European 2020

[19] See WS Atkins Management Consultants, *op. cit*. See also P. Cecchini, *op. cit*.

[20] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985), COM(85) 310, June 1985. See also Green Paper on Public Procurement in the European Union: *Exploring the way forward*, European Commission 1996; European Commission, Communication on Public Procurement in the European Union, COM (98) 143.

[21] See Communication from the Commission, *Europe 2020*...

[22] See Green Paper on the Modernization of EU Public Procurement Policy: Towards a More Efficient European Procurement Market, COM(2011) 15/47.

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Strategy which focused on growth and competitiveness and presented its effects as an essential part of the Single Market.[23]

The EU public procurement *acquis* has provided a differentiated regulatory system to public sector procurement and utilities procurement. Two reasons justify such choice. First, a more relaxed regime for utilities procurement has been instigated, irrespective of their ownership status, because of the positive effects of liberalization of network industries which has stimulated sectoral competitiveness.[24] Secondly, as regards public sector procurement regulation, a codified set of rules, covering supplies, works and services procurement in a single legal instrument[25] has been instigated. The codified system for the public sector procurement has the objective of producing legal efficiency, simplification, and compliance. A decentralized dimension of the public procurement regulation has been introduced by the procurement remedies directives.[26]

The evolution of the public procurement *acquis* has been problematic. The directives on public sector and utilities procurement suffer from conceptual and regulatory vagueness, have limited interoperability with legal systems of Member States and are subject to continuous market-driven modality changes in the financing and delivering of public services.[27] To treat such shortcomings, the Court of Justice of the European Union adopted judicial activism and shaped public procurement law[28] by providing intellectual support to the fundamental principles which underpin public procurement regulation.[29] Judicial activism is responsible for the creation of doctrines which have defined essential legal concepts such as

[23] See European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

[24] See C. Bovis, *Developing Public Procurement Regulation: Jurisprudence and Its Influence on Law Making*, "Common Market Law Review" 2006, vol. 43(2), pp. 461–495.

[25] See 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 (OJ L 134/114, 30.4.2004).

[26] See Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ L 395/33, 30.12.1989); Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 76/14, 23.3.1992).

[27] See C. Bovis, *Public Procurement in the EU: Jurisprudence and Conceptual Directions*, "Common Market Law Review" 2012, vol. 49(1), pp. 1–44.

[28] See idem, *Recent Case Law Relating to Public Procurement: A Beacon for the Integration of Public Markets*, "Common Market Law Review" 2002, vol. 39(5), pp. 1025–1056.

[29] See idem, *The Effects of the Principles of Transparency and Accountability on Public Procurement Regulation*, [in:] *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, eds. H. Hoffman, A. Türk, Cheltenham 2009, pp. 288–321.

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public contracts,[30] contracting authorities,[31] the remit of selection and qualification criteria,[32] and the parameters for contracting authorities to use environmental and social considerations[33] as award criteria.

The impact and effect of the Court of Justice of the European Union prescription of judicial activism on the public procurement *acquis* exposed exhaustive harmonisation as the main shortcoming of Public Procurement Directives and the cause of significant porosity, which has resulted in legal lacunas and a recurrent danger of limiting the effectiveness of the public procurement *acquis*. Exhaustive harmonisation is a symptom which reflects regulatory restrictiveness. The latter

[30] See cases C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409; C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745; C-59/00 *Vestergaard* [2001] ECR I-9505; C-26/03 *Stadt Halle and RPL Lochau* [2005] ECR I-1; C-264/03 *Commission v France* [2005] ECR I-8831; C-231/03 *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti* [2005] ECR I-7287; C-507/03 *Commission v Ireland* (An Post) [2007] ECR I-9777; C-231/03 *Coname* [2005] ECR I-7287; C-458/03 *Parking Brixen* [2005] ECR I-8585; C-412/04 *Commission v Italy* [2008] ECR I-0000; C-295/05 *Asociación Nacional de Empresas Forestales (Asemfo) v Transformación Agraria SA (Tragsa) and Administración del Estado* [2007] ECR I-2999; C-220/05 *Jean Auroux and Others v Commune de Roanne* [2007] ECR I-385; C-382/05 *Commission v Italy* [2007] ECR I-6657; C-6/05 *Medipac-Kazantzidis AE v Venizelio-Pananio (PE.S.Y. KRITIS)* [2007] ECR I-4557; C-480/06 *Commission v Germany* [2009] ECR I-04747; C-148/06 *SECAP SpA* and *Santorso Soc. coop. arl* [2008] ECR I-3565; C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] ECR I-12175; C-324/07 *Coditel Brabant SA v Commune d'Uccle, Région de Bruxelles-Capitale* [2009] 1 CMLR 29; C-437/07 *Commission v Italy* [2008] ECR I-0000; C-147/06 *Commission v Ireland* [2007] ECR I-0000; C-206/08 *WAZV Gotha v. Eurawasser Aufbereitungs* [2009] ECR I-8377.

