ELECTRONIC PUBLIC PROCUREMENT AND THE EUROPEAN INTERNAL MARKET: A PORTUGUESE PERSPECTIVE

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ABSTRACT. Public procurement is regarded as being responsible for distorting the functioning of the European market to a certain extent, because of the contingent protectionism, lack of transparency and discrimination rife in this sector, in every country. So an attempt is made in this paper to see if these negative aspects can be mitigated by the use of electronic means in this sector. It is, to this purpose, assumed that electronic public procurement is a facet of electronic government, which is expressed in the use of information and communication technologies (ICT), especially the use of the Internet, by contracting authorities in their pre-contractual and contractual relations with suppliers of goods, services and public works contractors.

INTRODUCTION

The topic for the paper that follows is, as the title indicates, related to public procurement, focusing especially on the legal aspects of the growing use of electronic means in a domain which the Community legislature and, rather more hesitantly, the Portuguese legislature, has been recognising and encouraging.

But, even though the widespread use of systems linked to new information and communication technologies does not, as a rule, itself guarantee administrative modernisation, it definitely does lead to changes in Public Administration. These changes have taken the form of

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cutting red-tape or simply adopting a more user-friendly approach, in a gradual process that has been termed *e-government*.

Electronic public procurement (*public e-procurement*) is one specific area in this domain, and is to subject of this paper. The focus is on its importance to the improvement of the internal European market and the opportunity it can entail for SMEs. This paper looks both these issues and at topics relating to the relevance of public procurement to European integration, to European commitment to the use of ICT in this area and to how of Portugal fits into this scenario.

It should be made clear at the outset that the inclusion of public procurement matters in general, as being of major relevance to the construction of the internal market and in terms of policies more directly related to fostering competition and movement is the outcome of having "also to consider public purchases favouring national producers as 'protectionist' forms of help" (PORTO, 1997: 284).

Public procurement is also regarded as being responsible for distorting the functioning of the European market to a certain extent, because of the contingent protectionism, lack of transparency and discrimination rife in this sector, in every country. So an attempt is made here to see if these negative aspects are mitigated by the use of electronic means in this sector.

So what does this combination of electronic means and public procurement consist of? It seems that a working definition of 'e-procurement' can be outlined, even though legal texts emanating from the EU that apply to public procurement do not give much idea of what should be understood by the term, since they confine themselves to mentioning the use of electronic means in procedures relating to public procurement and to listing and regulating the various modes that this usage may adopt.

It is therefore assumed that electronic public procurement is a facet of electronic government, which is expressed in the use of information and communication technologies (ICT), especially the use of the Internet, by contracting authorities in their pre-contractual and contractual relations with suppliers of goods, services and public works contractors.

IMPORTANCE OF PUBLIC PROCUREMENT TO EUROPEAN INTEGRATION

The relevant treaties do not deal explicitly with the issue of public purchases: there is no reference in the provisions which, under competition rules, addresses the help given by states (Articles 87-89, European Community Treaty), a topic with which they have a natural affinity.

Nonetheless, domestic laws regulating the acquisition of goods, services and public works contracts must be considered to obey the general principles and rules relating to the prohibition of any discrimination based on nationality, or those which block or hamper the free movement of goods and services, freedom of establishment, etc., within the EU, otherwise distortions will be introduced into the functioning of the European internal market. Thus, as made clear by DINGEL (1999: 36), "the EC Treaty does not exempt public procurement from its scope".

Therefore, the Community cannot distance itself from a sphere of intervention involving Member States and other public bodies, that is so important to the economic life of each Member State, as is made clear in the relation between the total amount under consideration and their respective GDP (see Table 1).

Here, the banning of the use of public procurement as an indirect way of supporting domestic suppliers or producers "although it may not appear in the Treaty's articles on competition, it is nonetheless in the spirit of the Treaty, or even in the letter of its provision, such as Article 12 [...], that 'each and every discrimination by reason of nationality', and also in the articles that block restrictions on free trade, free provision of services and freedom of movement is prohibited" (PORTO, 2005: 255).

In addition to these figures that show the relative importance of the sector, the same source provides some information about absolute figures, which are equally impressive. Thus, in 2005 public procurement contracts announced in the Official Journal of the European Union, involving over 20 000 contracting authorities throughout the EU, were worth around 330 billion euros. This sum amounts to more than 20% of total public spending for the year.

