INTERINSTITUTIONAL JOINT PUBLIC PROCUREMENT ACROSS FRONTIERS: THE CASE OF IT PROCUREMENT IN THE EUROPEAN UNION INSTITUTIONS, AGENCIES AND OTHER BODIES

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ABSTRACT

The European Union (EU) —a unique economic and political partnership between 27 democratic European countries— is run by a set of Institutions, Agencies and Other Bodies which adopt its legislation and implement its programmes. Their work relies very much on the use of Information and Telecommunication Technologies. In order to ensure efficient delivery of information systems and IT services, the EU Institutions, Agencies and Other Bodies call on the market to supply them with IT products, services and consulting. While every Institution, Agency or Other Body has its own independent IT service, the size and budget of which depends very much on its role and responsibilities, there are coordination mechanisms in place in order to increase synergies, set up shared services and exchange best practices.

The search for synergies has been particularly successful in the area of IT procurement and contracts. Joint procurement operations may involve more than 35 awarding authorities in the 27 Member States of the European Union. The paper describes the legal framework, the

* The views expressed in this paper are those of the author and do not necessarily reflect those of the European Commission nor of the Interinstitutional Committee on Informatics.

approach and the methods used to carry out these joint procurement procedures. It assesses the framework resulting from current practices in these areas, and reviews some of the benefits achieved through them. Finally, the paper outlines the way ahead with the introduction of e-Procurement.

INTRODUCTION

The present paper discusses the joint procurement activities of the European Union's Institutions, Agencies and Other Bodies in the field of IT.

It is worth noting that, although all of these entities belong to the same international —or rather supranational— organisation, for the purpose of public procurement each of them has the status of a separate awarding authority. As a result, the joint procurement operations described in this paper may easily involve more than 35 awarding authorities spread across the 27 Member States of the European Union.

For example, in 2009, out of the 15 main procurement procedures started by the European Commission, 9 involved other Institutions, Agencies and Other Bodies. The number of participants in these joint procurement procedures ranged from a handful to 36. The budget per joint procedure ranged between 4 million and 47 million euro spread over several years, for a total of about 132 million euro; of this total figure, the Commission represented about 40%.

The paper first presents the European Union and its institutional picture, with particular reference to the European Commission, then describes the relevant legal framework, reviews the approach and methods followed to ensure efficient, pragmatic and legally-compliant co-operation, and finally outlines the benefits achieved through the current practices as well as the way ahead with the introduction of e-Procurement.

THE EUROPEAN UNION AND ITS INSTITUTIONAL SET UP

The European Union

The European Union (EU) is a unique economic and political partnership between 27 democratic European countries aimed at creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen, and at achieving peace, prosperity and freedom for its citizens in a fairer and safer world.

This partnership is the result of a number of international treaties agreed voluntarily and democratically between the Member States

(MS) since the end of World War II — hence the initial emphasis on peace. The EU is based on the rule of law, and therefore can only act within the limits and in the areas of competence laid down in those treaties. Although explaining even the basics of the EU's constitutional framework is beyond the scope of the present paper, it is worth mentioning at least the following treaties:

- The founding treaties signed between the 6 original MS (Belgium, France, Federal Republic of Germany, Italy, Luxembourg and the Netherlands) in the '50s, namely the Treaty establishing the European Coal and Steel Community (ECSC), signed in Paris in 1951; the Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (Euratom), both signed in Rome in 1957.
- The treaties amending or supplementing the founding treaties, the main of which are the Merger Treaty (1965), the Single European Act (1985), the Treaty on European Union or Treaty of Maastricht (1992), the Treaty of Nice (2001) and the Treaty of Lisbon (2007), which entered into force on 1 December 2009.
- Various "accession treaties" extending the number of MS up to (currently) 27 in successive enlargement waves.

Based on "the Treaties" (as they are collectively called) or primary legislation, the EU can adopt secondary legislation —in the form (mainly) of regulations, directives and decisions—, which is then applicable in all the MS.

The EU Institutions, Agencies and Other Bodies

To achieve the EU's aims, the Treaties set up a number of Institutions, Agencies and Other Bodies fulfilling various roles and responsibilities, which together run the EU and, among other things, adopt its secondary legislation. This institutional set up consists of several "layers".

Technically speaking, the only "Institutions" are those mentioned in Article 13(1) of the Treaty on European Union (TEU):

- the European Parliament (EP), representing the people of Europe;
- the European Council, consisting of the Heads of State or Government of the MS, which sets the EU's political agenda;
- the Council, representing the national governments of the MS[1];

- the European Commission (or "the Commission"), which seeks to defend the interests of the Union as a whole;
- the Court of Justice of the European Union, which upholds the rule of European law;
- the European Central Bank, responsible for European monetary policy;
- the Court of Auditors, which checks the financing of the EU's activities.

