

INTERNATIONAL JOINT PUBLIC PROCUREMENT A NEW INITIATIVE HOSTED BY THE LUXEMBOURG CENTRAL BANK

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ABSTRACT. Sixteen Member States of the European Union have so far adopted the single European currency, the euro, and form the “Eurosystem”. The national Central Banks of the Eurosystem are responsible for some 2 billion euros worth of procurement of goods and services every year. A study conducted in 2005-2006 identified the potential for savings if the national Central Banks were to collaborate in joint procurements. In 2007, it was decided to create the Eurosystem Procurement Coordination Office (EPCO) and the Luxembourg Central Bank (BCL) was appointed as the host bank for EPCO. The paper describes the activities of EPCO since the office started operation on 1 January 2008, in particular the design and implementation of the yearly joint Procurement Plans. The legal Decision (ECB/2008/17¹) giving the framework and governance structure for joint European procurement is presented in the context of the EU public procurement legislation. The future prospects for EPCO are evaluated.

INTRODUCTION

The European Union (EU) represents a unique economic and political partnership of 27 democratic European countries. Key elements of the economic and political aims of the EU since its inception have been the development of a single market, ensuring the free movement of people and goods within the territory of the EU and the development and implementation of a single European currency.

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¹ Decision of the European Central Bank of 17 November 2008 laying down the framework for joint Eurosystem procurement (ECB/2008/17), OJ L 319, 29.11.2008, p. 76

² The views expressed in this paper are those of the author and do not necessarily reflect those of the Banque centrale du Luxembourg (BCL), the Eurosystem Procurement Coordination Office (EPCO) or the European Central Bank (ECB).

The legal basis for the single monetary policy is the Treaty establishing the European Community and the Statute of the European System of Central Banks and of the European Central Bank³. The Statute established both the ECB and the European System of Central Banks (ESCB) as from 1 June 1998.

Since 1 January 1999 the European Central Bank (ECB) has been responsible for conducting monetary policy for the euro area - the world's largest economy after the United States.

The euro area came into being when responsibility for monetary policy was transferred from the national Central Banks of 11 EU Member States to the ECB in January 1999. Greece joined in 2001, Slovenia in 2007, Cyprus and Malta in 2008 and Slovakia in 2009. The creation of the euro area and of a new supranational institution, the ECB, was a milestone in the long and complex process of European integration.

A study conducted in the ESCB in 2005-2006 noted that the Central Banks of the Eurosystem were, at that time, responsible for some 2 billion euros worth of procurement of goods and services each year. A lot of these goods and services are procured by all the Central Banks in the Eurosystem and the study identified the potential for efficiency and savings if the national Central Banks were to collaborate in joint procurements. In 2007, it was decided to create the Eurosystem Procurement Coordination Office (EPCO) and the Luxembourg Central Bank (BCL) was appointed as the host bank for EPCO.

This paper gives the political framework of the EU and the Eurosystem within which EPCO operates, the public procurement rules in the EU, and gives an account of how EPCO was established, the legal framework, the working methods which have been put into place, the achievements so far and future plans.

THE POLITICAL FRAMEWORK

The European Union (EU)

Established under the name of European Union (EU) in 1992 by the Treaty on European Union (Maastricht Treaty), the EU is a unique

³ The Treaty establishing the European Community was replaced by the Treaty on the functioning of the European Union on 1 December 2009.

partnership of 27 countries committed to work closely together for the benefit of all their citizens for peace and prosperity.

The Treaty of Rome signed in 1957 by the six founder members (Belgium, France, West Germany, Italy, Luxembourg and the Netherlands) created the European Economic Community (EEC), which later became the European Union. One of its main objectives was to create a common market with free movement of goods, services, capital and labour.

The Treaties (known as 'primary' legislation), are the basis for a large body of 'secondary' legislation which has a direct impact on the daily lives of EU citizens. The secondary legislation consists mainly of regulations, directives and recommendations adopted by the EU institutions.