[31] See cases C-31/87 *Gebroeders Beentjes B.V. v State of Netherlands* [1988] ECR 4635; C-343/95 *Diego Cali et Figli* [1997] ECR I-1547; C-44/96 *Mannesmann Anlangenbau Austria AG et al. v Strohal Rotationsdurck GesmbH* [1998] ECR I-73; C-360/96 *BFI Holding* [1998] ECR I-6821; C-360/96 *Gemeente Arnhem Gemeente Rheden v BFI Holding BV* [1998] ECR 6821; C-380/98 *University of Cambridge* [2000] ECR I-8035; C-107/98 *Teckal* [1999] ECR I-8121; C-470/99 *Universale-Bau and Others* [2002] ECR I-11617; C-237/99 *Commission v France (OPAC)* [2001] ECR I-939; C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605; C-373/00 *Adolf Truley* [2003] ECR-193; C-26/03 *Stadt Halle, RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECR I-1; C-18/01 *Korhonen and Others* [2003] ECR I-5321.

[32] See cases C-176/98 *Holst Italia* [1999] ECR I-8607; C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745; C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409; C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233; C-315/01 *(GAT) and Österreichische Autobahnen und Schnellstraßen AG (ÖSAG)* ECR [2003] I-6351; C-314/01 *Siemens and ARGE Telekom & Partner* [2004] ECR I-2549; C-57/01 *Makedoniko Metro and Mihaniki* [2003] ECR I-1091; C-126/03 *Commission v Germany* [2004] ECR I-11197.

[33] See cases C-31/87 *Gebroeders Beentjes B.V. v State of Netherlands* [1988] ECR 4635; C-225/98 *Commission v French Republic* (*Nord-Pas-de-Calais)* [2000] ECR 7445; C-513/99 *Concordia Bus Filandia Oy Ab v Helsingin Kaupunki et HKL-Bussiliikenne* [2002] ECR 7213; C-448/01 *EVN AG, Wienstrom GmbH and Republik Österreich* [2003] ECR I-14527.

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gives rise to porosity, which is the main deficiency in the integrity of any regulatory system. The Court prescribed the application of the transparency principle and its surrogate principle of equality as treatment. Judicial activism in public procurement regulation established a system of compliance safeguards by authenticating EU law principles and by verifying compatibility links with European policies.

THE DYNAMICS OF PUBLIC PROCUREMENT REGULATION AND THE REMIT OF DISCRETION IN ITS APPLICATION

Public procurement regulation is delivered through the process harmonisation and the adoption of directives, as legal instruments, which provide for flexibility in their implementation and discretion in their implementation. By affording discretion, Member States have discovered a feature of public policy in public procurement regulation. Discretion reveals inferences from ordo-liberal policy and has decentralized features. Public procurement regulation reflects on a convergence dynamic which aims at adjustments towards behavioural norms. Anti-trust regulation, on the other hand, is enacted through of uniformity, utilizing directly applicable regulations as legal instruments and has a corrective character which aims at restoring competitive market equilibria.

The Single Market Act[34] pointed out public procurement as being essential for competitiveness and growth[35] and as an indispensable instrument in delivering public services[36] in the European Union. Public procurement regulation[37] is decentralised[38] and has introduced discretion as a principle in its application. The discretion of contracting authorities in the Member States in public procurement

[34] See European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

[35] See Communication from the Commission, *Europe 2020*...