To this primary layer should be added:

- the two advisory bodies mentioned in Article 13(4) TEU, namely the Economic and Social Committee and the Committee of the Regions[2];
- the offices supporting two one-person specialised entities with "watchdog" responsibilities, namely the European Ombudsman and the European Data Protection Supervisor;
- various types of agencies [3] set up through secondary legislation, such as the (currently 22) "classic" regulatory agencies, the agencies entrusted with tasks in the fields of common foreign and security policy (currently 3) or in the area of police and judicial co-operation in criminal matters (currently 3);
- a more recent and distinct type of agencies, namely the so-called "Executive Agencies" (currently 6)[4], which *de facto* are spin-offs of former departments of the Commission —to which they remain closely linked— and are entrusted with the management of specific EU programmes;
- two financing bodies, namely the European Investment Bank and the European Investment Fund;

This list is by no means exhaustive[5] but it is more than sufficient to show that the term "EU Institutions, Agencies and Other Bodies" covers a very complex reality. Indeed, a joint procurement action can easily comprise more than 35 awarding authorities [6] spread throughout the 27 MS. In addition, the trend towards greater specialisation —and hence towards a greater number of entities— has been patent over the last few years.

For convenience, we will be using the abbreviation "EUIs" to refer to all the categories of "EU Institutions, Agencies and Other Bodies" outlined above.

The Commission

The Commission is a college consisting currently of 27 members (1 per MS). Its role in the EU's institutional framework is particularly noteworthy.

Indeed the EU is a supranational organisation, to which the MS have delegated areas of sovereignty. Legislation enacted following the procedures defined in the Treaties becomes law in all the MS. This happens regardless of whether a MS has voted for or against a particular EU legislative measure, and with no further need for a national act ratifying it; national courts are also required to apply EU legislation, if necessary by "disapplying" national law, including — in extreme cases— constitutional law. This departs radically from classical intergovernmental organisations, and explains the unique character of the EU mentioned in the beginning.

A corollary of this supranational character is the need for an institution representing independently —and consistently— the interest not of MS, or regions, or social partners, but of the EU *as a whole*. The European Commission is such institution. While the legislative power lies essentially with the Council and the EP, the Commission's almost exclusive power of legislative initiative turns it into the real engine behind the EU and, more generally, behind the process of European integration.

Once EU legislation is enacted, the Commission sees to it that it is consistently applied across the 27 MS. It also fulfils a number of other executive tasks.

Because of the nature of its role, the Commission is the largest administration among the EUIs, comprising approximately 38 000 staff members. From an organisational point of view, it is divided into some 40 directorates-general (DGs) and services, which are subdivided in turn into directorates, and directorates into units.

The administrative entity responsible for corporate IT and telecommunications at the Commission is the DG for Informatics (DIGIT); it is split between Brussels and Luxembourg. This central structure coexists with local IT teams in most DGs, which cater for specialised needs or for proximity support services.

THE LEGAL FRAMEWORK FOR PROCUREMENT IN THE EU INSTITUTIONS, AGENCIES AND OTHER BODIES

EU secondary legislation in the field of public procurement: the directives

A number of principles laid down in the Treaties (in the form of 'fundamental freedoms') are directly relevant for the award of public contracts in the MS of the EU: freedom of movement of goods,

freedom of establishment and freedom to provide services across the whole EU. Equally relevant are other principles deriving from them, and which are fully recognised in EU law: equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

However, for the award of public contracts above a certain value, the EU legislator considered it desirable to draw up additional provisions coordinating national procedures, so as to ensure the effects of the above-mentioned Treaty principles and to guarantee the opening-up of public procurement to competition.

The main provisions in this area are the following:

- Directive 2004/17/EC (the "Utilities Directive")[7];
- Directive 2004/18/EC (the "Public Sector Directive")[8];
- Directive 2007/66/EC (the "New Remedies Directive")[9];

These items of secondary legislation are aimed at ensuring competitive tendering for public contracts and at guaranteeing transparency and equal treatment for all tenderers, so that all public contracts are awarded to the tender offering best value for money, regardless of where the tenderer is based. As a rule, public contracts have to be advertised EU-wide, so that firms in all MS can bid for them. Technical specifications liable to discriminate against bidders from other MS are forbidden, and the award has to be based on objective and previously defined criteria. In addition, aggrieved bidders can rely on efficient review procedures when needed.

It must be noted that public procurement in the EU is also subject to international agreements, the most important of which is the World Trade Organisation's Government Procurement Agreement (GPA). A certain number of bilateral trade agreements with third countries also include public procurement provisions.

Public procurement directives *vs* Financial Regulation and Implementing Rules

The fact that the above-mentioned secondary legislation was enacted in the form of directives has important consequences for the subject covered in this paper. Indeed, directives lay down certain end results that must be achieved in all MS; these are then responsible to align national legislation as necessary to achieve those results. They are, therefore, addressed at the MS, not at the EUIs.

This has required the enactment of an additional body of public procurement legislation addressed at the EUIs themselves, which is separate from (but closely linked to) the public procurement directives addressed at the MS, particularly Directives 2004/18/EC

(the "public sector directive") and 2007/66/EC (the "remedies directive").