These laws, along with EU policies in general, are the result of decisions taken by the institutional triangle made up of the Council (representing national governments), the European Parliament (consisting of directly elected representatives from all Member States) and the European Commission (an executive body independent of EU governments that proposes new legislation and monitors implementation).

On 1 December 2009, the « last » Treaty entered into force, the « Treaty of Lisbon ». It provides the EU with modern institutions and optimised working methods to tackle both efficiently and effectively today's challenges in today's world. In a rapidly changing world, Europeans look to the EU to address issues such as economic and financial stability, globalisation, climatic and demographic changes, security and energy. The Treaty of Lisbon reinforces democracy in the EU and its capacity to promote the interests of its citizens on a day-to-day basis.

The ECB, the ESCB and the Eurosystem

Most nations belonging to the EU have adopted a common currency, the Euro. The Euro is overseen by the European Central Bank, in an effort to promote all economies that incorporate the use of the currency. In 2009, the number of nations using the Euro, collectively called the Eurozone, had risen to 16.

To join the euro area, the 16 countries had to fulfil the convergence criteria, as will other EU Member States prior to adopting the euro. The criteria set out the economic and legal

preconditions for countries to participate successfully in Economic and Monetary Union.

The ECB was established as the core of the Eurosystem and the ESCB. The ECB and the national Central Banks together perform the tasks they have been entrusted with. The ECB has legal personality under public international law.

The ECB is the organisation for the conduct of monetary policy and the performance of other central banking functions for the euro. It carries out these tasks together with the national Central Banks of the euro area. It was established in June 1998, replacing its precursor, the European Monetary Institute (EMI).

The **European System of Central Banks (ESCB)** comprises:

- the European Central Bank (ECB) and
- the national Central Banks (NCBs) of all 27 EU Member States.

The **Eurosystem** comprises the ECB and the NCBs of those countries that have adopted the euro. The Eurosystem and the ESCB will co-exist as long as there are EU Member States outside the euro area. The Eurosystem is thus a sub-set of the ESCB. Since the ECB's policy decisions, such as on monetary policy, naturally apply only to the euro area countries, it is in reality the Eurosystem which as a team carries out the central bank functions for the euro area. In doing so, the ECB and the NCBs jointly contribute to attaining the common goals of the Eurosystem. The euro area NCBs, which form an integral part of the Eurosystem, carry out the tasks conferred upon the Eurosystem in accordance with the rules established by the ECB's decision-making bodies.

The **euro area** consists of the EU countries that have adopted the euro. The primary objective of the Eurosystem is to maintain price stability, according to the main principle governing the ESCB activities that of independence of the ECB and the national Central Banks (NCBs). The Eurosystem is required to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources.

The Treaty entrusts the ESCB with the task of performing the central bank function for the EU, namely : to define and implement the monetary policy of the euro area, to conduct foreign exchange operations, to promote smooth operation of payment systems and to hold and manage foreign reserves. In addition to these basic tasks, the Eurosystem also carries out other ancillary tasks, such as :

advisory functions, the collection and compilation of statistics, to contribute to prudential supervision and financial stability and the issuance of euro banknotes and to ensure their integrity. The procurement of goods and services that are necessary for the performance of the performance of Eurosystem tasks is also considered such an ancillary task.

PUBLIC PROCUREMENT IN THE MEMBER STATES OF THE EU

The award of public works, supplies and services contracts by public bodies is subject to EU⁴ and international⁵ rules although not all public procurement is subject to these obligations⁶. Under these rules, public sector procurement must follow transparent open procedures ensuring fair conditions of competition for suppliers.

⁴ Namely, 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, 30.04.2004 p. 114) (the 'Public Sector Directive') 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 sectors (OJ L 134, 30.4.2004, p. 1) (the 'Utilities Directive'), both the 'Public Procurement Directives'.

In addition to this, in January 2008 a new directive dealing with remedies under the public procurement rules (Directive 2007/66/EC of 11 December 2007) came into force (the 'New Remedies Directive'). This applies to awards under the Public Sector and Utilities Directives and amended the Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

⁵ The main international agreement related to public procurement is the WTO Agreement on Public Procurement (GPA). The GPA is to date the only legally binding agreement in the WTO focusing on the subject of government procurement. The EU is part of this Agreement (OJ L 336, 23.12.1994, p. 1). The aim of this Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade.

