

Lessons for a Fairer, More Transparent, and More Competitive Public Procurement in the European Union

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Abstract

Public procurement is one of the main instruments of State action and resource allocation and it is used in a wide range of public policies. It is a particularly vital tool for social, environmental and innovation policies. However, it entails many challenges, as public funds are expected to be used to obtain maximum profitability; and market development opportunities must be seized to strategically contribute to innovation, social inclusion, and financial and environmental sustainability of a country. This article, eminently macro-conceptual, discusses the topic of public procurement, characterizing it as a framework for boosting contracting activity in public bodies across Europe, and highlighting the evolution of this practice and its corresponding regulation. Attention will then turn to its main implementation instruments, considering the fundamental principles of public procurement and the EU law restrictions that underpin them. Draws lessons on issues of systematic monitoring of public procurement performance in various European countries, with a view to the concerted practice of public procurement, in compliance with the principles of fairer, more transparent, and more competitive Public Administration.

Keywords: Public Procurement, New Public Management, Monitoring, Innovation Policy.

Cite paper as: Carolina Morais, Antonio B. Santos, (2024). Lessons for a Fairer, More Transparent, and More Competitive Public Procurement in the European Union, *Journal of Innovation Management*, 12(1), 1-23.; DOI: https://doi.org/10.24840/2183-0606_012.001_0001

1 Introduction

The performance of State functions has undergone significant changes throughout time, namely concerning the best way for public agencies to act (Hood, 1991). Regarding the doctrines that have emerged and prompted bureaucratic changes in several countries of the Organisation for Economic Cooperation and Development (OECD), the professionalization of administrative structures, the introduction of competition in the public sector, and result optimization (Rocha, 2013; Rocha & Batalhão, 2021) have spread across Europe since the late nineteen-seventies. The rise of these two governance models derives from the combination of, at least, two factors: (a) financial problems due to public debt, and (b) the predominance of neo-liberal and progressive ideals (Christensen & Lægheid, 2011). With the aim of restraining the power of political leaders and assigning more authority to skilled public managers, new public management endeavours to reorganize the public sector with management and accounting models, similar to the models used in the private sector, in response to many bureaucratic stereotypes and to the public agencies' weak response to the clients (Blind et al., 2017; Hyndman & Lapsley, 2016).

Even though the primary goal of public administration is to conduct activities that fulfil collective needs, it relies increasingly more on strict quality, economic, efficiency and effectiveness standards, without compromising a harmonious framework that is economically, financially, socially, and environmentally sustainable. Ethical conduct serves as a tool to outline action standards, which manifest the public agencies' organizational values and principles, fostering their sense of mission, as well as quality and transparent management (Almeida & Cúrdia, 2021). It is against this background that public services in modern European societies are increasingly scrutinized in their practices and monitored in their costs and results, as if they competed in the market or as if they were business organizations. It is expected that service provision will become more efficient, by means of decentralization, the creation of small (and strategic) units, bureaucratization, process simplification, and the fostering of service innovation. The output is administrative modernization (Almodovar, 2002; Reiter & Klenk, 2018).

These model principles have informed public administration reforms towards a more rational State in issues related to budget and resources, especially in public purchases. In this regard, Hood's work (1991) is notable for its systematization of a new set of public management characteristics, which have influenced the bureaucratic reform agenda of several OECD countries.

Much like Hood's doctrines (1991), Kickert (2011) lists some of the most recurrent methods of State disengagement, including: (a) the growing use of market mechanisms (e.g., domestic competition, service charges, enhancing the freedom of choice), (b) increase of public procurement, (c) deregulation, (d) encouraging private investment, and or market incentives. Public procurement of supplies and services are largely influenced by the rise of this new public governance model across Europe (Lane, 2001). Training programmes were carried out with the goal of bringing the Administration closer to its clients, through more responsible and open relationships (Ferraz, 2013; Simões, 2002), and by designing and developing pioneering projects for public-private partnerships (in the energy, transportation, health, and environmental sectors) (Gutiérrez-Goiria & Amiano-Bonatxea, 2022).

Public procurement is one of the main instruments of State action and resource allocation (*best value for money*), and it is used in a wide range of public policies. It is a particular vital tool for social, environmental or innovation policies (Teixeira, 2015). However, it entails many challenges, since public funds are expected to be used for maximum profitability, and since market development opportunities must be seized to contribute strategically for a country's innovation, social inclusion and financial and environmental sustainability (Santos, 2016). Almeida and Cúrdia (2021) also stress the importance of public procurement for the performance of any public agency, both in the inclusion of supply chains and in new partnerships/collaborations with key-stakeholders, who foster the creation of public value. Conforming to the principles of effectiveness, economy, and efficiency, with the goal of maximising profits for the lowest possible cost, therefore requires a complement, based on the ten ethical principles of public administration.

This article, of a conceptual nature, discusses at high-level the evolution of the importance of public contracts, as a framework for boosting contracting activity in public agencies across Europe (Section 2) and highlights the evolution of this practice and its regulation corresponding at the European level. The focus will then shift to its main implementation tools, considering the fundamental principles of public procurement and the constraints of EU legislation that underpin it (Section 3). Subsequently, it presents a systematic monitoring approach to the performance of public procurement in various European countries (Section 4.), in order to draw relevant lessons for more informed, fairer, more transparent and more competitive public procurement in the European scenario (Section 5).