The EU legislator inserted the relevant provisions into the legislative package governing EU budgetary rules and procedures, a 2-layer structure comprising:

- the "Financial Regulation" (FR) adopted through an act of the Council[10]; the procurement-related provisions are to be found at its Part One, Title V;
- the "Implementing Rules" (IR) adopted through an act of the Commission[11]; these rules contain more detailed provisions and follow the same structure as the FR.

Earlier versions of the FR and the IR did not include these provisions but made instead reference to the directives.

The current versions of the FR and the IR including the relevant provisions from the *former* public procurement directives —and adapting them to the specific context of the EUIs— were adopted in 2002 and have since been reviewed a number of times. Two significant revisions were aimed precisely at bringing them into line with the *new* public sector and remedies directives, both of which postdate the FR and the IR.

Similarities

It is therefore only natural that the procurement provisions contained in the FR and the IR are largely inspired by the equivalent ones in both directives — indeed in many cases the wording is identical.

The underlying principles are the same: pursuant to Art. 89 FR "*all public contracts* […] *shall comply with the principles of transparency, proportionality, equal treatment and non-discrimination* [and] *shall be put out to tender on the broadest possible base* […]"; these procurement-specific principles supplement the general budgetary principles laid down at Article 3 FR, which include sound financial management.

Not surprisingly, the basic procurement methods are also the same (Art. 91 FR): open or restricted calls for tender as the default procedures, and —when duly justified— negotiated procedures with or without publication of a notice and competitive dialogues[12]. Art. 129 IR lays down a number of simplified procedures for contracts below 60 000 €.

It must also be noted that the EUIs are bound to apply the World Trade Organisation's Plurilateral Agreement on Government Procurement (GPA) (Art. 107 FR) and similar bilateral agreements to which the EU itself —usually in addition to its MS— is a party.

… and some differences

Nevertheless, procurement conducted by the EUIs under the FR and the IR also presents a number of peculiarities which are worth noting.

The most salient of them is perhaps the fact that, roughly speaking, the FR and IR taken together are only slightly more detailed than the directives as regards many practical aspects of how procurement has to be conducted. Indeed, the directives leave it for the MS to clarify those practical aspects through the so-called "national implementing measures". Many MS have enacted very detailed rules and regulations which awarding authorities have to follow and which govern issues of communication, formalities, deadlines, etc. for which the directives still leave plenty of room. While this approach may look too rigid, it can also help awarding authorities to have greater certainty as to what they should do in many cases, something which they may welcome given the enormous variety of unforeseen situations which can arise in a procurement procedure. In the absence of such detailed provisions, the awarding authorities of the EUIs arguably have to "play by ear" more often than their national counterparts in the MS.

A similar observation comes from the fact that national awarding authorities can rely on their long-established civil and/or administrative law traditions as an additional tool to address complex situations. This has proved much more difficult in the case of the EUIs, which can certainly refer to general principles common to the MS — but not, for example, to a specific civil code which would supplement the FR and the IR.

Similarly, if a dispute arises which cannot be resolved through administrative means, aggrieved bidders in the MS can turn to ordinary courts. A certain degree of "economy of procedure" is automatically ensured as only the most complex (and economically significant) cases will end up in the top national courts[13]. In the case of the EUIs, however, aggrieved bidders have to go directly to the General Court (with one possibility of appeal to the Court of Justice). This is why a sizeable amount of case-law from the General Court exists already in relation to procurement conducted by the EUIs — sometimes on disputes which would have been unlikely to reach even ordinary appeal courts in the MS.

Having said this, one should also note the considerable interest taken by the European Ombudsman in monitoring procurement conducted by the EUIs. While the European Code of Good Administrative Behaviour which he promotes is still just a proposal, and while he lacks the power to issue binding decisions, the fact remains that his remarks provide the EUIs with an additional collection of

procurement-related administrative guidance which can, in certain cases, supplement the FR and the IR.

Last but not least, one should highlight the enormous importance of framework contracts[14] in the precise context of the EUIs, and more particularly in the administrative field, which very often requires a central body (like DIGIT) to provide a contractual framework which can then be used by decentralised entities (such as the other DGs). This is even more the case when the contract is awarded as a result of an interinstitutional procedure, for reasons which will be more clearly understood later in this paper.

The long way towards a legal framework for joint interinstitutional procurement

A political will to promote interinstitutional co-operation between the EUIs in the field of procurement (among others) has existed for many years, if not decades. In the '90s, for example, this will sometimes took the form of ritual resolutions from the Budgetary Authority, suggesting that administrative credits could be cut or frozen if no progress was made in that direction.

The reality was, however, that the statutes did not make the task easy at all. All the legal provisions then in force were conceived for procurement procedures involving a single awarding authority. Joint procurement operations were not explicitly forbidden, but an attentive reading of the relevant provisions suggested that a joint procurement procedure could only be the multiplication of individual procedures. From a legal point of view, nothing could prevent, for example, two participating EUIs to reach a different decision following the evaluation of a call for tenders, and to conclude each a contract with a different economic operator.