⁶ The Public Procurement Directives do not apply to all public contracts. There remains a wide range of contracts that are not or only partially covered by them, such as: contracts below the thresholds established for the application of the Public Procurement Directives (according to the threshold values established in Article 7 of Directive 2004/18/EC and Article 16 of Directive 2004/17/EC) and, contracts for services listed in Annex II B to Directive 2004/18/EC and in Annex XVII B to Directive 2004/17/EC that exceed the thresholds for application of these Directives.

Some purchases can be exempted from EU rules under certain conditions and purchases below thresholds must respect the principles of the Treaty only⁷. The purpose of the EU procurement rules is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition.

The Public Procurement Directives (most recently 2004/18/EC and 2004/17/EC) are based on three main principles:

- EU-wide advertising of contracts so that firms in all Member States have an opportunity of bidding for them.
- The banning of technical specifications liable to discriminate against potential foreign bidders.
- Application of objective criteria in tendering and award procedures.

The correct and rapid implementation in the Member States of the EU of these Directives should help open up public procurement, improve the functioning of the Internal Market and enable the EU to reap the full benefits from an enlarged Internal Market.

Total public procurement in the EU (i.e. the purchases of goods, services and public works by governments and public utilities) is estimated at about 16% of the Union's GDP or €1500 billion in 2002. Its importance varies significantly between Member States ranging between 11% and 20% of GDP. The opening up of public procurement within the Internal Market has increased cross-border competition and improved prices paid by public authorities. There remains potential for significant further competition in procurement markets and for further savings for taxpayers.

EPCO

It is within this political framework that the study referred to above was conducted with a view to identifying advantageous purchase

⁷ Contracting authorities/entities from Member States of the EU have to comply with the rules and principles of the Treaty of Lisbon whenever they conclude public contracts falling under the scope of that Treaty. These principles include the free movement of goods, the right of establishment, the freedom to provide services, non-discrimination and equal treatment, transparency, proportionality and mutual recognition.

conditions for joint procurement complying the principles of the Eurosystem of cost efficiency and effectiveness.

The study conducted in 2005-2006 and referred to earlier examined the detailed expenditure by product category of the national Central Banks and then determined whether it would be relatively easy or relatively difficult to pool procurement of particular product categories in practice. Other examples of joint procurement ventures elsewhere were studied as model. The overall conclusion was that substantial savings could be achieved by pooling procurement of common items. The Governing Council of the ECB then, in 2006, decided to enhance cooperation within the Eurosystem in the field of procurement on a voluntary basis and mandated a working group to explore the modalities for the establishment of a procurement coordination office and to address related issues, including assigned tasks, legal basis, governance framework and financing.

The working group's report, which was approved by the Governing Council, concluded that the main tasks of the coordination office would be:

- a) facilitating the adoption of best practices within the Eurosystem;
- b) developing the infrastructure (skills, functional tools, IT, processes) to enable the pooling of purchasing power;
- c) coordinating the Eurosystem procurement agenda.

It was also confirmed that participation in the joint procurement procedures would be on a voluntary basis but that a critical mass of pooling was necessary to ensure financial benefits. It was further concluded that EPCO would have access to support facilities of the Central Bank chosen to host the office and that it could make use certain ESCB structures e.g. the legal committee and the audit committee. The Governing Council selected the Luxembourg Central Bank as the host for EPCO and a first mandate of five years (2008-2012) was agreed. The Governing Council noted that in a first phase, the focus of EPCO on coordination would be necessary to prove the validity of the pooling concept and to build up credibility. The Governing Council also emphasised that in a later stage it could enhance the value added of the project for the Eurosystem, if EPCO over time would become active in executing procurements after it has demonstrated that gains and savings for Eurosystem procurement can be achieved. In this respect, the Governing Council will decide in

the future if the procurement coordination office would evolve into a “facilitation” central procurement office.