TABLE 1
Total Worth of Public Procurement in the EC-15, as Percentage of GDP

Years / Countries	1995	1996	1997	1998	1999	2000	2001	2002
Belgium	14.38	14.61	14.35	14.37	14.69	14.75	14.91	15.22
Denmark	16.27	16.26	16.51	16.94	17.26	17.39	18.40	18.76
Germany	17.98	17.99	17.45	17.19	17.15	16.99	17.01	17.03
Greece	13.62	12.92	12.69	13.00	12.71	13.55	12.98	12.62
Spain	13.84	12.81	12.76	12.97	12.94	12.73	12.75	13.02
France	17.26	17.32	17.26	16.49	16.35	16.52	16.35	16.62
Ireland	13.54	12.87	12.11	11.95	12.05	12.23	13.25	13.30
Italy	12.58	12.17	12.00	12.12	12.25	12.37	12.69	11.88
Luxembourg	15.49	16.01	14.89	14.43	14.38	13.11	14.25	15.48
Netherlands	20.84	20.51	20.27	20.12	20.21	20.12	20.68	21.46
Austria	18.36	18.15	17.70	17.69	17.77	17.05	16.22	16.46
Portugal	14.14	14.56	14.57	13.85	14.29	13.98	13.91	13.26
Finland	16.25	16.70	16.57	15.96	16.06	15.37	15.72	16.45
Sweden	22.14	20.97	19.99	20.48	20.27	19.40	20.01	20.49
UK	21.68	20.58	18.24	17.79	17.84	17.46	17.89	18.42
EU 15	**17.26**	**16.89**	**16.33**	**16.10**	**16.13**	**16.02**	**16.18**	**16.30**

Source: DG Internal Market

In addition, the percentage of these purchases awarded to foreign firms is relatively small, which, as PORTO (1997) points out, contrasts with the private sector, where the figures for purchases abroad are considerably higher.

In terms of economic activity, if there is open public procurement then the European Community as a whole can choose the most dynamic and competitive firms, thereby stimulating economic growth and the wider competitiveness of the European economy.

As noted earlier, with a certain optimism, in the renowned *report on the costs of the non-Europe* "the liberalisation of public procurement, besides having a major symbolic impact, will have more palpable effects on the whole economy that the elimination of customs barriers" (CECCHINI, 1988): 138), adding that the advantageous effects of this process on Europe's macro-economy would have repercussions for all the

agents involved, from the public administration to the firms responsible for supplying public entities.

THE EUROPEAN COMMITMENT TO THE USE OF ICT IN PUBLIC PROCUREMENT: THE NEW COMMUNITY LEGAL FRAMEWORK[1]

The use of electronic means for tendering procedures and for other acts related to public procurement that the new directives expressly set out to accommodate and encourage are the most innovative facet of this piece of EU legislation, since, according to BOVIS (2001), "a fully-fledged electronic procurement can positively benefit the supply side, the demand side and finally the policy makers (European and national)".

In fact, the establishment of new instruments, exemplified nicely by electronic auctions and dynamic purchasing systems, should be seen as a strong incentive for public entities to do their purchasing as effectively as possible, from the organisational point of view and as efficiently as possible, in financial terms.

Regarding the EC, the directives seek to answer the fact that public purchases play a considerable part in Community GDP, that they are an important part of its economic growth and they lie in an area that needs substantial improvement so that they are less likely to result in frequent distortions to the proper functioning of the Internal Market.

We can find a strong intention here, which could be taken as a *ratio legis* of the directives, to achieve a wider harmonisation of domestic law, and even of a more dedicated regulatory intervention in the issue of public procurement. This would simultaneously simplify procedures, make the applicable legal framework more easily understandable to bidding firms and adapt this framework to a world undergoing rapid and accelerating technological change.

In fact, the publication and entry into force of the new directives (replacing the four directives that had previous regulated the matter) was meant to give a new impetus to public procurement at EU level in an effort to boost the internal market.

The objectives of the 2004 directives can be summed up as follows:

- ✓ To give the EU legal system governing public procurement greater flexibility by setting new procurement procedures regarded as better suited to the present circumstances of the contracting authorities and to public needs and the collective interest to which they have to respond;
- ✓ To simplify the laws applying to public procurement and make them more accessible to the intended recipients, for a better understanding of the legal framework under which the purchaser public authorities and supplier firms alike operate, while maintaining and strengthening their basic ruling principles;
- ✓ To implement the systematic use of new technologies in pre-contractual and contractual procedures under public law and, at the same time, to suit the procurement mechanisms to current patterns of economic activity.