A good illustration of this dissonance between political statements and legislative texts is the fact that the only provision about interinstitutional co-operation in the version of the FR which was in force between 1978 and 2002 stated that "*if required, an Advisory Committee on procurements and contracts common to all the institutions may be set up*"[15]. At that time, such advisory committees existed in all the EUIs and were responsible for *ex ante* control of contract award proposals. Such interinstitutional advisory committee was, in fact, never created.

From the late '90s, however, the pressure was already very high and some EUIs (although initially only the largest ones) had started to work out *pragmatic* methods to carry out procurement procedures jointly. They were based on the principle that there would be a leading EUI which would not only carry out most of the administrative tasks but also provide actual leadership in conducting

the procedure (e.g. for defining the needs, prospecting the market, etc.); conversely, there was a more or less implicit understanding that the other EUIs would not take any action which could jeopardise a "common" result. This implied that, if its needs were significantly different, an EUI should abstain from participating in a joint procedure rather than adopt a "wait and see" approach.

These methods were defined more or less informally, through exchanges of notes, letters of intent, etc. While they did not contradict any explicit legal rule, they arguably went some way beyond the spirit of the existing statutory provisions, which placed all the "awarding sovereignty" with the authorising officer of *each* EUI. The resulting arrangements were refined through experience, particularly in the IT field, although at first they were conceived for a rather limited number of EUIs (those based in Brussels and Luxembourg), which had relatively similar needs, addressed themselves to the same local market and co-operated in other administrative areas. It must be noted that, already at that stage, the leading EUI —at least in the IT field— was almost invariably the Commission.

The new FR and the IR adopted in 2002 did not change this picture immediately. Once more, joint interinstitutional procurement was not explicitly forbidden, but it still lacked any clear legal status.

It was not until the first major revision of the current FR in end 2006[16] that the following new provision was inserted into its Art. 91(1): "*Where a public contract or a framework contract is of interest to two or more institutions, executive agencies or bodies* […]*, and whenever there is a possibility for realising efficiency gains, the contracting authorities concerned shall seek to carry out the procurement procedure on an interinstitutional basis*".

This opened the door at last to including into the IR a number of explicit provisions on how joint interinstitutional procurement should be conducted. Indeed, a few months later, in April 2007, the following revision of the current IR[17] introduced new rules on such procedures, more particularly:

- All participating EUIs must be named explicitly in the contract notice (Art. 118(4)). This is a matter of transparency as against prospective tenderers and had always been the Commission's position. However —in the absence of an explicit provision— the enforcement of this rule often created practical problems.
- Opening committees (Art. 145(2)) and evaluation committees (Art. 146(2)) must be appointed by the authorising officer in the leading EUI, but with the

desideratum that they should include members of other EUIs. This simply reflected consistent practice.

- The final award decision is taken by the authorising officer in the leading EUI alone (Article 147(3)).

The latter is undoubtedly the most innovative provision. Up to that point in time, the ultimate absolute sovereignty of *each* participating EUI's authorising officer could not be called into question. Although no major problems have ever occurred in the IT field, in theory nothing prevented a participating EUI from refusing the outcome of a joint procurement procedure. Indeed, under the provisions in force until then, the authorising officer of each EUI *had* to sign a separate award decision. With the new provision, a decision from the leading EUI's authorising officer automatically binds the other participating EUIs.

This new element clearly reinforces the position of the participating EUIs as a single, united front as against the economic operators.

The situation which has arisen from the new provisions outlined above is still far from settling *all* the practical details which joint interinstitutional procurement involves. However, the fact that a workable legal framework now exists recognising the possibility to conduct such procedures, and setting the general principles for it, is undoubtedly very good news for public purchasers on the ground.

INTERINSTITUTIONAL CO-OPERATION IN THE FIELD OF IT

It should now be reminded that each EUI has its own IT department. And, because each EUI's sphere of competence within the overall institutional set up of the EU is different, these autonomous IT services are aligned to serve the core business of their respective organisations. It is easy to understand that the IT department of, for example, the Court of Justice of the European Union —which fulfils a judicial role— cannot be expected to be organised in exactly the same way, and have the same priorities, as that of the European Medicines Agency (EMA), the main function of which is to evaluate and supervise medicinal products for human and veterinary use and which is largely self-financed through the collection of fees.

Other important factors in this respect are:

- the size of the various IT departments, which can vary considerably, and not only in absolute terms but as a ratio in respect of the overall size of each administration;
- the location, with a clear difference between the "historical" main EUIs based in Brussels, Luxembourg and Strasbourg, —which share what could be called a EU headquarters

environment— and the other EUIs, generally of more recent creation, which are spread across the 27 MS and inserted into essentially national contexts.

In these conditions, and for all the importance of a clearer legal framework as outlined above, joint IT procurement between the EUIs is mainly the result of a long-established pattern of co-operation between their IT departments in a wider context.

The College of Heads of Administration

This co-operation takes place under the umbrella of the College of Heads of Administration (CHA), an entity created more than 50 years ago —in the very beginning of the process of European integration— in order to ensure a consistent interpretation of the EU Staff Regulations across the then existing EUIs. Over time, however, the CHA started to discuss other matters which were also under the responsibility of the Human Resources departments. IT was —and, in some cases, still is— one of these subjects.

