



UNIVERSIDADE CATÓLICA PORTUGUESA
UNIVERSITÀ DEGLI STUDI DI TORINO

EU Public Procurement and Innovation
**A critique of the EU harmonisation process through the
innovation partnership procedure**

A Thesis submitted to Universidade Católica Portuguesa and Università Degli Studi
di Torino under the joint research agreement for the award of the Doctor of
Philosophy (PhD) in law

Pedro Cerqueira Gomes

Porto, April 2019

EU Public Procurement and Innovation

*I am enough of a coward to state that I hate Tributes
my “saudade” is untraceable
I am rude enough not to say “obrigado” through a piece of paper
my debt is eternal
I am foolish enough to believe I will reimburse every being that helped me
my actions will not rest
I am Portuguese enough to apologise for the poverty of this work
my mind and body had left the university benches yesterday*

Acknowledgments

First, I would like to express my profound gratitude to my supervisors, Professor Mário Aroso de Almeida and Professor Roberto Caranta. Without their words, advice, support and particularly inspiration, this work would never have seen the light of day. Second, I would like to mention that without the lively procurement discussions over the years with Pedro Telles, Albert Sánchez-Graells, Grith Skovgaard Ølykke and Benedetta Biancardi, this work would certainly be much poorer.

Thanks extending beyond gratitude are also due to my parents for all their patience and endless support, which go way beyond what I deserve. Further, I apologise to all my friends, my dogs and my city for my unforgivable absence due to the demands of my PhD.

Finally, my thanks go to Raul Guichard, since without him my academic career would have remained a remote, utopian ideal, of which I could only dream.

Contents

<i>Acknowledgments</i>	vii
<i>Table of Cases</i>	xiii
<i>Legislation</i>	xviii
<i>List of Abbreviations</i>	xxi
Introduction to the Study	1
1. Research Question	1
2. Sources, Methodology and Sequence	2
2.1 Sources	2
2.2 Methodology adopted	4
2.3 Sequence	6
1 The Promotion of Innovation Through EU Public Procurement Rules: A Critique of the EU Harmonisation Process	9
1. The European Crises as Drivers Towards Public Procurement of Innovation	9
1.1 Argument of context	9
1.2 The appearance of public procurement in the EU quest for innovation	14
1.3 The new EU legislation on public procurement and its ability to promote innovation	17
2. The EU Public Procurement Framework in the Current Stage of Evolution of the European Project	21
2.1 General remarks—the EU public procurement regime—coverage through different sources	21
2.2 State of the art—EU rules on public procurement within the internal market	25
2.2.1 The internal market as a market of values	31
2.2.2 The RegioPost case as legitimization of social procurement?	38
2.2.3 Strategic role of the new Public Procurement Directives—innovation as the main actor	43
2.2.3.1 The competence of the EU legislator to foster public innovation through public procurement—finding its roots	43
2.2.3.2 The latest approach towards innovation procurement—from the EU procurement legal framework to the latest guidance from the European Commission	46
3. The Development of the EU Public Procurement System as a Strategic System for Innovation—a Critical Perspective on the Harmonisation Process	49
3.1 Introductory remarks	49

3.2	The current method of transposing Public Procurement Directives and its impact on the effectiveness of EU law in the Member States—the case of innovation procurement	54
2	The Innovation Partnership	66
1.	<i>Ratio</i> of the Innovation Partnership: Article 31, Directive 2014/24/EU	66
1.1	The EU procedural strategy under Directive 2014/24/EU	66
1.2	Distinguishing between innovation partnerships and other competitive procedures available under Directive 2014/24/EU for the promotion of innovation	80
1.2.1	The procedural reason	86
1.2.2	The material scope or grounds of use	93
1.2.3	Reasons of discretion and flexibility	95
1.3	Partial conclusions	100
2.	Grounds of Use (Material Scope) of the Innovation Partnership Procedure	101
2.1	What is public innovation in the context of the EU public procurement system? The quest for a coherent legal definition	101
2.1.1	Initial quest for a legal definition of innovation for the public sector	101
2.1.2	The definition of public innovation within Directive 2014/24/EU—a dual path towards legal uncertainty	106
2.2	The subject-matter of the contract in an innovative partnership procedure—how to define it	111
2.2.1	The prior involvement of candidates or tenderers in the preparation of a tender procedure	114
2.2.2	The importance of drafting technical specifications as functional requirements	117
2.2.3	Does it makes sense to use variants (article 45, Directive 2014/24/EU) in the innovation partnership procedure?	124
3.	Particularities of the Selection and Award Phases in the Innovation Partnership Procedure	127
3.1	Can the innovation partnership procedure be a new paradise for innovative SMEs? A debate regarding the selection phase (article 31(6), Directive 2014/24/EU)	127
3.2	Negotiations, confidentiality and award criteria (article 31, Directive 2014/24/EU)—almost nothing new ...	135
4.	Contract Execution: Innovation Phase	140
4.1	The obligation to structure the innovation partnership execution phase into successive phases (article 31(2), Directive 2014/24/EU)	141
4.2	The importance of setting intermediate targets (article 31(2), Directive 2014/24/EU)	144

3 The EU Public Procurement Oversight Bodies: a Possible Strategy to Increase the Effectiveness of the EU Harmonisation Process and Consequently Increase the Level of Equality in Innovation Public Purchases	147
1. Introductory Background	147
2. The EU Oversight Public Body for Public Procurement	150
2.1 Why has the position changed? The role of a public procurement oversight body under the 2011 Proposal and Directive 2014/24/EU	152
2.2 Can the dream of EU public oversight bodies across Member States still live? The principle of institutional autonomy in the EU public procurement world and national organisational changes	154
3. The Need for Legal Advice as a Tool to Increase the Effectiveness of the EU Harmonisation Process When Dealing with Core National Administrative Law Traditions	156
4. The Duty of Monitoring in Public Procurement	159
5. Partial Conclusions	162
Conclusion	165
<i>References</i>	169

Table of Cases

COURT OF JUSTICE OF THE EUROPEAN UNION

- Cases 7/56, 3/57 to 7/57, *Algera et al v Common Assembly of the ECSC* [1957] ECR 81.
- Case C-9/56 *Meroni v High Authority*, [1958] EU:C:1958.
- Case C-26/62 *Van Gend & Loos v Nederlandse Administratis Der Belastingen* [1963] ECR 1.
- Case 48/71 *Commission v Italy*, [1972] ECLI: EU:C:1972:65.
- Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR-1989.
- Case 283/81, *Cilfit v Italian Ministry of Health* [1982] ECR 3415, 3430.
- Case C-14/83 *Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] EU:C:1984:153.
- Case C-294/83 *Parti Ecologiste “Les Verts” v Parliament* [1986] ECR 1339, 1365.
- Case C-27/86, *CEI v Association Intercommunale pour les Autoroutes des Ardennes (CEI)* [1987] ECR 3347.
- Case C-31/87 *Gebroeders Beentjes v State of the Netherlands* [1988] ECR 4635.
- Case C-45/87 *Commission of the European Communities v Ireland (Dundalk)* [1988] EU:C:1988:435.
- Case C-103/88, *Fratelli Costanzo SpA v Comune di Milano* [1989] ECLI:EU:C:1989:256.
- Case C-188/89, *Foster v British Gas* [1990] ECR I-3350.
- Case C-156/91 *Hansa Fleisch Ernst Mundt GmbH & Co KG and Landrat des kreises Schleswig-Flensburg* [1992] ECLI:EU:C:1992:423.
- Case C-243/89, *Commission of the European Communities v Kingdom of Denmark (Storebaelt)* [1993] ECLI:EU:C:1993:257.
- Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289.
- Case C- 433/ 93 *Commission of the European Communities v Federal Republic of Germany* [1995] ECLI:EU:C:1995:263.
- Case C-359/93 *Commission of the European Communities v Kingdom of the Netherlands (UNIX)* [1995] EU:C:1995:14.
- Case C-44/96 *Mannesmann Anlagenbau Austria AG and Others v Strohal Rotationsdruck GesmbH* [1998] ECR I-00073.
- Case C-360/96, *Gemeente Arnhem and Gemeente Rheden v BFI Holding BV* [1998] ECR I-06821.
- Case C-176/98 *Holst Italia SpA v Comune di Cagliari* [1999] ECR I-8607.
- Case C-81/98, *Alcatel Austria v Bundesministerium für Wissenschaft* [1999] ECLI:EU:C:1999:534.
- Case C-324/98, *Telaustria Verlags GbmH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG (“Telaustria”)* [2000] ECR I-10745.

Case C-225/98 *Commission v France* [2000] ECR I-7445.

Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

Cases C-223/99 and C-260/99, *Agora v Ente Autonomo Fiera Internazionale di Milano* [2001] ECLI:EU:C:2001:259.

Case C-237/99, *Commission v France* [2001] ECR I-00939.

Case C-380/98, *R v HM Treasury, ex p University of Cambridge* [2001] ECR I-08035.

Case C-513/99 *Concordia Bus Oy Ab v Helsingin kaupunki e HKL-Bussiliikenne* [2002] ECR I-7213.

Case C-373/00, *Adolf Truley GmbH v Bestattung Wien GmbH* [2003] ECLI:EU:C:2003:110.

Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527.

Case C-3/00 *Denmark v Commission* [2003] ECLI:EU:C:2003:167.

Case C-283/00, *Commission v Spain* [2003] ECR I-11697.

Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECLI:EU:C:2003:415.

Case C-421/01 *Traunfellner GmbH v Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2003] ECLI:EU:C:2003:549.

Case C-314/01 *Siemens v Hauptverband der österreichischen Sozialversicherungsträger* [2004] ECR I-2549.

Case C-212/02, *Commission v Republic of Austria* [2004] ECLI:EU:C:2004:386.

C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshunt*, [2004] EU:C: 2004:584.

Case C-496/99 *Commission v CAS Succhi di Frutta* [2004] ECLI:EU:C:2004:236.

Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti ("Coname")* [2005] ECR I-7287.

Cases C-21/03 and C-34/03 *Fabricom SA v État Belge* [2005] ECLI:EU:C:2005:127.

Case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna* [2005] ECLI:EU:C:2005:5.

Case C-212/04 *Adeneler and Others v Ellinikos Organismos Galaktos* [2006] EU:C:2006:443.

Case C-503/04 *Commission v. Germany* [2007] ECR I-6153.

Case C-507/03, *Commission v Ireland (An Post)* [2007] ECR I-9777.

Case C-503/04, *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-6183.

Case C-337/06 *Bayerischer Rundfunk and Others v GEWA—Gesellschaft für Gebäudereinigung und Wartung mbH* [2007] ECR I-11173.

Case C-213/07 *Michaniki v Ethniko Simvoulío Radiotileorasis et al* [2008] ECR I-999.

Case C-346/06 *Rüffert v Land Niedersachsen* EU:C:2008:189, [2008] ECR I-1989.

Case C-444/06 *Commission v Spain* [2008] EU:C:2008:190.

Case C-450/06 *Varec SA v État Belge*, [2008] ECLI:EU:C:2008:91.

Case C-454/06, *Presstext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH e APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* [2008] ECLI:EU:C:2008:351.

Case C-138/08 *Hochtief and Linde-Kca-Dresden v Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság* [2009] EU:C:2009:627.

Case C-299/08, *European Commission v French Republic*, EU:C:2009:769; [2009] ECR I-11587.

Case C-300/07, *Hans & Chirstophorus Oymanss GbR, Orthopädie Schuhtechnik v AOK Rheinland/Hamburg* [2009] ECLI:EU:C:2009:358.

Case C-58/08, *Vodafone O2 et al v Secretary of State* [2010] ECR I-499.

Case C-91/08, *Wall AG v Stadt Frankfurt am Main, Frankfurter Entsorgungs-und Service (FES) GmbH* [2010] ECLI:EU:C:2010:182.

Case C-406/08 *Uniplex (UK) Ltd v. NHS Business Services Authority* [2010] ECR I-817.

Case C-314/09, *Stadt Graz v Strabag AG, Teerag-Asdag AG, Bauunternehmung Granit GesmbH* [2010] ECLI:EU:C:2010:567.

Case C-568/08, *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others v Provincie Drenthe* [2010], ECLI:EU:C:2010:751.

Case C-456/08 *Commission v. Ireland* [2010] ECR I-859.

Case C-423/07 *European Commission v Kingdom of Spain* [2010] ECLI:EU:C:2010:211.

Case C-439/08, *VEBIC v Raad voor de Mededinging, Minister van Economie* [2010] EU: C:2010:739.

C-348/10, *Norma-A SIA, Dekom SIA v Latgales plānošanas regions* [2011] ECLI:EU:C:2011:721.

Case C-368/10 *European Commission v Kingdom of the Netherlands (Max Havelaar)* [2012] ECLI:EU:C:2012:284.

Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] ECLI:EU:C:2012:65.

Case C- 526/11, *IVD GmbH & Co KG v Ärztekammer Westfalen-Lippe* [2013] ECLI:EU:C:2013:54.

Cases C-105/12 to C-107/12 *Essent and Others* [2013], ECLI:EU:C:2013:677.

Case C-221/11 *Leyla Ecem Demirkan v Bundesrepublik Deutschland*, [2013] ECLI:EU:C:2013:583.

Case C-425/12, *Portgás-Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território* [2013] ECLI:EU:C:2013:829.

Case C-336/12 *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S*, [2013] ECLI:EU:C:2013:647.

Case C-113/13 *Azienda sanitaria locale n. 5 “Spezzino” v San Lorenzo Soc coop sociale*, [2014] ECLI:EU:C:2014:2440.

Case C-270/12 *United Kingdom v Parliament and Council* [2014] ECLI:EU:C:2014:18.

Case C-270/12 *The United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of European Union* [2014] ECLI:EU:C:2014:18.

Case C-497/13 *Froukje Faber v Autobedrijf Hazet Ochten BV* [2015] ECLI:EU:C:2015:357.

Case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund*, [2015] ECLI:EU:C:2014:2235.

Case C-113/13, *Spezzino, ANPAS, Regione Liguria v San Lorenzo Soc. coop. sociale, Croce Verde Cogema cooperativa sociale Onlus* [2015] EU:C:2014:2440.

Case C-62/14 *Gawweiler and others v Deutscher Bundestag* [2015] ECLI:EU:C:2015:713.

Case C-552/13 *Grupo Hospitalario Quiron SA v Departamento de Sanidad del Gobierno Vasco, Instituto de Religiosas Siervas de Jesús de la Caridad* [2015] ECLI:EU:C:2015:713.

Case 61/14, *Orizzonte Salute v Azienda Pubblica di Servizi alla persona San Valentino — Città di Levico Terme and others* [2015] ECLI:EU:C:2015:655.

Case C-495/14 *Tita and Others*, [2016] ECLI:EU:C:2016:230.

Case C-318/15, *Tecnoedi Costruzioni Srl v Comune di Fossano* [2016] EU:C:2016:747.

Case C-549/14 *Finn Frogne A/S v Rigspolitiet ved Center for Beredskabskommunikation* [2016] ECLI:EU:C:2016:634.

Case C-51/15 *Remondis GmbH & Co KG Region Nord v Region Hannover* (2016) ECLI:EU:C:2016:985.

Case C-115/14 *RegioPost GmbH & Co KG v Stadt Landau in der Pfalz*, [2016] ECLI:EU:C:2015:760.

Case C-410/14 *Dr Falk Pharma GmbH v DAK-Gesundheit*, [2016] ECLI:EU:C:2016:399.

Case C-486/17, *Olympus Italia SRL v Istituto di Ricovero e Cura a Carattere Scientifico—Centro di Riferimento Oncologico della Basilicata (CROB) di Rionero in Vulture*, [2017] EU:C:2017:889.

Case C-546/16 *Montte SL V Musikene* [2018] ECLI:EU:C:2018:493.

Case C-14/07 *VAR Srl (VAR) Azienda Trasporti Milanesi SpA (ATM) v Iveco Orecchia SpA* [2018] ECLI:EU:C:2018:568.

GENERAL COURT CASES

Case T-258/06, *Federal Republic of Germany (et al) v European Commission* [2006] OJ C-179/2.

EFTA COURT

E-16/16, *Fosen-Linjen AS v AtB AS* [2017] C 186/12.

GENERAL ADVOCATE OPINION

Opinion of Advocate General Stix-Hackl delivered on 1 July 2004, Case C-247/02 *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici (Sintesi)* [2004] ECLI:EU:2004:399.

Opinion of Advocate General Poaires Maduro delivered on 8 October 2008, Case C-213/07 *Michaniki AE v Ethniko Simvoulío Radiotileorasis Ipourgós Epikratías Ellíniki Technodomiki (TEVAE)* [2008] ECLI:EU:C:2008:544.

Opinion of Advocate General Mazák on 22 September 2009, Case C-299/08, *Commission of the European Communities v France* [2008] ECLI:EU:C:2009:570.

Opinion of Advocate General Kokott delivered on 15 December 2011, Case C-368/10 *European Commission v Kingdom of the Netherlands (Max Havelaar)* [2011] ECLI:EU:C:2011:840.

Opinion of Advocate General Wahl, delivered on 30 April 2014, Case C-113/13 *Spezzino v San Lorenzo Società Cooperativa Sociale*, [2014] ECLI:EU:C:2014:291.

Opinion of Advocate General Sharpston delivered on 17 November 2015, Case C-406/14 *Wrocław - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju* [2015] ECLI:EU:C:2015:76.

Opinion of AG Mengozzi, delivered on 9 September 2015, Case C-115/14 *RegioPost GmbH & Co KG v Stadt Landau in der Pfalz*, [2016] EU:C:2015:566.

Opinion of AG Mengozzi, delivered on 30 June 2016, Case C-51/15 *Remondis GmbH & Co KG Region Nord v Region Hannover*, [2016] ECLI:EU:C:2016:504.

Opinion of Advocate General Campos Sánchez-Bordona on 28 February 2018 in Case C-14/17 Case C-14/07 *VAR Srl (VAR) Azienda Trasporti Milanesi SpA (ATM) v Iveco Orecchia SpA* [2018] ECLI:EU:C:2018:568.

Legislation*

Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33.

Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L76/14.

Directive 2004/17/EC on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L34/1.

Directive 2004/18/EC on coordinating the procurement procedures for the award of public works contracts, public supply contracts and public services contracts [2004] OJ L34/114.

Directive 2007/66/EC 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 of 11 of December 2007 [2007] OJ L335/31.

Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the field of defence and security, and amending Directive 2004/17/EC and 2004/18/EC, [2009] OJ L216.

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1.

Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

Directive 2014/25/EU of the European Parliament and the Council on procurement by entities operating in the water, transport, energy and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

* This section only covers the public procurement directives mentioned in this work.

List of Abbreviations

CJEU – Court of Justice of the European Union

CMLR - Common Market Law Review

CUP – Cambridge University Press

ELR – European Law Review

EPPPL – European Procurement & Public Private Partnership Law Review

EU – European Union

GDP – Gross Domestic Product

OUP – Oxford University Press

PPI – Public Procurement of Innovative Solutions

PPLR – Public Procurement Law Review

R&D – Research and Development

SME – Small Medium sized Enterprises

TEU – Treaty of European Union

TFEU – Treaty of Function of the European Union

Introduction to the Study

1. Research Question

Innovation is nowadays categorised as an umbrella policy of the EU.¹ This is driving the EU to reshape several areas in which it has legal competence. These reforms aim to transform these areas into friendlier systems for innovation, due to the ability innovation has to promote economic growth and tackle the social and environmental challenges of the new era.² Therefore, bearing in mind the importance public procurement has in the European arena, it is logical that the legislative framework has to undergo a change, in order to transform this legal subject into a driver of innovation.

The new EU legislative package for procurement, in particular Directive 2014/24/EU,³ has effected several reforms in order to tackle possible hindrances to the promotion of innovation in the legislative framework. Moreover, the European Commission seems to view the promotion of innovation throughout public procurement as the perfect tool for addressing cost-efficiency and environmental and social concerns in a balanced and competitive way.⁴ This is also symptomatic of a wider phenomenon, in which the EU is viewing more and more public procurement as a strategic system to promote EU policies. One of the most important measures has been the creation of a new, tailor-made procurement procedure—the innovation partnership procedure (article 31, Directive 2014/24/EU).⁵ This procedure is intended to, *inter alia*, provide

¹ See C Edquist, “Striving Towards a Holistic Innovation Policy in European Countries—But Linearity Still Prevails!” (2014) 5(2) *Science Technology and Innovation Policy Review* 1–19; J Elder and J Fangerber, “Innovation policy: what, why, and how” (2017) 33(1) *Oxford Review of Economic Policy* 2–23.

² K Gretschnann and S Schepers, “Revisiting Innovation: Revolutionising European Innovation Policy by Means of an Innovation Ecosystem” in K Gretschnann and S Schepers (eds), *Revolutionising EU Innovation Policy* (Palgrave Macmillan, 2016) pp 1–27; V Reillon, *EU Innovation Policy—Part I: EU policies and instruments supporting innovation* (European Parliamentary Research Service, 2016) pp 3–5.

³ Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

⁴ European Commission, “Guidance on Innovation Procurement” (Brussels), COM(2018) 3051 final, 15.5.2018, pp 3–6.

⁵ For this new procedure, see P Cerqueira Gomes, “The Innovative Innovation Partnerships under the 2014 Public Procurement Directives” (2014) 4 *Public Procurement Law Review* 211–218; S Arrowsmith, *The Law of Public and Utilities Procurement*, vol I (3rd edn, Sweet & Maxwell, 2014) pp 1046–1060; P Telles and L Butler, “Public Procurement Award Procedures in Directive 2014/24/EU” in F Lichère,

more flexibility in order to encourage an increase in the levels of cooperation between public and private entities, to facilitate the creation of an innovative good, service or work capable of satisfying a specific public need.

Having described the background, my research will explore, through a sequence of steps, which will be set out in section 2 below, whether the EU, merely by harmonising laws, namely by creating a complex procedure such as the innovation partnership procedure, will be capable of increasing the levels of innovation procurement in the public sector for all Member States. My work will focus on the Procurement Directive for the public sector (Directive 2014/24/EU). Consequently, the utilities⁶ and defence sector⁷ will not be covered in this work, due to their specificities regarding the applicable legislative framework and the market in which contracting authorities will operate.

2. Sources, Methodology and Sequence

2.1 Sources

Across Europe, the typical problem-solving methodological approach applicable to legal matters in public procurement encompasses a sequence of deductive steps regarding the relevant sources. Public procurement legislation is regulated at the international level predominantly as a result of the Government Procurement Agreement (GPA) from the World Trade Organization (WTO)⁸ and the Model Laws of

R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djof Publishing, 2014) pp 131–185; M Andrecka, “Innovation partnership in the new public procurement regime—a shift of focus from procedural to contractual issues?” (2015) 2 *Public Procurement Law Review* 48–62.

⁶ Directive 2014/25/EU of the European Parliament and the Council on procurement by entities operating in the water, transport, energy and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

⁷ Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the field of defence and security, and amending Directive 2004/17/EC and 2004/18/EC, [2009] OJ L216/76.

⁸ On the plurilateral agreement (GPA) under the WTO, see R Anderson, “The Renegotiation of the WTO Agreement on Government Procurement (GPA)” (2013) *Paper Presented Global Revolution VI*, pp 9–10 (unpublished); S Arrowsmith, *Government Procurement in the WTO* (Kluwer Law International, 2003); A Reich, “The New GATT Agreement—the Pitfalls of Plurilateralism and Strict Reciprocity (1997) 4 *Journal of World Trade* 165–173. Nevertheless, the GPA has no direct provisions covering innovative procurement.

the United Nations,⁹ and the regulations of other international actors, such as the World Bank.¹⁰ These international instruments are essential in order to have an holistic understanding of public procurement regulations. However, the relevancy of these international sources for my research is almost minimal, because they rarely touch on the association between public procurement and innovation.

Within the European Union (EU), on the other hand, public procurement law has been widely harmonised throughout Treaty provisions (mostly due to internal market provisions, such as articles 53(1), 62 and 114 TFEU), directives and the case law of the Court of Justice of the European Union (CJEU). Currently, there are seven different procurement directives in force (four substantive directives¹¹ and three remedies directives¹²). These instruments will have primary importance in my research, since this work will analyse the harmonisation process in public procurement law, and particularly its ability to promote innovation through a complex procedure such as the innovation partnership (article 31, Directive 2014/24/EU). As part of this study, several references will be made to provisions of national law of the Member States. Nonetheless, this work will not adopt a comparative method of legal research. The references to national law will have the purpose of exploring problems with the EU harmonisation process, mostly regarding the innovation partnership procedure and its transposition. Finally, particular aspects related to the administrative legal culture of the Member States will be also examined, namely those issues connected with the use of complex procedures.

⁹ C Nicholas, “The UNCITRAL Model Law on Procurement—the current reform program” (2006) 4 *Public Procurement Law Review* NA161–164.

¹⁰ On this topic see, E Morlino, *Procurement by International Organizations—A Global Administrative Law Perspective* (Cambridge University Press, 2019).

¹¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1; Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and the Council on procurement by entities operating in the water, transport, energy and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243; Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the field of defence and security, and amending Directive 2004/17/EC and 2004/18/EC [2009] OJ L216/76.

¹² Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33; Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L76/14; Directive 2007/66/EC 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 of 11 of December 2007 [2007] OJ L335/31.

2.2 Methodology adopted

According to Neumann, the law is a particular science with a specific object and methodology. In that sense, legal methodology could be conceded to be a rational systematic process that aims to achieve sequential knowledge on a certain issue with the assistance of methods.¹³ This view departs from the systematic categorisation of legal methodology as a science.¹⁴ Krebs describes the doctrinal method as the “central nerve” of legal science.¹⁵ However, there is a tendency in legal scholarship, which I do not particularly share, to view the doctrinal method (also known as “black letter”) as in decline.¹⁶ This movement believes that legal scholarship has to work with empirical¹⁷ or interdisciplinary¹⁸ methods in order for law to be treated as a science. In this sense, Hage goes to the extreme of arguing that in a true normative science, the main methods to be used are sociological, economic and psychological, because only those reflect what the law should be.¹⁹

I recognise that empirical, interdisciplinary (for instance, economics or psychology) or behavioural analysis of the law is crucial in today’s legal research. In addition, I also acknowledge that even my research question, previously identified, could be tackled using one of those methods. However, my preference is for the doctrinal method. The

¹³ U Neumann, “Teoria Científica do Direito” in A Kaufmann and W Hassemer (eds), *Introdução à Filosofia do Direito e à Teoria do Direito Contemporâneas*, 3rd edn (Fundação Calouste Gulbenkian, 2015) p 472.

¹⁴ For legal positivists, such as Kelsen, despite the law’s being a social fact, it should be read in a purist way (*purity*). For the author, law must be pure from other subjects, such as psychological, sociological or ethical subjects: see H Kelsen, “Law, State and Justice in the Pure Theory of Law” (1948) 3 *Yale Law Journal* 378–390. This dimension is also named “negative legal constructivism”, which is about stripping the law from unnecessary idealisations: see A Somek, *The Legal Relation—Legal Theory after Legal Positivism* (Cambridge University Press, 2017) pp 10–20.

¹⁵ W Krebs, “Die juristische Method im Verwaltungsrecht” in E Schmidt-Aßmann and W Hoffmann-Riem (eds), *Methoden der Verwaltungsrechtswissenschaft* (Nomos, 2004) pp 220–222.

¹⁶ This tendency is true not only in the United States but in Europe as well. See A Posner, “The Decline of the law as an autonomous discipline: 1962–1987” (1987) 100 *Harvard Law Review* 761–766; HT Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession” (1992) 91 *Michigan Law Review* 34–50; R Posner, “The Future of Law and Economics Movement in Europe” (1997) 17 *International Review of Law and Economics* 2–5; N Garoupa and TS Ulen, “The Market for Legal Innovation: Law and Economics in Europe and the United States” (2008) 59 *Alabama Law Review* 1555–1563; F Cownie, *Legal Academics* (Hart Publishing, 2004) pp 197–200.

¹⁷ For empirical legal research, see P Cane and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010).

¹⁸ As merely an example of an interdisciplinary method, the ‘Law and Economics’ method is well recognised. This method aims to examine the effects of legal rules based on micro-economics methods. See RB Cooter Jr and T Ullen, *Law and Economics* (Pearson, 2014); A Sánchez-Graells “Economics analysis of law, or economically informed legal research” in D Watkins and M Burton (eds), *Research Methods in Law*, 2nd edn (Routledge, 2018) pp 170–193.