2 Overview of the Legal and Procedural Aspects of Public Procurement

The growing importance of public contracts in pursuing public interest is acknowledged by European organizations, which explains why they have become widely Europeanized. In the last decades, several normative acts pertaining to public procurement have been implemented, including *Directives 92/50/CEE, 93/36/CEE, 93/37/CEE, and 93/38/CEE*, three of which were merged and gave rise to *Directive 2004/18/CE*, pertaining to public works, public supply and public service contracts, as well as to *Directive 2004/17/CE*, pertaining to the water, energy, transportation and postal services sectors. Five years later, *Directive 2009/81/CE* introduced norms specific to defense contracts to facilitate access to the defense and security markets of other Member States. In 2014, Parliament adopted a new set of norms concerning public procurement, which includes *Directive 2014/24/EU*, pertaining to public contracts, and *Directive 2014/25/EU*, pertaining to public contracts signed by agencies operating in the water, energy, and postal services sectors, revoking the abovementioned directives. This set of norms was further reinforced by *Directive 2014/23/EU*, pertaining to the procurement of concession contracts.

The evolution of the 2004 Directives to the 2014 Directives was based on two tenets: (a) a more efficient use of public funds to maximize return on the investments made through public procurement. For this purpose, public procurement rules were revised and updated by simplifying and facilitating cross-border public procurement, as well as by involving all economic operators, particularly small and medium-sized enterprises (SMEs). Furthermore, the 2014 Directives consider the issue of contract size, traditionally one of the biggest obstacles to SME participation, since they are unable to submit proposals that guarantee the fulfilment of the contract in its entirety. These Directives introduce the possibility of dividing contracts into lots (Estorninho, 2016). Additionally, they aim to (b) use public procurement in support of common societal goals, through a social, environmental and innovation perspective (Domingos, 2020).

Over the years, the legal framework aimed at ensuring that all EU economic agents have effective and non-discriminatory access to the European market has been vehemently established and modernized, in conformity with the idea of competition as the driving force behind integration and the EU, and as a device to build a market economy where there are no internal barriers to the mobility of production factors, whilst also making public markets more efficient (Blind et al., 2017).

2.1 Pre-procurement procedures

Public procurement should not be perceived as a secondary instrument in business, nor should it be seen as an end in itself. For this reason, it is crucial that public agencies conduct contracting activity in an ethically, socially, and environmentally responsible and transparent way (Estorninho, 2016). One of the fundamental topics of public procurement is the preparation of the pre-procurement procedure, an exercise that requires planning for an appropriate choice, as well as skillful preparation of the necessary procedural documents, in compliance with the current legal and statutory requirements (Gorjão-Henriques, 2019).

Every time there is a lack of substantiated knowledge regarding solutions existing in the market that may meet the need underlying the decision to procure, the public agency (*i.e.*, designated in public procurement law as contracting authority) may conduct *informal market consultations* (although it is not mandatory), to better outline and prepare the procurement. This preliminary consultation cannot distort competition, serving the exclusive purpose of better substantiating the base price with objective criteria. A *prior information notice* must be published at the Official Journal of the European Union (in accordance with article 48, no. 1 of the European Parliament and Council's *Directive 2014/24UE*, of February 26).

The procedure starts with the competent body's decision to procure and to authorize the public expenditure, which lacks justification. The European legislator, in conformity with the 2014 Directives, envisages *lotting in public procurement*, with the goal of promoting the access of SMEs to public contracts, as previously mentioned. The contracting authority can divide the subject matter of the contract so that two or more independent tenders may supply it (Raimundo, 2017). Furthermore, *the product or service's features must be specified technically so that they meet the requirements of the contracting authority (e.g., quality levels, environmental performance, technical specification approved by the recognized standards body, or European technical assessment)* (Sousa, 2017).

Regarding the *assessment model of the tenders*, impartiality and objectivity are ensured by means of a factor and/or subfactor matrix, measured through assessment scales, which evaluate and score the tenders, organizing them for procurement purposes. The procurement is conducted taking into consideration the *most economically advantageous tender*, which is determined by means of one of two models: (a) the *multi-factor model*, in which, in addition to the price, the award criterion includes a range of factors and/or subfactors related to aspects of contract execution, evaluating two or more features of the tenders; or (b) the *single factor model*, in which price is the prominent factor for sorting the bids. Contracts with a subject matter that includes services subject to market competition, conform to the choice of one type of procedure based on contract price, according to European thresholds, substantive criteria, contract type or contracting authority (Almeida & Cúrdia, 2021). The choice is usually made based on *contract price* or on *substantive criteria*. Almeida and Cúrdia (2021) show how procedural choice is made according to contract price – defined by the maximum price of the economic benefit that the contractor will achieve based on contract price, and the European thresholds approved by the delegated regulations, EU 2019/1828, and EU 2019/1827, of 30 October 2019, both from the European Commission. On the other hand, choice of procedure according to substantive criteria enables contracts of any price.

The procedural documents are the legal, technical, and economic specifications, which put forward the requirements and conditions for the bidders, the characteristics of the proposals, the factors and/or qualification subfactors of the bidders, the proposals assessment criteria, and the contract itself (Estorninho, 2016). The competent body for the procurement decision is in charge of approving the procedural documents (Almeida & Cúrdia, 2021; Eckersley et al., 2022). The public procurement process must be transparent throughout all the above-mentioned stages. This goal is achieved by publishing the fundamental elements related to the contract award procedure, as well as information concerning the candidates and bidders. Transparency is also ensured by facilitating access to the necessary information and documents on all the stages of the process (Estorninho, 2016). The decision to award a contract is followed by a waiting period to afford the bidders with the opportunity to analyze the decision and decide whether or not to request a review. During this interval of at least ten days, the contracting entities cannot sign the contract (Blind et al., 2017; Gutiérrez-Goiria & Amiano-Bonatxea, 2022; Wiggen, 2014).