The Interinstitutional Committee on Informatics

As IT grew in importance, a specialised sub-group was eventually created: the Interinstitutional Committee on Informatics (ICI), which comprises the CIOs of the European Parliament, the General Secretariat of the Council, the Commission (which currently holds the chair), the Court of Justice of the European Union, the European Central Bank, the Court of Auditors, the Joint Services of the Economic and Social Committee and the Committee of the Regions, the European Investment Bank and a representative of the "classic" regulatory agencies. A good proof of the importance of the work of the ICI is that its membership has been extended to include other intergovernmental organisations based in Europe but which —strictly speaking— are not part of the EU legal order, in particular Eurocontrol and the European Patent Office.

The purpose of creating the ICI was to identify possible areas of synergy in the field of IT across the EUIs, and to take advantage of them as far as possible, in particular through the exchange of best practices.

The ICI reports yearly to the CHA. It meets 3 or 4 times per year, each time at the site of one of its members.

These contacts have enabled more flexible solutions than those which would have been possible if each IT department had continued to operate in isolation. A common approach has been developed which allows one or more EUIs to request, on a voluntary basis, to be provided with IT services by another one, without jeopardising their ultimate autonomy. There are, for example, administrative

arrangements in place whereby the Commission calculates the wages for staff of other EUIs, shares its Internet connection, provides website hosting services in its Data Centre, customises its information systems for human resources management so that they can be used by other EUIs, etc.

The Interinstitutional Group of Contact on IT Procurement

The ICI has itself set up a number of working groups of a more technical nature. One of them is particularly relevant for the subject matter of the present paper: the Interinstitutional Group of Contact on IT Procurement (known as GCIM by its French abbreviation).

The membership of the GCIM consists of approximately the same EUIs as the ICI, with some exceptions. Eurocontrol also participates, but with an observer status; indeed, as a non-EU organisation, Eurocontrol is —strictly speaking— not subject to the same procurement regulations as the EUIs (i.e. the FR and the IR), and its participation in joint procurement procedures would prove more problematic.

The GCIM meets 5 or 6 times per year and reports to the ICI every year. It is currently chaired by the European Parliament. It has as its mandate to promote the identification of common IT needs in order to prepare the ground for launching joint procurement procedures in the most favourable conditions for the EUIs. To that end, it follows up closely the IT procurement cycles in the EUIs, i.e. both the joint and the individual procedures.

The GCIM is also a forum for exchanges of information and best practices about contractual and other legal issues which are of particular relevance for IT departments: standard clauses specific for IT contracts, changes in the procurement regulations which may impact IT departments, IT procurement case-law, etc.

A JOINT IT PROCUREMENT PROJECT "FROM CRADLE TO GRAVE"

At this stage it may be useful to outline exactly how the EUIs go about conducting a joint procurement project in the field of IT.

The procurement procedure

For the sake of simplicity, we will take the most frequent example: that of a call for tenders under the open procedure where the leading EUI is the Commission —and which, as explained above, may eventually involve some 35 awarding authorities in all 27 MS—.

1 Once a particular need is identified as suitable for a joint procurement procedure, the Commission includes in the relevant **pre-information notice** (Art. 118(2) IR) a statement

to the effect that other EUIs to be defined at a later stage may join the announced procedure in due course. This suitability is determined on the basis of previous experience, contacts through the GCIM and other channels, etc. As a general rule, most contracts for hardware and software, perhaps including low- and mid-level associated services, are considered suitable by default, whilst contracts for development and other intellectual services are generally considered unsuitable for a number of reasons (among others, the fact that they are regarded as too dependent on the situation of local markets).

2 The Commission then draws up an **orientation document** explaining the current situation, the reasons to start a new procedure, the aims to achieve, the risks and opportunities, the possible award criteria to be used, etc. This document is approved at the highest level of management at DIGIT. Drafting this document does not constitute a legal requirement but has proved to be a "best practice" and is particularly useful in order to make sure that all participants in the procedure —present and future— are "on the same page" and have a common understanding about it, thereby preventing subsequent problems. Although this document is drawn up under the exclusive responsibility of the leading EUI, it is not unusual to integrate into it well-known requirements of other EUIs, insofar as they are compatible with the overall aims.

3 The orientation document is then sent to all EUIs, asking them to reply whether they want to join the procurement project on that basis, as well as —as the case may be— any other useful information, such as their volume estimates.

4 The EUIs which confirm their willingness to participate have to sign a **letter of intent** defining their rights and obligations *vis-à-vis* the Commission as leading EUI, in particular for matters not explicitly covered by the relevant legal framework (FR and IR).

5 A drafting group comprising technical but also procurement experts from the Commission is appointed to draw up the **technical specifications**. This group is open to members of other EUIs which may have a particular interest in the procedure at hand. However, the work of the drafting group cannot result in alterations to the principles laid down by the Commission's top management in the orientation document, unless this document is formally amended through the same procedure. This has appeared necessary to avoid the introduction of "patchwork" needs which could jeopardise

the overall consistency of the procedure and its economic efficiency.