¹⁹ J Hage, “The Method of a Truly Normative Legal Science” in M van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing, 2011) pp 19–44.

novelty of the topic and the originality²⁰ of my approach justifies the importance of building a theoretical background that only the doctrinal approach can provide.²¹ According to Smits, the doctrinal method aims at the description, prescription and justification of the research question.²²

The first step has as its main goal the description of the relevant law. This will require me to carry out a “systemised description” in order to achieve coherence of the relevant rules and principles applicable to my research question.²³ However, in this scenario van Hoecke states that the description or systematisation of the law should put it into context (*theory building*).²⁴ As an example, when dealing with a legislative change or the transposition of a European directive, the systematic description of the law should always be placed into its given context. It is evident that any legal method, even the doctrinal one, has to take into account the context of the normative provisions it means to analyse, namely the social, political or economic context. Only by doing so can the interpreter apply the proper hermeneutics to interpret the legal rules. In this regard, as I shall demonstrate, Directive 2014/24/EU provides for different normativity intensity when compared to the previous legal framework, since it is clear, either from the provisions or from the recitals of the Directive, that innovation has been given greater weight. Furthermore, the new provisions regarding public procurement and innovation must be interpreted in the light of the evolution of the European project, the internal market and the EU public procurement legislation (*context*). In addition, the innovation partnership procedure is a new procedure, brought into the European arena by Directive 2014/24/EU. This new procedure needs a systematic description capable of distinguishing it from other procedures covered by the Directive, based on the legal provisions, case law from the CJEU and European principles applicable to public procurement.

²⁰ On legal originality, see MM Siems “Legal Originality” (2008) 1 *Oxford Journal of Legal Studies* 147–164.

²¹ The words of Brownsword clearly illustrate the importance and interdependence of all methods in legal research: “theoretical work without any empirical content is hollow and (...) empirical work without supporting theory is shallow” in R Brownsword, *An Introduction to Legal Research*, pp 19–20; *Apud* R Van Gestel, H W Micklitz and M Poiars Maduro, ‘Methodology in the New Legal World’ (2012) *EUI Working Paper Law* 2012/13, pp 7–8.

²² JM Smits, “What is legal doctrine? On the aims and Methods of Legal-Dogmatic Research” in R Van Gestel, HW Micklitz and EL Rubin (eds) *Rethinking Legal Scholarship—A Transatlantic Dialogue* (Cambridge University Press, 2017), pp 207–228.

²³ *ibid*, pp 214–217.

²⁴ M van Hoecke, “Legal Doctrine: Which Method(s)” in van Hoecke (ed), *Methodologies of Legal Research*, n 19, pp 14–18.

Second, a legal doctrine method demands prescription. This will allow me to assess whether a specific set of rules will fit into a given legal system, that is, to assess the effectiveness of a given policy within the legal system.²⁵ In this work, I shall analyse whether the European rules (Directive 2014/24/EU) and case law of the CJEU, relating to the promotion of strategic policies such as innovation, are helping the Member States in promoting innovation, specifically those regarding the innovation partnership procedure. Here I shall bring together official data, in order to help measure the effectiveness of the rules in the harmonisation procedures, that is to say, which Member States are using more complex public procurement procedures, such as the competitive procedure with negotiation, competitive dialogue and the innovation partnerships procedure. Furthermore, in this phase I shall also explore the impact the administrative law traditions of the Member States can have on the topic.

Finally, the legal doctrine method aims at justification. This means that after assessing the effectiveness of the rules, if the method of harmonisation and the legal rules are shown to be ineffective, possible solutions, integrated in the European legal system, will be presented.²⁶

2.3 Sequence

This study is divided into three main chapters.

Chapter 1 provides, at its outset, a description of how innovation has entered the EU public procurement sphere. Subsequently, it situates the EU harmonisation process regarding public procurement into the wider context of the evolution of the European project and of the internal market. Lastly, chapter 1 analyses the impact the method of harmonisation through law has had in helping Member States overcome their national administrative law traditions, namely concerning the recourse to special and complex procedures capable of promoting innovation.

Chapter 2 is dedicated to the new special and complex procedure—the innovation partnership procedure (article 31, Directive 2014/24/EU). It aims to explore the main features of the procedure, and highlights possible issues and inconsistencies that will arise when conducting this procedure. At several points in chapter 2 it is

²⁵ Smits, n 22, pp 216–219.

²⁶ *ibid*, 219–222.

claimed that further guidance is needed, in order to minimise the legal uncertainty of the provisions governing this procedure.

Finally, chapter 3 argues that there is a need for a more protective model of oversight and legal advice at EU level, in order to decrease the structural disadvantages and administrative law traditions of some European States, regarding the use of special procedures. Only by adopting such a model can the EU foster an increase in the levels of promoting innovation through public procurement.

Chapter 1

The Promotion of Innovation Through EU Public Procurement Rules: A Critique of the EU Harmonisation Process

1. The European Crises as Drivers Towards Public Procurement of Innovation

1.1 Argument of context

Since 2007, the majority of European Union (EU) Member States have faced a series of crises.¹ The financial crisis was followed by an economic crisis, and these in their turn resulted in a fiscal crisis, further aggravated by a refugee crisis and national/European security crises due to terrorist attacks. This scenario, of a veritable cascade of different crises, paved the way to existential questions within the EU. Broadly speaking, the Member States and European citizens started to argue that the main purposes underlying the creation of a single market—economic prosperity and the safeguarding of peace—had not been completely accomplished by the EU system over the many years of the internal market’s existence.² Recent phenomena involving the rupture or partial rupture of the European ideal have reinforced this, or simply indicated that the crises are far from being resolved. Think of Brexit;³ the on-going threat, by the European Commission, to trigger article 7 of the Treaty of European

¹ AJ Menéndez, “The Crisis of Law and the European Crises: From the Social and Democratic *Rechtsstaat* to the Consolidating State of (Pseudo-)technocratic Governance” in M Bartl and M Karavias (eds), *Austerity and Law in Europe* (Wiley Blackwell, 2017), pp 56–60. For further developments on the nature of the EU economic crisis from socio-legal, economic, ideological and political perspectives, and its impact on banking, securities, contract, competition and corporate EU law, see AD Chirita, “The Impact of the European Union Current Crisis on Law, Policy and Society” (2014) 16 *Cambridge Yearbook of European Legal Studies* 255–288.

² According to Eurobarometer surveys, public support for the EU in 2013 and 2014 decreased to historic lows in all EU Member States, but especially in those countries heavily hit by the crises and austerity measures imposed by international organisations and the EU: European Commission, Standard Eurobarometer surveys (SE 57-Spring 2002, SE 69-Spring 2008; SE 79-Spring 2013; SE 83 Spring 2015); L Tsoukalis, *In Defence of Europe—Can the European Project be Saved* (OUP, 2016) pp 167–171.

³ For a brief description of Brexit and its legal consequences in the EU system, see P Craig, “Brexit: A Drama in Six Acts” (2016) 4 *European Law Review* 3–8; F Fabbrini (ed), *The Law & Politics of Brexit* (OUP, 2017).

Union (TEU) upon Hungary for their infringements of European values (article 2 TEU); and the case already brought, by the European Commission against Poland, on the basis of article 7 TEU for passing constitutional reforms that undermine the independence of the judiciary system, which were contravening European values (article 2 TEU), namely the rule of law.⁴

However, to be in crisis is not an abnormal state for the EU but its driving force. As noted by Meny,⁵ since its creation, the European project has faced and overcome several crises. According to the author, these functioned as an engine, not driving the EU towards failure but facilitating the empowerment of the EU institutions and the increase of powers of the EU, through the revision of the European Treaties and the work of the CJEU. This statement led Cassese to quote the words of Helmut Schmidt at the Royal Institute of International Affairs of 29 January 1974—“L’Europa vive di crisi. Le crisi in fin dei conti contribuiscono a un progressivo sviluppo, perché sono un’esortazione a prendere decisioni.”—to conclude that several crises, despite their diverse and heterogeneous nature, had helped the EU progressively to establish itself as a political subject, with a unique nature and a strong core of powers, in order to maintain the welfare state and economic progress necessary to feed the European ideal.⁶

In light of this momentum, the EU institutions were forced to construct a proper response and once again attempt to transform another set of crises into an era of economic prosperity. Several measures were adopted. For instance, at the financial level, two different policies were implemented. On the one hand, the European Central Bank injected a huge amount of liquidity into the Eurozone financial institutions at low rates. On the other hand, massive programmes of public aid were also granted to financial institutions, namely by the acquisition of “toxic” assets. At the fiscal

⁴ Discussion of the enforcement of EU values and the proper content of the legal concept of the rule of law in EU law is beyond the scope of this work, but these recent events and the awareness of the legal doctrine on the topic tend to reinforce the premise of EU crisis that continues to exist within the European project, leading to a debate on the enforceability and oversight of EU law and values. See A Jakab and D Kochenov (eds), *Enforcement of EU Law and Values* (OUP, 2016). It is important to mention that in the case of Poland, the European Commission on 24 September 2018 decided to refer Poland to the Court of Justice of the European Union (CJEU) due to violations of the principle of judicial protection created by the new Polish law on the Supreme Court, and asked the Court to order interim measures until it had issued judgment on the matter. For more information regarding this latter issue, see the detailed work of M Schmidt and P Bogdanowicz, “The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU” (2018) 4 *Common Market Law Review* 1061–1100.

⁵ J Meny, “It’s politics, stupid” the hollowing out of politics in Europe—and its return, with a vengeance” in *Stato e mercato* (2015 n° 103) pp 3–28.

⁶ S Cassese, “L’Europa vivi di Crisi” in *L’Unione Europea in crisi*, *Revista Trimestrale di Diritto Pubblico* (Giuffrè, 2017) pp 164–174.

governance level, several Memorandums of Understanding were signed, in order to grant financial assistance to states experiencing severe fiscal crises.⁷

These measures, pointing directly to financial stability and control of public debt, were not the only ones taken. The EU institutions also sought to create or reinforce state drivers,⁸ aiming to promote economic growth and exert a certain degree of control over public expenditure. Economic growth was required for the majority of the national economies of the Member States. This demand for economic growth was reflected in the Europe 2020 strategy.⁹ This aimed to reshape the EU economy, partly by fostering what had already been perceived under the Lisbon agenda.¹⁰

In accordance with the strategy of Europe 2020, the promotion of innovation in strategic areas, such as public procurement, has represented an attempt by the EU institutions to achieve some of those goals.¹¹ With Europe 2020, innovation reinforced its status, previously acquired in 2000 with the Lisbon Council, as a magical core concept,¹² capable of reforming the European economy and leveraging the level of competitiveness of the EU when compared with other economies championing innovation. Despite the gap's almost being closed between the EU and these innovation champions, the EU economy is still less innovative than those of the US, Japan, South Korea, Canada and Australia, according to the last Innovation Union Scoreboard,¹³ thus the EU must continue to conduct political and legislative reforms towards a more innovative economy if it wants to survive the demands of a global economy and the

⁷ For a complete perspective on the economic policy measures adopted in this context under articles 5 and 121 TFEU, see P Leino-Sandberg and J Salminen, "A Multi-Level Playing Field for Economic Policy Making: Does EU Economic Governance Have Impact?" in T Beukers, B de Witte and C Kilpatrick, *Constitutional Change through Euro-Crisis Law* (CUP, 2017) pp 68–107.

⁸ The concept of "state drivers" could be defined as the engines that boost smart, inclusive and sustainable growth and jobs.

⁹ Commission, *Europe 2020, A strategy for smart, sustainable and inclusive growth* (Communication) COM(2010) 2020 final 3.3.2010.

¹⁰ E Marelli and M Signorelli, *Europe and the Europe—Integration, Crisis and Policies* (Palgrave Macmillan, 2017) p 146.

¹¹ J Ritzen, "Forward to a second chance for Europe" in J Ritzen (ed), *A second chance for Europe—Economic, Political and Legal Perspectives of the European Union* (Springer, 2017) pp 253–254. The author argues that the only escape for the European Economic Model lies in raising levels of innovation by ensuring more public research and development (R&D) for industry and more entrepreneurship education.

¹² The categorisation of innovation as a magic concept with a strong normative connotation can be found in C Pollitt and P Hupe, "Talking about government: The role of magic concepts" (2011) 13(5) *Public Management Review* 641–658; J Torfing and P Triamtafillou, "Enhancing Public Innovation by Transforming Public Governance?" in J Torfing and P Triamtafillou (eds), *Enhancing Public Innovation by Transforming Public Governance?* (CUP, 2016) pp 1–10.

¹³ European Commission, *Innovation Union Scoreboard 2017*, Brussels, available at <http://ec.europa.eu/DocsRoom/documents/24829>, accessed 4 December 2017.

threat represented by China, whose state-dominated economy adopts an economic model mainly guided by innovation and experimentation (internationally recognised as the *Beijing Consensus*¹⁴).¹⁵ Consequently, the EU institutions have viewed innovation not only as a magical economic cure, but also as an umbrella policy with a strong normative connotation, which should be spread over almost all EU areas of action, including public procurement, in order to tackle the challenges imposed by a new innovative global economy.¹⁶

Today, innovation is categorised as an EU umbrella/holistic policy.¹⁷ This was justified because, in order to contribute to economic growth,¹⁸ innovation must encompass several key policies areas within the EU competence that would favour the creation of a European innovation ecosystem. An effective innovation ecosystem is the result of the right interaction among the actors in order to turn an idea into a solution, or bring a product or service into the market.¹⁹ In that sense, a huge variety of EU policies operating on both the supply side and demand side of the European market that could have an influence on the innovation process should be brought together, namely

¹⁴ The *Beijing Consensus* is the term used to describe the economic policies of the People's Republic of China, as opposed to the market-oriented models of the US or Europe. See JC Ramo, "The Beijing Consensus", The Foreign Policy Center (May 2004), available at <http://fpc.org.uk/fsblob/244.pdf>.

¹⁵ M Rasmussen, "The Benefits and Reward of Innovation Policies" in K Gretschmann and S Shepers (eds), *Revolutionising EU Innovation Policy* (Palgrave Macmillan, 2016) pp 29–53.

¹⁶ Commission, n 9, points 2 and 3.

¹⁷ The linear model for the innovation policy was based on the assumption that innovations were applied scientific research knowledge. It was predominantly a supply-side policy, where the process of innovation was defined in successive stages from basic research to the testing of a given product that ultimately influence growth and employment. Some have replaced this linear model. Recent economic doctrine argues that innovation policy must be holistic. Holistic policy is defined as a policy that integrates all public actions that directly influence the innovation process, eg systemic innovation policies, demand-oriented policies and demand-pull policies. See C Edquist, "Striving Towards a Holistic Innovation Policy in European Countries—But Linearity Still Prevails!" (2014) 5(2) *Science Technology and Innovation Policy Review* 1–19; C Edquist, *Efficiency of Research and Innovation Systems for Economic Growth and Employment*, Final Report from the 2014 ERAC Mutual Learning Seminar (MLS) on Research and Innovation Policies: SESSION I (2014), available at https://charlesedquist.files.wordpress.com/2015/04/201408_edquist.pdf; J Elder and J Fangerber, "Innovation policy: what, why, and how" (2017) 33(1) *Oxford Review of Economic Policy* 2–23.

¹⁸ In the words of Radosevic, Schumpeter's work places innovation as the main source of economic growth, because it is the main source of competition between private companies and entrepreneurs, which must be adapted to capture all the complexity of the European market. The author thus advances the concept of the (Neo) Schumpeterian model, where the particularities of the EU and national policies are taken into account. See S Radosevic, "Challenges of converging innovation policies in a multi-tier Europe: a neo-Schumpeterian perspective" in S Radosevic and A Kaderabkova, *Challenges for European Innovation Policy—Cohesion and Excellence from a Schumpeterian Perspective* (Edward Elgar, 2011) pp 9–47.

¹⁹ High Level Group on Innovation Policy Management, Report & Recommendations, June 2013, pp 12–18; K Gretschmann and S Schepers, "Revisiting Innovation: Revolutionising European Innovation Policy by Means of an Innovation Ecosystem" in K Gretschmann and S Schepers (eds), *Revolutionising EU Innovation Policy* (Palgrave Macmillan, 2016) pp 1–27.

the policies on research and development (R&D); regional development; and the industrial and education sectors. Reshaping these policies to achieve the perfect EU innovation ecosystem has also required specific instruments that support favourable conditions for innovation (supply-side measures) and others that fuel demand for innovation (demand-side measures).²⁰

A crucial instrument to promote demand-side policies in the EU innovation system is public procurement. As others have pointed out, demand-side policies should be defined as “a set of public measures to increase the demand for innovations, to improve the conditions for the uptake of innovations and/or to improve the articulation of demand in order to spur innovation and the diffusion of innovation”.²¹ The possibility, recognised by some economics scholars, to use public procurement as a tool to overcome market failures, through enlarging or even creating new markets for certain goods or services that will satisfy a particular public need in a more effective way, placed procurement as an essential demand-side tool.²² Additionally, due to the specific function of public procurement—satisfaction of public needs—it is one of the most effective instruments to redirect innovation to sustainability and societal goals (for example, climate change or aging population).

Bearing in mind the increasing importance of public procurement to the European economy (from 2011 to 2014 the figures representing the value of procurement activities in Europe fluctuated from 12% to 14% of the European GDP²³), its historical role as an instrument to achieve strategic diversified State policies²⁴ and its ability to create new markets,²⁵ it would only be logical that public procurement would be summoned to play an active role in helping the new EU *innovative* strategy to survive

²⁰ V Reillon, *EU Innovation Policy—Part I: EU policies and instruments supporting innovation* (European Parliamentary Research Service, 2016), pp 3–5.

²¹ J Elder “Demand oriented innovation policy” in R Smiths, S Kuhlman and P Shapira (eds), *The Theory and Practise of Innovation Policy: An International Research Handbook* (Edward Elgar, 2010), p 177.

²² E Uyarra, “The impact of public procurement of innovation” in J Edler, P Cunningham, A Gök and P Shapira (eds), *Handbook of Innovation Policy Impact* (Edward Elgar Publishing, 2016), pp 360–378.

²³ European Commission, DG-GROW G4-Innovative and e-procurement, Public Procurement Indicators 2014, 2 February 2016, point 3.

²⁴ On this topic and for an historical perspective, see P Trepte, *Regulation Procurement* (OUP, 2004) pp 139–176; C McCruden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (OUP, 2007); S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (CUP, 2009); MA Corvaglia, *Public Procurement and Labour Rights* (Hart Publishing, 2017) pp 44–51.

²⁵ S Borrás and C Edquist, *Conceptual Underpinnings for Innovation Policy Design—Indicators and Instruments in Context*, Paper prepared for the OECD Blue Sky Conference III, 19–21 September 2016 in Het Pand, Ghent, Belgium, available at <https://www.oecd.org/sti/019%20-%20Borrás-Edquist%20Blue%20Sky%20SUBMITTED%2025th%20July.pdf>, pp 3–21.

this time of crisis,²⁶ essentially as a demand-side driver of the EU innovation ecosystem.

Nevertheless, viewing public procurement as a driver of innovation is no novelty brought about by the crises or the Europe 2020 strategy. The birth of this alliance goes back almost to the Lisbon strategy. As pointed out, the Lisbon strategy considered innovation to be one of the essential pillars of a Europe driving towards prosperity, growth and competition in an era of economic globalisation.²⁷ Furthermore, in Göteborg (2001), the European Council stressed the need to consider sustainable development as part of the Union strategy, and consequently innovation was put at the service of generating new environmentally friendly technologies in the sectors of transport and energy.²⁸ Still, right after the adoption of the Lisbon strategy, the EU acknowledged that these new paths towards innovation would demand the boost of the overall levels of R&D and innovation of the Union, especially in frontier technologies, in order to close the gap between the EU and its major competitors, such as the US and Japan. In that regard, the European Council in 2002 agreed that overall spending on R&D should be increased, with the aim of approaching 3% of GDP by 2010, and two-thirds of this investment should come from the private sector.²⁹

1.2 The appearance of public procurement in the EU quest for innovation

The documents that constituted the foundations for the construction of a new EU innovation policy did not expressly mention public procurement as a potential engine for innovation. It was only with the Commission Communication of 2002, “More Research for Europe Towards 3% of GDP”,³⁰ that public procurement gained the status of a “possible” European innovation driver, mainly regarding public infrastructure projects in the areas of transport, telecommunications and defence. In 2003, the Commission reinforced this view in the Communication “Innovation Policy: updating

²⁶ Trepte, n 24, pp 150-170; P Costa Gonçalves, “Gestão de Contratos Públicos em Tempos de Crise” in *Estudos de Contratação Pública*, vol III (Coimbra Editora, 2011), pp 6–7.

²⁷ M Granieri and A Renda, *Innovation Law and Policy in the European Union—Towards Horizon 2020* (Springer, 2012), p 77.

²⁸ Presidency Conclusions, Göteborg, European Council, 15 and 16 June 2001, point 21, Document (SN 200/1/01 Rev 1).

²⁹ Presidency Conclusions, Barcelona, European Council 15 and 16 March 2002, point 47, Document (SN 100/1/02 Rev 1).

³⁰ Commission Communication, “More Research for Europe Towards 3% of GDP”, Brussels, COM (2002) 499 final, 11.09.2002, point 3.1.5.

the Union's approach in the context of the Lisbon strategy",³¹ again identifying the potential of public procurement to push innovation through the promotion of new types of services and the use of e-government, e-health and e-education.

Until this stage, the role that public procurement played in the EU innovation agenda was not clear. In fact, the Commission Communications were very vague and broad as to how public procurement could serve innovation. Moreover, the EU objective of achieving the R&D target of 3% of GDP was not being satisfactorily accomplished. Consequently, the Commission appointed an expert group to offer guidance concerning the design and implementation of direct public support measures to stimulate private investment in research. According to the expert group, public procurement was viewed as the most effective instrument to stimulate R&D from the demand side, mainly in the areas of health and public security (defence).³² The findings of the expert group were published by the Commission in 2005, and 25 recommendations were made to adapt procurement to the R&D and innovation world. The recommendations might be summarised as follows: (i) the need for the rules to facilitate participation from private sector actors (inventors and small to medium-sized enterprises (SMEs)); (ii) the need for the professionalisation of public officers under the supervision of the Commission; (iii) increasing the possibilities for larger firms to subcontract to small or medium-sized innovatory suppliers; (iv) the need to force national legislatures to address the regulation of public-private partnerships in compliance with EU law; (v) the need for more EU guidance and political commitment.³³

Simultaneously with the studies and documents already mentioned, the EU had adopted the Procurement Directives of 2004 (Directive 2004/17/EC³⁴ and Directive 2004/18/EC³⁵). Despite the fact that these Directives did not specifically mention innovation or R&D, some measures were implemented in order to favour innovative

³¹ Commission Communication "Innovation Policy: updating the Union's approach in the context of the Lisbon strategy", Brussels, COM (2002) 112 final, 11.03.2003, point 6.3.

³² Report to the European Commission from an Independent Expert Group, *Raising EU R&D Intensity: Improving the Effectiveness of Public Support Mechanisms for Private Sector Research and Development: Direct Measures*, 2003, points 39–45.

³³ Expert Group Report presented to the European Commission, *Public procurement to research and development procurement practises favourable to R&D*, Brussels, Belgium (2005), EUR 21793.

³⁴ Directive 2004/17/EC on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L34/1.

³⁵ Directive 2004/18/EC on coordinating the procurement procedures for the award of public works contracts, public supply contracts and public services contracts [2004] OJ L34/114.

public purchases, mainly by clarifying the fact that contracting authorities could use functional requirements in the specifications³⁶ and the creation of a new procedure—competitive dialogue.³⁷ Provisions on R&D were not part of the 2004 Directives, due to the fact that the EU excluded R&D from their scope of application. However, the legal uncertainty of this unwritten exclusion among Member States forced the Commission to adopt a Communication on pre-commercial procurement at the end of 2007,³⁸ clarifying the exemption of R&D services from the Procurement Directives and State aid law.

After 2004, it was undeniable that the association between procurement and innovation would encompass two different yet complementary approaches from the EU: (i) Public Procurement of Innovative Solutions (PPI)—a category of procurement where contracting authorities act as a “launch customer” for innovative goods or services that are not available on the market, and which may include conformance testing; and (ii) pre-commercial procurement—procurement of R&D services involving risk–benefit sharing under market conditions and competitive development in phases, where there is a separation of the R&D phase from the deployment of commercial volumes of end products. The latter is excluded from the Procurement Directives and there is specific guidance from the Commission on how to implement it.³⁹

The EU strategy for innovative public procurement was set and established by the Directives of 2004 and the 2007 Commission Communication on pre-commercial procurement with its two-pronged approach, comprising PPI and pre-commercial procurement.⁴⁰ However, this strategy was clearly proving to be ineffective, or at least insufficient. In this context, as Mazzucato pointed out, the “European googles” are yet to be seen. The example evoked the success story of Silicon Valley, where technologies such as the iPhone, Internet, GPS, touchscreen display and the Siri personal assistant

³⁶ The possibility for contracting authorities to draw up technical specifications in terms of functional performance and requirements was clarified (Recital 29 of Directive 2004/18/EU).

³⁷ Competitive dialogue (art 2(11) (c) Directive 2004/18/EU). On this topic, see the contributions in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Procurement* (CUP, 2012); R Apostol, *Trials and Tribulations in the Implementation of Pre-Commercial Procurement in Europe* (Springer, 2017) pp 14–15.

³⁸ Commission Communication “Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe”, Brussels, COM(2007) 799 final, 14.12.2007.

³⁹ European Commission, *Public Procurement as a Driver of Innovation in SMEs and Public Services* (European Union, 2014).

⁴⁰ Communication on pre-commercial procurement, n 38.

were created with direct funding from decentralised federal agencies under specific programmes, such as the Small Business Innovation Research Program (SBIR).⁴¹ The *Innovative Union* flagship initiative,⁴² issued by the European Commission following the Europe 2020 strategy, acknowledged that there was a notable failure to use it as a strategic innovative driver, unlike other prosperous examples, such as in the USA.

Innovative Union had identified the Union's failure to use public procurement to support public innovation, despite the possibilities already provided by the EU procurement legal framework for innovative acquisitions. For instance, the possibility given to contracting authorities to award contracts based on qualitative criteria was not sufficient to increase the level of innovative public purchases of EU Member States. This was due to a range of factors: incentives that favoured low-risk solutions (ie risk avoidance by public entities); lack of knowledge and capabilities, by public entities and officials, regarding successful procurement for technologies; and a disconnection between EU public procurement law and policy.⁴³

1.3 The new EU legislation on public procurement and its ability to promote innovation

The innovative endeavour from the EU, brought into being by the crises, was then reflected within the new legislative package on public procurement.⁴⁴ The new generation of Directives, in particular Directive 2014/24/EU, has expressly tried to *push* for the purchase of innovative goods, services or works in procurement procedures, and

⁴¹ M Mazzucato, "The Myth of the 'Meddling' State" in G Cozzi, S Newman and J Toporowski (eds), *Finance and Industrial Policy—Beyond Financial Regulation in Europe* (OUP, 2016), pp 113–115. It is worth noting that these US federal agencies did not limit themselves to funding high-profile, risky start-up companies or projects, but also provided them with the appropriate suitable test phase in the correct environment. As merely an example the United States Federal Government in 2015 has encouraged the National Aeronautics and Space Administration (NASA) to use new non procedural tools that can improve the levels of open innovation, such as prize, challenges and crowdsourcing, which are flexible legal concepts, but some guidance on the meaning of this concepts on NASA Policy Directive 1090.1, see J L Guistetic, J Crusan, S Rader and S Ortega "Outcome-driven open innovation at NASA" (2015) 34 *Space Policy*, 11–17. For more developments and economic data on the effect of prizes see MS Clancy and G Moschini "Incentives for Innovation: Patents, Prizes and Research Contracts" (2013) 35 2 *Applied Economic Perspectives and Policy*, pp 206–241.

⁴² Commission Communication, "Europe 2020, Flagship Initiative. Innovation Union" Brussels, SEC(2010) COM(2010) 546 final, 6.10.2010.

⁴³ *ibid*, point 3.2.

⁴⁴ Directive 2014/23/EU of the European Parliament and the Council on the award of concessions [2014] OJ L94/1; Directive 2014/24/EU of the European Parliament and the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65; Directive 2014/25/EU of the European Parliament and the Council on procurement by entities operating in the water, transport, energy and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L94/243.

has tried to avoid those hindrances identified in the *Innovative Union* flagship initiative.⁴⁵ One important example has been the creation of the new tailor-made procurement procedure innovation partnerships,⁴⁶ specifically designed and structured for supporting innovation.