The Directive relating to the public sector thus simplifies and codifies the three directives previously in force for this procurement segment in a single law. The legal framework is thus consolidated and the supply of goods, provision of services and public works contracts are covered by it.

Many of the normative solutions are carried over from the earlier directives, thus maintaining a certain continuity of legislative direction, but they have been augmented to accommodate the most recent methods and means of conducting public procurement transactions and the good practises already successfully tried and tested in some countries, both inside and outside the EU.

In relation to the Directive on special sectors (which now included the postal services, but not the telecommunications services), the normative changes are on a lesser scale compared with the previous regulations, largely because the use of framework agreements was already established.

At any rate, there is a strong correspondence between the two laws under consideration: they both include identical provisions, such as *centralised purchasing systems*, *electronic auctions* and *dynamic purchasing systems*. They also both establish matters relating to the use of ICT, access codes, technical specifications, and to the means of communication used during the procedures, etc. It should be mentioned, however, that there is no provision for *competitive dialogue* in the

directive on special sectors, which is one of the innovations in the other directive.

In general it can be said, then, that the new directives have made it both possible and desirable to use electronic forms of communication, provided that these means are in general use, i.e. these modes can only be used when they are available to all parties involved. It is therefore intended that modern means of communication should not introduce new forms of discrimination or restrict access to a particular public procurement procedure.

With respect to the forms of procurement that presuppose the use of electronic means, *electronic auctions*, in which previously chosen competitors submit their bids *online*, are a conspicuous presence. These auctions should only be held when the condition of the good or service that is to be purchased can be specified clearly and precisely, and the vendors must restrict themselves to the specifications supplied by the public procurement purchaser. This means, therefore, that this is not the best purchasing medium when the procurement relates to services that are of a predominantly intellectual or creative nature.

The electronic nature of this procedure is not confined to the tendering process: it covers the various communications and notifications that take place before and after it, including the invitation from the contracting authority to the eligible bidders, in relation to the submission of new prices or figures: all these operations can be undertaken electronically.

Another purchasing model that has been introduced is the *dynamic purchasing system*. These are designed for frequent, regular purchases in which the electronic context is used as a framework and any bidder can be added during the period of validity. Whenever necessary, the purchasing authority opens an independent procedure under which any economic operator which meets the selection criteria for this system can submit tenders.

One innovative aspect of these directives lies in the express contingency for the use of electronic means, that is, electronic means of communication, to all intents and purposes corresponding to the classic written instruments, and, in general, in their favouring the dematerialisation of the various award procedures.

As ESTORNINHO (2006: 19) noted, "this is a very important novelty in the quest for flexibility, as it introduces electronic purchasing systems, specifically electronic auctions and dynamic purchasing systems, at any stage of the procedure". GIURDANELLA and GUARNACCIA (2005: 70) also regard the innovations contained in the 2004 directives as historic for public procurement operation, since they "amount to a complete, integral 'codification' of the telematic award procedures".

To sum up, electronic public procurement has emerged as one of the most relevant areas of *e-government*. As GIMENO FELIÚ (2006: 227) noted, "the field of public procurement is particularly well-suited to the development and implementation of the new technologies that the information society gives us".

Knowing that the new normative framework established by the 2004 directives provided a necessary but not a sufficient condition for the effective generalised uptake of electronic means for the procedural operations relating to public procurement, the Commission drew up an action plan[2] with the threefold aim of:

- ✓ Ensuring the smooth functioning of the internal market when public procurement is conducted electronically;
- ✓ Achieving greater efficacy in public procurement and improving governance;
- ✓ Working for an international framework of electronic public procurement.

POTENTIAL OF ELECTRONIC PUBLIC PROCUREMENT FOR STRENGTHENING A LARGE EUROPEAN INTERNAL PUBLIC PROCUREMENT MARKET

The use of electronic communication, which is the fastest means of communication for all contracting procedures, has made it possible to shorten the minimum time limits envisaged in Community legislation. This makes the whole chain of actions and notifications associated with them both quicker and easier.

Most authors agree that the following advantages are generally associated with e-procurement: generally lower prices; lower administrative costs; faster procedures; more competition; more bidders;

easier access to the market; greater transparency in relation to processes, and less likelihood of fraud and corruption.