6 When the tendering specifications are ready, the Commission publishes the **contract notice** stating, as foreseen in Article 118(4) IR, the precise list of EUIs on behalf of which it is acting and which are also taking part in the procedure as additional awarding authorities. From this point no other EUIs are allowed to join the procedure and/or, at a later stage, the resulting contract.

7 The tendering specifications are made available to all interested economic operators. They give further details about the volume estimates for *each* of the participating EUIs as well as other information which may be relevant for the formulation of their offers (e.g. places of delivery).

8 The Commission's authorising officer appoints the **opening and evaluation committees,** which insofar as possible include members from the other participating EUIs, in line with the above-mentioned provisions from Art. 145(2) and 146(2) IR.

9 At the end of the procedure, the evaluation committee draws up its **report** containing an award proposal (cf. Art. 147(1) IR), which is presented to the Commission's authorising officer.

10 In accordance with additional control mechanisms established at DIGIT, the intention to award the contract is then notified to an **advisory group** which is external to the directorate-general itself. This group may select the file for closer examination (particularly of the procedural aspects) on the basis of a sampling mechanism. If the file is examined, the advisory group will issue an opinion which may contain recommendations.

11 After considering the evaluation report and, as the case may be, the opinion of the advisory group, the Commission's authorising officer adopts an **award decision**, which is notified simultaneously to successful and unsuccessful tenderers[18]. Since the recent changes made by the legislator to Art. 147(3) IR, this is a *single* award decision which binds all the participating EUIs; it also states the market volumes earmarked for each of them (based on their initial estimates and the price of the selected offer).

12 Following a number of formalities, the authorising officer signs a **framework contract** with the successful tenderer on behalf of the participating EUIs.

13 The Commission then publishes the **contract award notice** as foreseen in Art. 118(4) IR. This notice states the total awarded amount for all the participating EUIs.

14 During the lifetime of the contract, the Commission, as leading EUI, is responsible for ensuring that *ex post* **transparency requirements** are met. For example, it collects information about actual usage of the contract by all the EUIs and aggregates it as required in the legal framework.

This cycle will usually start again about one year before the expiration of the contract.

Contract performance

So, as we have seen, it is possible —although not easy— for EUIs to procure supplies and services jointly. However, what about actual contract performance? Who places the orders and who pays the invoices? Indeed in this area we find a major obstacle: the budget of each EUI is separate, and credits made available to a given EUI can be committed validly only by an authorising officer of that EUI.

Hopefully the FR and the IT contain certain provisions about the form of the contracts which allow for some flexibility in this respect.

This is precisely why all the contracts referred to in this paper are "framework contracts". According to Art. 88(2) FR, "*Framework contracts* [are aimed at] *establish*[ing] *the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged*". In other words, they lay down the basic terms of the contractual relationship but do not, in themselves, constitute orders of goods or services.

Actual orders are instead placed through "specific contracts". The relevant provision reads as follows: "*Specific contracts based on framework contracts shall be awarded in accordance with the terms of the framework contract, only between the contracting authorities and the economic operators originally party to the framework contract. When awarding specific contracts, the parties may not make substantial amendments to the terms laid down in that framework contract*" (Art. 117(2) IR).

And, crucially in the context of the EU budgetary rules, "*Only specific contracts based on framework contracts shall be preceded by a budgetary commitment*" (Art. 117(5) IR).

This 2-layer structure enables a large number of actors (other EUIs but also other decentralised departments of the Commission itself) to *use* the result of a procurement procedure (= the framework contract) by issuing orders (= specific contracts) based on the agreed terms. While these orders cannot alter the result of the call for tenders, they

are autonomous acts which can be signed by any authorising officer from one of the EUIs which are a party to the contract.

Before signing a specific contract (legal commitment), the department in charge in a given EUI must reserve the relevant funds from its budget (budgetary commitment). It will afterwards be responsible for accepting the deliverables, paying the invoices, etc. Minor incidents affecting a specific contract are also handled by the EUI which has signed it. But, naturally, in case of major or systematic disruptions in contract performance, DIGIT will step in in its role as "master" of the framework contract to remind the contractor about its obligations.

For the sake of completeness, it must be added that DIGIT has put in place a procedure for *ex ante* control of specific contracts to be concluded by other authorising officers *within the Commission*. This procedure enables to keep total actual expenditure under the framework contract in line with the announced estimates and to ensure that the orders placed are fully in line with the terms of the framework contract.

OVERALL APPRAISAL OF THE CURRENT FRAMEWORK

As we have seen, progress in the area covered by the present paper has been the result of the combination of a series of factors:

- the Budgetary Authority's political will to achieve economies of scale through interinstitutional co-operation;
- the slow but decisive changes in the relevant legal framework;
- the general impetus for co-operation between the EUIs in the field of IT provided by the ICI;
- the GCIM's work in ensuring constant exchanges of information and best practices in the area of IT procurement;
- and, above all, the effort of many IT procurement experts on the ground to work out pragmatic solutions in a somewhat uncertain environment.