Accordingly, EPCO recruited the team of four to establish the coordination function within the structure of the host Luxembourg Central Bank. The full team was in place by 1 October 2008. Twenty of the Central Banks in the ESCB/Eurosystem committed to participating in EPCO.

THE LEGAL FRAMEWORK

The Governing Council asked the legal committee of the ESCB to examine the legal issues involved in joint procurement between Central Banks subject to different national legal jurisdictions. It transpired that some Central Banks did face legal restrictions arising from their national law for their participation in joint procedures governed by a different national law. The solution to overcome such restrictions was to develop an ECB legal instrument laying down an EU law framework for joint Eurosystem procurements. It was concluded that this would enable all Central Banks to participate in joint Eurosystem tender procedures which would also be fully in line with EU law on public procurement. The instrument would also provide clarity on the range of tasks assigned to EPCO, the governance structure and the roles and responsibilities of EPCO and the Central Banks in joint Eurosystem tender procedures.

Accordingly, a new legal instrument in the form of an ECB Decision was promulgated and came into force on 17 November 2008 (ECB/2008/17).

The Legal Instrument defines that EPCO shall carry out all of the following tasks:

- a) facilitate the adoption of best procurement practices within the Eurosystem;
- b) develop the infrastructure (e.g. skills, functional tools, information systems, processes) required for joint procurement;
- c) identify potential cases for joint procurement which fall within or outside the scope of this Decision on the basis of procurement needs that Central Banks address to EPCO;
- d) prepare and update as necessary an annual procurement plan for joint tender procedures based on the assessment described in point (c);

- e) prepare common requirements in cooperation with the Central Banks participating in a joint tender procedure;
- f) support the Central Banks in joint tender procedures;
- g) support the Central Banks in procurement relating to common projects of the European System of Central Banks, if so requested by the central bank leading the project

It also specifies the obligations of the hosting Central Bank to provide basic infrastructure for EPCO, defines the reporting requirements and provides a “Eurosystem-oriented governance structure” for EPCO, whereby the office has a normal reporting line within the hosting Central Bank but also reports to an EPCO Steering Committee within the ESCB which steers the activities of EPCO.

The Legal Instrument in addition lays down the procedures for joint Eurosystem tender procedures whereby a Central Bank is nominated as leading Central Bank and the procedure is carried out according to its own procedures and therefore subject to the national legal provisions of that Central Bank. The procedure is conducted on behalf of all the participating Central Banks, participation being on a voluntary basis and an opt-in provision allowing Central Banks to decide, prior to publication of the contract notice, that it no longer wishes to participate.

WORKING METHODS

As a first step, a network of procurement experts from the participating Central Banks was established and continues to meet regularly. The network has provided a valuable platform for the exchange of information on current and foreseen plans for procurement activities and on practical procedures. Outside bodies are regularly invited to make presentations to the network on various aspects of procurement. The procurement experts’ network is also the source of the yearly plan for joint procurement procedures and areas for further study which is submitted in December of each year for approval by the Governing Council for the following year. Certain specific proposals are identified which respond to needs in a number of Central Banks and candidates are identified to act as leading Central Bank for each procedure. Other areas are identified where it is clear that advantageous purchase conditions can be obtained, but where further study is required to define priorities.

For the exercise on best practices, EPCO first prepared a list of required best practices in procurement and this was refined in

discussion in the network. Subsequently, individual procurement experts volunteered to prepare drafts for discussion at the meetings of the network, following which the best practices have been progressively adopted as benchmarks for use in the participating Central Banks.