The EU's underachievement in reaching the R&D targets forced it to redirect its efforts towards PPI, that is, procurement procedures that would allow both research/production and the acquisition phase in a single procedure. Although the *Innovative Union* flagship initiative⁴⁷ still provided that Member States need to boost their R&D procurement scheme, the debate centred on the renewal of PPI procedures. This was also reflected under the new legislative package for EU public procurement. Recital 49 of Directive 2014/24/EU noted that the former procedures available under the repealed Directive 2004/18/EC were not suitable for conducting an innovative public purchase. The European legislator claimed, in this recital, that when contracting authorities need to both develop and purchase solutions that are not available on the market (ie innovative solutions), they must have access to a new specific procedure, the innovation partnership. The mere existence of this recital indicates that the European legislator believed that satisfaction of a public need in an innovative way would require the *procedural bridge* of the innovation partnership to be crossed, in order for it to be successful.

Two main premises inspired the emergence of this new specific procedure. First, pre-commercial procurement, a procedure falling outside the scope of the Directives, which was established in 2007 and which specifically aimed at increasing innovation purchases from contracting authorities, was posing several legal issues and causing several inefficiencies. Second, the procedures available under Directive 2004/18/EC did not conform to the flexibility required from an innovative public purchase.⁴⁸

⁴⁵ We can easily see this change, since the previous Directive on the public sector (Directive 2004/18/EC) did not include any express reference to the word “innovation”, while the new Directive for the public sector (Directive 2014/24/EU) uses the word 48 times.

⁴⁶ For this new procedure, see P Cerqueira Gomes, “The innovative Innovation Partnerships under the 2014 Public Procurement Directives” (2014) 4 *Public Procurement Law Review* 211–218; S Arrowsmith, *The Law of Public and Utilities Procurement*, vol I (3rd edn, Sweet & Maxwell, 2014) pp 1046–1060; P Telles and L Butler, “Public Procurement Award Procedures in Directive 2014/24/EU” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djof Publishing, 2014) pp 131–185; M Andrecka, “Innovation partnership in the new public procurement regime—a shift of focus from procedural to contractual issues?” (2015) 2 *Public Procurement Law Review* 48–62.

⁴⁷ Commission, *Europe 2020 Flagship Initiative Innovation Union*, n 42.

⁴⁸ Arrowsmith, n 46, pp 1046–1052; Cerqueira Gomes, n 46, pp 211–213.

Following the adoption of the new Procurement Directives, the European Commission acknowledged the capacity that the new EU legal and political framework would have in increasing innovative procurement. Not only the new innovation partnership was highlighted, but also the simplified and improved competitive dialogue, the greater emphasis on innovative and sustainable technical specifications, the facilitation of cross-border joint procurement and a strengthened legal framework for pre-commercial procurement. Lastly, the financial support of the European Commission and the creation of a Platform to exchange experience and best practice to support transnational cooperation and to help contracting authorities implement innovation procurements, respectively the Horizon 2020 funds and the Public Procurement of Innovation Platform, were also highlighted.⁴⁹ These last instruments aimed at remedying the failure of contracting authorities to deal with the typical uncertainty risk that categorised innovation and innovative markets, and the lack of capacity and knowledge of public officials and public authorities in those Member States that do benefit from effective government intervention in the innovation ecosystem.⁵⁰

The EU fever for stressing the benefits of public procurement of innovation could also be found in the 2015 Commission Communication for upgrading the single market. In this document the Commission linked the achievement of an efficient public procurement system with the increase of innovative public purchases by contracting authorities.⁵¹ Additionally, the recent European Commission Guidance on Innovation Procurement shows an almost unprecedented optimism regarding the virtues of public procurement of innovation when satisfying public needs. It is precisely its capability to offer more efficient solutions and better cost-effectiveness, to foster environmental and social values, and to provide the suppliers' market with new business opportunities⁵² that makes innovation procurement the best player in the European arena.

⁴⁹ European Commission, *State of innovation union. Taking stock 2010–2014*, COM(2014) 339 10.6.2014, point 17.

⁵⁰ All these pathogenic agents were also pointed out in the European Commission, “Guidance on Innovation Procurement” COM(2018) 3051 final, 15.5.2018, pp 16–21, namely the need to build up capacity and train public servants to address these challenges and risk aversion on the part of public entities.

⁵¹ European Commission, “Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee of the Regions on Upgrading the Single Market: more opportunities for people and business” COM (2015) 550 final, 28.10.2015, point 3.2.,

⁵² European Commission, *Guidance on Innovation Procurement*, n 50, pp 3–6.

As previously stated, the EU strategy for procurement involves both pre-commercial procurement and PPI. However, only PPI could be viewed as an innovative procurement instrument that pushes the demand side of a given market.⁵³ Pre-commercial procurement, on the other hand, being a multi-staged process from development to prototyping, field tests for a product that will address specific public needs, and does not involve the purchase of a (non-existing) product by the procuring agencies.⁵⁴ The public body funding the pre-commercial procurement does not have to acquire the result of the pre-commercial process and the intellectual property rights remain on the SME's side.⁵⁵ Pre-commercial procurement involves only public financing of R&D, and must be considered to be only a supply-side facet of the innovation policy. It does not provoke the market pull typical of demand-side instruments, such as PPI.⁵⁶ Recital 49 of Directive 2014/24/EU states that innovation partnerships (part of PPI instruments) “can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market”.

Pre-commercial procurement has several limitations already described when promoting innovation. For the above reasons, the present work will focus only on PPI procedures, since they are instruments that can work effectively on the demand side, by enlarging the market, fostering competition, promote sustainability and satisfying public needs in a more cooperative manner between the private and the public sector.

To sum up, it is clear that the crises only encouraged an already institutionalised innovation revolution within the EU. As shown, this innovation revolution also had an impact on the EU public procurement framework that will lead to several questions throughout the present thesis.

⁵³ C Edquist and JM Zabala-Iturriagoitia, *Why Pre-Commercial Procurement is not Innovation Procurement* (Centre for Innovation, Research and Competence in the Learning Economy (CIRCLE) Lund University, 2012), available at <https://charlesedquist.files.wordpress.com/2013/04/201211-revised-edquistzabala-as-circle-electronic-paper-final.pdf>, pp 3–5.

⁵⁴ Communication on pre-commercial procurement, n 38.

⁵⁵ Edquist and Zabala-Iturriagoitia, n 53, pp 7–24. For a different opinion, see T Berman and M Squire, “Demand-side innovation policies in Australia” in *OECD Demand-side Innovation Policies* (OECD Publishing, 2011) pp 95–113.

⁵⁶ *ibid*, pp 23–24.

2. The EU Public Procurement Framework in the Current Stage of Evolution of the European Project

In section 1 of the present chapter, innovation was described as a EU umbrella policy of the most importance. It was also stressed that this innovation policy has a greater role in the European project, mostly since the European crises, with a clear impact in the EU public procurement system. However, before accurately placing innovation in the EU public procurement system it is essential to analyse the development of the EU public procurement framework in the current evolution of the European project.

2.1 General remarks—the EU public procurement regime—coverage through different sources

The legal basis for the EU to regulate public procurement has always rested, since the appearance of the first generation of Directives, on the Treaties' internal market provisions on free movement.⁵⁷ The new legislative package of 2014 (Directives 2014/23/EU, 2014/24/EU and 2014/25/EU) still relies, as we can see, on the Treaty on the Functioning of the European Union (TFEU), and in particular on articles 53(1), 62 and 114 TFEU.⁵⁸ Despite the importance of public procurement to the European GDP,⁵⁹ it was never expressly regulated under EU primary law. Consequently, the European Treaties (TFEU and TEU) do not directly mention public procurement in their provisions. Several reasons were advanced by the legal doctrine for that omission, in particular the fact that with the advent of the internal market, the relevance of public procurement for the European project was not clear. Besides, in the early days of the European Community, Member States were also reluctant to renounce certain strategic protectionist and discriminatory measures implemented through their own procurement legal framework, such as the protection of “infant industries”⁶⁰ or helping minority groups within society (for example, the unemployed or racial groups).⁶¹ These

⁵⁷ S Arrowsmith, “The Purpose of the EU Public Procurement Directives: Ends, Means, and the Implications for National Regulatory Space for Commercial and Horizontal Policies” (2012) 14 *Cambridge Yearbook of European Legal Studies* 1–47; P Kunzlik, “Neoliberalism and the European Public Procurement Regime” (2013) 15 *Cambridge Yearbook of European Legal Studies* 283–356.

⁵⁸ R Caranta, “The changes to the public contract directives and the story they tell about how EU law works” (2015) 52(2) *Common Market Law Review* 394–395.

⁵⁹ See n 23.

⁶⁰ C Bovis, *EU Public Procurement Law*, 2nd edn (Edward Eldgar, 2012), pp 6–7.

⁶¹ For a more complete analysis on the restrictive procurement practices and the barriers to trade in procurement markets that led to the liberalisation of public markets in the EU procurement framework,

protectionist measures were creating limitations on the level of cross-border activity and delaying the arrival of the “promised land” comprising a complete internal market, which was the essential tool towards economic and social prosperity. Public tenders needed a level of competitiveness that only cross-border trade was able to supply,⁶² leading to a reduction of the burden on public purchases and the growth of the EU economy, due to the extensive public savings expected from a competitive regime in the area of public contracts.⁶³

After the Treaty of Maastricht and the set of Procurement Directives adopted in the early 1990s,⁶⁴ which aimed to expand, strengthen and consolidate the procurement regime with the demands of the single market, and also adapt the EU framework to the Government Procurement Agreement (GPA) of the World Trade Organization (WTO), the importance of public procurement to the European project and the level of regulation were well established. However, the choice of the EU primary legislator in the subsequent Treaty revisions (Treaty of Amsterdam (1997), Treaty of Nice (2001), the non-ratified Constitutional Treaty (2004) and the Treaty of Lisbon (2007)) was not to overload its “Constitution”⁶⁵ with detailed specialised rules, as opposed to in other

see Arrowsmith, n 46, pp 151–158 and WS Atkins Management Consultants, *The Cost of Non-Europe in Public Procurement*, vol 5A (WS Atkins, 1998).

⁶² JM Fernández Martín, *The EC Public Procurement Rules: A critical Analyses* (OUP, 1996), p 42.

⁶³ European Commission, “The Cost of Non-Europe in Public Sector Procurement” in *The Cost of Non-Europe, Basic Findings*, vols 5A and 5B (1988).

⁶⁴ Council Directive 93/36 concerning the coordination of procedures for the award of public supply contracts [1993] OJ L199/1; Council Directive 93/37 concerning the coordination of procedures for the award of public works contracts [1993] OJ L199/54; Council Directive 92/50 concerning the coordination of procedures for the award of public works contracts [1992] OJ L209/1; Council Directive 93/38 concerning the coordination of procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L199/84. Then the EU adopted two new directives, in light of the World Trade Organization Agreement on Government Procurement (GPA) adhesion, namely Directive 97/52/EC amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively [1997] OJ L328/1; and Directive 98/4/EC amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1998] OJ L101/1.

⁶⁵ For the purposes of this work the European Treaties are considered as having the same characteristics as a constitution. In this regard, the European Treaties are viewed as the EU Constitution by the CJEU and legal scholars alike: see the paradigmatic Case C-294/83 *Parti Ecologiste “Les Verts” v Parliament* [1986] ECR 1339, 1365, para 23, “It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”. This constitutional perspective still makes sense even after the demise of the Constitutional Treaty, because the EU legal order still establishes a hierarchy of norms, recognises citizenship, establishes a division of competence between the EU and Member States, grants fundamental rights and establishes a public authority. So the EU Treaties perform the same functions as national constitutions in federal states. For further developments, see R Schütze, *European Constitutional Law* (CUP, 2012); A Von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Hart Publishing, 2011).

fields, for instance competition law (articles 101–106 TFEU) or State aid law (articles 107–109 TFEU). It was argued that the increasingly complex and detailed EU secondary legislation for public procurement needed flexible tools, that is Directives, and not a rigid Treaty provision. Only with these flexible legal instruments was the EU able to make the necessary changes within the internal legal, political and administrative framework and traditions of the Member States, and consequently liberalise the European procurement market.⁶⁶

Nonetheless, part of the EU public procurement process of harmonisation was also made directly through EU treaty primary law, regardless of the non-existence of a European Treaty provision specifically dedicated to public procurement. Following the *Telaustria*⁶⁷ and *Coname*⁶⁸ cases, it was clear not only that negative obligations resulted from the direct application of the TFEU⁶⁹ to public procurement, but also that positive obligations flowed from that Treaty. In those cases, concerning contracts excluded from the coverage of the Directives, the CJEU stated that the TFEU-based non-discrimination principle forced Member States to guarantee an obligation of transparency. This would demand a level of advertisement capable of opening the market to competition and subjecting the impartiality of the procurement process to review.⁷⁰ The CJEU ruled in the *An Post*⁷¹ case that this obligation of transparency only applied to contracts that had a “certain cross-border interest”.⁷²

The impact of this jurisprudence led the European Commission to issue two interpretative Communications, one in 2000 (“Interpretative Communication on

⁶⁶ M Comba, “Variation in the scope of the New Public Procurement Directives of 2014: Efficiency in Public Spending and a Major Role of the Approximation of the Laws” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: the New Directive* (Djøf Publishing, 2014), p 31; M Trybus, “Public Contracts in European Union Internal Market Law: Foundations and Requirements” in R Noguellou and U Stelkens (eds), *Droit comparé des contrats publics* (Bruylant, 2010), pp 81–89.

⁶⁷ Case C-324/98, *Telaustria Verlags GbmH and Telefonadress GmbH v Telekom Austria and Herold Business Data AG* (“*Telaustria*”) [2000] ECR I-10745.

⁶⁸ Case C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de’ Botti* (“*Coname*”) [2005] ECR I-7287.

⁶⁹ M Trybus, “Public Contracts in European Union Internal Market Law” in R Noguellou and U Stelkens (eds), *Comparative Law on Public Contracts Treatise* (Bruylant, 2010), pp 81–121.

⁷⁰ Arrowsmith, n 57, pp 6–7.

⁷¹ Case C-507/03, *Commission v Ireland* (“*An Post*”) [2007] ECR I-9777.

⁷² On the evolution of this concept according to the CJEU, see P Telles, “The Good, the Bad and the Ugly: EU’s Internal Market Thresholds and Cross-Border Interest” (2013) 43 *Public Contract Law* 3–25; S Treumer, “Cross-Broader Interest and Application of EU Law Principles in the Context at National Level” in D Dragos and R Caranta (eds), *Outside the EU Procurement Directives—Inside the Treaty* (DJØF Publishing, 2012), pp 335–356; C R Hansen, *Contracts not Covered or not Fully Covered by the Public Sector Directive* (Djøf Publishing, 2012), pp 121–170.

concessions of 2000”⁷³) and other in 2006 (“Interpretative Communication on contracts falling outside the scope of the Directives of 2004”⁷⁴) to explain the impact of the CJEU rulings on the daily life of contracting authorities and economic operators.⁷⁵ The effect among some Member States of the Interpretative Communication on contracts falling outside the scope of the Directives of 2004 was controversial. Germany, joined by a number of Member States, unsuccessfully challenged the Interpretative Communication before the General Court, on the basis that it contravened the principle of separation of powers, since the European Commission Communication created new legislative rules and the Commission does not possess that competence according to the European Treaties.⁷⁶ However, the General Court concluded that the Communication did not contain new rules for the awarding of public contracts that went beyond the existing obligations under EU law, especially those arising from the principles of equal treatment, non-discrimination and transparency.⁷⁷ However, even today the case law on the existence of certain cross-border interests in the awarding of public contracts creates a great amount of legal uncertainty concerning the objective criteria that may indicate the existence of a certain cross-border interest and the burden of proof related to that.⁷⁸

The EU Treaty primary law also applies on a supplementary basis to the Directives. Therefore, where there is the need to interpret some concept or to fill some gap within the Directives, the provisions of the TFEU shall apply, principally the main European

⁷³ Commission Interpretative Communication of Concessions under Community Law, 29 April 2000, [2000] OJ C-121/2.

⁷⁴ Commission Interpretative Communication on the Community law applicable to contracts not or not fully subject to the provisions of the Public Procurement Directives, 1 August 2006, [2006] OJ C-179/02.

⁷⁵ For further details on the topic, see R Caranta, “The Borders of EU Public Procurement Law” in Dragos and Caranta (eds), *Outside the EU Procurement Directives—Inside the Treaty*, n 72, pp 25–57.

⁷⁶ Case T-258/06, *Federal Republic of Germany (et al) v European Commission* [2006] OJ C-179/2. For a more detailed analysis of the case, see Z Peterson, “Below-threshold contract award under EU primary law: Federal Republic of Germany v Commission (T-258/06)—case comment” (2010) 6 *Public Procurement Law Review* 215–220.

⁷⁷ Case T-258/06, *Federal Republic of Germany (et al) v European Commission* [2006] OJ C-179/2, paras 157–162.

⁷⁸ Case C-318/15, *Tecnoedi Costruzioni Srl v Comune di Fossano* [2016] EU:C:2016:747, paras 20–25. The CJEU in *Tecnoedi* tightened its approach to the burden of proof of the existence of a certain cross-broader interests. The CJEU stated that the objective criteria that indicate certain cross-broader interests must be real and not fictitious. Moreover, it should be for the referring court to provide the evidence that proves a cross-broader interest. This view was also reinforced in Case C-486/17, *Olympus Italia SRL v Istituto di Ricovero e Cura a Carattere Scientifico—Centro di Riferimento Oncologico della Basilicata (CROB) di Rionero in Vulture*, EU:C:2017:889, para 21, “Dall’altro, nella sua domanda di pronuncia pregiudiziale il giudice del rinvio non ha fornito alcun elemento tale da permettere alla Corte di disporre di informazioni in grado di dimostrare l’esistenza di un interesse transfrontaliero certo (v., in tal senso, sentenza del 6 ottobre 2016, *Tecnoedi Costruzioni*, C-318/15, EU:C:2016:747, punto 23)”.

principles of non-discrimination, equal treatment, transparency and proportionality.⁷⁹ A suitable example of this interpretative function of the EU Treaty principles as regards public procurement may be found in the case law on the application of the EU principle of proportionality⁸⁰ to discretionary exclusion of economic operators.⁸¹ Another example on a similar theme might be the theoretical construction of the self-cleaning doctrine, now codified in article 57(6) of Directive 2014/24/EU.⁸² The importance of proportionality and other EU public procurement principles, such as equal treatment, non-discrimination and transparency, was reflected in article 18 of Directive 2014/24/EU, a general rule dedicated to the general principles that apply to procurement.⁸³

2.2 State of the art—EU rules on public procurement within the internal market

The EU public procurement regime is thus organised as a multi-layered system of Treaty provisions (regulation of economic freedoms and the general EU principles) and

⁷⁹ P Braun, “A Matter of Principles(s)—The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives” (2000) 9 *Public Procurement Law Review* 39–48; M Trybus, “European Union Law and Public Procurement” (1 September 2017), English version of Spanish paper “El Derecho de la Unión Europea y la contratación pública” in A Montaña Plata and JI Rincón Córdoba (eds), *Contratos Públicos: Problemas, Perspectivas y Prospectivas Administrativo* (Universidad Externado de Colombia, 2017) pp 743–781, available at <https://ssrn.com/abstract=3060436>.

⁸⁰ JM Hebby and J Meesters, “The principle of proportionality principle in the Dutch Public Procurement Act” (2014) 4 *European Procurement Public-Private Partnerships Law Review* 266–270.

⁸¹ Case C-213/07 *Michaniki v Ethniko Simvoulío Radiotileorasis et al* [2008] ECR I-999, para 48, “in accordance with the principle of proportionality, which constitutes a general principle of Community law (see, inter alia, Case C-210/03 *Swedish Match* [2004] ECR I-11893, para 47), such measures must not go beyond what is necessary to achieve that objective (see, to that effect, *Fabrimcom*, paragraph 34)”; Joined Cases C-72/10 and C-77/10, *Costa and Cifone*, Judgment of 16 February 2012, para 81, “Legislation which provides for operators to be excluded, even temporarily, from the market can be regarded as proportionate only if it provides for an effective legal remedy and compensation for any loss suffered in the event that such exclusion subsequently proves to be unjustified.”

⁸² S Arrowsmith, HJ Priess and P Friton, “Self-cleaning as a Defence to Exclusions for Misconduct—An Emerging Concept in EC Public Procurement Law” (2009) 18 *Public Procurement Law Review* 257–263. The Opinion of the Advocate General Sánchez-Bordona, delivered on 16 May 2018 pending Case C-124/17 *Vossloh Laeis GmbH v Stadtwerke München GmbH*, clarifies important issues concerning the self-cleaning doctrine (art 56(6), (7), Directive 2014/24/EU). The Advocate General rejects the legal interpretation of art 56(6) that forced economic operators to duplicate the proof of their reability to both investigation authorities and contracting authorities (paras 60 and 61). Moreover, the concept of “relevant fact” (art 57(7), Directive 2014/24/EU), which sets the maximum period for the exclusion, must be the one of the application of the penalty, when there was a previous decision from a competition authority (para 85).

⁸³ P Bogdanowicz, “Article 56 and the Principle of Proportionality” in A Sánchez-Graells (ed), *Smart Public Procurement and Labour Standards—pushing the discussion after RegioPost* (Hart Publishing, 2018) pp 40–41.

specific Directives, mostly legitimised by internal market provisions and EU law principles. However, the debate around the legal basis and *teleological* function of the EU public procurement rules and their objectives cannot be resolved only through typical obligations derived from the free movement rules.⁸⁴

It is true that EU procurement rules always had a market orientation supported by the almost unchanging character of its legal basis (internal market provisions).⁸⁵ In other words, the initial European objective for public procurement was to open economies to one another and to increase cross-border trade in public markets. Therefore, abolishing protectionist practices and discriminatory measures, and also promoting effective competition, was the European priority for this legal field. Europe's idea was that public procurement regulations and the practices of the Member States could be a source of *market failures* that were undermining the existence of a European public internal market. Thus, equal treatment, non-discrimination, proportionality and transparency were essential requirements in the awarding of public contracts. In addition, the CJEU favoured the view that effective competition was an essential ingredient of public procurement. In the *Hochtief* case, the Court stressed that "the purpose of that directive is to develop effective competition in the field of public works contracts".⁸⁶ Moreover, article 18 of Directive 2014/24/EU⁸⁷ for the first time has expressly embedded the principle of competition in a procurement directive. This latter rationale was used by some legal doctrine as the missing piece in the construction of a true pro-competition procurement system. Given the view from the CJEU and the

⁸⁴ On the lack of coherence of the case law of the CJEU on the free movement rules and the legitimacy of the CJEU *principiological* constructions', see NN Shuibhne, *The Coherence of EU Free Movement Law—Constitutional Responsibility and the Court* (OUP, 2013), pp 31–62.

⁸⁵ Caranta argues for a need for a change in the legal basis in the substantive directives, in order to legitimise a more strategic approach to procurement: n 58, pp 394–395.

⁸⁶ Case C-138/08 *Hochtief and Linde-Kca-Dresden v Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság* (2009) EU:C:2009:627, para 47. In the case, the question was related to Directive 93/37/ECC and Directive 2004/18/EC.

⁸⁷ "The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators."

recent legislative reform, the debate concerning the objectives of the procurement system⁸⁸ could finally come to earth in a land covered with legal certainty.⁸⁹

Nevertheless, the lack of consistency in the ruling of the CJEU on the correct weight to be given to competition, and the fact that the wording of the law (article 18(1), Directive 2014/24/EU) seems to connect distortions of competition with a subjective element of “intent”, limits the existence of the *in dubio pro concurrentia* principle of interpretation.⁹⁰ The value of competition has yet to be clarified by the CJEU. The formula used by the CJEU in the *Falk Pharma* judgment did not view the principle of competition as one with the ability to provide interpretive criteria to the European procurement legal framework.⁹¹ However, both the CJEU *Spezzino*⁹² case and the

⁸⁸ The debate concerning the objectives of the EU public procurement system has given rise to different views among scholars. Arrowsmith argues that the EU legal framework for procurement aims merely to achieve three objectives related to the internal market: (i) the prohibition of discrimination on grounds of nationality; (ii) transparency to support the prohibition of discrimination; and (iii) the removal of barriers for market access. See Arrowsmith, n 70, pp 6-14. In that vein also see P Trepte, “The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate What We Buy” in G Skovgaard Olykke, C Risvig Hansen, CD Tvarno (eds), *EU Public Procurement—Modernisation, Growth and Innovation—Discussions on the 2011 proposals for Procurement Directives* (Djof Publishing, 2012) pp 87–91; and L Richer, *L’Europe des marchés publics* (LGDJ, 2009) pp 9–26. Controversially, Sánchez-Graells adds a fourth objective: the principle of competition connected with economic efficiency of public markets based on the legal reasoning of the CJEU, in A Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart Publishing, 2015) pp 195–237. Holding an intermediate position, Kunzlik argues that the procurement directives pursue certain competition objectives, but not the “efficiency” objective defended by Sánchez-Graells. According to Kunzlik, competition should be used only to the extent that it opens public markets and ensures equality for competitive contractual opportunities: see Kunzlik, n 57, pp 327–340.

⁸⁹ Sánchez-Graells, n 88. In the 1st edn of Sánchez-Graells’ work, the author argued that this competition principle was already integrated into the previous Directive, based on the fact that the competition principle is a general principle of EU law present in the European Treaties. That dimension was also fully recognised by AG Stix-Hackl in the *Sintesi* case. Stix-Hackl argued that one of the dimensions of competition within EU public procurement legal framework was the protection of competition as an institution, in Opinion of Advocate General Stix-Hackl delivered on 1 July 2004, Case C-247/02 *Sintesi SpA v Autorità per la Vigilanza sui Lavori Pubblici (Sintesi)* ECLI:EU:2004:399, paras 29–40.

⁹⁰ Sánchez-Graells, n 88, pp 243–451. Explaining the appearance of the subjective element in art 18 of Directive 2014/24/EU in a discussion of its legal value, see A Sánchez-Graells, “A Deformed Principle of Competition?—The Subjective Drafting of Article 18(1) of Directive 2014/24” in GS Olykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar Publishing, 2016) pp 80–101; A Sánchez-Graells, “Assessing the Public Administration’s Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?” (2016) 18 *Cambridge Yearbook of European Legal Studies* 93–121.

⁹¹ Case C-410/14 *Dr Falk Pharma GmbH v DAK-Gesundheit*, [2016] ECLI:EU:C:2016:399, para 34: “However, it should be noted, first, according to recital 2 of that directive, the coordinating provisions which it establishes must be interpreted in accordance with the principles of the FEU Treaty, in particular the principles of the free movement of goods, freedom of establishment and freedom to provide services and the principles that derive therefrom, such as equality of treatment, non-discrimination, mutual recognition, proportionality and transparency to which the award of public contracts in Member States are subject.”

⁹² Case C-113/13 *Azienda sanitaria locale n. 5 “Spezzino” v San Lorenzo Soc coop sociale*, [2014] ECLI:EU:C:2014:2440, para 51: “EU law on public tendering, in so far as it concerns, inter alia, public service contracts, is intended to ensure the free movement of services and the opening-up to competition in the Member States which is undistorted and as wide as possible ...”.

Opinion of Advocate General Sharpston in the *Wrocław—Miasto na prawach powiatu*⁹³ case recognised that EU law on public tendering aims to guarantee the opening-up of procurement to competition.

In this author's view, it is clear that competition is one of the objectives of the EU public procurement system that can no longer be considered merely as an instrument to achieve or guarantee the effectiveness of other EU principles, such as equal treatment or transparency.⁹⁴ However, since competition is not the only principle, objective or value of the European framework, its normative intensity is of variable geometry. Competition needs to be balanced with other objectives⁹⁵ (social, environmental or even innovation) and principles of the internal market. Consequently, competition cannot be chosen as the only player in the procurement regime, especially given the current stage of evolution of the European project, where both the internal market and public procurement are being transformed into a strategic European tool to reach other European policies, such as innovation, environmental and social policies.