Therefore the modernisation of the public procurement process, which is intimately bound up with electronic means, is therefore strictly linked to the much wider idea of public administration reform (LOPES, 2005). In spite of all the doubts and pertinent criticisms that can be levelled at the legislative changes wrought by the 2004 directives, "the explicit authorization of electronic means is a valuable reform" (ARROWSMITH, 2004: 1297) of the legal framework for public procurement.

The use of electronic means in public procurement is a factor of great value when it comes to making the procedures associated with it more agile and flexible, with both direct and indirect consequences for the performance of the Public Administration. As RIVERO ORTEGA (2004: 30) suggested, "agility and flexibility in the purchase of goods and services are the key to the efficiency of organisations, especially in today's swiftly changing context".

The Community drive to conduct public procurement operations electronically is largely the result of the finding that, although the EU has also established non-discriminatory and transparent normative principles and procedures in this area, and made a huge effort to harmonise legislation, as well as administrative and technical procedures, the level of participation of suppliers from outside the contracting authority's Member State is extremely poor. As DAVIES (2000: 632) observed, "while procurement formed a part of the general programme for the completion of the internal market, closed national procurement markets remain as one of the most intractable barriers to the realisation of the fundamental freedoms".

Among the possible reasons for this situation, expressed in the relative failure of successive EU directives regulating public contracts, Davies suggested that, on the one hand the public purchasing authorities had problems in disseminating relevant information about their procurement requirements, and, on the other, that suppliers and public works contractors had difficulty in pinpointing this information and establishing its true relevance to their particular sphere of business. He believes that "the Community's current initiatives in the area of electronic procurement are intended to address these key concerns" (*ibidem*).

Actually, the Lisbon Council of Europe of 23-24.03.2000 urged the Commission, the Council and Member States to take the necessary steps under the *economic reforms for a complete and fully operational internal market* to ensure that it would be possible to make Community and public sector purchases electronically by 2003.[3]

The main body for defining the EU's strategy and driving its major policy options thus underscored the importance of using the new technologies in public procurement to improve the internal market.

Even though the time target has not been met, since the directives on this issue were only published in 2004, with the obligation on the Member States to transpose them by 31 January 2006,[4] and given that some of them – like Portugal – have not yet done so, both the goal that was then established and the fact that electronic means have great potential to help to achieve a more dynamic internal market are still valid.

Along the same lines, in the context of electronic procurement as one of the areas of the new legal system of public procurement with greatest impact, BOVIS (2006: 83) thinks that "electronic procurement can contribute in increasing competition and streamlining public purchasing, particularly in cases where repetitive purchasing allows efficiencies to be achieved both in time and in financial terms".

THE SPECIFIC QUESTION OF SMEs

On the whole, the crucial role of micro, small and medium sized firms (SMEs)[5] in the European economy must be acknowledged, both as job creators and as drivers of innovation, adaptation to change and entrepreneurism. According to the Commission, prior to the recent entry of Bulgaria and Romania there were around 23 million SMEs in the European Union. They accounted for approximately 75 million jobs and represented nearly 99% of all companies. And as we have seen, the public procurement market represents a considerable slice of Community GDP, which means enormous opportunities for European firms, with SMEs occupying a prominent position among them, given their significance in the EU's entrepreneurial fabric.

Taking these facts as a starting point, Community policy for assisting SMEs aims to help them to gain access to opportunities at the public procurement level, thereby boosting their competitiveness, maintaining

and strengthening their irreplaceable role in job creation and their crucial contribution to economic growth and the competitiveness of the European economy as a whole. For this, the legal framework of public procurement and the procedures that it involves should not contain anything that might hamper equal chances of success in public tenders, no matter what the size of the bidding firm.

But it appears that certain procedures (excessive red tape and its high costs, for instance) and certain practices (such as invitations to tender only being directed at large companies) employed in public procurement may have the practical effect of excluding SMEs. This is where the simplification and use of electronic means in procurement, as envisaged in the 2004 directives, could help to improve the access of these firms to a larger number of public purchasing contracts.

In any case, these chances cannot take the form of any kind of discrimination in favour of SMEs, or of disproportionate and illegitimate favouring of them, since "small and medium sized enterprises (SMEs) must have the ability to take advantage of the new technology on the same footing as larger firms but any assistance given by national governments must be compatible with state aid legislation" (RAMSEY, 2006: 283).