2.2 The freedom of choice of national legislations

Whilst abiding by the public procurement legal framework is critical (in European countries), purchasing policies and effectiveness are crucial to competent public management results (Domingos, 2020). For example, in Portugal, public procurement was instituted by the Public Contracts Code (CCP) in 2008 (Decree-Law no. 18/2008, of January 29th), through the transposition of Directives no. 2004/17/CE and no. 2004/18/CE, of the European Parliament and Council of 31 March, amended by Commission's Directive no. 2005/51/CE, of September 7th, rectified by the

European Parliament and Commission's Directive no. 2005/75/CE, of November 16th. CCP – decree that regulates the procedures of awarding and executing public contracts by contracting entities – transposes and implements EU rules, but also reflects the freedom of the national legislator to maintain certain country traditions, or to innovate. In any of these circumstances, the legislator must ensure legal security and stability for the economic agents. Over the years, various amendments were made to CCP, the most recent one in 2021 (Law no. 30/2021, of May 21st). This republication transposed the 2014 Directives to foster greater efficiency in public expenditure and to make it easier for economic operators to access public contracts in Portugal.

To achieve the goals of debureaucratization and dematerialization of public procurement, partially motivated by *new public management*, it was established as mandatory that, in Portugal, tender processes are to be conducted in electronic interfaces at every stage, and that data is to be transmitted electronically in contracting procedures of direct award. In this regard, an electronic portal – BASE - was created in 2008, the first portal of its kind in the EU. Furthermore, CCP homogenizes the nomenclature and procedural rules, and asserts the rule of selecting the procedure according to contract price. In 2020, within the context of the Covid-19 pandemic, exceptional and provisional legal measures were established, regarding public expenditure, which combine the required procedural readiness in a context of increasing global demand and a significant reduction in the production and circulation of goods, with the protection of State interests (Decree-Law no. 10-A/2020, of March 13th).

Despite the freedom of choice of national legislators, the procedures must comply with EU legislative principles (Wiesbrock, 2016). The level playing field created for economic operators all across Europe are not to be neglected, insofar as EU legislation establishes minimum harmonized public procurement rules, which regulate the way public authorities and certain public service providers purchase goods, works and services. European legislation aims to maximize *value for money* for the public sector and ensure compliance with three fundamental principles: equality, non-discrimination, and transparency. Section 3 puts forth the main tools on organizational framework, the formation and duties of the tenders committee, budget preparation and procurement planning, as well as the tendering methods and techniques.

3 Tools for a Public Procurement Policy With Ensured Value for Money

Having dissected the main pre-procurement procedures and the circumstances in which they are used, it is also important to understand the entire institutional and organizational approach behind this implementation. As previously mentioned, some fundamental principles must be ensured in practicing public procurement, namely by adopting practices that encourage fair competition on the part of contracting authorities, as well as impartiality in affording all interested suppliers the opportunity to compete.

3.1 The tender process

No bidder can be discriminated against with respect to the participation requirements, either on the level of qualifications or financial and technical skills. Moreover, purchases and contract implementation must be transparent in order to mitigate corrupt practices and create the conditions for a market with no distortion of competition between suppliers and contractors (Amaral, 2018). For this purpose, public agencies must:

- (a) publicize the opportunities by means of calls for bids and by disseminating them in advance in official journals and on the respective country's government website for public procurement;

- (b) give public access to purchase documents (e.g., legislation, regulations, handbooks) through the respective country's government for public procurement;
- (c) publicize the contracts awarded indicating the winning bidder, the date and the chosen purchase method;
- (d) register the purchase processes, filing each requisite with its corresponding reference number;
- (e) report bidders and consultants indicating the tender evaluation result as well as the reasons for non-selection;
- (f) encourage the involvement of civil society's with invitations to organizations for tender openings or contract signings (Estorninho, 2016).

Each contracting authority must set up its own Tender Board, created to advise the public agency on the acceptance of goods, works and services. This Board generally comprises the agency's President, a chief procurement officer and the Financial Officer. Additionally, the procurement of goods, works and services must take quality, quantity, time, source, and price into account. Value for money is crucial and desirable (Eckersley et al., 2022).

Considering the supply side is also important. Finding business opportunities in the public sector demands a pro-active approach by the interested companies, who must begin by conducting a market analysis in order to become better acquainted with its main and current needs. For this purpose, according to Pollitt (2003), companies must be able to answer five key first questions:

- (a) What do they buy, how do they buy it, and which procedures do they use the most?;
- (b) How often do they award contracts and what is the contract value?;
- (c) What is their tendering strategy, in case they have one (price and/or the most advantageous one)?;
- (d) Who are the current suppliers?;
- (e) Who are the other players involved?¹

Competitive tendering provides suppliers or purchasers with the opportunity to sell their products and services in competition with other interested parties. The competitive tendering process is normally used because it enables the government to source products and services from the best suppliers at prices that reflect true market conditions (Rodrigues, 2007). From the point of view of the public sector organizations, the procurement practice is very much linked with the tender process, which includes the various stages.

As mentioned in Section 2, the evaluation of proposals is a critical stage of the procurement process, which can be easily manipulated if there is the intention to favor one particular bidder (Rodrigues, 2014). Once the tender is open, the Evaluation Committee must examine all the proposals received thoroughly. The goal of the preliminary examination is to identify incomplete, invalid proposals, or those that are not in conformity with the documents, and which are, consequently, revoked (Almeida & Cúrdia, 2021; Blind et al., 2017).

In short, the tenderers' response capacity must be ascertained, errors must be corrected, deviations quantified, assessment criteria must be implemented and finally the evaluation report must be written. The tenders are evaluated according to the award criteria. Once the winning bid is selected, the purchase order is issued to the successful tenderer, while the unsuccessful

1. In Portugal, this information can be collected efficiently, albeit not in an exhaustive and detailed way, from BASE Portal, which is coordinated and managed by IMPIC – Public Markets, Real Estate and Construction Institute.

tenderers are notified in writing (Sousa, 2017). It is important to understand how these guidelines have been implemented in European public procurement markets. Section 4 monitors and defines priorities for the existing dynamics of reglementary convergence in European countries, regarding contract formation and their accountability to the existing Directives.