The low levels of cross-border trade in the European public procurement market are also proof that the regime is in need of a change. Recent studies showed that the levels of *direct* cross-border procurement (where the successful bidder is not located in the same country as the contracting authority and is not domestically owned) and *indirect* cross-border procurement (where the successful bidder is based in the same country as the contracting authority but is a subsidiary of a foreign country) are significantly low compared to what was initially expected from the EU. Over the period 2009–15, *direct* cross-border procurement represented 1.7% of the number and 3% of the value of all contract awards by the 28 Member States, while *indirect* cross-border procurement was considerably higher, at 21.9% of the number and 20.4% of the value.⁹⁶ Bearing this in mind, one should question whether the EU system for procurement is really efficient in

⁹³ Opinion of Advocate General Sharpston delivered on 17 November 2015, Case C-406/14 *Wrocław - Miasto na prawach powiatu v Minister Infrastruktury i Rozwoju* ECLI:EU:C:2015:76, para 30: “Directive 2004/18 is designed not only to avoid obstacles to freedom to provide services in the award of public service contracts or public works contracts but also to guarantee the opening-up of public procurement to competition”. Nonetheless, in the same case the final decision of the CJEU did not evoke the competition element.

⁹⁴ On the other hand, see Kunzlik, n 57, pp 327–340.

⁹⁵ On the topic of the possible objectives of any procurement system, see SL Schooner, “Desiderata: Objectives for a System of Government Contract Law” (2011) *GWU Law School, Public Law Research Paper* 37, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620.

⁹⁶ European Commission, *Measurement of impact of cross-border penetration in public procurement—Final Report—Study* (2017), available at <https://publications.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1>.

increasing cross-border trade, or whether a more strategic and balanced approach is needed in this legal area.

The evolution of the European procurement rules into a more strategic scheme was not sudden but an ongoing process, where the speed of change was set by the levels and momentum of the European integration process. In fact, the case law from the CJEU on the promotion of horizontal policies is a clear example of the latter. Cases such as *Beentjes*,⁹⁷ *Commission v France*,⁹⁸ *Concordia Bus*⁹⁹ and *Wienstrom*¹⁰⁰ showed how the EU was at first struggling with the legitimisation of horizontal policies and its threats to the internal market, which was the legal basis for procurement rules. As summarised by Advocate General Kokott in the *Max Havelaar* case, a hermeneutic balance need to be achieved:

Whether and to what extent environmental and social considerations may be taken into account and in, particular, reference may be made to environmental and fair trade labels, is a question of fundamental importance for further development of public procurement law. In giving its answer, the Court is faced with the challenge of finding an equitable balance between the requirements of the internal market and social concerns, without ignoring the practical requirements of award procedures.¹⁰¹

⁹⁷ Case C-31/87 *Gebroeders Beentjes v State of the Netherlands* [1988] ECR 4635, para 30: “[T]he obligation to employ long-term unemployed persons could inter alia infringe the prohibition of discrimination on grounds of nationality laid down in the second paragraph of Article 7 of the Treaty if it became apparent that such a condition could be satisfied only by tenderers from the State concerned or indeed that tenderers from other Member States would have difficulty in complying with it. It is for the national court to determine, in the light of all the circumstances of the case, whether the imposition of such a condition is directly or indirectly discriminatory.”

⁹⁸ Case C-225/98 *Commission v France* [2000] ECR I-7445, para 50: “Nonetheless, that provision does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services ...”

⁹⁹ Case C-513/99 *Concordia Bus Oy Ab v Helsingin kaupunki e HKL-Bussiliikenne* [2002] ECR I-7213, para 64: “It follows from the above considerations that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.”

¹⁰⁰ Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paras 66–68: “As recalled in paragraph 33 of this judgment, ecological criteria used by a contracting authority as award criteria for determining the most economically advantageous tender must, inter alia, be linked to the subject-matter of the contract...An award criterion that relates solely to the amount of electricity produced from renewable energy sources in excess of the expected annual consumption, as laid down in the invitation to tender, cannot be regarded as linked to the subject-matter of the contract”.

¹⁰¹ Conclusion of Advocate General Kokott in Case C-368/10 *European Commission v Kingdom of the Netherlands (Max Havelaar)* ECLI: EU:C: 2011:840, para 3. Example taken from R Caranta,

Nonetheless, the *Max Havelaar* case already represented a step further in the legitimisation of horizontal policies.¹⁰² In this case the Court considered that the environmental label (EKO label) fulfilled the conditions listed in article 23(6) of Directive 2004/18 and constituted an “eco-label” within the meaning of that provision, respectively under article 23(2) and (3)(b) and the last sentence of recital 29 in the preamble to Directive 2004/18.¹⁰³ Although the other label (Max Havelaar) described products of fair-trade origin purchased at a price and under conditions more favourable than those determined by market forces from organisations made up of small-scale producers, according to the CJEU such criteria did not correspond to the definition of the concept of technical specification in paragraph 1(b) of Annex VI to Directive 2004/18, given the fact that that definition applies exclusively to the characteristics of the products themselves, their manufacture, packaging or use, and not to the conditions under which the supplier acquired them from the manufacturer. In that sense, the Max Havelaar label fell under the concept of “conditions for performance of contracts” within the meaning of article 26 of that Directive 2004/18/EC and not the requirements for technical specifications.¹⁰⁴

Despite the failure of the latter label (Max Havelaar), the reasoning of the CJEU showed more openness to introducing social and ecological factors into the procurement procedures.¹⁰⁵ Moreover, the crises previously described seemed to have contributed to give an extra analgesic to the tension between the use of procurement as a regulatory instrument and the internal market imperatives for non-trade restrictions.

As we shall see, a more balanced or even strategic approach from the European legislator and the CJEU to both the internal market and the Procurement Directives is perceptible. In fact, to understand the evolution of the internal market is an essential

“Sustainable Procurement” in M Trybus, R Caranta, G Edelstam (eds), *EU Public Contract Law—Public procurement and beyond* (Bruylant, 2014) pp 166–167.

¹⁰² Caranta, n 101, p 166.

¹⁰³ Case C-368/10 *European Commission v Kingdom of the Netherlands (Max Havelaar)*, [2012] ECLI:EU:C:2012:284, paras 61–64.

¹⁰⁴ *ibid*, paras 61–64, paras 73–77.

¹⁰⁵ Article 43 of Directive 2014/24/EU introduces a novelty in relation to the *Max Havelaar* case, which is the possibility to make reference to a specific label in the technical specifications, if the requirements of article 43 have been fulfilled. For a definition of “label”, see G Cantillon, “Labels écologiques et sociaux: vers une utilisation facilitée par une extension du lien à l’objet du marché” (2014) 144 *Contrats Publics* 29–30. P Kunzlik, “From suspect practice to market-based instrument: policy alignment and the evolution of EU law’s approach to “green” public procurement” (2013) 3 *Public Procurement Law Review* 111–112 warns us to be alert to the potential threats that this “good measure”, in the words of the author, could pose to the principles of equal treatment and competition.

hermeneutic requirement, in order to correctly comprehend the development of the procurement field within the European system.

2.2.1 *The internal market as a market of values*

The undefined character of the internal market was remarkably described in 1991 by JHH Weiler. In his famous masterpiece, *The Transformation of Europe*, he predicted that the single market, now the internal market, would entail “a highly politicized choice of ethos, ideology, and political nature, that would seek to maximize utility and would be premised on the assumption of formal equality of individuals”.¹⁰⁶ In other words, the internal market provisions would embody a permanent constitutional mutation, in order to reflect the constitutional and political reality of the European project. In this regard, it is unquestionable that nowadays, the internal market goes beyond the rules on free movement. The ambiguity of the legal definition adopted by the Treaty in article 26(2) TFEU—“the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”—creates a risk of viewing the internal market as having only an economic purpose,¹⁰⁷ that is, as a tool for a customs union and the removal of obstacles to trade. Nonetheless, non-market interests, such as protection of the environment, promotion of social rights,¹⁰⁸ healthcare or data protection, are essential to European integration and to achieving the desired level playing field among all Member States.¹⁰⁹ Therefore, during the process of

¹⁰⁶ JHH Weiler, “The Transformation of Europe” (1991) 100(8) *Yale Law Journal* 2474–2483.

¹⁰⁷ Case C-221/11 *Leyla Ecem Demirkan v Bundesrepublik Deutschland*, [2013] ECLI:EU:C:2013:583, para 56: “By contrast, under European Union law, protection of passive freedom to provide services is based on the objective of establishing an internal market, conceived as an area without internal borders, by removing all obstacles to the establishment of such a market. It is precisely that objective which distinguishes the Treaty from the Association Agreement, which pursues an essentially economic purpose”.

¹⁰⁸ As an example, see article 9 TFEU (“In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”). Despite this provision’s inability to transfer any new legal competences to the EU in this regard, it affirms that social objectives are equivalent to economic objectives under EU primary law. See M Dawson and B Witte, “Welfare Policy and Social Inclusion” in A Arnall and D Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015), pp 966–967; F Scharph, “The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”” (2010) 8(2) *SocioEconomic Review* 211–250. For the argument regarding constitutional asymmetry, see C Joerges, “Re-Conceptualising European Law as Conflicts Law’ the ECJ’s Labour Law Jurisprudence and Germany’s Federal Constitutional Court” in B Verschraegen (ed), *Interdisciplinary Studies of Comparative and Private International Law*, vol I (Jan Sramek Verlag, 2010), pp 7–18.

¹⁰⁹ L Azoulai, “The Complex weave of harmonization” in Arnall and Chalmers (eds), *The Oxford Handbook of European Union Law*, n 108, pp 592–596.

harmonisation of laws (article 114 TFEU) that have a legal basis in the internal market, the EU is concerned not only with opening up markets, but also with creating a set of values to ensure social, environmental and economic models.¹¹⁰

The harmonisation method not only puts in place common regulatory foundations for the internal market, but to a certain degree it also replaces national diversity with a single EU model that aims to create a market of *values*¹¹¹ (articles 2 and 3(3) TEU).

The harmonisation method under article 114 TFEU, coupled with a broad catalogue of Union competences (articles 2–6 TFEU) based on the principle of conferral (article 5(2) TEU),¹¹² allows the EU to take *intra vires* action in fields such as the internal market, the environment and social policy (article 4(2) TFEU—areas of shared competence), or even coordinating the EU industrial policy (article 6 TFEU).¹¹³ Nevertheless, to extend the logic of the internal market to non-commercial interests provokes a conflict between values. In order to avoid contradictions and safeguard the consistency of the goals and reasoning of the EU heterogenic system of values (articles 3 and 6 TEU), the principle of consistency present in articles 7 and 13 TFEU demands that the European legislator and the CJEU balance these interests and bring uniformity and effectiveness in the application of EU rules, achieving legal certainty.¹¹⁴ On the side of the law-making process, the principle of consistency demands that with respect to the principle of conferral, the European legislator, as a *rational* actor, must take into

¹¹⁰ The doctrine had already identified that the European Treaties have a pluralistic character that supports the implementation of a variety of very different socio-economic policies depending on the political choice of the EU and the Member States. It is more than evident from both a political and legal perspective that the economic constitution of the EU does not force a specific neo-liberal or downturn-austerity paradigm. For more developments, see C Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing, 2016); and M Poaires Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: a critical reading of article 30 of the EC Treaty* (Hart Publishing, 1998), pp 103–174.

¹¹¹ The expression “market of *values*” can be found in S Weatherill, *Law and Values in the European Union* (OUP, 2016), pp 383–419.

¹¹² The conferral principle (article 5(2) TEU) states that “the Union shall act only within the limits of competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States”.

¹¹³ G Davies, “The Competence to Create an Internal Market” in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States—Reflection on the Past, The Present and the Future* (Hart Publishing, 2017) pp 77–82; K St C Bradley, “Legislating in the European Union” in C Barnard and S Peers (eds), *European Union Law*, 2nd edn (OUP, 2017), pp 106–110.

¹¹⁴ E Herlin-Karnell and T Konstadinides, “The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration” (2013) 1 *Cambridge Yearbook of European Legal Studies*, pp 139–167, available at <https://ssrn.com/abstract=2339597> or <http://dx.doi.org/10.2139/ssrn.2339597>.

consideration the stage of the integration process and guarantees that there is no conflict between the policies of the Union.¹¹⁵

The European legal doctrine has highlighted that consistency also works as a strategic principle for the CJEU to resolve difficult cases, where it is necessary to balance different contradictory interests, mainly through the judicial application of the principle of proportionality.¹¹⁶ The principle of proportionality in general EU law theory represents a control mechanism regarding the application of justification of restrictive measures to the internal market. It also aims to balance economic freedoms and the EU social agenda in the internal market.¹¹⁷

The need for equilibrium between economic and non-economic considerations in the European project must be reflected in the internal market (market of *values*) framework. Despite the initial economic fever, the European project is much more than that. This latter conclusion was not the result of the crises previously mentioned but the acknowledgement of the European ethos and European foundational principles, which were only re-awakened—and perhaps redirected—by the crises.

The discussion on EU constitutional principles is ongoing among academics and national and EU institutions. However, the sub-category of primary law principles, the founding principles,¹¹⁸ are somehow less permeable by a systematic constitutional approach by the European legal actors. The foundational principles have a triple function: (i) to legitimise the European political process and its ethos; (ii) to constitutionalise the main constitutional principles that will pave the way to fostering European integration; (iii) a cohesive function that aims at economic and social cohesion, but also to create a new culture or European identity.¹¹⁹ Von Bogdandy argues that EU foundational principles have a normative function for the whole of the EU's legal order. The foundational principles are those that establish the legitimacy

¹¹⁵ K Lennaerts and JA Gutiérrez-Fons, "To say what the law is: methods of interpretation and the European Court of Justice" (2014) 20 *Columbia Journal of European Law* 10–16.

¹¹⁶ Herlin-Karnell and Konstadinides, n 114, pp 147–158.

¹¹⁷ T Tridimas, "The principle of Proportionality" in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law*, vol I: *The European Union Legal Order* (OUP, 2018) pp 246–263. In the context of EU public procurement, see also Corvaglia, n 24, pp 170–172; S Arrowsmith and P Kunzlik, "EC Regulation of Public Procurement" in Arrowsmith and Kunzlik (eds), n 24, pp 12–15.

¹¹⁸ J Molinier (ed), *Les principes fondateurs de l'Union européenne* (Presses Universitaires de France, 2005).

¹¹⁹ J Molinier (ed), *Synthèse—Les principes fondateurs de l'Union européenne* (Recherche réalisée avec le soutien du GIP Mission de recherche Droit et Justice, 2004), pp 10–12.

foundations for the EU to exercise public authority.¹²⁰ Therefore, the founding principles have the normative ability to frame the whole of the EU's legal order and lay down a new constitutional rhetoric.¹²¹ These principles are divided into two sets: (i) principles governing relations between the Union and its Member States (effectiveness; rule of law; principles regarding the EU competence; comprehensive legal protection; principle of loyalty); (ii) principles governing relations between the individual and the Union (here, the values referred to in article 2 TEU)¹²² constitute the foundational principles—human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These foundational principles are the ones capable of framing the whole EU system, and they reflect much more than an economic or even financial union. These principles materialise the values of democracy and a progressive society in the European context, which should be spread throughout European policies.

Nonetheless, both the existence of foundational principles that clearly overcome a purely economic normative dimension and the incontrovertible conclusion that the EU is evolving towards a market of *values* force us to define the European ethos, in order to have a holistic picture of what should drive the EU as a legal actor today. Since the signing of the Schuman Declaration in 1950 and the draft of the European Coal and Steel Treaty, the European project has had a foundational mission to deliver peace and prosperity. So, up to the present time, peace and prosperity have been the cornerstones of the EU or Europe's ethos. However, the constitutional and political debate around the Europe's ethos or *raison d'être*¹²³ seemed to have stalled. The recent successive crises already described have awakened the latter debate. One might argue that the lack of debate surrounding Europe's ethos was almost redundant because of Europe's own successes in effectively delivering peace and prosperity among its Member States.¹²⁴ The effectiveness of the former was even recognised internationally when the EU was

¹²⁰ A Von Bogdandy, "Founding Principles of EU Law—A Theoretical and Doctrinal Sketch" (2010) 12 *Revus* 35–56.

¹²¹ *ibid.* See also J Dickson and P Eleftheriadis, "Introduction: The Puzzles of European Union Law" in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP, 2012), pp 1–22.

¹²² The tenets down in article 2 TEU are referred to as values, but they should be understood as legal norms and principles, since the values present in art 2 TEU have been agreed upon in art 48 TEU and produce the legal consequences set out in art 49 TEU; thus they are legal norms and not merely values—Von Bogdandy, n 120, pp 42–45.

¹²³ The expression was inspired by G de Búrca, "Europe's Raison d'être" in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP, 2013), pp 21–38.

¹²⁴ *ibid.*, pp 27–35.

awarded the Nobel Peace Prize in 2012. Additionally, the European institutions were aware of the effectiveness of the EU's laws and policies regarding the delivery of peace and prosperity. This sense of accomplishment from the European institutions made them relegate the debate on Europe's ethos to second place. Therefore, since the ethos of the European project was clad in armour built upon the success of European policies, the Union did not feel any need to reflect on its purpose. Instead, the European project focused on its own desire to grow in both market and geopolitic terms,¹²⁵ and also on an attempt to formally constitutionalise the European project, through the failure approved of the constitutional treaty.¹²⁶

However, following the recent crises it was clear and uncontroversial that prosperity was not being delivered to the majority of the Member States. Weiler's "political messianism", that is the pursuit of a mission (peace, prosperity and "supernationalism"),¹²⁷ was not enough to give the European project legitimacy and therefore public authority. For the author, the recent crises have showed that in order to drive the process of integration further, the EU must shift its legitimacy from the pursuit of ideals to a regular process-democracy.¹²⁸

On the other hand, Gráinne de Búrca believes that at the current stage of evolution, the EU still needs to draw its legitimacy from the effective delivery of policy and a perceived *raison d'être*. It is true that the EU must improve its democratic deficit,¹²⁹ but at this time of political and social rupture, Europe is not yet ready for a federal type of governance. The EU must continue to draw its political legitimacy from its performance of effective policy delivery, which nowadays is much more oriented

¹²⁵ A Somek, "Unity and Community: A Tale of Two Monsters and One Unanswered Question" in MP Maduro and M Wind (eds), *The Transformation of Europe—twenty-five years on* (CUP, 2017), pp 249–261.

¹²⁶ After the "no" votes in the 2005 French and Dutch referendum on the already promulgated European Constitutional Treaty, Europe's leaders removed the constitutional formal semantic from it; and at the Lisbon Summit of December 2007 an agreement for the Lisbon Treaty was reached and successfully implemented before the end of 2009. See N Walker, "The European Union's Unresolved Constitution" in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (CUP, 2012), pp 1185–1204; P Craig, *The Lisbon Treaty—Law, Politics, and Treaty* (OUP, 2010).

¹²⁷ JHH Weiler, "60 Years since the First European Community: Reflections on Messianism" (2011) 22 *European Journal of International Law* 303–340.

¹²⁸ JHH Weiler, "The Transformation of Europe Revisited: The Things that Do Not Transform" in Maduro and Wind (eds), *The Transformation of Europe—twenty-five years on*, n 125, pp 348–352.

¹²⁹ For an overview of the multiperspectives of what constitutes democratic deficit in the EU, see D Grimm, *The Constitution of European Democracy* (OUP, 2017) pp 1–117; JE Fossum and J Pollak, "Which Democratic Principles for the European Union? What Deficit?" in S Piattoni (ed), *The European Union: Democratic Principles and Institutional Architectures in Times of Crises* (OUP 2015), pp 29–46.

towards prosperity than peace on the European continent.¹³⁰ Effective policy delivery demands, on the one hand, a novel transnational relationship between the Member States, their citizens and the EU; and, on the other hand, acknowledgement of the EU's role as a global actor capable of offering a third-way model of social democracy as an alternative means of managing economic globalisation and offering solutions to global problems (climate change, human rights, health issues, etc).¹³¹

The EU's *raison d'être* must be placed at the current stage of the European integration. In that sense, in order to achieve prosperity, a new transnational relationship between the EU, the Member States and their citizens that captures the evolution of the internal market to a market of values needs to be put in place by the EU institutions. Despite the inability of the TEU preamble to be seen as a source of direct enforceable rights, it must be evoked, since it has legal value. It gives the correct interpretative framework for the internal market and the other legal fields, such as public procurement, that have their legal basis in internal market provisions.

In this vein, the preamble to the TEU states that the Member States of the EU are determined to

promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields ...

Rectius, the wording of the preamble is clearly a constitutional mandate, through the provisions of both the TEU and TFEU, for the EU to demand the establishment of a market of *values*, by integrating sustainable development and environmental and social protection in the context of the internal market and economic progress.¹³² A clear analogy can be made with the legal value of preambles under domestic constitutional law. Preambles embed core values and principles that are supportive in the

¹³⁰ de Búrca, n 123, pp 25-30.

¹³¹ *ibid.*

¹³² According to Melica, both the preamble and article 3 TEU contain the real reasons for the existence of the EU: L Melica, "The unconstitutional development of the European legal framework" (2018) 3 *Diritto Pubblico Comparato ed Europeo* 627–630; L Melica, "The unconstitutional development of the European legal framework" (2018) 3 *Diritto Pubblico Comparato ed Europeo* 627–630.

interpretation of constitutional text,¹³³ so as an auxiliary hermeneutic tool they also contribute to the unity of any given constitution (in this case, of the EU) to be interpreted as a unique legal text, in order to avoid contradictions or tensions within the constitution.¹³⁴ The failure to approve of the Constitutional Treaty does not preclude the treatment of the TEU as a material constitution for Europe and to accord value to its preamble.¹³⁵

The constitutional European framework given by the foundational principles, the European *ethos* or *raison d'être* and the preamble to the TEU demand that in the current period (crises) of European integration, the internal market must be seen as a market of *values*.

In the Single Market Act I¹³⁶ and II¹³⁷ strategy, it is clearly stated that the single market will have a new vision of a highly competitive social market economy, which will demand sustainable growth (social and environmental progress), smart growth (revival of the EU industrial policy with innovation and a digital economy) and inclusive growth (more small and micro enterprises, and more solidarity). Therefore, the new strategy for the single market is not compatible with Sánchez-Graells' *in dubio pro concurrentia* principle of interpretation for the procurement framework.¹³⁸ Instead, the given context will demand from both the European legislator and the CJEU, the latter mainly through legal reasoning (coupling systematic and teleological methods of interpretation), a more balanced approach to economic and non-economic factors.

As has been shown in section 1 of this chapter, promoting innovation can play a crucial role in increasing the competitiveness of the European economy in an atmosphere of sustainable, smart and inclusive growth. On the procurement side, the route towards a proportionate balance between market and non-market interests in the

¹³³ W Voermans, M Stremler and P Cliteur, *Constitutional Preambles—A Comparative Analysis* (Edward Elgar, 2017) pp 89–105. See also JO Frosini, *Constitutional Preambles: At a Crossroads between Politics and Law* (Santarcangelo di Romagna: Maggioli, 2012), pp 82–83.

¹³⁴ Voermans, Stremler and Cliteur, n 133, pp 90–99.

¹³⁵ For a similar view, M Rosenfeld “Constitutional Identity” in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, n 126, pp 683–687.

¹³⁶ Commission Communication, “Communication from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the Regions Single Market Act: Twelve levers to boost growth and strengthen confidence ‘Working together to create new growth’”, Brussels, COM (2011) 206 final, 13.04.2011.

¹³⁷ Commission Communication, “Communication from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the Regions on Single Market Act II Together for new growth” Brussels COM (2012) 573 final, 3.10.2012.

¹³⁸ A Sánchez-Graells, *Public Procurement and EU Competition Rules* (Hart Publishing, 2015), pp 226–230.

EU public procurement legislation, which started with the 2004 Directives, when the possibility for Member States to pursue horizontal policies within public procurement rules was timidly codified,¹³⁹ needs to be pursued further. Interestingly, it was also with the 2004 Directives that the principle of non-tariff barriers was abandoned as a legal basis of the Public Procurement Directives, given the growing importance of the principle of approximation of legislation (article 114 TFEU), indicating the necessity to integrate non-market interests in the European legal rules on procurement, as an EU choice. By harmonising the rules among Member States, the risk of unlawful behaviour from contracting authorities when promoting non-market interests would be reduced.¹⁴⁰

After 2004, and fostered by the global and European crises, examples can be found to demonstrate that both the CJEU and the EU legislator have continued to strength the legitimisation of other policies beyond competition and other economic interests.¹⁴¹

2.2.2 *The RegioPost case as legitimization of social procurement?*

On the CJEU side, a good example can be found in the more recent ruling from the CJEU in the *RegioPost*¹⁴² case, where the Court abandoned the objections, found in

¹³⁹ McCrudden, *Buying Social Justice, Equality, Government Procurement & Legal Change*, n 24; Arrowsmith and Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law*, n 24; R Caranta and M Trybus (eds), *The Law of Green and Social Procurement in Europe* (Djof Publishing, 2010); R Caranta, “Sustainable Procurement” in M Trybus, R Caranta and G Edelstam (eds), *European Union Law of Public Contracts: Public Procurement and Beyond* (Bruylant, 2014), pp 165-188; DC Dragos and B Neamtu, “Sustainable Procurement in the EU: Experience and Prospects” in *Modernising Public Procurement. The New Directive* (Djof Publishing, 2014), pp 301-326; B Sjøfjell and A Wiesbrock (eds), *Sustainable Public Procurement under EU Law* (CUP, 2016).

¹⁴⁰ Despite the benefits of the method of harmonisation laws through art 114 TFEU, it needs to be rethought, as will be discussed in section 3 and 4 of the current chapter.

¹⁴¹ Comba, n 66, pp 40–60; Bovis, n 60, pp 8–10.

¹⁴² Case C-115/14 *RegioPost GmbH & Co KG v Stadt Landau in der Pfalz* EU:C:2015:760, [2016] 2 CMLR 20 (ECJ (4th Chamber)). On the case, see F Costamagna, “Minimum Wage between Public Procurement and Posted Workers: Anything New after the RegioPost Case?” (2017) 1 *European Law Review* 101–105.

previous judgments (*Rüffert*¹⁴³ and *Bundesdruckerei*¹⁴⁴), that contracting authorities could not require payment of a minimum wage as a mandatory condition of contract performance (article 70, Directive 2014/24/EU¹⁴⁵). The CJEU did not voice the same objections to the limiting of the scope of application of the collective agreement in question to public works only, as it had done in *Rüffert*¹⁴⁶ and *Bundesdruckerei*,¹⁴⁷ due to an interpretation of the Posted Workers Directive (Directive 96/71) that includes public contracts.¹⁴⁸ Clearly the *RegioPost* ruling contributes to a more social union.¹⁴⁹ However, the extent of the impact of this judgment might be questionable, leading to undesirable legal uncertainty.

¹⁴³ Case C-346/06 *Rüffert v Land Niedersachsen* EU:C:2008:189, [2008] ECR I-1989 (ECJ (2nd Chamber)), para 62. The CJEU carefully distinguishes the factual basis and legal matter present in *RegioPost* from the one previously ruled on in *Rüffert*: “In this connection, it must be stated that a provision such as Paragraph 3 of the LTTG (*Landestariftreuegesetz*) must be regarded as a ‘law’, for the purposes of the first indent of the first subparagraph of Article 3(1) of Directive 96/71, laying down a ‘minimum rate of pay’, within the meaning of point (c) of the first subparagraph of Article 3(1) thereof. First, contrary to the Law of the Land Niedersachsen on the award of public contracts at issue in the case that gave rise to the judgment in *Rüffert* (C-346/06, EU:C:2008:189), a provision such as Paragraph 3 of the LTTG itself lays down the minimum rate of pay. Secondly, at the time of the facts in the main proceedings, the AEntG (*Arbeitnehmer-Entsendegesetz*) did not impose, nor did other national legislation impose, a lower wage for the postal services sector.”

¹⁴⁴ Case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund* EU:C:2014:2235, [2015] 1 CMLR 25 (ECJ (9th Chamber)), para 34: “By imposing, in such a situation, a fixed minimum wage corresponding to that required in order to ensure reasonable remuneration for employees in the Member State of the contracting authority in the light of the cost of living in that Member State, but which bears no relation to the cost of living in the Member State in which the services relating to the public contract at issue are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained.”

¹⁴⁵ In the case the reference was made to art 26, Directive 2004/18/EC.

¹⁴⁶ Case C-115/14 *RegioPost GmbH & Co KG v Stadt Landau in der Pfalz*, n 142, para 74: “Thus, in the judgment in *Rüffert* (C-346/06, EU:C:2008:189), the Court based its conclusion on the finding that what was at issue in the case that gave rise to that judgment was a collective agreement applying solely to the construction sector, which did not cover private contracts and had not been declared universally applicable. Furthermore, the Court observed that the rate of pay set by that collective agreement exceeded the minimum rate of pay applicable to that sector under the AEntG”; *ibid*, para 75: “The minimum rate of pay imposed by the measure at issue in the main proceedings is laid down in a legislative provision, which, as a mandatory rule for minimum protection, in principle applies generally to the award of any public contract in the Land of Rhineland-Palatinate, irrespective of the sector concerned”.