Over time, this has brought about a well-established tradition of joint work in the field of procurement between the IT departments of the EUIs, which remains nonetheless deeply rooted in down-to-earth considerations.

In particular, it is generally well understood that, in most cases, the main beneficiaries of these efforts are not the largest EUIs, such as the Commission itself, the European Parliament or the Council. Indeed these EUIs (together or even alone) often have sufficient "critical mass" to obtain prices which would be very similar to those

resulting from a call for tenders involving many more EUIs[19]. On the other hand, smaller EUIs, in particular those scattered outside the Brussels – Luxembourg – Strasbourg triangle can undoubtedly improve their bargaining power by going with the largest EUIs.

Ultimately, however, the European taxpayer is unconcerned by these niceties. What matters, and rightly so, are economies of scale.

In any case, these considerations explain why other EUIs are readily willing to accept:

- that the Commission imposes a rather strict discipline for interinstitutional calls for tender, in terms of deadlines to confirm participation and other formalities, unreserved acceptance of the orientation document, etc.;
- that the Commission cannot open *all* of its IT procurement to the other EUIs[20], as this would risk making certain (already very complex) projects simply unmanageable.

As far as the second point is concerned, it is worth mentioning that other large EUIs, in particular the European Parliament in the area of IT services, are increasingly supplementing the role of the Commission as natural "leading EUI" by taking over this function when the Commission chooses to go alone. And there are also good examples of "clusters" of EUIs associating with each other for specific procurement projects, such as the Council, the Court of Justice of the European Union and the Court of Auditors for their accounting systems.

MAJOR ACHIEVEMENTS

The following facts and figures can give an overall indication of the level of co-operation achieved by the IT departments of the EUIs through joint IT procurement operations led by the Commission:

- Joint procurement has brought about a major convergence in the field of **hardware** across a vast majority of EUIs. For example, the last call for tenders for PCs, awarded in 2007, involved 23 EUIs in 11 MS, purchasing together some 80,000 units over the duration of the contract; the number of participants is expected to increase in the next exercise. Even high-level supplies requiring additional configuration, where commoditisation is more elusive, have proved to be ripe for very large interinstitutional co-operation. For example, in 2009 the Commission awarded a large framework contract for office and application servers on behalf of 31 EUIs in 17 MS, which were purchasing together nearly 4,800 machines.
- In the area of **software**, more particularly corporate infrastructure software, the EUIs regularly present

themselves as a united front with homogeneous needs, and it is not uncommon for procurement procedures in this field to include between 35 and 40 EUIs in virtually all the MS. The market has taken good notice of this fact, and indeed major software editors have not only had to revise significantly their pricing conditions, but also accepted to review their standard licensing terms in order to make them more acceptable to the EUIs. This is a key achievement in a market dominated by non-European operators.

- The field of **telecommunications** is also a very fruitful one for interinstitutional co-operation. The last call for tenders for voice telephony services, awarded in 2008, involved 16 EUIs, which together represented some 650 million minutes of voice traffic worldwide. One year earlier, the Commission had awarded a framework contract for Internet access and associated services on behalf of 11 EUIs, involving 160 managed Internet accesses with bandwidths from 10 Mbps to 1 Gbps and total content delivery of around 2 Terabytes per year.
- Although the Commission has traditionally viewed the area of **services**, in particular high-level services not directly associated to hardware or software products, as being more impervious to efficient joint procurement, success stories are beginning to emerge also there. A call for tenders for IT advice, benchmarking and consulting services, divided into two lots, has been awarded in early 2010 on behalf of 27 EUIs in 13 MS, for services worth in total around 50 million euro over the whole lifetime of the contracts.

WHAT NEXT?

The Commission, and DIGIT in particular, is currently exploring ways to bring IT procurement co-operation between the EUIs one step further, through its ongoing **e-Procurement project**. This project aims to a paperless procurement cycle that would simplify manual interactions, save time and reduce payment delays, and would encourage businesses from all over Europe to participate in public tenders issued by the Commission and other EUIs.

It should be stated from the outset that this project is not aimed at addressing the stages of procurement *prior* to the award of the contract (i.e. publishing the specifications, submitting and evaluating the offers and adopting an award decision) — other departments in the Commission are responsible for that. This project views instead the procurement cycle in its widest sense, i.e. up to and including the payment of the invoices, and tries to concentrate on those stages where the potential for economies of scale is most significant. In the

case of the contracts managed by DIGIT, these are clearly in the *post-award* phase: indeed, for the reasons explained above, a single framework contract is at the origin of (potentially) thousands of similar transactions —such as requests for quotation, product catalogues, orders (=specific contracts) and invoices—, in all the other departments of the Commission as well as in the other EUIs. Until now, most of these exchanges have been made on paper. This is costly for the environment and takes considerable time.