4 Public Procurement Performance in EU Countries

According to Estorninho (2016) the importance of public procurement for European economy is unquestionable: it is estimated that it accounts for around 14-16% of the European Union's GDP. However, no known studies have systematically assessed the performance of various member-States in terms of good value for money. This research gap may be explained by the lack of integrated databases and open statistics on the subject, and/or by the lack of web portals to register public contracts in the various European countries *per se* (e.g., the case of Portugal, there's BASE Portal). A multiple factor analysis of the EU countries' public procurement performance is therefore crucial, in order to gain some insight into how the prerequisites and practices outlined in the 2014 Directives are implemented (see Section 2). The scientific and socio-political relevance of this analysis makes it an important instrument to monitor compliance with the various particularities of the current norms established by the European legislator, particularly with regards to the preparation of administrative contracts (Rolfstam, 2009).

Moreover, this analysis makes it possible to determine the overall priorities of national public procurement policies, as well as the potential challenges and weaknesses arising from its different procedural stages, in each European country. For an holistic analysis of European public contracts, the best available information must be combined, namely by extracting it from two reliable sources that complement each other: (a) the European Commission official website for the public procurement policy area², which discloses the main praxis and sectoral reports with solid insights into the current European legislation and European policy on this matter, and (b) the data provided by *TED – Tenders Electronic Daily*³, the recent European platform storing signed public contracts at a supranational level, which was last updated in 2020⁴.

By compiling the documents available in these sources, it is possible to collect information on the foundational preparation stages of administrative contracts and on key procedural documents, and thereby define overall thresholds of implementation (and standard performance) for pre-procurement procedures, *i.e.*, the different weightings are outlined based on the particularities of the different legal and procedural stages and figures introduced. The results of this exhaustive exercise can be seen in *Table 1*, which shows a comprehensive framework⁵ with twelve of the top priorities for a competitive and responsible contractual practice.

2. See <https://www.europarl.europa.eu/factsheets/pt/sheet/34/contratos-publicos> (Accessed 24 June 2022).

3. *TED* covers public procurement for the European Economic Area, Switzerland, and the Republic of North Macedonia, for the time-period from 1 January 2006 to 31 December 2020. This data includes the most important fields of the standard tender notice forms and the contract award announcement, such as who purchased, what, to whom, for how much, and what award procedure and criteria were used. Generally, the data consists of bids above acquisition thresholds. However, the publication of bids below the threshold on TED is considered a good practice and, therefore, a non-negligible number of bids below the threshold is also present (See <https://data.europa.eu/data/datasets/ted-csv?locale=en>, accessed 22 June 2022).

4. Data collection from the *TED platform* was conducted in June and July 2022.

5. *Performance* is **green** when at least 5 indicators are **green** and, at most, 4 indicators are **red**. *Performance* is **yellow** when at least 4 indicators are **green** and at most, 7 indicators are **red** (interpolated by **yellow**). *Performance* is **red** when more than 5 indicators are **red**, combined with, at least, two **yellow** indicators.

Table 1. Assessment approach to procurement performance in EU countries, 2017-2020.

Indicators	Weighting ⁶		
	Green	Yellow	Red
[ι_1] Single binder	$\iota_1 \leq 10\%$	$10\% < \iota_1 \leq 20\%$	$\iota_1 \geq 20\%$
[ι_2] No calls for bids	$\iota_2 \leq 5\%$	$5\% < \iota_2 \leq 10\%$	$\iota_2 \geq 10\%$
[ι_3] Publication rate	$\iota_3 > 5\%$	$5\% \geq \iota_3 \geq 2.5\%$	$\iota_3 < 2.5\%$
[ι_4] Cooperative procurement	$\iota_4 \geq 10\%$	n.a.	$\iota_4 < 10\%$
[ι_5] Award criteria	$\iota_5 \leq 80\%$	n.a.	$\iota_5 > 80\%$
[ι_6] Decision speed	$\iota_6 \leq 120$ days	n.a.	$\iota_6 > 120$ days
[ι_7] SMEs contractors	$\iota_7 > 60\%$	$60\% \geq \iota_7 \geq 45\%$	$\iota_7 < 45\%$
[ι_8] SMEs bids	$\iota_8 > 80\%$	$80\% \geq \iota_3 \geq 65\%$	$\iota_8 < 60\%$
[ι_9] Procedures divided into lots	$\iota_9 > 40\%$	$40\% \geq \iota_3 \geq 25\%$	$\iota_9 < 25\%$
[ι_{10}] Missing calls for bids	$\iota_{10} \leq 3\%$	n.a.	$\iota_{10} > 3\%$
[ι_{11}] Missing seller registration numbers	$\iota_{11} \leq 3\%$	n.a.	$\iota_{11} > 3\%$
[ι_{12}] Missing buyer registration numbers	$\iota_{12} \leq 3\%$	n.a.	$\iota_{12} > 3\%$

The goal is to measure performance when *good value for money* is achieved. Like most indicators and methods, they abridge reality, because they are affected by country-specific factors, such as what is being bought, the structure of the concerned economies, and the relationships between different tendering options, which aren't considered in these performance indicators. Despite this, the proposed indicators measure key influences on procurement performance in a way that is easy to understand and compare, tackling the inadequate comparative monitoring of this subject matter in the economics and public policy research fields.