¹⁴⁷ Case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund*, n 144, para 10.

¹⁴⁸ HK Nielsen, “Labour clauses in public contracts: ILO Convention no 94 in the European Union after *RegioPost*” (2017) 5 *Public Procurement Law Review* 201–219; also A Brown, “The Lawfulness of a regional law requiring tenders for a public contract to undertake to pay workers performing that contract the minimum wage laid down in that law: Case C-115/14 *RegioPost*” (2016) 25 *Public Procurement Law Review* NA54, who stated that “[t]he Court’s conclusion in *Rüffert* therefore resulted largely from the specific provisions of the Posted Workers Directive”.

¹⁴⁹ For a normative construction that a social union is a key element for the European States to become perfect welfare States, see the work of F Vandenbroucke, “The Idea of a European Social Union: A Normative Introduction” (December 2016), paper submitted for publication as an introductory chapter in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union After the Crisis* (CUP, forthcoming) available at <https://ssrn.com/abstract=2991081>.

First, the factual bases of the CJEU case law on minimum wages in public procurement (*Rüffert*, *Bundesdruckerei* and *RegioPost*) could not be more different. In that sense, it is arguable whether the Court’s approach will remain the same in future cases.¹⁵⁰ For instance, only in the cases of *Rüffert* and *Bundesdruckerei* was a *cross-border* element present; the cross-border element in *RegioPost* was merely potential. Further, the minimum wage requirement under judicial review in *RegioPost* was provided for by legislation; the minimum wage requirement in *Rüffert* was set by a collective agreement, going beyond the minimum pay laid down in the legislation.¹⁵¹ Secondly, the CJEU in *RegioPost* did not refer to the principle of proportionality, which had been used in both the *Rüffert* and the *Bundesdruckerei* rulings. Despite this, in all three cases measures capable of constituting a restriction on the freedom to provide services within the meaning of article 56 TFEU were at stake, and consequently the three-step test (restriction, justification and proportionality) should have been undertaken.¹⁵² As remarked by Bogdanowicz, the CJEU stopped at the second test merely by stating that the measure was justified by the objective of public interest. The Court did not consider whether the measure being evaluated by the CJEU was appropriate and necessary for the protection of workers, and therefore failed to provide proof that the requirement for proportionality had been fulfilled.¹⁵³ Lastly, both the CJEU and Advocate General Mengozzi¹⁵⁴ failed to provide a coherent theory of how to address the relationship between EU primary law (in this case, article 56 TFEU) and secondary law (in this case, the Posted Workers Directive and Procurement Directives). In this regard, the Court stated that “where a national measure falls within a field that has been exhaustively harmonised at EU level, that measure must be assessed in the light of the provisions of that harmonisation and not on the light of primary law”. As explained by Syrpis, the small amount of legislation in the context of the internal market that can be categorised as exhaustive harmonisation will force the CJEU always to

¹⁵⁰ R Caranta, “Upholding General Principles v Distinguish Cases: On the Use of Precedent in EU Public Procurement Law (A case study)” in Sánchez-Graells (ed), *Smart Public Procurement and Labour Standards—pushing the discussion after RegioPost*, n 83, pp 59–61.

¹⁵¹ *ibid*, pp 59–60.

¹⁵² Bogdanowicz, n 83, pp 41–43.

¹⁵³ For further developments, see *ibid*, 29–44. For a different approach, C Kaupa “Public Procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process? (2016) 1 *European Papers* 135.

¹⁵⁴ Opinion of AG Mengozzi, delivered on 9 September 2015, Case C-115/14, *RegioPost GmbH & Co KG v Stadt Landau in der Pfalz*, [2016] EU:C:2015:566.

consider not only secondary law but also primary law. In the context of public procurement, specifically in *RegioPost*, the CJEU interpretation has ended up being the Court's interpretation of article 26 of Directive 2014/18/EC of primary law, and the Court's interpretation of primary law (article 56 TFEU) was driven by its own interpretation of the Posted Workers Directive.¹⁵⁵

Another possible way of assessing the *RegioPost* judgment and its differences from other rulings (*Rüffert* and *Bundesdruckerei*), apart from the factual differences among them, which in some instances even resulted in different choices of applicable law,¹⁵⁶ is through the use of hermeneutic standards, mainly *meta-teleological* reasoning. Being part of a wider social practice of giving reasons according to different contexts, legal reasoning refers to interpretation requirements and the application of the law,¹⁵⁷ and provides a channel of dialogue between different actors and political contexts, other relevant social systems and society as a whole.¹⁵⁸ In *Van Gend en Loos*,¹⁵⁹ the then European Court of Justice (ECJ) made reference to the following possible types of arguments when interpreting EU Law—"the spirit, the general scheme and wording". Therefore, to interpret EU law one must use linguistic arguments, systematic and teleological arguments. In the words of Maduro, due to the unique features of EU law as a legal order, the teleological element of interpretation provides not only the purpose of a specific legal provision, but also a systemic element of context in the light of the broader context of the EU legal order and its "constitutional telos". Therefore, an association exists between the systemic element (context) and teleological element; a *meta-teleological* reasoning that must be applied by the CJEU.¹⁶⁰ In the *CILFIT* case,

¹⁵⁵ P Syrpis, "RegioPost—A constitutional Perspective" in Sánchez-Graells (ed) *Smart Public Procurement and Labour Standards—pushing the discussion after RegioPost*, n 83, pp 24–27.

¹⁵⁶ Komárek describes these type of factual background as *decisional facts*, differentiating them from *foundational facts*, the latter having only the purpose of justifying a particular interpretation of the law and the former determining a clear choice between applicable laws: see J Komárek, "Legal Reasoning in EU Law" in Arnulf and Chalmers (eds), *The Oxford Handbook of European Union Law*, n 108, pp 28–50.

¹⁵⁷ *ibid*, pp 28–50.

¹⁵⁸ J Habermas, *Between Facts and Norms—Contributions to a Discourse Theory of Law and Democracy* (MIT Press Editions, 1996), pp 194–222.

¹⁵⁹ Case C-26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

¹⁶⁰ The author advocates several arguments for this *meta-teleological* reasoning, such as linguistic difficulties; different legal traditions among the Member States; the EU's decentralised legal order; the textual ambiguity of the Directives and Treaties; and the complexity of the legislative and political process. See MP Maduro, "Interpreting European Law—Judicial Adjudication in a Context of Constitutional Pluralism" (2008) Working Paper IE Law School, available at <https://ssrn.com/abstract=1134503> or <http://dx.doi.org/10.2139/ssrn.1134503>, pp 3–8; also defending a *meta-teleological* reasoning in the context of EU law, M Lasser, *Judicial Deliberations. A comparative study of Judicial Transparency and Legitimacy* (OUP, 2009), pp 203–241.

the Court also legitimised the existence of an element of meta-teleological legal reasoning:

[E]very provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.¹⁶¹

In this regard, the *RegioPost* judgment could be seen as a result of a change of context in the EU legal order, allowing for a more social and strategic approach to the procurement regime. This change could also be seen in the Opinion of Advocate General Wahl in the *Spezzino* case, where the CJEU held it admissible to award some service contracts directly to non-profit organisations that were compliant with certain requirements:

I am mindful of the fact that the pursuit of economic efficiency in a Europe-wide market based on free and open competition is not an end in itself, but only an instrument to achieve the aims for which the European Union has been created ... Accordingly, I am prepared to accept that the need to promote and protect one of the fundamental values on which the European Union is founded may, at times, prevail over the imperatives of the internal market.¹⁶²

In the *RegioPost* case the CJEU interpreted the law according to the EU context (crises and craving for social values), using the *meta-teleological* element to reflect the state of evolution of European integration. Nevertheless, I acknowledge that the *ratio decidendi* of CJEU leaves room for considerable doubt. Future case law will give us a clearer answer to the question of whether the CJEU approach to procurement disputes

¹⁶¹ Case 283/81, *Cilfit v Italian Ministry of Health* [1982] ECR 3415, 3430, para 20. On the same topic, see O Pollicino, “Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint” (2004) 5 (3) *German Law Journal* 289-317. Conway also advocates the importance of a prospective teleological interpretation with an element of context (stage of integration process) being present in the CJEU rulings: see G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP, 2012), pp 114–170.

¹⁶² Opinion of AG Wahl, delivered on 30 April 2014, Case C-113/13 *Spezzino v San Lorenzo Società Cooperativa Sociale*, [2014] ECLI:EU:C:2014:291, para 63. Some commentators have seen this case as an example of the CJEU reaching a more balanced model between the competing aims of the EU, especially concerning free movement and fundamental and social rights: see, eg, S Reynolds, “Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights” (2016) 53 *Common Market Law Review* 674–678. For an analysis of the *Spezzino* case, see R Caranta, “After *Spezzino* (Case C-113/13): A Major Loophole Allowing Direct Awards in the Social Services Sector” (2016) 1 *European Procurement & Public Private Partnerships Law Review* 14–21.

will be a more strict internal market approach (*Rüffert* and *Bundesdruckerei* cases), or re-routed to a more social union or market of *values* approach (*RegioPost*). The new legislative framework for public procurement may also help to reveal whether there is change in the trajectory for the public procurement framework to a more balanced, social and strategic approach. Recalling de Búrca’s argument that a novel transnational relationship between the Member States, their citizens and the EU is crucial for the EU to achieve effective policy delivery and to recover the European *raison d’être*, might justify, in a procurement context, more room for strategic procurement.

2.2.3 Strategic role of the new Public Procurement Directives—innovation as the main actor

2.2.3.1 The competence of the EU legislator to foster public innovation through public procurement—finding its roots

The complexity of the EU competence to regulate public procurement can be easily perceived, looking at the evolution of the Procurement Directives and the jurisprudence of the CJEU. The variety of values that the European project possesses today (articles 2 and 3 TEU) does not confine the EU legal basis to avoiding discrimination and trade restrictions. This complexity becomes even more acute because of the strategic role associated with procurement activities. Procurement can promote other EU goals that go beyond the “off-the-shelf” acquisition of public goods, services and works, referred today as *strategic procurement* (environmental, social and innovative purposes), which required coherence, consistency and balance from the European actors (the CJEU and EU institutions).

The position of the innovation policy in today’s Europe was made clear in section 1. This umbrella policy embraces several key EU actors/policies that can influence the innovation process. Public procurement, especially PPI, was called for to act as demand-side driver on the European market, mainly as part of the EU’s industrial policy. In the Commission’s view, public procurement will create a boost on the demand side of innovation policy, and improve efficiency in the allocation of resources in respect of competition and internal market rules. The path to achieving these

objectives runs through the new industrial policy of the EU.¹⁶³ The EU has coordinating competences regarding the industrial policy (articles 6 and 173 TFEU). It is logical that other areas of shared competence (internal market/public procurement) should be adapted to face the new challenges of that new industrial policy.

The *Europe 2020* strategy for smart, sustainable and inclusive growth places industrial policy at the centre of a new EU economic growth model after the crises discussed in section 1.¹⁶⁴ The modern concept of EU industrial policy overcomes the traditional concept of *industry*, and it must be understood as a set of common policies for the entire system of production, ranging from agriculture to services and industrial R&D/innovation, which aim to make structural adjustments in order to increase economic growth.¹⁶⁵

The 2002 definition of industrial policy by the European Commission categorises it as having a horizontal nature, and its purpose is to secure the framework conditions favourable to industrial competitiveness in which entrepreneurs and business can take initiatives, exploit their ideas and build new opportunities.¹⁶⁶ The EU industrial policy does not prioritise any specific sector or type of firms, so it cannot be categorised as vertical.¹⁶⁷ In fact, the adoption of a vertical industrial policy would enter into direct conflict with the EU competition rules. Consequently, the EU must adopt a horizontal industrial policy aimed at increasing the level of competitiveness of the whole EU economy, regulated under article 173 TFEU.¹⁶⁸ Nonetheless, EU industrial policy, despite being horizontal in nature, also takes into account the specific context of individual sectors in order to guarantee its effectiveness in individual sectors' mentioned in the preceding line.

The question of the compatibility of a specific EU industrial policy with the EU competition policy is complex, and it might require a sectorial analysis coupled with the rules on State aid, which goes beyond the scope of this study. However, it can be

¹⁶³ European Commission "Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions For a European Industrial Renaissance"(2014) COM/2014/014 final, 12.09.2014, p 9.

¹⁶⁴ Commission, n 42, pp 8–10.

¹⁶⁵ S Guillou, "Convergence of EU and US industrial policy—the obsession of competitiveness" (2014) 145 *Reveu d'économie industrielle* 181–200.

¹⁶⁶ European Commission, "Industrial policy in an enlarged Europe, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions", Brussels, COM(2002) 714 final, 1.04.2002.

¹⁶⁷ AA Ambroziak, "Review of the Literature on the Theory of Industrial Policy" in AA Ambroziak (ed), *The New Industrial Policy of the European Union* (Springer, 2017), pp 15–16.

¹⁶⁸ A Jones and B Surfin, *EU Competition Law: Text, Cases, and Materials*, 6th edn (OUP, 2016), p 44.

said that according to article 173(3) TFEU, the measures adopted to increase the levels of competitiveness of EU industry, “shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition”. In the words of Sauter, competition is only a precondition for the success of the EU industrial policy; it is not the goal or the engine/accelerator.¹⁶⁹

The goal of EU industrial policy is to foster the competitiveness of the European industries, as is stated in article 173 TFEU.¹⁷⁰ One of the paths set out in article 173 TFEU to achieve that goal is to foster better exploitation of the industrial potential of policies of innovation, research and technological development. Therefore, as explained in section 1 of the present thesis, innovation is the economic star, and nowadays is the main engine/accelerator of the EU’s industrial policy.¹⁷¹ This is reflected in the Commission Communications regarding European industry after the adoption of the *Europe 2020* strategy.¹⁷² In addition, the recent Communication from the European Commission in 2017 for a *Renewed EU Industrial Policy Strategy* places innovation and technological development as reform leaders for the European industries.¹⁷³

Public procurement, as a demand-side innovation system within the EU’s industrial policy, aims to alleviate system and market failures, mainly due to its capacity to enlarge markets for new goods and services, facilitate the adoption of new standards, and change the market structure and encourage competition. These capacities have a clear impact on increasing the level of competitiveness of the EU system, and can contribute to the new era of an European innovation ecosystem.¹⁷⁴ However, despite the fact that public procurement of innovation has entered the EU door through its industrial policy as a demand-side key, a concrete definition is needed of innovation

¹⁶⁹ W Sauter, *Competition Law and Industrial Policy in the EU* (OUP, 1997), pp 30-60.

¹⁷⁰ P Kauffmann, “La Politique industrielle dans l’Union européenne” in JB Auby and P Idoux (eds), *Le Gouvernement économique européen* (Bruylant, 2017) pp 234–245.

¹⁷¹ European Commission “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions An Integrated Industrial Policy for the Globalisation Era, Putting Competitiveness and Sustainability at Centre Stage” COM(2010) 614 final, 28.11.2010.

¹⁷² N Ortega Gómez, “Política Industrial” in M Ortega Gómez (ed), *Las Políticas de La Unión Europea en el siglo XXI* (Bosch Editor, 2016), pp 427–460.

¹⁷³ European Commission “Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Investing in a smart, innovative and sustainable Industry – A Renewed EU Industrial Policy Strategy” COM(2017)479 final, 13.9.2017, point 1.

¹⁷⁴ J Edler and E Uyarra, “Public procurement of innovation” in SP Osborne and L Brown (eds), *Handbook of Innovation in Public Services* (Edward Elgar, 2013), pp 228–229.

within the public sector¹⁷⁵, in order to avoid using it only as a market-oriented instrument. The innovative satisfaction of public needs should be the main purpose of procurement of innovation, not only as an instrument used to market and satisfy private purposes. Therefore, innovation in the public sector, due to the characteristics of its own definition, shall foster sustainable purposes, such as social and environmental solutions,¹⁷⁶ but at the same time provide the best cost-effective solutions for a given *public* need.

2.2.3.2 The latest approach towards innovation procurement—from the EU procurement legal framework to the latest guidance from the European Commission

The 2011 Green Paper for modernising public procurement policy¹⁷⁷ and the Commission Proposal for a new Directive¹⁷⁸ made it clear that market access, free movement and competition are not the only concerns regarding public procurement. According to the Green Paper, the rules should now be devoted to achieving efficiency of public spending and to fostering the goals set out under the Europe 2020 strategy (such as environmental, social and innovation concerns).¹⁷⁹ Reinforcing the latter document, the Commission Proposal for a new Directive highlighted the efficiency of public spending and the achievement of the targets mentioned in the Europe 2020 strategy as core aspects for reform.¹⁸⁰ In the Single Market Act I, public procurement was viewed as a lever for developing a single market that is greener, more social and more supportive of innovation.¹⁸¹ The final versions of the 2014 Directives do not deviate from the path already traced: as we can see from reading recital 2 of Directive

¹⁷⁵ See ch 2, section 2.

¹⁷⁶ European Commission n 173 point 3. “.... To assist authorities to better use public procurement as a driver for smart, sustainable and innovative technology, the Commission will furthermore propose measures to boost strategic procurement and to assist Member States with procurement aspects...”.

¹⁷⁷ European Commission, “Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market Brussels” COM(2011) 15 final, 27.1.2011.

¹⁷⁸ Commission, “The Commission’s original proposal for a new Public Procurement Directive” COM(2011) 896 final, 20.12.2011.

¹⁷⁹ Kotsonis is harshly critical of the Green Paper’s programmatic content, since, according to the author, the Directives aim exclusively at the protection of the rights of the bidders and are not at the service of the EU strategic sustainable policy: T Kotsonis, “Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Public Procurement Market” (2011) 3 *Public Procurement Law Review* NA51–58.

¹⁸⁰ Commission, n 178, point 1 and recital 2. On this issue see J Hettne, “Strategic Use of Public Procurement—Limits and Opportunities” (2013) 7 *European Policy Analysis* 1–18.

¹⁸¹ Commission communication, “Single Market Act: Twelve levers to boost growth and strengthen confidence ‘Working together to create new growth’”, COM (2011) 206 final 13.04.2011.

2014/24/EU, public procurement is required to play a key role in achieving smart, sustainable and inclusive growth, as stated in the Europe 2020 strategy, ensuring the most efficient use of public funds, facilitating the participation of SMEs, supporting common societal goals and ensuring legal certainty. Moreover, article 18(2) of Directive 2014/24/EU reinforced that strategic role for public procurement, as a general principle, where Member States should take appropriate measures in order to safeguard that economic operators comply with the environmental, social and labour law standards established by the Union. Finally, in 2017, the Commission established six strategic priorities for public procurement: the first priority concerned a wider use of strategic procurement, in order to respond to the societal, environmental and economic objectives, such as the circular economy, as well as to increase the level of procurement for innovative solutions.¹⁸²

It is clear that the EU has competence to promote other goals not directly connected with the rules of free movement or trade restrictions (*internal market*), for instance the green, social or industrial aspects of a specific EU policy, because these policies can be traced to specific treaty provisions¹⁸³ and are part of a new strategy regarding a different internal market and European project with holistic values (article 3(3) TEU) and foundational principles. As regards the goal of efficiency in public spending, this is not a direct aim of the EU system but merely an indirect one, which remains in the rhetoric of the Directive because it was a “buzz concept” inherited by the austerity wave or a marketing exercise for some domestic audiences,¹⁸⁴ or simply inherited from the language of austerity to be found in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in 2012.

The CJEU and Directive 2014/24/EU still impose limitations on contracting authorities’ promotion of EU horizontal policies (especially those mentioned in Europe 2020) with procurement rules, in order to avoid market distortions and favouritism as regards certain economic operators. These limitations are in force through the principles of proportionality and competition, and require that the environmental, innovative or social aspects included in the procurement decision-making process are closely related

¹⁸² European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions—Making Public Procurement Work in and for Europe”, COM(2017) 572 final, 3.10.2017, p 8.

¹⁸³ Caranta, n 58, pp 394–410.

¹⁸⁴ Ibid, p 405.

to the object of the contract, and that they do not leave full discretion to the contracting authorities in the awarding of contracts.¹⁸⁵

Interestingly, in the recent European Commission Guidance on Innovation Procurement it is stressed that the EU public procurement rules are no longer concerned only with “how to buy” but should also provide more incentives regarding “what to buy”, without prescribing to or forcing Member States “what to buy”, since the latter would be a clear violation of the principle of conferral and subsidiarity. Later on, the Guidance recognises that the public interest formula required in any public purchase should overcome the mere primary needs of public entities. Instead, public purchases should bring the best value in terms of cost-efficiency, environmental and social impact, and whether it opens up opportunities for the suppliers in the market (specifically, increase *cross-border* levels). Lastly, it concludes that public procurement of innovation is the most suitable tool, capable of addressing all the above concerns in a balanced and competitive way. It opens the door to more efficient solutions and better cost-effectiveness; it values environmental and social benefits; and it provides the suppliers’ market with new business opportunities at a *cross-border* level.¹⁸⁶

As already pointed out, innovation is the main strategy for public procurement in the EU. Some have argued that the innovation partnership, which is the most suitable instrument to purchase innovation under the Procurement Directives, is the “most important novelty of the new Directives”.¹⁸⁷ Innovation procurement is a crucial tool for the wider innovation policy from the EU. It is the best tool to achieve effective competition and at the same time reach sustainability and social standards.

It is worth noting that the European Parliament, in a recent report on the public procurement strategic package of 27 June 2018, points out that the current EU legislation allows, more than ever, for the use of strategic procurement to promote EU policy goals. Furthermore, the report calls for Member States to use innovative

¹⁸⁵ A Sanchez-Graells, “Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?” (2016) 22:2 *European Public Law* 377–394. However, the author’s theory is much more based on an assumption that art 18(1) of Directive 2014/24/EU, which requires that contracting authorities avoid artificially narrowing down competition, imposed a stringent proportionality test applicable to the promotion of horizontal procurement policies where such “smart” use of public procurement can generate market distortions. This author’s view is that the same results could be achieved by the principle of proportionality.

¹⁸⁶ European Commission, “Guidance on Innovation Procurement” (Brussels) n 50, pp 3–6.

¹⁸⁷ AR Apostol, “Pre-commercial procurement in support of innovation: regulatory effectiveness?” (2012) 6 *Public Procurement Law Review* 213–225; Telles and Butler, n 46, pp 160–180.

procurement to achieve smart, green and inclusive growth, and to strengthen the circular economy and promote SMEs.¹⁸⁸

To sum up, it is clear that the EU legislation is allowing for more and more strategic procurement, and that innovation is the main player when it comes to strategic purchases, due to its capacity to achieve simultaneously the most efficient and competition-friendly solution and also the more sustainable one. However, despite this change in policy and legislation, one must consider, first, whether the methodology chosen is the most suitable one and, second, if the new rules are capable of providing the best legal framework for innovation procurement and, chiefly, PPIs.

3. The Development of the EU Public Procurement System as a Strategic System for Innovation—a Critical Perspective on the Harmonisation Process

3.1 Introductory remarks

The EU Public Procurement Directives did not mention other provisions as their legal bases, only those directly connected with the European internal market freedoms (articles 53(1) and 62 TFEU) or the need for harmonisation to transform national provisions capable of affecting the internal market into common EU law (article 114 TFEU). Thus other treaty provisions that legitimised EU action in other fields through procurement, such as social (articles 4(2), 9, 10 and 151–161 TFEU), environmental (articles 4(2), 11 and 191–193 TFEU) and industrial (articles 6(b), 173 and 179–190 TFEU) treaty provisions, remain undeclared as legal bases, even though references to these aspects could be found throughout the Directives (for example recital 2, Directive 2014/24/EU).

This must be understood as a general predisposition of the European legislator, when regulating the internal market, to trust only to the power of article 114 TFEU to guarantee a harmonised and functional market that balances economic and non-

¹⁸⁸ European Parliament, *Report on public procurement strategy package of 27 June 2018*, (2017/2278(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0229+0+DOC+XML+V0//EN#title1>, points 7–10.

economic interests.¹⁸⁹ The EU strategy under article 114 TFEU forced the Member States to remove all those legislative differences capable of being categorised as obstacles to free movement, or as distortions of competition that cannot be justified under EU law.¹⁹⁰ The EU harmonisation process under article 114 TFEU had departed from an idea of voluntary alignment of legal rules, and at its current stage of European integration has evolved to a state of unification of laws through codification in those fields where the EU can act *ultra vires*.¹⁹¹

However, in the EU context, harmonisation is much more than a legal technique for putting together common legislation. It is a political goal, and only with that in mind can we understand the European legislator's approach to unifying national legal frameworks. Nonetheless, since the EU harmonisation process is a chimera, with a body of legal technique but with political goals as it's the head, it must seek its legitimacy outside of its self-imposed goals (in the words of Kau, (*Integration als selbständige Finalität*)).¹⁹² Therefore, unification of laws is not a value in itself.¹⁹³ So, the harmonisation method must, within the boundaries of the Treaties (EU legitimacy/legal basis), serve the purpose of effective policy delivery among all Member States.

Magnetic resonance imaging (MRI) of the European project would show that the lack of efficiency or legitimacy of the method of harmonisation through unification of laws is starting to spread malignant cells throughout the Member States. Some Member States have already started to claim back control over the legislative function (Brexit); others are using the lack of efficiency of the former method as a political discourse and instrument to increase populist anti-European movements.¹⁹⁴

The lack of certainty of the limits of article 114 TFEU, due to broad interpretation by the EU institutions of the undetermined legal concepts that triggered its use, coupled with the absence of effective instruments capable of providing different rules and

¹⁸⁹ B De Witte, "The Competence to Protect. The Pursuit of Non-market Aims through Internal Market Legislation" in P Syrpis (ed), *The Judiciary, the Legislature and the Internal Market* (CUP, 2012), pp 25–46.

¹⁹⁰ G Davies, "The Competence to Create an Internal Market" in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States—Reflection on the Past, The Present and the Future* (Hart Publishing, 2017), pp 77–79.

¹⁹¹ M Kau, *Rechtsharmonisierung -Untersuchung zur europäischen Finalität dargestellt am Beispiel des Grenzkontroll-, Ausländer- und Asylrechts* (Mohr Siebeck, 2016), pp 562–569.

¹⁹² *ibid*, pp 562–569.

¹⁹³ D Grimm, "Historische Erfahrungen mit Rechtsvereinheitlichung" (1986) 50 *RabelsZ* 61–74.

¹⁹⁴ M Möstl, "M Kau, *Rechtsharmonisierung -Untersuchung zur europäischen Finalität dargestellt am Beispiel des Grenzkontroll-, Ausländer- und Asylrechts* (Mohr Siebeck 2016)—Book Review" (2017) 54 *Common Market Law Review* 663–665.

differential territorial application of European law¹⁹⁵ without compromising the process of European integration, are hampering effective policy delivery among all Member States.

The general mechanism for enhancing cooperation, redesigned after the Lisbon Treaty, which aimed to integrate and correct, under certain conditions (article 20 TEU and articles 326–334 TFEU), the asymmetries of certain Member States within the EU without all the other Member States being involved, following some substantive and procedural requirements, has been struggling to prove itself compatible, from a legal perspective, with the principles of unity of the EU legal order and the principle of non-discrimination on the grounds of nationality (article 18 TFEU).¹⁹⁶ In addition, the fact that the Directives could be transposed by the Member States with the freedom to decide the “form and methods” to be applied (article 288 TFEU) is another indication that the application of EU law should be flexible, in order to allow Member States to adapt the new rules to their national structures and legal traditions. However, as will be shown in section 3.2, public procurement provides a clear example of where the level of discretion on the forms and methods to be used in the transposition of the Directives is greatly reduced, contravening the nature of what a Directive should be, according to primary law (article 288 TFEU).

It is true that the expansionist regulatory mission of article 114 can be subject to some limitations, in order to reflect not only the EU competence, but also some diversity within the EU legislation. First, the principles of subsidiarity (article 5(3) TEU) and proportionality (article 5(4) TEU), and the political control of national

¹⁹⁵ The idea that to have an unitary EU legal order, it must also be uniformly applicable to all Member States was presented at the beginning of the EU case law (see Case 48/71 *Commission v Italy*, ECLI: EU:C:1972:65, para 8). However, it has been proved that EU primary law leaves room for territorial differentiation in core legal fields that constitute State functions, namely money, migration, criminal law and defence. The enhanced cooperation mechanism and even the ESM Treaty and Fiscal Compact show that the EU law can be applied differently. B de Witte, “Variable geometry and differentiation as structural features of the EU legal order” in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration—the Trajectory of Differentiation in EU Law* (Edward Elgar, 2017), pp 9–22; B Rittberger, D Leuffen and F Schimmelfenning, “Differentiated Integration of Core State Powers” in P Genschel and M Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (OUP, 2014), p 189.