[36] See European Commission, *Guide to the Application of the European Union Rules on State Aid, Public Procurement and the Internal Market to Services of General Economic Interest, and in Particular to Social Services of General Interest*, 7.12.2010, SEC(2010) 1545 final; European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010) 1258 final.

[37] See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94/65, 28.3.2014); Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94/243, 28.3.2014); Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94/1, 28.3.2014).

[38] The decentralisation of public procurement regulation is depicted in Member States' exclusive jurisdiction both application and enforcement of the substantive provisions of the EU Directives. See C. Bovis, *The Law of EU Public Procurement*, Oxford 2015.

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regulation is possible because of the doctrine of flexibility which is present in the instruments and concepts of the *acquis* and has been verified by the Court of Justice of the European Union.

The remit of discretion in public procurement points to exhaustive harmonisation as the limitation ground where it can be exercised by contracting authorities. Discretion has been curtailed by exhaustive harmonisation caused, which has been the main shortcoming of public procurement law from its inception until the most recent reforms of the 2014 procurement directives and the cause of porosity in the procurement *acquis*. The exhaustive harmonisation of the public procurement rules has had the effects of discretion in the application of public procurement regulation and limiting the effectiveness of the public procurement *acquis*.

The main boundary in applying discretion in public procurement law is the *de lege ferenda* interpretation of Public Procurement Directives. Such interpretation is deemed necessary to provide a platform upon which Member States can effectively implement the *acquis* into national legal orders. A *de lege ferenda* interpretation has pointed towards arming the regime with direct effect, enhancing access to justice at national level, improving compliance and streamlining public procurement regulation by introducing an element of uniformity in its application.

The most obvious deficiency of the Public Procurement Directives is their porosity which is caused by exhaustive harmonisation. The porosity of the Public Procurement Directives undermines their effectiveness by preventing their applicability to certain contractual situations and as a result restricting a *de lege ferenda* extension of their provisions.

Exhaustive harmonisation excludes from the remit of the Public Procurement Directives public contracts below certain thresholds and certain contractual relationships which reflect inter-administrative interfaces in the public sector or contractual relations based on dominant influence between utilities and affiliated undertakings and in particular, service concessions, public contracts based on exclusive rights, public contracts in pursuit of services of general economic interest, in-house contracts, and non-priority services contracts.

Exhaustive harmonisation projects the mutual exclusivity of the Public Sector Directive and the Utilities Directive as well as their non-applicability in cases of public contracts awarded pursuant to international rules, or secret contracts and contracts requiring special security measures or contracts related with the protection of Member States' essential interests. In addition, the Public Sector Directive also does not cover public contracts of which their object is to provide or exploit public telecommunications networks; contracts for the acquisition or rental of land; contracts related to broadcasting services; contracts related with financial securities, capital raising activities and central bank services; employment contracts; and research and development contracts which do not benefit the relevant contacting authority. The Utilities Directive does not apply to contracts awarded in a third

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country; contracts awarded by contracting entities engaged in the provision or operation of fixed networks for the purchase of water and for the supply of energy or of fuels for the production of energy; contracts subject to special arrangements for the exploitation and exploration of oil, gas, coal or other solid fuels; contracts and framework agreements awarded by central purchasing bodies, contracts of which their object activity is directly exposed to competition on markets to which access is not restricted and contracts related to works and service concessions.

Exhaustive harmonisation appearing in legal instruments such as the Public Procurement Directives cannot impose limits on the application of primary EU law to supplement their legal parameters. The lacuna in the limited effectiveness of the procurement directives and particularly in areas which cannot *de lege ferenda* be conducive to regulatory control has been recognised by the Court of Justice of the European Union. Although the application of primary European law is not precluded in the presence of exhaustive provisions of secondary law,[39] it has been explicitly recognised that the *lex specialis* character of the procurement directives aims at complementing fundamental freedoms of EU law. The Court responded to and treated the porosity of the procurement directives by signalling the necessity to supplement their remit with *acquis* deriving from fundamental principles of EU law. Thus, the supplementary applicability of primary EU law intends to close the gap that exists in contracts falling outside the procurement directives, such as below thresholds contracts[40] and in contracts which fall within the remit of the directives but escape from the full application of the principles enshrined therein, such as non-priority services contracts.[41] The need to increase compliance of contracting

[39] See cases C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, para. 9; C-324/99 *DaimlerChrysler* [2001] ECR I-9897, para. 32; C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, para. 64.