Figure 1 shows the overall procurement performance in EU countries⁷ in the year 2020, based on the implementation of the 2014 Directives' references and good practices and on the use of cost-effective public contracts. The panorama is pessimistic, since out of the 30 countries analyzed, 30% (9) performed poorly, and 43% (13) had a nearly unsatisfactory performance, with yellow performance indicators.

4.1 Procurement agility versus lack of transparency of the engaged economic agents

The economic operator must be notified as soon as possible whether it has won or lost the contract, and it also enjoys the right to a reasoned explanation in case of rejection. Should it feel discriminated against, or should it detect any irregularity in the procedure, the economic agent can request a review or, as a last resort, file an appeal. It should be noted that excessively long procedures are economically and financially inefficient and create uncertainty both on the supply side (*i.e.*, in companies) and on the side of the public procurer, for competitiveness and results. The "*decision speed*" indicator is therefore pivotal in most countries. The impact of such negative repercussions shows how important it is for the contracting authority to perform satisfactorily, since this is the indicator with the best performance. 70% of the countries have a decision speed equal or inferior to 120 days, which means that, in 21 European countries, the time between the

7. In addition to the Member-States, this study considers Iceland, Liechtenstein, and Norway since data on this country was made available on the European Commission's official website.

Figure 1. Overall public procurement performance in EU countries, in 2020.
Source: Author's elaboration, based on TED - Public procurement notices.

application deadline and the contract award date is of at most 120 days (Figure 2). This shows the effectiveness of the administrative proceeding used by the body in charge of the decision to choose one of the proposals or to accept the only one that has been submitted and accepted, rapidly ascertaining to whom the contract shall be awarded. To ensure the robustness of the comparative method, only procurement notices that do not include framework-agreements⁸ were taken into consideration.

8. A framework-agreement is the contract established between one or several contracting authorities and one or more entities with the aim of regulating future contractual relationships during a certain period of time, by setting out in advance the respective terms.

Figure 2. Performance of public contracts based on decision speed.

Missing seller registration numbers on the other hand, is a low performance indicator, considering that only 33% of the countries insert the supplier's registration number on the administrative contract, as a rule. This can lead to a lack of process transparency, corruption risks, and to the increase of non-competitive market dynamics, which makes the identification of the buyers and suppliers' identification numbers (provided by commercial records) pivotal. The inclusion of this piece of information is also important in the case of audits by the Court of Auditors. Among the countries that meet this requirement, the following, organized by geographical proximity, warrant a mention: I Finland and Latvia, and II Croatia, Greece, and Bulgaria. These countries identify the supplier in an exemplary manner, in different types of public procurement (Figure 3).

Figure 3. Performance of public contracts based on seller registration numbers.

The following subsection includes a detailed analysis of the indicators that make up the performance framework. For this purpose, two groups were created, namely green performance

indicators that show a positive relative performance (over 50% of the countries comply with them), and (b) yellow-to-red performances indicators (with more than 50% of the countries neglecting, or, more and more, failing to accomplish this stage of the procurement procedure).

4.2 Green performances indicators to public procurement

Regardless of the broader circumstances, all public procurement procedures in the EU are conducted in accordance with national rules. For contracts of higher value, these rules draw on the EU public procurement rules. The thresholds established for when EU rules are used are reviewed regularly, and the amounts are slightly readjusted. It is therefore relevant to ascertain the value of the purchases announced on TED in relation to the GDP of the European countries under analysis. To fulfil this purpose, the publication rate indicator shows the value of the public tenders announced to the companies in each country (making it possible to evaluate how accessible and open public procurement markets are). Figure 3 it is possible to see the percentage figures of Croatia, Hungary, and Latvia, which are above the 7% mark. These positive numbers indicate that a considerable number of enterprises can bid, thereby contributing to a better cost-benefit ratio and to more transparency in the formation of administrative contracts in these countries.

It should be added that the proposals assessment model must foster competition and ensure that the bid that is the most advantageous for the purchasing entity is the one that is chosen. For this purpose, the contracting authority can select one of two assessment models – multifactor or single-factor –, based on the 2014 Directives, in accordance with what it aims to promote in practice. However, there is a high probability of a tie in bid evaluation, particularly when the award criterion stipulated in the procurement documents includes the single-factor modality, (it relies solely on price to sort the bids). So that the contracting authority may find a solution more easily and with greater transparency, the bid evaluation methodology must include a tie-break criterion. It is therefore crucial nowadays to identify the features of the proposal to complete this stage. The award criteria indicator analyses the way the contracting authorities choose the companies to which they award the contracts, ascertaining whether the purchasing authorities decide solely based on price, or whether they take other features into consideration. A threshold of 80% was set for the proportion of contracts awarded solely because the offer was the cheapest one possible (i.e., the one with the lowest price). It was thereby ascertained that twenty of the countries under consideration use predominantly quality attributes, favoring procurements that comply with the principles of equality, competition, transparency, impartiality, and good faith, through matrices that include quality factors and subfactors.

Market economy has recognized the potential of SMEs in public contracts, particularly due to the increasing competition in the procedures, the growing number of participants, the encouragement to entrepreneurship and its contribution to job creation (Directive 24/2014/EU). EU policy for SMEs has therefore sought to guarantee that EU initiatives and policy measures are accessible to them, and that they contribute to make Europe a more attractive zone to create enterprises and conduct business.¹⁰ In this regard, the SMEs contractors indicator shows how many suppliers are SMEs. Since this type of enterprise comprises 99% of the companies in the EU, percentages higher than 60% are desirable. However, even though seventeen of the thirty countries under analysis (57%) have a considerable number of SMEs as contractors, many others show percentages that fall below 45%. In these countries, according to Almeida and Córdia

9. The main thresholds are: (a) 140 000 euros for most services and supplies purchased by central government authorities. (a) 5 382 000 euros for construction contracts.