¹⁹⁶ Departing from Kelsen’s concept of the unity of legal orders, I agree with Thym, who argues that the formal unity of a legal order does not demand substantive uniformity: various reasons, such as the heterogeneity of the living conditions in different geographical areas, call for differentiation. Moreover, Thym argues that asymmetric legislation may have different geographic scope but it applies just like every other law, so art 18 TFEU should be respected: D Thym, “Competing models for understanding differentiated integration” in de Witte, Ott and Vos (eds), n 195, pp 23–75.

parliaments,¹⁹⁷ work as a barrier to the adoption of standardised legislation under the general clause of article 114(1) TFEU. Second, article 114(2) expressly excludes from the adoption of harmonisation measures, tax matters and matters related to the free movement of persons, or those related to the rights and interests of employed persons. Third, the “out-put” clauses under article 114(4)–(5) TFEU¹⁹⁸ allow Member States the possibility to retain the right to derogate from the common EU standard if they provide a higher level of protection for the environment, the national system of social values and intellectual property, following notification to the Commission (article 114(6)–(7) TFEU).¹⁹⁹ However, the level of application of both article 114(4) and 114(5) is rather modest according to the numbers. From 1987 until 2014, only 16 out of 22 derogations were approved by the Commission on the basis of article 114(4) TFEU, and on the basis of article 114(5) TFEU only one of 12 derogations was approved. The scant application of the possible derogations under article 114(4)–(5) TFEU reflects the fear of the EU institutions of a more flexible approach to the adoption of EU legislation.²⁰⁰

The CJEU had also already recognised some restrictions on harmonising national laws under the general clause of article 114(1) TFEU. In the *Tobacco Advertising* case, for example, the CJEU recognised some limitations to the expansionist movement of harmonising national laws in the name of the internal market, by stating that mere discrepancies between national rules, and the abstract risk to the exercise of fundamental freedoms and of distortions of competition, were not sufficient to trigger what now constitutes article 114 TFEU.²⁰¹ However, the subsequent case law, for instance the *Vodafone* case, had applied more flexible reasoning than that used in the

¹⁹⁷ S Weatherill, *The Internal Market as a Legal Concept* (OUP, 2017) pp 173–186. Regarding the role of national parliaments as active and effective actors in the legislative procedure, and the lack of positive effects of the green card proposal for proposing new legislation, see K Borońska-Hryniewiecka, “From the Early Warning System to a ‘Green Card’ for National Parliaments—Hindering or Accelerating EU Policy-making?” in D Jančić (ed), *National Parliaments After the Lisbon Treaty and the Euro Crisis—Resilience or Resignation?* (OUP, 2017), pp 247–262.

¹⁹⁸ It is important to highlight that according to the CJEU case law, the Commission is not obliged to grant the Member State the right to be heard before adopting its decision under art 114(4)–(5) TFEU: Case C-3/00 *Denmark v Commission* (2003) ECLI:EU:C:2003:167, paras 37–41.

¹⁹⁹ For more details on the limitations of art 114 TFEU, see Sung-Kyung Yi, *Zwingende Erfordernisse als Grenze für den europäischen Gesetzgeber* (Nomos, 2016), pp 152–169.

²⁰⁰ Data from E Vos and M Weimer, “Differentiated integration or uniform regime? National Derogations from EU internal market measures” in de Witte, Ott and Vos (eds), n 195, pp 304–333.

²⁰¹ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419, paras 83–99; R Schutze, “Limits to the Internal Market Competences” in L Azouli (ed), *The Question of Competence in the European Union* (OUP, 2014), pp 225–230.

Tobacco Advertising case, regarding the boundaries of article 114 TFEU.²⁰² In the latter case, the CJEU considered Regulation 717/2007 on the basis of preventive harmonisation to be lawful, because of the “likelihood” that price control measures of different types would be adopted in an attempt to address the problem of the high level of retail charges for EU-wide roaming services.²⁰³ In addition, in the *United Kingdom v Parliament and Council* case, the UK was seeking the annulment of article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and credit default swaps. Article 28 allocated to the European Securities and Markets Authority (ESMA) powers of intervention, in exceptional circumstances, to take direct decisions concerning natural or legal persons. The UK objected to this interpretation, arguing that this provision was *ultra vires* article 114 TFEU. The CJEU, concerning the UK’s argument regarding article 114 ruled that this primary law provision

intended to confer on the Union legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features.²⁰⁴

Therefore, the limits and elasticity of article 114 TFEU remain uncertain,²⁰⁵ and as will be demonstrated next, within the procurement framework, article 114 TFEU has contributed to building a set of common rules that have left little room for flexibility, diversity or even discretion for both the Member States and contracting authorities.

Another possible limitation on the strength of article 114 TFEU, when harmonising the legal frameworks of the Member States, can be found in the obligation posed by primary law in the EU to respect Member States’ national identities (article 4(2) TEU).

²⁰² Case C-58/08, *Vodafone O2 et al v Secretary of State* ECLI:EU:C:2010:321, [2010] ECR I-499. On the case, see M Brenncke, “Case note on European Court of Justice, C-58/08, Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform” (2010) 47 *Common Market Law Review* 1793–1801; J Oberg, *Limits to EU Powers—A Case Study of EU Regulatory Criminal Law* (Hart Publishing, 2017), pp 54–57.

²⁰³ Weatherill, n 111, pp 172–173.

²⁰⁴ Case C-270/12 *United Kingdom v Parliament and Council* ECLI: EU:C:2014:18, para 102. See C Joerges, “Integrating through law and the crises of Law in Europe’s emergency” in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats Dream* (CUP, 2016), pp 310–311.

²⁰⁵ Weatherill, n 111, pp 172–173. On the procedural aspects of art 114 TFEU and the limited possibility under art 114(4) TFEU to maintain existing national measures following the adoption of a harmonisation measure from the EU, see I Maletic, *The Law and Policy of Harmonisation in Europe’s Internal Market* (Edward Elgar, 2013), pp 94–193.

However, the restrictive wording of the latter primary law provision, which demands that national identity must be incorporated in the Member State's constitutional or political fundamental structure, limits its scope of application as a counterbalancing mechanism between Member States' internal structures and the European integration process.²⁰⁶

Within the procurement context, the Opinion of Advocate General Poiares Maduro on the *Michaniki* case²⁰⁷ provides a good example of how one should restrictively address the relationship between EU law and constitutional/national identity. According to paragraph 33 of the Opinion of Advocate General Poiares Maduro:

It is, nevertheless, necessary to point out that that respect owed to the constitutional identity of the Member States cannot be understood as an absolute obligation to defer to all national constitutional rules. Were that the case, national constitutions could become instruments allowing Member States to avoid Community law in given fields. Furthermore, it could lead to discrimination between Member States based on the contents of their respective national constitutions. ... In the present case, the national constitutional rules can be taken into consideration to the extent that they fall within the discretion available to the Member States in order to ensure the observance of the principle of equal treatment required by the directive. The exercise of that discretion must, however, remain within the limits fixed by the principle and by the directive itself. ...²⁰⁸

As can be seen, the Advocate General states that the Member States' discretion on the transposition process must be granted by the Directives themselves and must be interpreted within the objectives of those Directives.

3.2 The current method of transposing Public Procurement Directives and its impact on the effectiveness of EU law in the Member States—the case of innovation procurement

The premise that the most perfect or complete market is the most legally homogeneous inspired the legal framework of the EU's multi-layered system for public procurement.

²⁰⁶ On the national identity clause (article 4(2) TEU), see E Cloots, *National Identity in EU Law* (OUP, 2015), pp 127–225.

²⁰⁷ Opinion of AG Poiares Maduro delivered on 8 October 2008, Case C-213/07 *Michaniki AE v Ethniko Simvoulío Radiotileorasis Ipourgós Epikratías Ellíniki Technodomiki (TEVAE)* [2008] ECLI:EU:C:2008:544.

²⁰⁸ For a critique on how the concept of constitutional identity should not be automatically considered national identity, see Cloots, n 206, pp 165–170; M Rosenfeld, *The Identity of the Constitutional Subject* (Routledge, 2010), pp 73–75.

In fact, it might be argued that the national disciplines of public procurement have been suffering from a progressive *Europeanisation* since the first generation of procurement directives, with the aim of reaching an almost maximum level of legislative harmonisation.²⁰⁹ Symptoms of this phenomenon of Europeanisation in the public procurement field can be easily perceived. The European legislator and the CJEU, with the aim of making national procurement systems compatible with the internal market, created new legal concepts or categories, which then necessitated the transplantation of these concepts into national legal structures or adapting them to those structures. Concepts such as “body governed by public law”, “vertical and horizontal cooperation”, “stand-still period” and “discretion in the choice and conduct of the procurement procedures” are all European conceptualisations that have reshaped and influenced national law. Regarding the scope of the harmonisation provided by the EU Public Procurement Directives, it cannot be categorised as “full” because Member States still retain some level of discretion in procurement activities below the thresholds and when there is no cross-border interest. However, in terms of intensity, the EU procurement legislative framework must be classified as “full”, since the Member States cannot derogate from the majority of the procurement rules set by the Directives, with a few exceptions where they still retain some discretion.²¹⁰

The autonomy and supremacy of EU public procurement when compared with national procurement laws are an unquestionable reality. Today the EU procurement rules encompass the majority of the procurement activities of Member States when compared with national law, by regulating the tender procedures above certain thresholds, and are also part of the contract execution phase, mainly contractual modification. In addition, they also grant remedies to aggrieved suppliers.²¹¹ The

²⁰⁹ On the concept of Europeanisation, see Weatherill, n 111, pp 53–69.

²¹⁰ In the European legal discourse the concept of harmonisation can have several meanings. Having said that, this work closely follows the distinction between full and partial harmonisation in scope and intensity provided by M Kamert, “What We Talk When We Talk about Harmonisation” (2015) 17 *Cambridge Yearbook of European Legal Studies* 360–379. For other perspectives, see S Weatherill, “The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a Drafting Guide” (2011) 12 *German Law Journal* 827–835.

²¹¹ On this topic, see R Caranta, “Many Different Paths, But Are They All Leading to Effectiveness?” in S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJOF Publishing, 2011) p 53; S Treumer, “Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues” in S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJOF Publishing, 2011); C Bovis, “Legal Redress in Public Procurement Contracts” in M Trybus, R Caranta and G Edelstam (eds), *EU Public Contract Law—Public Procurement and Beyond* (Bruylant, 2014); M Sandulli, “Inefficacia del contratto e sanzioni alternative” in Guido Greco (ed), *Il sistema Della Giustizia Amministrativa Negli Appalti Pubblici in Europa* (Giufree Editore, 2011).

remedies directives for procurement²¹² aim to ensure that the substantive procurement directives are enforced, and the means elected by the European legislator to ensure compliance with these rules is mainly based on a decentralised model (at national level) of enforcement.²¹³ This involves granting subjective rights to the aggrieved suppliers, in order for them to monitor the rules,²¹⁴ by providing primarily for a preventive system that is capable of maintaining intact the possibility of concluding a public contract; or, when this is not possible, by providing for the sanction of ineffectiveness for the most serious breaches;²¹⁵ or, lastly, securing the possibility for damages claims.²¹⁶ To sum

²¹² Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395 (hereinafter Directive 89/665); Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L76; Directive 2007/66/EC 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 of 11 of December 2007, OJ L335/31 (hereinafter Directive 2007/66/EC).

²¹³ For a critical view of the EU public procurement decentralised system of enforcement and the need for a decentralised procurement body, see P Cerqueira Gomes, “A Lost Proposal in 2014 Public Procurement Package: Is there any Life for the Proposed Public Procurement Oversight Bodies?” in GS Ølykke and A Sanchez-Graells (eds), *Reformation and Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016) pp 170–190.

²¹⁴ Arrowsmith considers that the primary objective of the remedies system is to ensure compliance with the substantive rules of procurement, S Arrowsmith, *Remedies for Enforcing the Public Procurement Rules* (Winteringham Earls Gate Press, 1993), p 49. On the other hand, Díez Saestre has a different approach, whilst possibly reaching the same conclusion, since she argues that EU law represents a *tertium genus* system, and the objective of legal protection is not to protect individuals or restore the law, but simply to ensure compliance with the European legal framework: S Díez Saestre, *La Tutela de los Licitadores en la Adjudicación de Contratos Públicos* (Marcial Pons, 2012), p 70.

²¹⁵ Art 2(d) of Directive 2007/66/EC regulates the EU remedy of ineffectiveness and represents a codification of the ruling in Case C-503/04 *Commission of the European Communities v Federal Republic of Germany* [2007] ECR I-6183.

²¹⁶ On this topic, see H Schebesta, *Damages in EU Public Procurement Law* (Springer, 2016), who stresses that the Remedies Directives for public procurement do not regulate either the evidential facts aggrieved suppliers need to prove in order to obtain compensation, or which type of damages can be claimed. National jurisprudence among Member States is not uniform when awarding damages, so bid costs, loss of profits or loss of chance could be awarded on different grounds, depending on the national legal traditions of both administrative and tort law. Nonetheless, the EU regulates in a minimalistic way the issue of causation under Directive 92/13/EEC through the concept of “real chance”. The author advocates the need to review the Remedies Directives, in order to give more uniformity to the requirements on the burden of proof side, in parallel to what has been done under the Competition Damages Directive (Directive 2014/104/EU), where provisions on evidence and quantification of harm have been adopted. Concerning damages claims, another interesting aspect is inspiring the legal debate in the procurement context: the recent judgment of the EFTA Court of 31 October 2017, *Fosen-Linjen AS v AtB AS* (E-16/16), found in para 84 that “[a] simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of Directive 89/665/EEC, provided that the other conditions for the award of damages are met, including in particular, the condition of a causal link”. Here, the EFTA Court supported the view that under EU procurement law, only a *simple* breach is required and not a *sufficiently serious breach*. The requirement of a *sufficiently serious breach* is, according to the CJEU, a mandatory requirement to trigger State liability under EU law. The EFTA ruling recognises the autonomy of the procurement remedies system when compared with the general theory of EU State liability. For a critical perspective on the *Fosen-Linjen* case, see A Sanchez-Graells, “You Can’t Be Serious: Critical

up, EU public procurement is an autonomous legal discipline with a proper systematic and hermeneutic that is capable of directly and indirectly shaping the procurement systems of Member States,²¹⁷ justified mostly by article 114 TFEU.

Moreover, as can be seen, the current transposition of the Public Procurement Directives follows a much more minimalistic (copy-out) method rather than a “gold-plating” one.²¹⁸ In fact, the obsession with banning “gold-plating” is turning the transposition mandate under articles 90 and 94 of Directive 2014/24/EU into a “copy-out” exercise, which was the preferred legal transposition technique in the UK²¹⁹ in order to turn the legal norms of the Directive into national sources of law or other enforceable instruments. Another example of the “copy-out” method of transposition of Directive 2014/24/EU can be found in Germany. There, the Act Against Restrictions of Competition, responsible for most of the regulations applicable to public procurement at a federal level, followed a “copy-paste” exercise, with few exceptions.²²⁰ Indeed, it is interesting to see that Italy, in article 1(1)(a) of the Legge

Perspective on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Rules After the EFTA Court’s Fosen-Linjen Opinion” (2018) *Nordic Journal of European Law*, forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129430.

²¹⁷ Aroso de Almeida considers that EU public procurement law is not yet an independent branch of the law, since it regulates only the tendering procedures for the acquisition of goods, services or works. In that sense, the author points that the system is not complete, because the discipline of contract execution has suffered only a simple limitation imposed by the CJEU and the Directives. With the latter example, the author justifies that the EU public procurement system can not be seen as autonomous from the national procurement systems, due to its incompleteness. See M Aroso de Almeida, “Novas Dimensões do Direito dos Contratos Públicos” in J Rodríguez-Arana Muñoz et al (eds), *Bases y Retos de La Contratación Pública en el Escenario Global* (Fundación Editorial Jurídica Venezolana, 2017), pp 6–12.

²¹⁸ Gold-plating is understood as any permissible transposition that, in whatever way, exceeds the minimum requirements of a directive, ie exceeds minimalistic transposition: see R Král, “On the choice of methods of transposition of EU Directives” (2016) 41:2 *European Law Review* 230–232; and D Greenberg, “The ‘Copy-Out’ Debate in the Implementation of European Union Law in the United Kingdom” (2012) 6 *Legisprudence* 243–254. In the same vein, the Commission in 2010 had defined “gold-plating” as the practice of national bodies going beyond what is required in EU legislation when transposing or implementing it at Member State level: European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Smart Regulation in the European Union” COM(2010) 543 final, 8.10.2010, p 5.

²¹⁹ UK Guidance on the Implementation of the EU Directives, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf. For more details on the banning of gold-plating in the UK public procurement regulations, see A Sanchez-Graells, “The implementation of Directive 2014/24/EU in the United Kingdom” in S Treumer and M Comba (eds), *Modernising Public Procurement—The Approach of EU Member States* (Edward Elgar Publishing, 2018), pp 282–290.

²²⁰ From 2005 the German Government announced that it would refrain from gold-plating; instead copy-and-paste would be used for the transposition of EU directives. Thus the EU Public Procurement Directives (ie Directive 2014/24/EU) were transposed in accordance with the Government’s announcement. For example, an exception can be found in s 97(4), where the German legislator, unlike art 46(1) of Directive 2014/24/EU, stated that contracting authorities are required to award contracts in

Delega, under which the Italian Parliament had delegated power to the Government to transpose the Procurement Directives, bans the introduction or maintenance of regulatory levels above the minimum levels required by the Directives.²²¹ However, this ban was not fully respected as regards some provisions, for instance with regard to subcontracting,²²² which demands a special regime due to the special features of Italy—in the instant case, the anti-Mafia regulations.²²³ Recalling the words of Mantini, the Italian framework for public procurement and concessions still exists in a state of “continuous emergency” to avoid the infiltration of the Mafia and other criminal organisations. This fear justifies the increasing empowerment of ANAC (Autorità Nazionale Anticorruzione (National Anticorruption Authority)) regulatory functions. For the author, nevertheless, the EU is applying a puristic liberal model, with fewer rules and more discretionary powers, which bans “gold-plating”. In this vein, it is worth mentioning that the correct implementation of the Directives depends on the national context, which, in order to protect some public interest, might require more rules and less discretion in certain cases.²²⁴

It is true that at the beginning of implementation of the EU regulation on national procurement systems, “gold-plating” was the main preference of most Member States, in order to promote a better understanding of the new rules by public officials and economic operators, thus minimising the impact of the new EU demands. And even today, we continue to see the gold-plating method, as explained in the Italian example,

lots, except in the circumstances regulated under that section. See D Wolff and M Burgi, “Scaling down the cascade: a critical analysis of the implementation of Directive 2014/24/EU” in Treumer and Comba (eds), n 219, pp 117–120.

²²¹ Legge 28 gennaio 2016, n.º 11, Deleghe al Governo per l’attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE del Parlamento europeo e del Consiglio, del 26 febbraio 2014, sull’aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d’appalto degli enti erogatori nei settori dell’acqua, dell’energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture. Mantini categorises this as a true principle for avoiding *gold plating*: P Mantini, *Nel Cantiere Dei Nouvi Appalti Pubblici—simplificazione, efficienza, concorrenza, anticorrezza* (Giuffrè Editore, 2015), pp 54–56.

²²² A La Chimia and S Valaguzza, “A new approach to implementing the 2014 public procurement Directives in Italy: ANAC’s soft law regulatory powers amidst uncertainty and need for clarity” (2017) 4 *Public Procurement Law Review* 165–186.

²²³ Art 105(6) of the Italian Public Contracts Code demands that “the indication of the number of subcontractors on the offer is mandatory, if the works, services and supplies contracts are equal to or above the thresholds referred to in Article 35 or, irrespective of the amount based on the tender, concern the activities most exposed to the risk of Mafia infiltration, as identified in paragraph 53 of article 1 of law no 190 of 6 November 2012” (my translation). For more details, see R Perfetti, *Codice Dei Contratti Pubblici Commentato* (Wolters Kluwer, 2017) pp 959–964; F Caringella and M Protto, *Il Codice Dei Contratti Pubblici Dopo Il Correttivo* (Dike Giuridica Editrice, 2017), pp 500–513.

²²⁴ Mantini, n 211, pp 52–63.

and also when some Member States expand the EU regime to public tenders above the relevant thresholds, in order avoid the legal uncertainty of the *Telaustria* doctrine.²²⁵

Nonetheless, in the view of the Commission, “gold-plating” is somehow a transposition methodology that Member States should avoid. In fact, since the launch of their strategy on how to better regulate, the Commission showed a clear tendency to discourage the use of the “gold-plating” method by Member States when transposing EU Directives into national law.²²⁶ Currently, the Commission still sees the so-called “gold-plating” method of transposition as a risk,²²⁷ inasmuch as it has the ability to increase burdens on citizens and business beyond what is foreseen by the legislation.²²⁸ The Commission’s fear regarding the capacity for “gold-plating” to create extra legislative undesirable burdens is understandable. However, “gold-plating” should not be discouraged, since it is a crucial tool for transposing EU legislation into national law. According to the Commission, “gold-plating” can still be used when it helps to achieve the objectives of the legislation in the local context, or where it aims to deliver greater benefits, but in that scenario Member States are forced to explain the reasons for adopting such a “gold-plating” technique.²²⁹ This obligation upon Member States has a deterrent effect on the use of this technique for the transposition of directives, and favours “copy-out” methods. In the same vein, under the inter-institutional agreement signed by the Commission, Parliament and Council on 13 April 2016, if Member States choose to add elements that are in no way related to certain EU legislation, such additions should be made identifiable either through transposing act(s) or through

²²⁵ Král, n 218, pp 237–242. The Portuguese Procurement Code (approved by Law-Decree no 18/2008, 29 January, modified by the Law-Decree no 111-B/2017, 31 August) is a clear example of that. Articles 19–21 establish lower thresholds when compared to the ones set by the Procurement Directives, in order to avoid the legal uncertainty of the *Telaustria* doctrine. There can be some temptation not to consider this as “gold-plating, ie to expand the regime of the Directives to procurement situations below the Directive thresholds, but in my view it is still gold-plating, since the *Telaustria* doctrine must be viewed and interpreted as a exceptional case scenario, where reasons beyond the financial aspect justified the existence of certain cross-border interest.

²²⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Third Strategic Review of Better Regulation in the European Union”, COM (2009) 15 final, 28.01.2009.

²²⁷ JH Jans and L Squintani with A Aragão, R Macrocry and BW Wegener, “Gold plating of European Environmental Measures” (2009) 6.4 *Journal for European Environmental & Planning Law* 417–435.

²²⁸ Commission Staff Working Document—Better Regulation Guidelines, SWD (2017) 350, 7 July, pp 9–10.

²²⁹ Commission communication “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Better regulation for better results—An EU agenda”, COM/2015/0215 final 19.05.2015, point 3, pp 3–4; European Parliament, Directorate General (DG) for Internal Policies, “Gold-plating the EAFRD: To what extent to national rules unnecessarily add to complexity and, as a result, increase the risk of errors?” (2014), pp 3–51.

associated documents.²³⁰ On the other hand, the possibility, already made available under the Better Regulation Agenda of 2015, for the Commission to set up plans for national implementing measures, which could include EU assistance to improve a State's capacity, can have a positive effect.²³¹

In my view, to discourage the use of “gold plating” when transposing a directive *per se* is paradoxical and contradicts the proper definition of what a directive should be under EU primary law, that is, a binding legal instrument as regards the results to be achieved, but also a legal instrument under which national authorities have the flexibility to choose the form and method to be used to achieve that fixed result (article 288 TFEU).²³²

Directives are meant to be incomplete legal structures. That having been said, from an intrinsic perspective, directives provide Member States with proper and complete legal norms, which, depending on the level of harmonisation (minimum or maximum), provide for more or less discretion to the Member States to go beyond the objectives of the directive.²³³ However, from an external point of view they suffer from a normative incompleteness in their nature. This calls for a transposition exercise that guarantees effectiveness on both sides, at EU and national level, which can indicate the need to go beyond the directives to take into account the legal cultural and diversity of Member States. In Dawson's view, the Commission's position towards “gold-plating” is at an impasse. On the one hand, “gold-plating” should be discouraged, due to the CJEU's inability to effectively police national derogations from EU legislation. On the other hand, it should be encouraged, because of the inability of the EU institutions themselves

²³⁰ Inter-institutional Agreement of 13 April 2016 on Better Law-Making, [2016] OJ L123/1, para 43; M Dawson, “Better Regulation and the Future of EU Regulatory Law and Politics” (2016) 53 *Common Market Law Review* 1221–1229.

²³¹ Dawson, n 230, pp 1227–1229.

²³² EU directives need to be transposed into the national legal order by the respective national legislator, in order to adapt them to the national context and provide an injection of democratic legitimacy to these instruments. Unlike regulations, which have a direct provision in the Treaty on their direct applicability (art 288(2) TFEU), directives' direct effect depends on a set of criteria established by the case law of the CJEU. This condition proves the tensions that still exist between those Member States requiring independence and those seeking more European integration. In fact, the transposition phase creates the necessary legal bridge to accommodate EU law and the legal culture of the particular Member State from the outset, creating an effective dialogue. Then, *post* transposition, those traditions of the Member State that remain and are possibly capable of contravening EU law are going to be tackled by European juridical constitution devices that include the preliminary ruling procedure and the interpretive principles introduced by the CJEU. See K Touri, *European Constitutionalism* (CUP, 2015), pp 60–68; 320–330.

²³³ See also S Weatherill, “Maximum versus minimum harmonization: Choosing between unity and diversity in the search for the soul of the internal market” in N Shuibhne and L Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP, 2012), pp 200–230.

to design forms of EU legislation to achieve the appropriate effect on Member State soil.²³⁴

Closely following the words of Xanthaki to guarantee the effectiveness of EU law on both sides (EU and national), it is not possible to rely on the “copy-out” method; instead, it requires the national drafter to interpret EU law as a set of legislative instructions and not model laws, and consequently to adapt, through different words or instruments, the words of the European legislator, in order to adjust EU law to the national culture and environment (legal, financial, administrative or policy).²³⁵ In other words, an effective transposition exercise must require the use of “gold-plating”, if that concept is understood as involving merely a permissible transposition that exceed the minimalistic method and not as a transposition that creates unnecessary burdens. The negativity associated with the formula “going beyond the Directive’s minimum standards” is contravening the effectiveness of EU law in the territory of the certain Member States.

Despite some traces of the “gold-plating” approaches that can still be found in certain current transpositions of the recent Public Procurement Directives, the main method of transposition of directives is now performed in accordance with the minimalistic approach. This approach has the effect of reshaping national systems on how to legislate or regulate. The Italian example is a clear manifestation of that, because, in order to overcome the complexity of procurement rules and the dangers of “gold-plating”, the Italian legislator entrusted the ANAC, an administratively independent authority (a non-legislative body),²³⁶ with extensive powers to complement the hard law provisions (implementation measures) in the Italian Procurement Code, mainly through issuing guidelines, opinions and standard documents (article 213), providing ad hoc advice to individual entities (article 211), and also controlling and monitoring anti-corruption activities (article 213).²³⁷

²³⁴ Dawson, n 230, pp 1229-1231.

²³⁵ H Xanthaki, “Improving the Quality of EU Legislation” in S Garben and I Govaere (eds), *The EU Better Regulation Agenda—a critical assessment* (Hart Publishing, 2018), pp 29–49.

²³⁶ With the Law-Decree no 90/2014 (converted with Law no 114/2014), the ANAC is an independent administrative authority with competences regarding prevention, supervision, regulation and sanctions in matters of transparency, corruption and public contracts. It has administrative, normative and para-judicial powers. For more developments, see F Giufrè, “Le Autorità Indipendenti Nel Panorama Evolutivo Delle Stato di Diritto: Il Caso Dell’Autorità Nazionale Anticorruzione” in IA Nicotra (ed), *L’Autorità Nazionale Anticorruzione—tra prevenzione e attività regolatoria* (G Giappichelli Editore, 2016), pp 9–33.