[40] See cases C-231/03 *Coname* [2005] ECR I-7287, para. 16; C-264/03 *Commission v France* [2005] ECR I-8831, para. 32.

[41] See cases C-45/87 *Commission v Ireland* [1988] ECR I-4929, para. 27, where the Court held that the inclusion in the contract specification of a clause stipulating exclusively the use of national specifications infringe Article 30 EC; C-243/89 *Commission v Denmark* (*Storebælt)* [1993] ECR I-3353, where the Court found that contract clauses concerning preference to national specifications and nominated sub-contractors infringe Articles 30, 48 and 59 EC; C-158/03 *Commission v Spain* and C-234/03 *Contse and Others* [2005] ECR I-9315, where the content of tendering specifications, and in particular sub-criteria for the award of contracts ran contrary to Article 49 EC; C-92/00 *HI* [2002] ECR I-5553, para. 42, where the Court ruled that contracting authorities' decisions are subject to fundamental rules of Community law, and in particular to the principles on the right of establishment and the freedom to provide services; C-244/02 *Kauppatalo Hansel Oy* [2003] ECR I-12139, paras 31 and 33, where the Court confirmed the principle under which primary law is to be taken into account in a supplemental capacity for evaluating the effectiveness of the Public Procurement Directives; C-57/01 *Makedoniko Metro and Mihaniki* [2003] ECR I-1091, para. 69, where the Court held that even if the Community directives on public procurement "do not contain specifically applicable provisions", the general principles of Community law govern procedures for the award of public contracts; C-275/98 *Unitron Scandinavia* [1999] ECR I-8291, para. 30 ff., where the Court held that

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authorities by promoting the objectivity of the procurement directives and enhancing their justiciability, whilst in parallel limiting their inherent flexibility has been manifested as a driver of the public procurement regime.

The porosity of the Public Procurement Directives has been treated further by relying on the principle of transparency for their interpretation and application. The principle of transparency is surrogate to the principle of equal treatment and both principles encapsulate the fundamental EU law principles which underpin public procurement, such as the free movement of goods, the right of establishment and the freedom to provide services, as well as the principle of non-discrimination. The conceptual link between transparency and the principle of equal treatment is evident from jurisprudential developments. Transparency intends to ensure the effectiveness of equal treatment in public procurement by guaranteeing the conditions for genuine competition. As the principle of equal treatment is a general principle of EU law, Member States are required to comply with the duty of transparency, which constitutes a concrete and specific expression of that principle.

The duty of transparency represents a concrete and specific expression of the principle of equal treatment,[42] which assumes that similar situations should not be treated differently unless differentiation is objectively justified.[43]

There has been an opportunity to define the scope of the principle of equal treatment in the context of public procurement in case C-243/89 *Commission v Denmark*[44] and in case C-87/94 *Commission v Belgium*.[45] It was held that compliance with the principle of equal treatment requires an absence of discrimination on grounds of nationality and a duty of transparency which enables contracting authorities to ensure that that principle is complied with. The duty of transparency in case C-324/98 *Telaustria*[46] and in case C-458/03 *Parking Brixen*[47] was defined. Accordingly, the duty of transparency is intended to preclude any risk of favouritism or arbitrariness on the part of contracting authorities by ensuring a sufficient degree of advertising, which would result in opening the market to competition and by guaranteeing effective review mechanisms of the impartiality of the procurement procedures. The duty of transparency also implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise,

Community law principles such as the principles of transparency and the prohibition of discrimination on grounds of nationality must embrace the remit of the public procurement directives.

[42] See joined cases C-117/76 and C-16/77 *Ruckdeschel and Others* [1977] ECR 1753, para. 7.

[43] See joined cases C-201/85 and C-202/85 *Klensch and Others* [1986] ECR 3477, para. 9; case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, para. 32.

[44] See case C-243/89 *Commission v Denmark* (*Storebælt)* [1993] ECR I-3353, paras 37 to 39.

[45] See case C-87/94 *Commission v Belgium* [1996] ECR I-2043, in particular paras 51 to 56. See also case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-3801, para. 108.

[46] See case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745.

[47] See case C-458/03 *Parking Brixen* [2005] ECR I-8585.