Without prejudice to this position of respecting the principles generally applied to public procurement, the Commission has stressed the need for the public authorities of Member States to encourage the participation of SMEs, especially when the nature and amount of goods and services to be supplied, or the public works to be constructed, are such that the public purchases in question are within their capacities and resources. In fact, the European structures that deal with SME matters complain that "even when the value of the contract is of a size appropriate for SMEs, there are many barriers which discourage SMEs from responding to tenders or even lead them to avoid such opportunities altogether."[6]

Examples of such barriers range from basic difficulties of accessing relevant information about public procurement tenders (including the invitation announcements themselves) to the administrative procedures and legal formalities and red tape involved in submitting bids, not forgetting problems related to the kind of language all too often used (*public procurement jargon)*. Other hindrances to SMEs include deadlines that are sometimes too short and the associated costs, the

complicated nature of the procedures, the demand for particular certificates or costly financial guarantees.

These difficulties, some of which do not only affect SMEs, could be really easily overcome with the proper implementation of the new legal system established in the new directives. The administrative burden of the procurement processes would be lightened, the expense of participating in tenders would be lowered, and procedures would be simplified, becoming more transparent and easier to understand. This is where the use of ICT, especially those in more widespread use, and provided their use did not entail new, technological, barriers, could well mean a significant reduction – or even removal – of some of the more negative features that are generally mentioned as discouraging SME participation in public procurement procedures.

Indeed, one of the provisions introduced by the directives that could really be of benefit to SMEs is that they could perform some of the operations related to public procurement via the Internet, which offers a genuine simplification in learning about and gaining access to public purchasing processes throughout the EU, and heightens the visibility of these business opportunities. Actually, "these new horizons could by especially useful to SMEs by letting them seek opportunities beyond their immediate environment" (GIMENO FELIÚ, 2006: 229), and it may be hoped that the increased electronic public procurement on a European scale will allow firms – especially SMEs – in a Member State to submit bids in procurement tenders in any of the 27 states.

Under what is known as the *Lisbon Strategy*, the EU's institutions have called attention to the relevance of public procurement with a view to stimulating SMEs to perform better, just as it has tried to encourage their access to this market. The Commission has set out to identify instances of good practice in relation to opening up the public procurement market to SMEs, both within Member States and beyond their borders, so as to try and induce their various domestic public administrations to accept these already proven good examples in their legal systems and, above all, in their *praxis*. Meanwhile, since all Member States are bound to transpose and duly comply with the directives, and as they are still quite recent, there is some joint learning to be undergone before full advantage can be taken of the instruments established in the new legal framework. It should also be noted, in relation to this, that the access of SMEs, and the position they occupy in

the public procurement markets, are monitored by reports sponsored by the EU's executive arm, and a study on this very issue was prepared in 2004,[7] with periodic updates being expected.

The path opened up by the 2004 directives for the creation of *centralised public procurement systems*, whenever so established in the transposition into domestic law, to the detriment of decentralised processes – even though these may permit overall savings in purchases made by public authorities – could give rise to perverse effects for SMEs that are quite clearly not intended by the Community legislature. So any increased centralisation with respect to public procurement, implying the supply of goods and services on a national scale could lead to SMEs, accustomed as they so often are to taking part in public tenders on a local or regional level, to be afraid of submitting bids in macro-purchases, particularly when this requires the sort of effort in terms of human, financial and logistical resources that is beyond their ability. The fear of this kind of negative impact can cause some Member States to not use centralised ways of undertaking public procurement.

As a rule, it should be borne in mind when looking at SMEs' access to public procurement that the underlying legal principles contained in the Treaty should also be taken into account. This means that non-discrimination, fair competition, transparency and freedom of movement and establishment must apply to all public contracts, even the less valuable ones, and to every single bidding firm, whether it is a large corporation or an SME. With respect to the latter, the respect for these principles should be even more rigorous, so that SMEs have exactly the same opportunities of access to public purchases as all other companies.

THE PORTUGUESE SITUATION

The transposition of the new directives on public procurement (Directives 2004/17EC and 2004/18/EC) has been done way behind schedule in Portugal, considering that over two years have passed since the deadline established for this to be done (31.01.2006). The Public Procurement Code (*Código dos Contratos Públicos*),[8] duly announced, has only been published at the end of last January 2008, even though several versions of the preliminary draft were discussed since 2006. The working methods adopted by the Portuguese government in the drafting

of the new code on public procurement included phasing it in in two stages.