²³⁷ However, to empower the ANAC with such powers was not consistent with the doctrine and jurisprudence, because the nature of the ANAC’s powers was not clear. The *Consiglio di Stato* opinion

Beyond the Commission's mixed feelings towards "gold-plating", which has decreased its use, several other reasons can be identified for the reduction of effectiveness of EU legislation in the procurement world. First, the letter of the Public Procurement Directives leaves almost no room for any other method than simple "copy-out" transposition, since the method adopted is in effect a codification of prior CJEU decisions,²³⁸ reducing to a greater extent the discretion of national authorities to introduce other wording into their legislation. Second, the level of regulation brought about by the Directives touches on a crucial aspect of a procurement procedure (choice of the available procedures, advertising, selection and the award phase), and it also provides rules on contract performance (conditions for the performance of contracts; subcontracting; modification of contracts during their term; and termination of contracts under Chapter IV of Directive 2014/24/EU). Having said that, S Treumer and M Comba have recently claimed that Directive 2014/24/EU is more similar to a regulation than a directive. In fact, the authors had only found seven examples where Directive 2014/24/EU truly behaves like a directive and not as a regulation. In those examples the Directive had only set out the aim to be achieved by the Member State, without providing specific legal rules or regulatory options. As examples, see compliance with the obligations set out in article 18(2) of Directive 2014/24/EU; the use of electronic means of communication (article 22(1), Directive 2014/24/EU); the performance of the tasks set out in article 83 of Directive 2014/24/EU; or the grounds of use of article 73 of Directive 2014/24/EU, regarding the issue of the termination of

no 855/2016 first clarified the power and legitimacy of the ANAC to undertake those acts, and then divided them into 3 categories: (i) measures proposed by the ANAC and formally endorsed and enacted with a ministerial decree; (ii) measures enacted as ANAC deliberations having an *erga omnes* and binding nature, especially the guidelines (*linee guida*); and measures enacted as the ANAC's deliberations that are of a non-binding character. Only the measures in (i) are capable of being categorised as sources of law and are legally binding; measures in (ii) and (iii) are not sources of law. The Court stated that in (iii) we are facing ordinary administrative acts, and in (ii), despite the difficulties of the Court in classifying those measures, it classified them as regulatory acts (*atti di regolazione*) issuing from an independent administrative body. The acts in (ii) are not regulatory decrees but general administrative acts with regulatory effects. See La Chimia and Valaguzza, n 222, pp 165–186. See also Caringella and Proto, n 223, pp 822–893; C Deodato, "L'Attuazione Normativa Del Codice Dei Contratti Pubblici: Configurazione Giuridica, Struttura e Questioni Applicative" (2018) 9 *Il Foro Amministrativo* 1560–1597; R De Nictolis, "I poteri dell'ANAC dopo il correttivo" (2017), available at www.giustizia-amministrativa.it, pp 1–37; G Morbidelli, "Linee guida dell'ANAC: comandi o consigli?" (2016) 3 *Diritto Amministrativo* 273–320.

²³⁸ As is formally recognised by recital 2 of Directive 2014/24/EU, "There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union".

contracts.²³⁹ Lastly, the complexity and novelty of the rules and the lack of understanding by national authorities sadly also justify a “copy-out” method of transposition. A good example, mainly because of the latter difficulty, may be found in the method that has been used by some Member States to transpose article 31 of Directive 2014/24 on the innovation partnership procedure.²⁴⁰

The Member States’ approach towards article 31 of Directive 2014/24/EU has been adopted not because of the regulatory detail of article 31 of Directive 2014/24/EU, but due to fear and lack of knowledge about how to couple this complex and flexible “promised land” procedure with the administrative culture of some Member States. The fact that different countries have different administrative law traditions²⁴¹ may create extra difficulties in the application of flexible award procedures, in particular in view of the lack of capacity of the public agents to deal with this type of procedural flexibility (*discretion*). Recently, for example, voices within Italian legal scholarship have expressed concern over the use of flexible procedures within the administrative culture of the Italian system, reaching the conclusion that these flexible competitive procedures, such as competitive dialogue and innovation partnerships, will never be used.²⁴² Thus, one of the most important innovations of the Directive will be of no use to Member States with a more restrictive legal culture as regards the discretion of the administrative agent.

Following, the taxonomy proposed by Telles and Butler, the procedures contained in Directive 2014/24/EU may be characterised as *standard* (open and prescriptive procedures—articles 26; 27 and 28), when the contracting authority can use them in any circumstances and for any type of contract; *special* (competitive dialogue; competitive procedure with negotiation, and innovation partnerships—articles 26; 29;

²³⁹ Other examples can be found in articles 24, 61(1) and 76 of Directive 2014/24/EU; see S Treumer and M Comba, “Introduction” in Treumer and Comba (eds), n 219, pp 9–10.

²⁴⁰ For example, French Law—articles 93–95 of the French Décret no 2016-360 of 25 March 2016; Italian law—article 65 of the new Codice dei Contratti Pubblici; Portuguese Law—arts 218.º A to article 218.º-D Decree of the Law no 111-B/2017. On the other hand, the Danish law—Public Procurement Act, §73–79—seems to adopt a gold-plating approach when dealing with the innovation partnerships, making it clearer how such a partnership should be structured.

²⁴¹ On the concept of national administrative law traditions, see E Schmidt-Aßmann, “Administrative law in Europe: Between common principles and national traditions” in M Ruffert (ed), *Administrative Law in Europe: Between Common Principles and National Traditions* (Europa Law Publishing, 2013); G Napolitano, *La Logica del diritto amministrativo* (Il Mulino, 2014), p 249.

²⁴² G Marchianò, “La regolamentazione nella domanda pubblica alla luce della legge delega di recepimento delle nuove direttive: il ruolo dell’amministrazione” (2016) 1 *Rivista Italiana di Diritto Pubblico Comunitario* 17–19; L Torchia, “La nuova direttiva europea in materia di appalti servizi e forniture nei settori ordinari” (2015) 2–3 *Rivista Diritto Amministrativo* 298–300.

30; 31), when they can be chosen only according to specific grounds of use; and *exceptional* (negotiated procedure without prior publication—articles 26; 32), when they function as a final alternative, enabling the contracting authority to use them when other procedures fail.²⁴³ Moreover, the recent Commission Guidance on Innovation highlights that the procedures qualified as *special* are those most suitable to conduct innovative public purchases (competitive dialogue; competitive procedure with negotiation, and innovation partnerships), because they give more discretion and flexibility to the public agent to acquire and find the best innovative solutions.²⁴⁴

It is interesting to see that from the period 2009–18, the numbers of tenders that are classified as a *special*, accordingly to the taxonomy set out above, and advertised in the *Official Journal*, vary from Member State to Member State, which might indicate that the process of harmonisation is not favouring each State in the same way. In Portugal, the number of *special* procedures corresponds to 0.78% of the total number of procedures advertised in the *Official Journal* in the time period 2009–18; in Italy, *special* procedures correspond to 1.75%; in Spain and France the figures are higher, 4.5% and 4.8% respectively, but do not compare to the 6% of Denmark and the 9% of Germany.²⁴⁵

Kukovec transplants the centre-periphery theory to the legal discourse of the EU.²⁴⁶ According to his theory, institutional representation and participation in the legislative process, coupled with transfers of budget funds, are manifestly insufficient to create a legal theory of constitutional tolerance, solidarity, mutual benefit and growth to all Member States. Actors at the periphery, such as Portugal, Greece, Hungary,

²⁴³ Telles and Butler, n 46, pp 131–183.

²⁴⁴ Regarding the possible procedures to conduct innovative public purchases, the Guidance also design contests and other solutions that do not demand for a procedure, such as pre-commercial procurement, but they are not going to be part of our analyses: see European Commission, n 186, pp 40–45.

²⁴⁵ These figures were extracted from the Opentender portal overview, available at <https://opentender.eu/all/about/about-opentender>. I take sole responsibility for the treatment of the numbers provided in that portal. In fact, they would benefit from a couple of more years to mature, due to the fact that the numbers take into account a completely new procedure—innovation partnership—and the competitive procedure with negotiation, which is not entirely new, since it simply gives a new name to the negotiated procedure with prior notice. In the same vein, regarding the nature of the competitive procedure, see Telles and Butler, n 46, pp 131–183.

²⁴⁶ Kukovec believes that the centre-periphery distinction is the best model of legal thought that captures the dynamics of the EU, where European legal speech and reasoning reproduces the hierarchies and the entrenched domination of the centre over the periphery. This author claims that a new method of legal thought is needed, and that the legal structure of the EU should be based on a set of freedoms and prohibitions or legal entitlements, rather than on the interplay of social and autonomy considerations and certain economic theories that favour the centre: see D Kukovec, “Law and the Periphery” (2015) 21(3) *European Law Journal* 406–428.

Poland, parts of Italy and parts of Spain, are hierarchically subordinated and enjoy a structural disadvantage in economic and social terms when compared with actors at the centre, mainly Germany, Denmark and France.²⁴⁷ This structural disadvantage can also be found in the capacity of public administrations to use flexible and complex procedures (*special* procedures). As we have seen, the number of *special* procedures used by the actors at the centre of Europe are much greater than the numbers used by actors at the periphery of Europe. However, this is not a cause of European disintegration, but simply *reflects* on the capacity of the method of harmonising national laws to guarantee the same level of effectiveness throughout national public administrations.

To simply harmonise national laws does not create competitive equality²⁴⁸ if the background conditions are different among the Member States, namely regarding the market culture and the capacity of public administrations. Therefore, recalling our example, pushing Member States to buy innovation with one of the *special* procedures, the innovation partnership procedure, does not simply require an *equal* law for all Member States. Only when different cultural backgrounds are also taken into account will the internal market be capable of creating a level playing field and maximising cross-border trade,²⁴⁹ consequently promoting innovation. The fact that common rules are in place is not enough to guarantee the effectiveness of the rules. Concerning innovative public purchases, other factors, connected with the culture of public administrations towards risk and the discretion and capacity of public officials would have a greater impact.²⁵⁰

²⁴⁷ *ibid*; D Kukovec, “Taking Change Seriously, A Discourse of Justice and the Reproduction of the Status Quo” (22 September 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302389.

²⁴⁸ Somma claims that a realistic theory concerning EU law must always choose the path to minimum harmonisation, because it will provide for different forms of competition between norms and better accommodate the legal and non-legal traditions of each Member State: A Somma, *Temi e Problemi di Diritto Comparato*, vol IV (G Giappichelli Editore-Torino, 2003) pp 136–143.

²⁴⁹ Davies, n 113, p 78. Following the same sceptical path, Weatherill, n 111, pp 212–222.

²⁵⁰ As was stressed in section 1 of this chapter, the Commission expert group of 2005 identified the need for professionalisation of public officials to conduct innovative public purchases. Moreover, the Commission has been trying to address some of these issues in its *State of innovation union* document in which financial support and the creation of the Public Procurement of Innovation Platform were set out, Commission, n 49.

Chapter 2

The Innovation Partnership

1. *Ratio of the Innovation Partnership: Article 31, Directive 2014/24/EU*

1.1 The EU procedural strategy under Directive 2014/24/EU

We can start by noting that the European legislator considers the innovation partnership procedure (articles 26(3) and 31, Directive 2014/24/EU) to be a step towards the development of innovation that goes beyond those existing award procedures considered appropriate for promoting innovation procurement, such as competitive dialogue, design contests or negotiated procedures, and even beyond the existing possibilities for pre-commercial procurement. To begin with, article 26(3) of Directive 2014/24/EU requires all Member States to make the innovation partnership procedure available to any contracting authority that wants to use it. The Commission Proposal to revise Directive 2004/18/EC,¹ on the other hand, provided that the adoption or non-adoption of this procedure into the national legislative framework of each Member State was meant to be at the discretion of each Member State. However, during the trilogue negotiations forming part of the EU legislative procedure there was an amendment: the element of discretion vanished, the word “may” in the Commission Proposal being replaced with the word “shall” in the new Directive.² Therefore, the innovation

¹ European Commission, “Proposal for a Directive of the European Parliament and of the Council on public procurement” COM(2011) 896 final, 20.12.2011. Caranta stresses that this view was also shared by the Council. The same author mentions that the “tool box” approach, proposed by the European Commission in the proposal for a new directive, which meant that each Member State could choose those procedures considered more suitable to its domestic situation, was abandoned: see R Caranta, “Commentary on article 26 Directive 2014/24/EU” in M Steinicke and PL Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law* (CH Beck, Hart, Nomos, 2018), pp 380–385. Favouring the “tool box” approach from the European Commission see R Mostroiani, “Italie” in U Neergaard, C Jackson and GS Ølykke (eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes—The XXVI FIDE Congress*, vol 3 (Djøf Publishing 2014), pp 560–580.

² See, European Parliament, “Report on the proposal for a directive of the European Parliament and of the Council on Public Procurement” COM(2011) 0896-C7-0006/2012-2011/0438(COD) 11.01.2013. Here is possible to see the change between the Commission Proposal, which provided that the innovation partnership procedure should be available at the discretion of each Member State, and the final version of the Directive, which had removed this element of discretion.

partnership procedure must now be transposed into national law. The reason behind this legislative change can be found, at least indirectly, in the documents that were part of the preparatory works for the approval of the new Directive for the public sector.³

It should be remembered that under the Commission Proposal for a new Directive, there was a different philosophy regarding special procedures (article 24, Commission Proposal) and the innovation partnership procedure was part of that.⁴ It seems that the Commission Proposal wanted to widen the degree the flexibility offered by Directive 2004/18/EC on the transposition of the competitive dialogue procedure. According to recital 14 and article 29 of Directive 2004/18/EC, competitive dialogue was an optional award procedure for transposition by Member States, but Member States had not taken advantage of this flexible approach and competitive dialogue was invariably transposed by them, regardless of the lack of use in certain Member States.⁵

³ Both the Court of Justice of the European Union (CJEU) and the Advocate General had used the preparatory works as a viable method of legal reasoning for EU secondary legislation. As an example in EU consumer law, see Case C-497/13 *Froukje Faber v Autobedrijf Hazet Ochten BV* [2015] ECLI:EU:C:2015:357, para 61: “According to the travaux préparatoires in respect of that directive (Directive 1999/44...), that option reflects the aim of reinforcing legal certainty, by encouraging ‘diligence’ on the part of the purchaser, ‘taking the seller’s interests into account’, ‘but does not establish a strict obligation to carry out a detailed inspection of the good’ (see the explanatory memorandum to the proposal for a directive, COM(95) 520 final, p 14)”. However, it is true that the review of the *travaux* in secondary legislation can be a territory full of conflicting intentions, since each actor that is part of the legislative procedure normally has an opposing view in conflicting issues. This sometimes makes it difficult to point to a single coherent intention by the European legislator, as remarked by S Schønberg and K Frick, “Finishing, Refining, Polishing: On the Use of *Travaux Préparatoires* as an Aid to the Interpretation of Community Legislation” (2003) 28(2) *European Law Review* 149–160. Here, I do not explore the differences between the hermeneutic value of the preparatory works for the approval of the European Treaties and that for the approval of secondary law, mainly Directives, since the former gives rise to more complex and diverse issues, and also because public procurement is not directly mentioned in the European Treaties. On the issue see S Miettinen and M Kettunen, “Travaux to the EU Treaties: Preparatory Work as a Source of EU Law” in (2015) *Cambridge Yearbook of European Legal Studies* 145–167. Nonetheless, in this context it is clear from the preparatory works that the actors undertaking the role of the European legislator agreed that this procedure must be made mandatory for all contracting authorities, and even further that a more flexible approach in this regard could be harmful.

⁴ Following the Commission Green Paper on how to modernise the EU Procurement Directives in 2011, it was indicated that the range of procedural options needed to be re-examined. Therefore it needed to be evaluated, in the context of reform of the procurement procedures, whether the procedures under the current Directives (2004) were the best possible toolkit for efficient procurement. Moreover, it was noted that the stakeholders often suggested that the procedures should include more room for negotiations and flexibility: see Commission, “Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market” COM(2011)15 final, 27.1.2011, point 2, pp 12–15. This explains why, under the Commission Proposal, a more flexible approach was taken to the availability of the special procedures at national level.

⁵ S Treumer, “The Field of Application of Competitive Dialogue” (2006) 15 *Public Procurement Law Review* 307–315; S Arrowsmith and S Treumer, “Competitive Dialogue in EU law: a critical review” in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Public Procurement* (Cambridge University Press, 2009), pp 3–144; A Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart Publishing, 2015), pp 259–260. Curiously, against the expectations of the European legislator, not all Member States took advantage of this flexible approach; instead, they all included specific legal bases for the use of the competitive dialogue: see EPEC (European PPP Expertise Centre),

In the previous chapter I used Telles and Butler's taxonomy in order to categorise, for the most part, the availability of the procurement procedures offered under Directive 2014/24/EU.⁶ Thus innovation partnerships (article 31, Directive 2014/24/EU), competitive dialogue and competitive procedure with negotiation (article 26(4), Directive 2014/24/EU) all fell into the category of special procedures, since they required specific grounds for their use. Article 24 of the Commission Proposal for a new directive for the public sector provided that the decision to make the innovation partnership procedure, the competitive dialogue procedure and the competitive procedure with negotiation available to contracting authorities involved a discretionary choice for each Member State. Therefore, the final part of article 24 of the Commission proposal included the following wording:

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures.

The European Economic and Social Committee, during the legislative negotiations, had showed mixed legal feelings towards the non-mandatory inclusion of EU special procedures under national law. On the one hand, the Committee noted that the circumstance of having common European procedures would ensure greater transparency and objectivity. On the other hand, it had also underlined that the Commission's Proposal, in allowing a more flexible approach to this issue, would increase the administrative flexibility of each Member State to adjust the procedures to its own specific situation, and therefore better benefit the public interest.⁷ Therefore, the mandatory transposition of the special procedures, provided for under Directive 2014/24/EU, divided the European Economic and Social Committee. On the other hand the Committee of Regions, in its Opinion entitled "Public Procurement Packaged", had advocated strong opposition towards this flexible approach proposed by the European

Procurement of PPP and the Use of Competitive Dialogue in Europe—A Review of Public Sector Practises across the EU (2011), available at http://www.eib.org/attachments/epc/epc_procurement_ppp_competitive_dialogue_en.pdf.

⁶ P Telles and L Butler, "Public Procurement Award Procedures in Directive 2014/24/EU" in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djøf Publishing, 2014), pp 131–185.

⁷ On this issue, see the Opinion of the European Economic and Social Committee on the "Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors" COM(2011) 895 final — 2011/0439 (COD) 7.2.2013, point 1.5.

Commission regarding the availability of the so-called “special procedures”. The Committee of Regions said:

It is also important to make clear that it is the contracting authority which must choose the appropriate procedure in each case, not the national or EU level. The EU and the national level must make all procedures available to contracting authorities. To do otherwise would mean different rules and procedures in different Member States, distortions of competition and an unlevel playing field.⁸

This view from the Committee of Regions must be understood not only as a manifestation of the EU subsidiarity principle (article 5 (3) TEU), but also on the basis of its proper agenda, since its main purpose during the EU law-making process is to give a formal voice to European regions and cities and safeguard their autonomy.⁹ This reveals the special focus of this particular Committee, to ensure the position and needs of regional and local authorities, mainly by granting contracting authorities the power to choose the most suitable procedure, aimed at overcoming the central power of a given State and defending political and administrative autonomy at regional level. Besides, it is a proven fact that the contracting authorities at a local and regional level are those that most efficiently satisfy the public interest of their citizens, with more democratic and suitable decisions being taken for that particular community.¹⁰

Having said that, the European Parliament adopted, or at least appeared to do so, the same position as the Committee of Regions at the first reading under the legislative process. In this document, article 26 required Member States to make special procedures available to their contracting authorities, and consequently use of those

⁸ Opinion of the Committee of the Regions on “Public procurement package” 2012/C 391/09, 18.12.2012, amendment 10 of the Opinion.

⁹ On the topic see J Mendoza Jimenez, *The Committee of the Regions: a springboard for the citizens in Europe: Exploring the ways for bigger influence from the citizens in the EU decision-making process* (Lambert Academic Publishing, 2014); R Wyn Jones and R Scully, “Introduction: Europe, Regions and European Regionalism” in R Wyn Jones and R Scully (eds), *Europe, Regions and European Regionalism* (Palgrave Macmillan, 2010), pp 3–20.

¹⁰ It should be mentioned that in accordance with art 4(2) TEU, the EU shall respect, amongst other things, regional and local self-government. Moreover, the preamble to the Charter of Fundamental Rights of the EU states that the Union shall preserve the organisation of their public authorities at national, regional and local levels, and the ratification by all Member States of the European Charter of Local Self-Government from the Council of Europe also stresses such local and regional autonomy as a core element of the constitutional identity of the Member States. C Panara and M Varney, “Introduction—Local Government in the EU Layered System of Governance” in C Panara and M Varney (eds), *Local Government in Europe, The “fourth level” in the EU multilayered system of Governance* (Routledge, 2013), pp 6–15.

procedures must be a discretionary power of each contracting authority. This article remained unchanged until the final version of the Directive.¹¹ However, the reasoning of the European Parliament cannot be directly accessed. It can be presumed that the European Parliament believed that not to require every Member State to transpose the same set of procedures, regulated in the Directive, might be to create undesirable levels of inequality among the procedural tools available to contracting authorities across Europe and an undesirable constraint on satisfying the public interest. In addition, to entrust that power to the Member States and not the contracting authorities might also represent a drawback as regards the EU policy on local and regional autonomy.¹²

The Commission approach towards special procedures might also have posed some issues of compatibility with the case law of the CJEU. In *European Commission v French Republic*, the Court rejected the view, advocated by the French Republic, that Directive 2004/18/EC was only a coordinating Directive that left Member States with the discretion to adopt procedures other than those provided under the Directive.¹³ The CJEU ruled:

Whilst it is true that Directive 2004/18 does not seek to establish complete harmonisation of the rules governing public procurement in the Member States, the fact remains that the procedures for the award of public contracts that the Member States are permitted to use are listed exhaustively in Article 28 of that directive.¹⁴

The 2004 Directive, according to the latter case law, did not permit the award of public contracts covered by the Directive by means or procedures other than those provided by the EU Public Procurement Directives. Permitting flexibility, regarding the

¹¹ European Parliament, “Position of the European Parliament, adopted at first reading on 15 January 2014, with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC” EP-PE_TC1-COD(2011)0438, 15.1.2014, pp 163–164.

¹² See n 10. This issue will not be explored further in the context of this work.

¹³ Case C-299/08, *European Commission v French Republic*, EU:C:2009:769; [2009] ECR I-11587, para 27. This case represents a stricter approach to that in Case C-27/86, *CEI v Association Intercommunale pour les Autoroutes des Ardennes* (“CEP”) [1987] ECR 3347, which allowed for more discretion in the application of the procedural rules. However, the two different judgments are separated by 22 years and must be interpreted according to their own context. In the *CEI* case the levels of harmonisation and compromise concerning public procurement were much lower than those in *European Commission v French Republic*.

¹⁴ *European Commission v French Republic*, n 13, paras 28–29. Reaching the same conclusion, but with different reasoning, see the Opinion of Advocate General Mazak on 22 September 2009 in Case C-299/08, *Commission of the European Communities v France* [2009] ECLI:EU:C:2009:570, paras 23–24. See also J Knibbe, “Whether the award procedures laid down by Directive 2004/18 are exhaustive: *Commission v France* (C-299/08)” (2010) 3 *Public Procurement Law Review* NA91-93.

adoption or non-adoption of the special procedures, might put into question the ruling in *European Commission v French Republic*, mostly due to uncertainty surrounding the possibilities for each Member State to adopt procedures different from the ones laid down by the Directives. It is true that according to the wording of article 24 of the Commission Proposal, this latter possibility cannot be directly excluded. However, flexibility on this aspect might have sent a different political message to the Member States. As a merely speculative exercise of possible legal uncertainty, the idea that the European legislator wanted to modify the rigidity of the CJEU's former judgment and consequently allow Member States more discretion or flexibility on this issue might lead to a scenario where Member States decided to create other procedures not specifically regulated in the Directives but which, according to Member States' reasoning, were not breaching the European principles applicable to procurement. Moreover, Member States could also be tempted to build new procedures, by mixing the legal features of the competitive procedure with negotiation, competitive dialogue and the innovation partnership in an unique new procedure. Finally, this could also lead to questions concerning the *vacatio legis* of the Directive, most particularly the use of special procedures that were still being conducted in those Member States that had decided not to transpose them into national law after the transposition period passed, namely procedures already available in national law due to their being the result of previous directives, such as competitive dialogue and competitive procedure with negotiation. Therefore, article 90 of Directive 2014/24/EU would have to expressly address this issue.¹⁵

Once again taking a holistic perspective on procurement procedures, the taxonomy of Telles and Butler is not enough. This taxonomy mostly focused on procedural availability, and therefore it was not sufficient to explain the distinguishing procedural features of the procurement procedures. Procedures can also be classified in accordance with other sets of criteria, such as the level of competitiveness, the inclusion or not of a negotiation phase (in other words, the level of flexibility).¹⁶ Thus special procedures,

¹⁵ As was already mentioned, this exercise is merely speculative, since the Commission's Proposal was modified, during the legislative process for the approval of a new directive. However, the legal issues that could arise from a more flexible approach to transposition are more than evident. From inequality to legal uncertainty, they are all factors that could compromise the harmonisation process.

¹⁶ Gallego Córcoles advanced several possible criteria in order to distinguish the procurement procedures, namely, the grounds of use; the level of competitiveness; the inclusion or not of a negotiation phase; the levels of flexibility; the mandatory character of the transposition of the procedures: see I Gallego Córcoles, "Los procedimientos de adjudicación en la nueva Directiva sobre contratación pública" in *Observatorio de los contratos públicos 2013* (Thomson Reuters Aranzadi, 2014), pp 165–235.

in the context of the present work, are not only those with specific grounds for their use, but also those providing more room for negotiation and discretion.

In my understanding, the above-mentioned special procedures are also the procedures with more room for negotiation when compared with the open and restricted procedures.¹⁷ The advantages of negotiations, and consequently flexibility, in procurement procedures had already been stressed by the European Commission Green Paper in 1996,¹⁸ which stated:

In cases where it is allowed, the negotiated procedure appears to enable an economically more efficient outcome to be arrived at than a traditional call for competition, thus proving to be a rational method of reducing public purchasers' costs while achieving the objectives pursued. The fact remains, however, that the procedure is less favourable to the goal of market transparency.

The Commission was also alert to the possible damage to transparency in the latter Green Paper. Nonetheless, the route of the European legislator in the new Directives was towards more negotiation.¹⁹ The path followed by the European legislator did not compromise the weight of transparency in the EU public procurement framework; instead it aimed only for a more balanced approach, in order for negotiations not to damage the obligations of transparency and equal treatment.²⁰ The importance of the use of negotiated procedures is highlighted in recital 42 of Directive 2014/24/EU, which clearly states:

¹⁷ In the same vein, Gallego Córcoles, *ibid*; J Davey, "Procedures involving negotiation in the new Public Procurement Directive: Key reforms to the grounds for use and procedural rules" (2014) 3 *Public Procurement Law Review* 103–111.

¹⁸ European Commission, "Green Paper Public Procurement in the European Union—Exploring the Way Forward" COM(96) 583 final, 27.11.1996, point 3.16.

¹⁹ It is interesting to see the empirical study conducted by Chever and Moore. They had analysed (during the period January 2004 to December 2009) the public works contracts tendered by Paris Habitat-OPH, the largest social housing contractor in Europe, and reached a conclusion that the use of negotiated procedure with publication had a negative impact on the number of received bids by 26%, because the competitive behaviour stimulated by the negotiated procedure and the levels of discretion of the public buyer might increase favouritism or corruption of the public buyer. Those factors must be dealt with through increasing of the levels of transparency. See L Cheve and J Moore, "Negotiated Procedures Overrated—Evidence from France Questions the Commission's Approach in the Latest Procurement Reforms" (2012) 7 *European Procurement & Public Private Partnerships* 228–241.

²⁰ S Treumer, "Flexible Procedures or Ban on Negotiations? Will More Negotiation Limit the Access to the Procurement Market?" in G Skovsgaard Ølykke, C Risvig Hanse and C Tvarnø (eds), *EU Public Procurement Modernisation, Growth and Innovation—Discussions on the 2011 proposals for Procurement Directives* (Djøf Publishing, 2012), pp 135–150. The Impact Assessment Report from the Commission, prior to the approval to the new Directives, mentions the same benefits and disadvantages of negotiations in tender procedures: European Commission, "Impact assessment accompanying the document 'Proposal for a Directive of the European Parliament and of the Council on Public Procurement'" (2011), SEC(2011) 1585 final, 20.12.11, pp 184–187.