10. See <https://www.europarl.europa.eu/factsheets/pt/sheet/63/pequenas-e-medias-empresas>, accessed 25 June 2022.

(2021), problems such as excessive bureaucracy, lack of competitiveness among smaller enterprises and even public tenders that are biased against smaller firms, persist. Fair competition and a more inclusive access to the markets must therefore be ensured, in order to tackle discriminatory practices and foster strategic autonomy by means of regulatory convergence between all European countries.

Another positive feature in the current landscape of European public procurement is the proportion of contracts awarded following a tender with a name and terms that are not sufficiently clear. Around 67% of the countries subject to analysis understand how the firms were selected, since there is thorough information and sufficient documentation available on public procurement activities, in compliance with the EU legislation. Nevertheless, even though all member-States have transposed the 2014 Directives, some unfair and non-transparent practices persist in this field (missing calls for bids). E-Procurement is an indispensable tool on this front, with more requirements demanding the scanning of key documents and stages of the procurement process, as well as with the greater thoroughness of technical specifications which may result in the contract not being awarded, in the case of insufficient or asymmetric information.

Figure 4. Performance of public contracts based on publication rate.

Figure 5. Performance of public contracts based on award criteria.

Figure 6. Performance of public contracts based on SMEs contractors.

Figure 7. Performance of public contracts based on missing calls for bids.

The following subsection focuses on the six indicators that achieved poorer results and from which some lessons may therefore be drawn about public procurement in Europe.

4.3 Yellow-to-red performances indicators to public procurement

Competitive bidding helps the buyers get the best price and contract terms for their proposals. It allows them to get the most qualified sellers of products and services while keeping costs low. The single bidder indicator examines this domain by evaluating the proportion of contracts awarded, when there is only one bidder. A larger number of bidders is therefore desirable, since it provides the public procurers with more options (more competition) to reach a better benefit-cost ratio (Rodrigues, 2014). Framework-agreements and direct awards are excluded for these purposes since the European legislator does not anticipate competition for these procedures. Only two of the countries under analysis had more than one bidder in their procedures (namely Iceland (3%) and Liechtenstein (8,5%)). The overwhelming majority of the remaining countries had a single bidder. Among these, Czechia (43%), Greece (42%) and Hungary (39%) stand out (Figure 8).

It is thus important to ensure that all firms have the opportunity to respond to public needs. For this purpose, contracting authorities must launch public tenders, which offer interested firms the possibility of applying within a certain timeframe. Should a firm be interested in participating in a tender, it can request the purchase documentation, which provide technical information and expert knowledge, describing the client/user's expectations and the technical specifications of the services to be conducted, including schedules with important deadlines (Teixeira, 2015). Procurement procedures negotiated with only one firm, with no calls for bid, had negative results (Figure 9). Only eleven of the thirty European countries mention having organized bids before carrying out the procurement negotiations, fostering non-discrimination and transparency, in addition to boosting competition, as required in the 2014 Directives. An analysis of the number of SMEs bids revealed lack of inclusivity, even though eleven of the thirty countries are at a transitional stage, yellow performance, close to a more positive threshold (red). These findings

may reflect a gradual change in favor of the priorities set in the new Directives, namely by opening the market to SMEs as a leverage for more efficient public services (Figure 10).

Figure 8. Performance of public contracts based on number of bidders.

Figure 9. Public contracts performance based on the existence of calls for bids.

The proportion of bids that have opted for dividing the contracts into lots has also been evaluated. As mentioned above, lotting occurs in public procurement when the public agency, within the same procedure, divides the subject matter of the procurement so that two or more contracts may be awarded, with the aim of fostering the access of SMEs to public procurement,

since the latter are considerably underrepresented in public markets (Raimundo, 2017; Rolfstam, 2009). The 2014 Directives stipulated the division of the contract into smaller lots in order to protect and promote SMEs in public procurement. Lotting is not, however, mandatory, although a justification is required every time there is a decision not to do so, as determined by the rule designated as explain (Blind, 2010; Sousa, 2017). The indicator procedures divided into lots shows that it is still easier for large enterprises to bid for public contracts (Raimundo, 2017). Only five of the thirty countries are taking advantage of the opportunities that smaller enterprises can offer to the public market, among which Romania stands out (Figure 11).

Figure 10. Performance of public contracts based on type of bids.

Figure 11. Performance of public contracts based on division of procedures of into lots.

Even though not all procurement types are suitable for joint purchases, strikingly low rates imply missed opportunities (cooperative procurement), with only nine countries favoring joint purchases. Joint purchases lead to better, more competitive prices and provide the opportunity to share costs, risks, and knowledge. Furthermore, they allow public purchasers to begin paving the way for interoperable solutions and a critical mass, encouraging private investment in the development of goods, works or services and fostering growth in target markets (Figure 12).

Finally, the indicator missing buyer registration numbers like the indicator missing seller registration numbers (rated above as the most unsatisfactory one), shows the lack of a practice of registering buyers' and sellers' numbers respectively, which is crucial for understanding who has been buying and supplying more, and under what procedural conditions (Almeida & Cúrdia, 2021). In 60% of the analyzed countries, public agencies do not provide information sufficiently complete on their public procurement activities (Figure 13).

Figure 12. Performance of public contracts based on the existence of cooperative procurement.

Lastly, it should be mentioned that all Member-States have transposed the 2014 Directives and that the European Commission has ensured that all transposition measures comply with the directives, working in cooperation with the Member States. European public procurement policy has strongly supported public investment with the goal of increasing its impact on socio-economic growth in the long run and of improving public welfare. For this reason, every Directive has promoted the conversion of public procurement into a major instrument in the pursuit of cross-cutting political goals, such as the green transition and digitalization, as well as economic resilience and recovery.