Phase one involved the preparation of a first version of the part of the code relating to the issues of invitation to tender and implementation of the procurement tender, including the selection of the successful bidder, and this was put before public opinion and specialists in May 2006. As the material in question was basically dealt with by the Community directives, their legislative solutions were closely followed to ensure correct transposition. The partial presentation of the final draft also deliberately aimed to show the competent authorities in the EU that the Portuguese government was committed to transposing the directives, since it was obviously already very late in complying with the deadline.

The second phase, which has come to an end in mid-2007, involved the preparation of that part of the code dealing with the monitoring of contracts for works and contracts to supply goods and services. Along with this, the text submitted in the first phase was being improved, largely in light of the public discussion, with the critical reflection by experts in the field of Public Procurement Law and inputs from conferences held on the new code during this period.

In the meantime,[9] at the end of this pre-legislative journey, the Government did approve the final version (still on a general basis and for consultation purposes) of the Decree-Law that approves the Public Procurement Code - *Código dos Contratos Públicos*, (CCP) which establishes the legal framework that should apply to public procurement and the substantive regime of public procurement that takes the form of administrative contracts.

According to the lawmaker, the aim of this law is to make the "respective regime [correspond] to the requirements of the situation as it stands, in particular those imposed by *e-procurement*, aligning them with the latest Community directives on this matter, as well as rationally organising and harmonising the system governing administrative contracts, unjustifiably fragmented until now." It is stressed that, given the subject of this paper, the future Code will often advocate, in the wake of the EU directives, that it aims to transpose into Portuguese law the use of new information technologies, with special reference to making it compulsory to carry out all the pre-contractual procedures electronically.

This legal rule does not merely mean pursuing the general goal of simplifying pre-contract procedures, but also envisages allowing new

procedural time limits that are considerably shorter than those currently in force, and which can be applied in practice to procurement tenders called for by public authorities. Indeed as ESTORNINHO (2006: 11) noted, one of the aims of this legal reform is to "foster technological innovation in purchasing processes, in an effort to shorten deadlines, cut costs and improve efficiency by dematerialising procedures".

Furthermore, these new laws are part of the wider process of modernising Portugal's Public Administration and cutting bureaucracy that is currently in progress, establishing a number of legal measures as set forth in the government's programme that guides the policy of administrative simplification within this general framework (the so-called *Programa SIMPLEX*). Among other things, the CCP provides for the dematerialisation, in broader terms, of public procurement procedures, thus allowing open invitations to tender to be made electronically, and it establishes replacing the official document, in electronic procedures, with online consultation of the list of accepted tenderers and the bids submitted. And so, as the aforementioned government document says, "the CCP makes the public procurement system more efficient, the procedure shorter, and its monitoring and supervision more effective, with the entire process thus becoming simpler and more flexible, and, at the same time, ensuring greater rigour and transparency in the management of taxpayers' money."

The new code will repeal Decree-Law no. 59/99 dated 3 March, Decree-Law no. 197/99 dated 8 June, and Decree-Law no. 223/2001 dated 9 August, which are the laws currently governing public procurement matters. It will systematise, harmonise and consolidate into a single text all the matters relating to the framing and implementation of public contracts, especially public works contracts, public works concessions, public services concessions, the leasing and purchasing of chattels and the acquisition of services. The same law will also regulate contracts related to public utilities sector (water, energy, transport and postal services).

CONCLUSION

By way of conclusion it must be acknowledged that the new Community directives on public procurement have created a legal framework with great potential in terms of improving the internal

market. They have specifically increased the possibilities for firms competing for public supply and works contracts to operated beyond the Member State in which they are based.

Now, a single public procurement market that sets out to be integrated and open cannot be held to have been constructed unless all the firms that could compete for a particular works or supply contract can actually do so, without any constraint other than that arising from its own business capacity. But it is equally true that the assessment of the real reach and the actual outcomes of the normative innovations introduced depends almost entirely on the performance of each market operator (bidding firms and public authorities), the experience of the convergence of all these individual activities and the harmonisation of domestic approaches when implementing and making use of the new means made possible by Directives 2004/17/EC and 2004/18/EC. For example, with specific reference to the use of ICT instruments, all the possibilities indicated could be derailed by barriers of a similarly technological nature if the endeavours of the Commission and its dependent bodies fail to achieve the interoperability of the various systems and methods adopted by the 27 Member States.