DIGIT has reviewed a number of solutions which already exist at national level. Nevertheless, none of these is fully applicable at European level, and several obstacles prevent a bigger number of enterprises from using them with their business partners. In addition, MS use several standards to cover e-Procurement processes and legal requirements are different from one MS to another. Companies are therefore reluctant to use e-Procurement solutions for cross-border business. We therefore need to provide a simple, cheap, secure and compliant system and to contribute to the definition of common standards at European level.

The e-Procurement project consists of four main modules which will eventually be interconnected:

- **e-Catalogue** will enable the Commission and its suppliers to share secure and structured catalogues of products by electronic means;
- **e-Request** aims at automating the exchange of service requests and offers between the Commission and its suppliers.
- **e-Ordering** will be used by Commission staff to send electronic orders for products or services to Commission suppliers.
- **e-Invoicing** —which is already in production— allows suppliers to send electronic invoices and credit notes for products or services supplied to the Commission.

DIGIT will be the first user of these modules, which are meant to be used later by other DGs in the Commission.

EUIs are the next natural candidates to adopt this software, insofar as they are subject to the same regulatory environment, interact with businesses in all the MS —and therefore also require pan-European solutions— and, to a large extent, thanks to the well-established interinstitutional co-operation described in the present paper, already use the same framework contracts in the field of IT as the Commission itself.

CONCLUSION

The Commission, which due to its institutional role within the EU legal setup is the engine behind the EU public procurement secondary legislation, is in a rather peculiar situation; like the other EUIs, it is itself subject to a separate (though closely related) body of rules and regulations, namely the FR and its IR. This body was originally conceived to conduct procurement procedures issued by only one EUI.

In spite of recent developments which have clarified the legal status of joint procurement procedures, in the specific case of IT procurement it has been mainly through pragmatic co-operation between the EUIs, including towards gradual convergence of needs, that it has become possible to work out over the years a sufficiently detailed framework enabling operations with often more than 30 participants in virtually all the MS.

This paper has explained how this has been achieved, and more particularly what additional mechanisms have been put in place to supplement the relevant regulatory environment where needed. In this context, it has given a list of steps of a typical joint open procedure led by the Commission; these steps can be viewed as "add-ons" to the underlying legal provisions, of which they are relatively independent. Public purchasers in other countries or regions wishing to assess the feasibility of similar joint procurement operations, whether cross-border or interinstitutional, may perhaps draw inspiration from this approach.

The paper has also provided some specific examples of significant achievements.

Last but not least, it has outlined why e-Procurement (and, in particular, the post-award stages) presents a great potential for increased synergies between the EUIs.

NOTES

[1] Although the European Council and the Council are separate Institutions, they share a joint administration: the General Secretariat of the Council.

[2] Each of these two committees has its own administration, but they share a part of their core departments, known as "Joint Services".

[3] The term "Agency" is widely used to cover all the entities referred to here. However, their official name may differ and some of them are called "Centre", "Authority", "Office", "Foundation", "Institute", etc.

[4] Set up under Council Regulation (EC) No 58/2003 (OJ L 11, 16.1.2003).

[5] It does not include, in particular:

- the "joint undertakings" created under Article 187 of the Treaty on the Functioning of the European Union (TFEU), of which at the moment there exist 7 (and which are not entirely public bodies);
- a number of entities created by the MS in parallel to the EU —but through separate legal instruments, and hence of a more classical intergovernmental nature—, such as the 14 existing European Schools and their governing body;
- and, perhaps most importantly, what may soon become one of the major players in this field, namely the European External Action Service foreseen in Article 27(3) TEU, which at the time of writing is in the process of being created.

[6] Potentially up to 70 if we include the entities referred to in the previous note.

[7] 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).

[8] 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, 30.4.2004, p. 114).

[9] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives

89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335, 20.12.2007, p. 31).

[10] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1).

Note that the term "European Communities" is no longer used in new legislation following the entry into force of the Treaty of Lisbon on 1 December 2010. It now has the same meaning as "European Union".

[11] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1).

[12] Contests are not relevant in relation to the subject covered by the present paper.

[13] Notwithstanding the possibility to ask the Court of Justice of the European Union for a preliminary ruling under Art. 267 TFEU.

[14] This is the term used in the FR and the IR to cover what the public sector directive calls "framework agreement".

[15] Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ L 356, 31.12.1977, p. 1), Article 63.

[16] Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ L390, 30.12.2006, p. 1).

[17] Commission Regulation (EC, Euratom) No 478/2007 of 23 April 2007 (OJ L111, 28.4.2007, p. 13).

[18] This step "starts the clock" for the purposes of the administrative remedies foreseen in the relevant legal framework (standstill period, etc.), which —as mentioned above— are similar to those provided for in the "remedies directive".

[19] It is even arguable than, in some cases, the largest EUIs actually pay a somewhat higher price, for example when the contract put to tender involves complex deliveries in all the MS (as opposed to Brussels, Luxembourg and Strasbourg alone) under demanding Service Level Agreements.

[20] This is perhaps with the exception of the Executive Agencies, which —as explained above— are *de facto* former Commission departments and remain very tightly linked to it.