5 Final considerations

European law emerged from the need to regulate matters related to the formation of public contracts, ensuring the existence of open, transparent, competitive procedures (Estorninho, 2016). Between Sections 2 and 4 the concept of public procurement was introduced, including its

Figure 13. Performance of public contracts based on buyer registration numbers existence.

procedures, institutions, audience, and techniques for its operationalization. The landscape of procurement practices in European public markets was also described, as well as level of compliance with the legislation that regulates them and, especially, the goal of achieving value for money (i.e., efficiency in public spending, manifested in resource optimization for the best economic result). There is a notorious lack of thoroughness in the application of the 2014 Directives, in safeguarding transparency and efficiency in the formation of new administrative contracts, in ensuring a level playing field on a European scale and in granting access to public procurement markets outside the EU (an issue rarely addressed in academia and public policy).

Overall, the following lessons may be drawn (which can be interpreted as priorities for a more assiduous public procurement practice):

- Data-oriented decision-making that (a) helps public purchasers effectively select the pre-procurement procedure; that (b) fosters strategic planning of the public procurement policy on the part of the policymakers and the creation of policy instruments to guide the entire process, and that (c) draws the attention of contracting authorities for the importance of this topic. Instruments: increase the use of e-Procurement for digital contracts, with the aim of a continuous digitalization of the contracts' lifecycle. Digitalizing public contracts will increase the amount of information available, particularly structured data, which is crucial for administrative contracts (Domingos, 2020). Implementing new e-forms may be the first crucial step in that direction. The continuous professionalization of the public purchasers must also be supported, namely by fostering the top ProcureCompEU the EU competency framework aimed at raising the awareness of public procurement professionals for the correct use of all procurement Directives (Madureira, 2013; Raimundo, 2017).
- Expanding the access to public procurement markets, by fighting the distorted effects of foreign investment in the European procurement market and by reducing strategic dependencies, for a consistent regulatory convergence. However, in implementing this, coherence between external rules and the ones devised by the European legislators must be preserved (proposal for

an International Procurement Instrument). Negotiation through international agreements is therefore decisive, for example with countries like China, Australia, New Zealand, Chile, and Indonesia, with dealings made within the World Trade Organization and the Free Trade Agreement²⁷ respectively. There are no known studies that have evaluated these connections. This work must be conducted by national regulators, with a European report (Grandia & Kruyen, 2020).

- Instruments: the creation and implementation of a White Book about the distortive effects of foreign subsidies, with potential resources and solutions to generate a level playing field in procurement markets; opening universal procurement markets by means of pacts with key partners (e.g., Latin America and Africa), based on the proposal for an International Procurement Instrument. The ranking of European companies in the global market must also be bolstered, namely by supplying general and specific guidelines, best practice, and success stories, for instance with regards to the involvement of bidders from other countries in the EU public procurement market (Rocha, 2013; Rodrigues, 2014).
- Use of public procurement as an instrument for economic recovery, through the green transition, more efficient pre-procurement activities (i.e., better cost-benefit ratio), tendering procedures more open and accessible to SMEs, environmentally preferable, innovative and socially engaged purchasing. Instruments: the public purchasers must be regularly counselled to promote public procurement markets that work well, do not discriminate and are fair. Additionally, purchasing networks must be created to foster the acceptance of innovation and sustainable procurement, as well as to boost the creation of collaborative partnerships that include mandatory green targets and criteria in sector initiatives (Blind, 2010; Eckersley et al., 2022).

As previously mentioned, the European legislator advocates that contracting authorities must make optimum use of public contracts to foster innovation (Eckersley et al., 2022), since the procurement of innovative products, works and services plays a key role in improving the efficiency and the quality of public services, whilst also tackling larger social challenges (Domingos, 2020, p.20). It thereby contributes to a more profitable use of public funds, as well as to greater economic, environmental, and social benefits, (...) and to a more sustainable economic growth (Domingos, 2020, p.20).

Acknowledgement

The authors received no financial support for the research, authorship, and/or publication of this article.

6 References

- Almodovar, F. (2002). O panorama da gestão de pessoal nos serviços públicos. In E. Quadros (Org.), *A Reinvenção da Administração Pública – da burocracia à gestão*. Lisboa: INA Editora, 291-306.
- Almeida, P., & Cúrdia, A. (2021). *Aprovisionamento e Contratação Pública*. Lisboa: Almedina.
- Amaral, D. (2018). *Curso de Direito Administrativo*. Coimbra: Edições Almedina.
- Blind, K. (2010). The role of standards for trade in services: hypotheses and first insights. In. F. Gallouj & F. Djellal (Eds.), *The Handbook of Innovation and Services*.
- Blind, K., Peterson, S., & Riillo, C. (2017). The impact of standards and regulation on innovation in uncertain markets. *Research Policy*, 46: 249-264.
- Christensen, T., & Lægreid, P. (2011). Introduction. In T. Christensen & P. Lægreid (Eds.), *The Ashgate Research Companion to New Public Management*. Surrey: Ashgate Publishing Company, 17-32.
- Directive 92/50/CEE of the Council (1992, June 18). *Coordination of public service contract award procedures*.
- Directive 93/37/CEE of the Council (1993, June 14). *Coordination of public works contract award procedures*.
- Directive 93/38/CEE of the Council (1993, June 14). *Coordination of procurement procedures in the water, energy, transport and telecommunications sectors*.
- Directive 2004/17/CE of European Parliament (1994, March 31). *Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*.
- Directive 2009/81/CE of European Parliament (2009, July 13). *Coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security and amending Directives 2004/17/EC and 2004/18/EC, both of the European Parliament and of the Council, of 31 March 2004*.
- Directive 2014/23/EU of European Parliament (2014, February 26). *Award of concession contracts*.
- Directive 2014/24/EU of European Parliament (2014, February 26). *Public procurement*.
- Directive 2014/24/EU of European Parliament (2014, February 26). *Public contracts concluded by entities operating in the water, energy, transport, and postal services sectors*.
- Directive 2014/55/EU of European Parliament (2014, April 16). *Electronic invoicing in public contracts*.
- Domingos, A. (2020). *Contratação Pública de Soluções Inovadoras*. Lisboa: Lisbon International Press.
- Eckersley, P., Flynn, A., Lakoma, K., & Ferry, L. (2022). Public procurement as a policy tool: the territorial dimension. *Regional Studies*, 57: 2097-2101.
- Estorninho, M. (2016). *A Transposição das Diretivas Europeias de 2014 e o Código dos Contratos Públicos*. Lisboa: Centro de Investigação de Direito Público da Faculdade de Direito de Lisboa.