At an early stage, before any procedures had been launched, the network adopted two key operational documents, based on proposals from EPCO, to provide clarity in the procedures for joint Eurosystem tenders. The first document on “Roles and Responsibilities” defines the different phases of a procedure as:

- a) planning and organization (lead Central Bank, EPCO)
- b) procurement preparation (an Expert Group nominated by the participating Central Banks, lead Central Bank, EPCO)
- c) procurement (a Joint Procurement Committee consisting of representatives from the lead Central Bank, EPCO and a limited number of Expert Group members)
- d) monitoring (lead Central Bank, EPCO)

The agreed outcome of the procurement preparation phase is the second key document: the “Procurement Initiation Document” (PID), which summarises the requirements of the participating Central Banks, the procurement strategy and the agreed aims. It is then the responsibility of the Joint Procurement Committee in the procurement phase to implement the PID.

ACHIEVEMENTS

In a short space of time, EPCO can claim a number of significant achievements. The **network of procurement experts** has proved to be a particularly valuable forum to develop joint procurement plans and also to discuss and exchange information on current and proposed procurement activities and on procedures. A **data base on ongoing and upcoming procurement procedures** in the participating Central Banks has been established, is regularly maintained and is the source of fruitful bilateral and multilateral contacts between the procurement experts of the participating Central Banks.

Having been established over the course of 2008, **annual procurement plans for 2009 and 2010** were prepared with the help and support of the procurement experts’ network, were assessed by the EPCO Steering Committee and approved by the Governing Council of the ECB. The procurement plans were ambitious in scope and

cover a range of activities from hotel agreements, arrangements for air transport, IT licences, market data, packaging for banknotes to international train services and office supplies. The first procedures are currently being concluded and therefore concrete positive results will be available over the course of 2010.

The joint procurement process has been supported by EPCO by the development and implementation of the key operational documents referred to earlier: **“Roles and Responsibilities”** and **“Procurement Initiation Document”**. In addition, a total of 23 out of 54 identified **best practices** had been concluded by the end of 2009. To assist the procurement experts in their work, and at their request, EPCO prepared a **Compendium of European Court of Justice case law** relating to public procurement issues and this has proved a very useful tool for the experts.

Finally, reports have been successfully prepared, submitted and approved by the Governing Council of the ECB via the EPCO Steering Committee. These reports relate to the **Budget and Procurement Plan for 2009** (approved in December 2008), the **Annual Report of activities for 2008** (approved in May 2009) and the **Budget and Procurement Plan for 2010** (approved in December 2009). The Annual Report of activities in 2009 is currently in the approval procedure.

FUTURE PLANS

The first mandate runs until the end of 2012 and this will allow EPCO to broaden and deepen the range of activities for joint procurement to achieve advantageous purchase conditions in accordance with the principles of cost-efficiency and effectiveness. It is planned to continue the operation of the highly successful procurement experts’ network and the work on best practices. A mid-term review is currently being conducted to examine all aspects of EPCO’s work and, if felt necessary to improve the efficient operation of the activities, adjustments may be proposed to some aspects of the work on joint pooled procurement by the Central Banks.

The Luxembourg Central Bank is proud to have been chosen to host EPCO. The initial stages of establishing the basic infrastructure for EPCO have now been completed and we can look forward to the results of extensive programmes of joint pooled procurement procedures to the benefit of all the participating Central Banks.

NOTES

1. The views expressed in this paper are those of the author and do not necessarily reflect those of the Banque centrale du Luxembourg (BCL), the Eurosystem Procurement Coordination Office (EPCO) or the European Central Bank (ECB).
2. Decision of the European Central Bank of 17 November 2008 laying down the framework for joint Eurosystem procurement (ECB/2008/17), OJ L 319, 29.11.2008, p. 76
3. The Treaty establishing the European Community was replaced by the Treaty on the functioning of the European Union on 1 December 2009.
4. 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 , 30/04/2004 p. 0114 - 0240)
5. Namely, 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 , 30.04.2004 p. 114) (the 'Public Sector Directive') 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 sectors (OJ L 134, 30.4.2004, p. 1) (the 'Utilities Directive'), both the 'Public Procurement Directives'. In addition to this, in January 2008 a new directive dealing with remedies under the public procurement rules (Directive 2007/66/EC of 11 December 2007) came into force (the 'New Remedies Directive'). This applies to awards under the Public Sector and Utilities Directives and amended the Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
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