It is worthwhile noting here the Commission's worry when it says, in relation to *e-government* in the future of Europe, that a "a Community approach integrating the Internal Market dimension is crucial to prevent potential fragmentation of the procurement market due to incompatible electronic procurement systems and standards across Europe."[10] The same document also makes it clear that this concern will also be essential "to avoid imbalances in economic development due to slower penetration of the new technologies in certain countries or regions".

The use of electronic means cannot be viewed, however, as the sole way of improving the internal public procurement market, but they assuredly make a critical contribution towards enhancing the efficacy and efficiency of public organisations and to reinforcing certain fundamental principles that must underpin public purchasing as a whole, i.e. transparency, equal treatment and free competition. Even though electronic means are important tools in the hands of public administrations and economic operators, this is in fact how they should be seen, that is, as a means and not as ends in themselves, far less as a panacea for accomplishing a perfect internal market in the context of public procurement. The relevant directives and successive documents

emanating from Community Institutions have undoubtedly vastly improved the potential for the better functioning of this European market, with the further possibility of their opening up so that firms from anywhere in the EU can compete on a more equal footing in the public purchases undertaken by all Member States.

In addition, the new legal framework clarifies matters in relation to the introduction of ICT into public procurement, thus demonstrating the Community institutions' political will both to implement these technologies speedily and to embrace their legal worth, on the same (or even higher) level as that of the traditional paper form. We must therefore agree that "the new legislation also contributes significantly to flexibility by removing some uncertainties over using electronic communications" (ARROWSMITH, 2004: 1322), which may yet persist.

For this it is not only desirable (as the Commission states[11]) but essential that the implementation of electronic public procurement becomes as widespread as possible, if the commitment of the Member States to "endow all the public administrations in Europe with the necessary means for them to conduct 100% of public procurements electronically [...] and to ensure that at least 50% of public procurements that exceed the EU threshold are carried out electronically in 2010"[12] is fulfilled. At any rate, the results may not be as hoped for if those targeted in the Community law, that is to say, the contracting authorities and competing firms, fail to make proper use of the new tools that are made available to them. What happens in the next few years will be crucial to the legal-economic assessment of this topic.

NOTES

1. Directive 2004/17/EC of the European Parliament and of the Council, dated 31/3/2004 (OJ no. L 134, dated 30.4.2004, pp. 1-113) and Directive 2004/18/EC of the European Parliament and of the Council, dated 31/3/2004 (OJ no. L 134, dated 30.4.2004, pp. 114-240).

2. COM (2004) 841 final – *Action plan for the implementation of the legal framework for electronic public procurement*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, (http: //ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/actionplan/actionplan_en.pdf) and its annex, SEC (2004) 1639 - *Commissio*

n Staff Working Document (http://ec.europa.eu/governance/impact/docs/ia_2004/sec_2004_1639_en.pdf), 29.12.2004 [Retrieved on March 19, 2007].

3. Cf. *Presidency Conclusions*, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm [Retrieved on March 19, 2007].

4. Cf. Article 71/1 and Article 80/1, of Directive 2004/17/EC and Directive 2004/18/EC, respectively.

5. Pursuant to Article 2 of the annex to *COMMISSION RECOMMENDATION of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises*, OJ L 124 of 20.5.2003, p. 36, the EC defines what is meant by SMEs, bearing in mind the permanent employees and certain financial thresholds. Thus, "the category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million." (no. 1). Each category in this general definition is itself defined as follows: "a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million" (no. 2); "a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million" (no. 3); a medium-sized enterprise is defined by certain exclusions, i.e. it will employ 50 or more workers (but fewer than 250) and have an annual turnover of less than 50 million euros, but more than 10 million euros, or whose total annual balance sheet does not exceed 43 million euros, but is more than 10 million euros.

6. Cf. *European portal for SMEs*, http://ec.europa.eu/enterprise/entrepreneurship/public_procurement.htm [Retrieved on April 19, 2007].

7. *Idem.*

8. That was approved by Decree-Law no. 18/2008 dated 29 January 2008, and will enter into force six months later. Completely electronic public procurement procedures will be binding a year later.

9. Cf. Point 2 of the Portuguese Cabinet document *Comunicado do Conselho de Ministros* of 01.06.2007, http://www.portugal.gov.pt/Portal/PT/Governos/Governos_Constitucionais/GC17/Conselho_de_Ministros/Com

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