- Ferraz, D. (2013). Política, Administração e responsabilização e dirigentes públicos: implicações das teorias, modelos e reformas da Administração. In C. Madureira & M. Asensio (Org.), *Handbook de Administração Pública*. Lisboa: INA Editora, 173-185.
- Gorjão-Henriques, M. (2019). *Direito da União: história, direito, cidadania, mercado interno e concorrência*. Coimbra: Edições Almedina.
- Grandia, J., & Kruyen, P. (2020). Assessing the implementation of sustainable public procurement using quantitative text-analysis tools: A large-scale analysis of Belgian public procurement notices. *Journal of Purchasing and Supply Management*, 26: 100627.
- Gutiérrez-Goiria, & Amiano-Bonatxea. (2022). The role of public procurement in the framework of the 2030 Agenda: the approach of institutions and civil society. *Revista Internacional de Comunicación y Desarrollo*, 4: 2386-3730.
- Hyndman, N., & Lapsley, I. (2016). New Public Management: The Story Continues. *Financial Accountability & Management*, 32: 385-408.
- Hood, C. (1991). A public management for all seasons? *Public Administration*, 69: 3-19.
- Kickert, W. (2011). Public Management Reform in Continental Europe: National Distinctiveness. In T. Christensen & P. Lægreid (Eds.), *The Ashgate Research Companion to New Public Management*. Surrey: Ashgate Publishing Company, 123-140.
- Lane, J. (2001). *New Public Management*. London: Routledge.
- Lei 30/2021 (2020, May 21). *Aprovação de medidas especiais de contratação pública e alteração ao Código dos Contratos Públicos*. <https://files.dre.pt/1s/2021/05/09900/0000200039.pdf>
- Madureira, C. (2013). Profissionalização e avaliação dos dirigentes de topo na Administração Pública: o caso de Portugal. In C. Madureira & M. Asensio (Org.), *Handbook de Administração Pública*. Lisboa: INA Editora, 159-172.
- OCDE. (2005). *Modernising Government*. Paris: OCDE.
- Pollitt, C. (2003). *The Essential Public Manager*. Maidenhead: Open University Press.
- Raimundo, M. (2017). Dever de ponderação da adjudicação por lotes e dever de fundamentação da não divisão no direito dos contratos públicos. *Revista Eletrónica de Direito Público*, 2: 21-26.
- Reiter, R., & Klenk, T. (2018). The manifold meanings of 'post-New Public Management' – asystematic literature review. *International Review of Administrative Sciences*, 85: 1–17.
- Rocha, J. (2013). Mudança do Estado e mudança da Administração Pública: a história duma disciplina. In C. Madureira & M. Asensio (Org.), *Handbook de Administração Pública*. Lisboa: INA Editora, 75-90.
- Rocha, I., & Batalhão, C. (2021). *Código dos Contratos Públicos*. Porto: Porto Editora.
- Rodrigues, C. (2014). *Entre a Contratação Pública Ecológica e a Contratação Pública Sustentável – Compreender o Presente, transpor o Futuro*. [Dissertação de Mestrado, Universidade de Coimbra]. Repositório Institucional da Universidade de Coimbra. <http://hdl.handle.net/10316/28443>.
- Rolfstam, M. (2009). Public procurement as an innovation policy tool: The role of institutions. *Science and Public Policy*, 36: 349-360.

- Santos, A.B. (2016). *Política pública orientada para a Inovação Aberta: As condições teóricas, contextuais e programáticas para o seu desenho e implementação, no caso português*, [Phd. Thesis, ISCTE Business School], Lisbon.
- Simões, J. (2002). O panorama da gestão de pessoal nos serviços públicos, In E. Quadros (Org.). *A Reinvenção da Administração Pública – da burocracia à gestão*. Lisboa: INA Editora, 185-207.
- Sousa, L. (2017). Algumas notas sobre adjudicação por lotes. *Revista Eletrónica de Direito Público*, 2: 67-86.
- Teixeira, P. (2015). *Contributos para a Elaboração de um Manual de Procedimentos de Compras Públicas*. [Dissertação de Mestrado, Instituto Politécnico do Porto]. Repositório Institucional do Instituto Politécnico do Porto. <http://hdl.handle.net/10400.22/7762>.
- Wiesbrock, A. (2016). Socially responsible public procurement: European value or national choice? In B. Sjaafjell & A. Wiesbrock (Eds.), *Sustainable public procurement under EU law: new perspectives on the state as stakeholder*. United Kingdom: Cambridge University Press, 75-98.
- Wiggen, J. (2014). *Directive 2014/24/EU: The New Provision on cooperation in the public sector*. *Public Procurement Law Review*, 3: 83-93.