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and unequivocal manner in the notice or contract documents in order to enable all reasonably informed tenderers their significance and to allow unequivocally their interpretation. The duty of transparency must also enable contracting authorities to ascertain whether the tenders submitted satisfy the award criteria applied to the relevant contract.[48]

CONCLUSIONS

The European institutions have identified public procurement as essential components of competitiveness and growth and as indispensable instruments of delivering public services.

The public procurement reforms over the last decade have been registered in a positive manner. The Public Sector Directive represents a notable example of codification of supranational administrative law. The main influence for the codification of the Public Sector Directive can be traced in important recent case law developments, in particular case law on the definition of contracting authorities, the use of award procedures and award criteria, and the possibility for contracting authorities to use environmental and social considerations as criteria for the award of public contracts. The modernization objective of the reforms focuses on the ability of private undertakings, which pursue activities of general interests of non-commercial or industrial character to tender for public contracts alongside bodies governed by public law, is a significant development influenced by the Court's rulings. The flexibility objective of the public procurement regulatory regime reflects on the relaxation of the competitive tendering regime and the disengagement of the public procurement rules in industries that operate under competitive conditions in the utilities sectors indicate the links between procurement regulation and anti-trust. The non-applicability of the regime to telecommunications entities is an important development indicative of the future legal and regulatory blueprints.

The Court of Justice of the European Union has inferred where further reforms are needed. The substantive public procurement rules and mainly the Public Sector Directive suffer from legal porosity because of exhaustive harmonisation. Exhaustive harmonisation has been treated through a rule of reason approach, by a hybrid transplant of EU legal principles to the Public Procurement Directives to control

[48] See Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179/2, 1.8.2006). The Commission drew up best practices by recommending means of adequate and commonly used publication of notices in the Member States such as the internet, the contracting authority's website, or specific portal websites, national official journals and other means of publication including a voluntary submission to the OJEU/Tenders Electronic Daily for larger value contracts.

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their porosity. However, this treatment is temporary and does not produce legal certainty and legitimate expectations.

Public contracts which fall below the stipulated value thresholds (sub-dimensional contracts) represent the most difficult category for reform. On the one hand, they encapsulate a significant amount of Member States' public expenditure which escapes the clutches of the public procurement *acquis*. On the other hand, the Court is keen to subject these contracts to some form of competition and has supplemented the Public Procurement Directives with EU law principles which ensure a parallel process of procurement with dimensional public contracts. This development has created uncertainty in the marketplace and resulted in a dysfunctional application of procurement rules to those contracts. The administrative and procedural burdens on the part of contracting authorities often surpass any potential efficiency benefits resulting from competitively tendering sub-dimensional contracts. In addition, adequately sufficient safeguards against intentional division of dimensional contracts into lots to avoid the applicability of the Public Procurement Directives exist in the current *acquis*.

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ABSTRAKT

Regulacja zamówień publicznych koncentruje się na rynku wewnętrznym Unii Europejskiej i jego funkcjonowaniu zgodnie z podstawowymi swobodami. Ma ona na celu określenie zachowania sektora publicznego posiadającego dynamikę podobną do rynków prywatnych. Regulacja zamówień publicznych odzwierciedla jednak cechy rynków tego sektora, stanowiących kategorię samą w sobie, których cechą charakterystyczną jest realizacja interesu publicznego. Rynki te określane są jako rynki publiczne, różniące się od rynków prywatnych rodzajem bodźca do działania. Rynki publiczne mają za zadanie realizację interesu publicznego, podczas gdy rynki prywatne są po to, by przedsiębiorcy mogli osiągać zyski. Regulacja zamówień publicznych opiera się na harmonizacji, która jako proces kreowania prawa i polityki została wybrana przez instytucje europejskie do tworzenia regulacji za pośrednictwem dyrektyw. Dyrektywy są instrumentami prawnymi zapewniającymi ramy do wdrażania dorobku wspólnotowego, umożliwiając jednocześnie wymaganą elastyczność poprzez swobodę decyzyjną przyznaną państwom członkowskim co do form i metod ich wdrażania.

Słowa kluczowe: zamówienia publiczne; elastyczność; swoboda decyzyjna; harmonizacja; rynek wewnętrzny