A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the competitive dialogue has significantly increased in terms of contract values over the past years ...

The benefit of procedures with more room for negotiation is clear in the eyes of the European legislator, despite the possible dangers that flexibility may pose to the principles of equal treatment and transparency. In addition, recital 42 of Directive 2014/24/EU notes that the negotiated procedure is the one most capable of guaranteeing the overall success of procurement outcomes, and particularly of innovation procurement.²¹ There is an intrinsic correlation between flexibility in the procurement procedures and the successful acquisition of innovation for the public sector.

It was suggested in section 3.2 of chapter 1 that there is a huge discrepancy as regards the number of special procedures being used in each Member State. In that sense, Member States will simply decide not to transpose most of the special procedures, for instance competitive dialogue, which is a more complex procedure, due to the lack of use of these procedures by their own contracting authorities. The impact of this fact could not remain unnoticed, and the same deficiency would likely taint the use and impact of the innovation partnership procedure.

This flaw in the harmonisation process of the procurement procedures justified a different approach by the Commission in its Proposal on the mandatory transposition of special procedures, which had previously left the question of the availability of special procedures to be a political choice of each Member State. Thus the political power (legislative function) of a given State, for example Portugal or Greece, experiencing low numbers concerning the use of the competitive dialogue procedure, which was an optional award procedure under the 2004 Directive for the public sector

²¹ Recital 42, Directive 2014/24/EU: “It has shown itself to be of use in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Where relevant, contracting authorities should be encouraged to appoint a project leader to ensure good cooperation between the economic operators and the contracting authority during the award procedure”.

but had been transposed by every Member State,²² instead of discovering possible ways to foster this flexible and competitive procedure, would be tempted not to transpose it into national law.²³ However, the method best suited to address this issue was not to allow Member States to have discretion, during the transposition of the Directives, as to whether to make these special procedures available to contracting authorities or not. This path would only foster the economic and social structural disadvantages already highlighted between European actors on the periphery (for example Portugal, Hungary, Poland, Italy and Spain), which use fewer special procedures, and European actors at the centre (for instance France and Germany), which use more special procedures.²⁴ As I have said, regarding the use of EU special public procurement procedures, harmonising laws is not enough to provoke a change in core administrative law traditions. Only a more proactive model of oversight and legal advice at the EU level will reduce the levels of legal uncertainty and foster the level playing field between contracting authorities in Europe.

An interesting question, which goes beyond the scope of the present thesis, is whether the EU legal framework for public procurement has the legal competence to give contracting authorities European legal powers or even procedural rights of an EU nature, independent from national law, concerning the availability and use of the procurement procedures regulated under the Procurement Directives. The theoretical construction of “public subjective rights” seems inadequate to explain the latter possible phenomenon. The definition of “public subjective right” given under the general theory of administrative law is broad and elastic. In the words of Maurer, public subjective rights are defined as the legal power given to an individual, through an imperative legal norm of public law, with the normative power of demanding from the State a certain and determined behaviour, for the realisation of that individual’s own interest.²⁵ Despite coherent theories expanding the content of this concept, in order for it to adapt in accordance with the evolution of the relationship between the citizen and

²² See n 5.

²³ From 2009 to 2018, Portugal had advertised only 16 competitive dialogue procedures in the *Official Journal of the European Union* (OJEU), and Greece had also advertised only 25 competitive dialogue procedures. In contrast, France and the UK had advertised, during the same period, 4,975 and 3,810 competitive dialogues procedures respectively. These figures have been taken from the Opentender portal overview, available at <https://opentender.eu/all/about/about-opentender>.

²⁴ Section 3.2 of ch 1. D Kukovec, “Law and the Periphery” (2015) 21(3) *European Law Journal* 406–428.

²⁵ H Maurer, *Hartmut, Allgemeines Verwaltungsrecht*, 17th edn (CH Beck, 2009), pp 163–165.

the State and the imperatives provided by EU law, some authors were forced to try to advocate a mutation of the concept. For instance, in Ruffert's work, he tried to argue that in German public law, whenever a specific legal provision is capable of satisfying the EU legal doctrine of direct effect, it must also be capable of conferring public subjective rights within the legal sphere of that particular legal person, with important procedural and legal standing effects.²⁶ These recent expansionist developments on the subjective scope of legal protection conferred by the concept of "public subjective rights" still are not enough to affirm that contracting authorities have been empowered by the EU in the public procurement context with pure "public subjective rights". On the one hand, the definition of "public subjective rights" grants rights to individuals against the State. Contracting authorities in EU public procurement law can also be part of the EU definition of State. On the other hand, there can also be some overlap, regarding the interests protected both by contracting authorities and the State in the EU public procurement law framework, since they apply the same EU principles in their procurement activities. This possible subjective (entities) and objective (protected interests) overlap dictates that the notion of "public subjective rights" is unsuitable. Therefore, one should question, if there is any room for other type of procedural rights given to contracting authorities, by the EU public procurement legal framework, independently from national law, regarding the use of certain EU public procurement procedures.

There is no doubt that the EU doctrine of direct effect is reshaping national administrative law concepts. A classical vertical direct effect situation can be found when the EU allows particulars to claim EU law protection against an infringing Member State that has failed to transpose EU directives. As I have said, to consider the existence of the vertical direct effect of the provisions of the Procurement Directives, by contracting authorities against the State, is too complex to be addressed in this current work, and therefore only a brief analysis of the matter will be conducted here. It is true that the majority of contracting authorities (article 2(1)(1)–(4), Directive 2014/24/EU) fall within the EU concept of the "State" as defined in the *Foster* case:²⁷

²⁶ M Ruffert "Dogmatik und Praxis des subjektiv-öffentlichen Rechts unter dem Einfluß des Gemeinschaftsrechts" (1998) *DVB* 69–75.

²⁷ Case C-188/89, *Foster v British Gas* [1990] ECR I-3350, para 20.

It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event, among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.

However, it is not true that the interests of a contracting authority and the State cannot be opposed in the context of EU public procurement law. First, in the old *Costanzo* case the CJEU ruled that administrative authorities (*in casu*, an Italian municipality) were obliged to disregard a domestic legal provision that conflicted with EU law.²⁸ So, according to the CJEU, the power or obligation to set aside a national unlawful provision does not vest solely in the national courts but in any administrative body as well. Moreover, it is also worth mentioning that in the *Portgás* case,²⁹ the CJEU dealt with the opposite scenario regarding vertical direct effect: here, the CJEU ruled that *Portgás*, despite being a private undertaking, could be considered an emanation of the State, and hence articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38/EC could be invoked against it. Consequently, the Court considered that in this scenario, the Portuguese State could invoke the provisions of the Directive against *Portgás*. As pointed out, in this case the Court's reasoning was ingenious, because it assumed that the defaulting State, which had failed to effectively transpose a Directive, could rely on an unimplemented directive against one of the State's own emanations.³⁰

In my view, the precedent opened up by the CJEU, despite having the clear aim of safeguarding the effectiveness of EU law by any means, also opens up a dangerous path to situations of abuse of law. Nonetheless, the *ratio decidendi* of *Portgás* could also be transferred to a less dangerous context where contracting authorities invoke vertical direct effect against the State when recourse to special procedures is made extremely difficult by the State; based on the fact that the EU had directly given to contracting authorities the right to use this procedure, independently from national law.

²⁸ Case C-103/88, *Fratelli Costanzo SpA v Comune di Milano* [1989] ECLI:EU:C:1989:256, para.33.

²⁹ Case C-425/12, *Portgás-Sociedade de Produção e Distribuição de Gás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território* [2013] ECLI:EU:C:2013:829, paras 24–37.

³⁰ On the issue, see A Albors-Llorens, “The direct effect of EU directives: Fresh controversy or a storm in a teacup?” (2014) 39 *European Law Review* 850–862; A Sánchez-Graells “CJEU: Vertical Effect of Directives goes both ways (C-425/12)”, available at <http://www.howtocrackanut.com/blog/2013/12/cjeu-vertical-effect-of-directives-goes.html>.

Moreover, it is clear that contracting authorities are forced to interpret national law in accordance with EU law, due to the doctrine of consistent interpretation established by the *Von Colson* case.³¹ Therefore, in accordance with article 26 of Directive 2014/24/EU, contracting authorities must be granted the power to use special procedures, if the grounds for the use of these procedures regulated under EU law are fulfilled. Thus, if a national legislator creates additional unlawful requirements concerning the use of the latter procedures, contracting authorities and courts must interpret those national norms in accordance with EU law and, if necessary, beyond the wording of the law. However, this EU constitutional obligation to interpret national law in accordance with EU law only arises after the deadline for its implementation expires.³²

One should note that, notwithstanding the fact that there are legal arguments doubting the lawfulness and effectiveness of the EU harmonisation process, concerning public procurement³³ there are not signs that it is slowing down. The Commission Proposal on a more flexible approach to the transposition of special procedures represented a “yellow card” to the whole public procurement harmonisation process, but it also comprised the use of strategic instruments the new Public Procurement Directives aimed to foster or promote.

For instance, the possibility for contracting authorities to aggregate public needs, in order to gain economies of scale, lower prices and transaction costs, and to improve the professionalisation of procurement managers and best practices, is promoted by the European legislator, provided competition and opportunities for small to medium-sized

³¹ Case C-14/83 *Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] EU:C:1984:153, para 26.

³² On the point, see Case C-212/04 *Adeneler and Others v Ellinikos Organismos Galaktos* [2006] EU:C:2006:443, para 115. After that period there is a duty to interpret national law as far as possible in the light of EU Law: see Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshunt*, [2004] EU:C: 2004: 584, paras 109–112. On the topic of the doctrine of consistent interpretation and its limits, see R Schütze “Direct Effects and Indirect Effects of Union Law” in R Schütze and T Trimidas (eds), *Oxford Principles of European Union Law*, Vol I: *The European Union Legal Order* (Oxford University Press, 2018), pp 290–298; L Daniele “Vingt-Cinq Ans D’Interprétation Conforme: Une Principe Encore en Quête de Définition” in B Nascimbene and F Picod (eds), *L’Italie et Le Droit de L’Union Européenne* (Bruylant, 2010), pp 181–200; M Klammert “Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots” (2006) 43 *Common Market Law Review* 1251–1260.

³³ S Arrowsmith, “The Purpose of the EU Public Procurement Directives: Ends, Means, and the Implications for National Regulatory Space for Commercial and Horizontal Policies” (2012) 14 *Cambridge Yearbook of European Legal Studies* 1–47; S Arrowsmith, “The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?” (2006) 35 *Public Contract Law Journal* 337–350.

enterprises (SMEs) are safeguarded.³⁴ This possibility for collaboration is encouraged not only between contracting authorities operating in the same Member State (article 38, Directive 2014/24/EU—“occasional joint procurement”), but also as regards cooperation among contracting authorities from different Member States (article 39, Directive 2014/24/EU—“procurement involving contracting authorities from different Member States”). Cooperation between the EU and national administrations (article 6(g) TFEU)³⁵ and the emergence of common public needs among European contracting authorities, mostly in particular sectors, such as health,³⁶ had created the basis for codifying these instruments of cooperation. The option regulated in article 39 Directive 2014/24/EU poses a great number of legal difficulties, mostly connected with conflict of laws on both the procedural aspects and the execution of contracts, due to its intersection with more than one jurisdiction,³⁷ which will be not explored further. In simple terms, if certain requirements are met, the Directive allows for contracting authorities from different Member States to jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system, amongst other things (article 39(4), Directive 2014/24/EU). In that sense, not permitting contracting authorities to have direct access to all procedures available under Directive 2014/24/EU will seriously compromise the use of this instrument that clearly points to the fostering of cross-border procurement, professionalisation and value for money. As a final

³⁴ Recital 59, Directive 2014/24/EU. R Cavallo Perin and GM Racca, “La cooperazione amministrativa europea nei contratti e servizi pubblici” (2016) 6 *Rivista Italiana di Diritto Pubblico Comunitario* 1457–1470.

³⁵ The speed of composite administrative procedures, which are procedures in which administrative authorities from the Union and from Member States cooperate to get the best final decision, is an example of an area of administrative cooperation between administrations (EU and national), mostly in areas such as genetic modified organisms, pharmaceuticals, ecolabels, protection of geographical indications and designations of origin, etc. For more details, see amongst others S Alonso de León, *Composite administrative in the European Union* (Lustel, 2017), pp 149–213.

³⁶ GM Racca, “Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement” (2010) 8 *Public Procurement Law Review* 119–133.

³⁷ The difficulties arising from this procedure were recognised by the European legislator in recital 73, Directive 2014/24/EU. See A Sánchez-Graells, “Collaborative Cross-Border Procurement in the EU: Future or Utopia?” (2016) 3(1) *Upphandlingsrättslig Tidskrift* 11–37; S Ponzio, “Joint Procurement and Innovation in the New EU Directive and in Some EU-Funded Projects” (2014) 2 *Ius Publicum*, available at http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf; the study published by the European Commission, “BBG – SKI, Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States” December 2016, available at <http://ec.europa.eu/DocsRoom/documents/22102/>. Finally a critique of the latter study, due to its lack of normative discussion, by A Sánchez-Graells, “Is Joint Cross-Border Public Procurement Legally Feasible or Simply Commercially Tolerated?—A Critical Assessment of the BBG-SKI JCBPP Feasibility Study” (2017) 12 (2) *European Procurement & Public Private Partnership Law Review* 97–111.

remark, the provision in article 39 of Directive 2014/24/EU is also seen by some scholars as a crucial tool for the success of innovative procurement, due to the specificity of the object of the purchase.³⁸ In my view, if properly conducted, innovation partnerships could be a suitable procedure for making use of the possibilities offered by article 39 Directive 2014/24/EU, due to the ability to limit the risk of such a procedure. For example, the development and purchase of new hospital instruments or medicine, which can be used in several medical procedures across Europe; or the uniting of two cities in different Member States with a speedy method of transportation. In these two examples, both the contractual object and the public need have an innovative cross-border purpose.

The non-mandatory transposition of special procedures into the national law of each Member State would have the potential to harm not only the availability of comparable tools for the satisfaction of public needs, but also the number of cross-border transactions. As indicated in the Commission Green Paper of 1996,³⁹ the use of more procedures with negotiation should serve to increase the low levels of cross-border procurement. Similarly, encouraging the use of special procedures with more room for negotiation among all Member States of the EU is likely to increase the considerably low levels of direct and indirect cross-border procurement, and consequently the success of the harmonisation process.⁴⁰

Specifically, regarding the mandatory transposition of the innovation partnership procedure (article 26(3), Directive 2014/24/EU), a complementary argument can also be made that goes beyond the equality concerns already displayed regarding the use of special procedures by contracting authorities. The mandatory transposition of the innovation partnership introduces a certain degree of differentiation between that procedure and other European procedural instruments that can promote innovation. Bearing in mind the weight of innovation in the European strategy and the on-going evolution of the EU public procurement system into a strategic system,⁴¹ it would only be logical that contracting authorities should be required to transpose the innovation

³⁸ P Valcárcel Fernández, “The Relevance of Promoting Collaborative and Joint Cross Border Public Procurement for Buying Innovative Solutions” (2017) 1 *Ius Publicum Network Review* 1–50.

³⁹ European Commission, n 18, point 3.16.

⁴⁰ On the levels of cross-border procurement, see ch 1, section 2.2.

⁴¹ See ch 1, section 2.2.3.2.

partnership into national law, since it is one of the main procedural instruments aiming to promote one of the main EU strategies—innovation—in the public sector.⁴²

It is clear that there is a weakness in the EU procedural strategy, since the procurement procedures that aim for more value for money, efficiency and cross-border procurement are not being used to the same extent by the Member States. As the EU process of harmonising by law grows, and consequently EU procurement becomes more and more strategic, the gap and structural disadvantages between Member States will also increase. Innovation procurement will be a clear example of that, with the obvious risk of increasing inequality. There is an unquestionable need for a remedy to minimise this tendency. This point will be addressed in the last chapter of the present work, where it will be suggested that the creation of a EU model of oversight bodies for public procurement has the ability to tackle structural disadvantages and institutional disadvantages, and to expand the levels of innovation procurement, by providing legal advice, sharing practices and offering more legal certainty.⁴³

1.2 Distinguishing between innovation partnerships and other competitive procedures available under Directive 2014/24/EU for the promotion of innovation

As indicated by recital 49 of Directive 2014/24/EU, a new procedure should be available to contracting authorities when they want to procure innovative goods, services or works:

Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already

⁴² Chapter 1, section 2.2.3.2 and recital 47, Directive 2014/24/EU. Several authors had identified innovation partnerships as the main novelty of the new public procurement legal framework: see, eg, JM Gimeno Feliu, “La Contratación Pública Como Estrategia: El fomento de la Innovación” (2018) 1 *Ius Publicum Network Review* 1–27; AR Apostol, “Pre-commercial procurement in support of innovation: regulatory effectiveness?” (2012) 6 *Public Procurement Law Review* 213–225.

⁴³ P Cerqueira Gomes, “A Lost Proposal in the 2014 Public Procurement Package: Is there any Life for the Proposed Public Procurement Oversight Bodies?” in G Ølykke Skovgaard and A Sánchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016) pp 170–190; P Cerqueira Gomes, “EU Public Procurement Oversight Bodies—the way forward” (2017) 6 *Public Procurement Law Review* 249–255.

available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive ...⁴⁴

It is important to note that the inclusion of this new procedure (innovation partnerships) does not indicate that it is the only one capable of promoting innovation. In fact, as recognised in the Guidance on Innovation Procurement, innovation can occur within both open and restricted procedures (mostly with the use of preliminary market consultations; technical specifications; functional requirements; variants; an award phase, etc); within special procedures, mainly negotiated procedures with competition, competitive dialogue, design contests, innovation partnerships; or even without a procurement procedure, that is, through pre-commercial procurement.⁴⁵ The fact that not only special procedures were able to provide for innovative public purchases had already been highlighted in the Green Paper on the modernisation of EU public procurement,⁴⁶ prior to the approval of the new Procurement Directives of 2014.

As rightly pointed out by Caranta, the questionnaire present in the Green Paper on the modernisation of EU public procurement law was already an indication that a new procedure would emerge.⁴⁷ First, issues arose around the competitive dialogue procedure, concerning the protection of intellectual property rights and the confidentiality of innovative solutions, mainly when participants were forced to disclose to other candidates the unique features of their solutions. Though justified by a particularly cautious legal interpretation of the weight of the EU principles of equal treatment and transparency during the dialogue phase, this was discouraging the participation of economic operators in this type of public tender. Second, the Green Paper identified other measures that should be adopted, in order to reduce the risk to contracting authorities and the lack of knowledge of public officials in fostering innovative solutions. In response, the Green Paper advocated that particular attention should be paid to measuring performance in innovative public purchases. This aspect would play a key role when evaluating the effect of public procurement on innovation,

⁴⁴ P Cerqueira Gomes, “The innovative Innovation Partnerships under the 2014 Public Procurement Directives” (2014) 4 *Public Procurement Law Review* 211–218. In the same vein, European Commission, “Guidance on Innovation Procurement” COM(2018) 3051 final, 15.5.2018, pp 4–9.

⁴⁵ European Commission “Guidance on Innovation Procurement”, n 44, pp 29–30.

⁴⁶ Commission, “Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market”, n 4, point 4.3.

⁴⁷ R Caranta “Commentary on article 31 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, n 1, pp 420–428.

improving performance, reducing risk and achieving the actual goal of innovation.⁴⁸ This last aspect justifies the new innovation partnership procedure's special focus on the contract execution phase, by stressing the importance both of cooperation between public and private actors and measurement of the performance levels of economic operators.

Another argument can be added. As the Commission stressed, one of the main reasons to reform the rules on the procedures was to allow more flexibility (discretion) in their use.⁴⁹ So, one can also conclude that innovation called for more flexible procedures, and that innovation partnerships in particular should be more flexible as regards their rules, even regarding State aid law, which would be a further element of differentiation.⁵⁰

Strangely, no flexible approach towards State aid (article 107 TFEU) can be seen in the final text of the Directive, especially in the articles and recitals regulating innovation partnerships.⁵¹ The danger of the latter issue has already been pointed out by the legal doctrine and will be briefly explored in section 4.3.2., due to its complexity.⁵² In addition, one of the main reasons previously indicated for having created this new procedure was to avoid the “cherry picking” of intellectual property rights. According to the final version of the Directive, article 31(6) of Directive 2014/24/EU merely states that arrangements for intellectual property rights, under the

⁴⁸ Commission Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market”, n 4, point 4.3.

⁴⁹ Commission, “Modernising European public procurement to support growth and employment—Press Release” (2011) IP/11/1580, pp 1–3.

⁵⁰ In the same vein, Opinion of the European Economic and Social Committee on the “Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors”, n 7, point 4.16, stresses the fact that there should be flexibility as regards the procedural rules and the rules on State aid: “The EESC agrees with the regulation of the innovation partnership procedure by Articles 29 and 43 in the two proposals, as excessively tight regulation would in practice hamper its use. For the same reason, this procedure should be flexible with regard to the rules”.

⁵¹ Directive 2014/24/EU mentions in recital 49 that “[w]hether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market”; and art 31(7) stresses that the innovation partnership procedure should be structured in a way that does not contravene competition. This might also indicate that precautions should be taken not to violate the EU framework on State aid.

⁵² A Sánchez-Graells, “Public procurement and state aid: reopening the debate? (2012) 21 *Public Procurement Law Review* 213–220; T Indén and K Naundrup Olesen, “Legal Aspects of Public Private Innovation” (2012) 4 *European Procurement & Public Private Partnerships Law Review* 265–270; “The innovative Innovation Partnerships under the 2014 Public Procurement Directives” (2014) 4 *Public Procurement Law Review*, pp 211–218; DC Dragos and B Racolta, “Comparing Legal instruments for R&D&I: State Aid and Public Procurement” (2017) 4 *European Procurement & Public Private Partnership Law Review* 408–421.

innovation partnership procedure, should be included by the contracting authority in the procurement documents, leaving this crucial and controversial issue, with the potential to feed anti-competitive behaviours and unlawful State aid, to the discretion of public officials.⁵³

However, the question is not easy to address, mainly due to the different philosophies concerning the regime applicable to the ownership of intellectual property rights.⁵⁴ For instance, in the field of EU copyright law there is a lack of EU regulation of the rules on authorship and contracts, which is capable of generating uncertainties as to who the real beneficiaries of protection are—the creators or the creative industry.⁵⁵ As pointed out, this issue is merely regulated by contractual practices and clauses. These practices normally demand the assignment or transfer of ownership to be made against the payment of fees, in terms of a lump sum or royalties.⁵⁶

Nonetheless, in my view, there are unique features that set the innovation partnership procedure apart from other procurement procedures that are also suitable to

⁵³ A Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart Publishing, 2015) pp 445–451; Cerqueira Gomes, “The innovative Innovation Partnerships under the 2014 Public Procurement Directives” n 44, pp 211–218.

⁵⁴ The contrasting and different approaches to the regulation the ownership of intellectual property rights in legal systems are summarised in Cornish’s well-known observation: “Throughout the history of intellectual property there has been a fundamental tension between the creator (inventor, author)—whose activity is the key to entitlement—and the investor/entrepreneur—who needs the right in order to turn the subject-matter to commercial account, potentially for the benefit of both ...”. See W Cornish, “The Expansion of Intellectual Property Rights” in G Schriker, T Dreier and A Kur (eds), *Geistiges Eigentum im Dienst der Innovation* (Nomos, 2001) pp 16–30. For more on this topic, see N Sousa e Silva, *The Ownership Problems of Overlaps in European Intellectual Property* (Nomos, 2014); S Wolk, *EU Intellectual Property Law and Ownership in Employment Relationships* (Wahlgren, 2010), pp 419–450; A Quaedvlieg, *Authorship and Ownership: Authors, Entrepreneurs and Rights in Codification of European Copyright Law* (Kluwer Law, 2012) pp 197–220. For examples of how the acquisition of intellectual property rights could be undertaken—in the context of competitive dialogue but relevant by analogy to the innovation partnership—see P Telles, “Competitive Dialogue: should the rules be fine-tuned to facilitate innovation” in G Skovgaard Ølykke, C Risvig Hanse and C Tvarnø (eds), *EU Public Procurement Modernisation, Growth and Innovation—Discussions on the 2011 proposals for Procurement Directives* (Djøf Publishing, 2012) pp 232–235.

⁵⁵ An example of an EU attempt to regulate this matter in order to harmonise different national traditions (copyright tradition versus *droit d’auteur* tradition) on the issue of establishing the principal director of a cinematographic or audio-visual work and not only the cinematographic or audio-visual company as one of its authors, can be found in Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] ECLI:EU:C:2012:65, para 72: “Articles 1 and 2 of Directive 93/83, and Articles 2 and 3 of Directive 2001/29 in conjunction with Articles 2 and 3 of Directive 2006/115 and with Article 2 of Directive 2006/116, must be interpreted as meaning that rights to exploit a cinematographic work such as those at issue in the main proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director. Consequently, those provisions must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question”.

⁵⁶ A Ramalho, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer, 2016), pp 151–223.

procure innovation. Therefore, a distinction must be made between innovation partnerships and the other special procedures that are suitable to procure innovation, such as competitive dialogue and competitive procedure with negotiation.⁵⁷ In addition, despite the fact that the analysis of the regime applicable to pre-commercial procurement is excluded from the present thesis, some aspects of its regime will be also be mentioned merely in an instrumental way, in order to highlight specific traits of the innovation partnership.⁵⁸

The question that remains unanswered, and which will be explored throughout this work, is whether the legal ecosystem surrounding the innovation partnership procedure will be more suitable to promote innovation in every Member State. As shown, the process of harmonisation through law, when applied in the context of the use of special procedures, had proven to be ineffective. There is a huge difference between Member States when it comes to the use of such special procedures. The reason behind it goes beyond positive law and needs to be understood with recourse to a comparative law methodology. As previously explained, to harmonise institutional values and practices through legislation alone most likely will have the effect of creating dead letter norms. So, despite their legality and compatibility with the legal order, the legal norms that allow these instruments (special procedures) to be triggered will not be used. The same rationale will apply to innovation partnerships. Thus in the institutional context of a given contracting authority, a high level of discretion will be required for public officials to conduct special procedures, and that discretion will of course be limited in the first place by the legal framework, but also by the practices and values of the particular organisation, mostly due to the lack of capacity building of public officials⁵⁹ and the absence of the correct tools to assess the risk associated with the procurement of innovation.

Since the mandatory transposition of this procedure into the laws of Member States, there has also been a discrepancy between States concerning the number of

⁵⁷ Telles and Butler, n 6, pp 131–185.

⁵⁸ As already discussed in section 1.3 of ch 1, pre-commercial procurement, a multi-stage process from development to prototyping, field tests for a product that will address specific public needs, and does not involve the purchase of a (non-existent) product by the procuring agencies. As I have stated, pre-commercial procurement has several limitations and is a supply-side tool of the EU innovation policy and does not provoke the typical market pull of demand-side instruments, such as PPI. Thus it will not be part of the present study.

⁵⁹ On this topic, see European Bank for Reconstruction and Development, “Capacity Building in Procurement” (December 2012); OECD, “Developing public procurement capacity in Europe” (2017).

innovation partnership procedures conducted.⁶⁰ France has so far launched 20 innovation partnership projects. The UK, Germany and Finland had advertised 12, 11 and 11 innovation partnership contracts, respectively. The Netherlands and Denmark had conducted, respectively, 9 and 7 innovation partnerships. Italy and Spain, on the other hand, launched only 4 and 3 innovation partnerships, respectively. Lastly, Portugal and Greece failed to trigger any innovation partnership projects at all.⁶¹

Having said that, throughout this work, and mainly taking the innovation partnership procedure as my framework of analysis, I shall also analyse procedural instruments that can favour innovation, namely via non-special procedures or standard procedures, such as the open and restricted procedures,⁶² with a special emphasis on the use of technical specifications.⁶³

In conclusion, there is no doubt that the European legislator believed that the European legal framework for public procurement was in need of a new procedure specially designed for procuring innovative goods, services or works. This new procedure is the innovation partnership procedure (article 31 and recital 49, Directive 2014/24/EU).⁶⁴ Yet there is a certain degree of doubt as to how this special procedure can provide for new and more effective ways to procure innovation. In my view, three main arguments can be advanced, in order to trace the unique aspects of the regime that will apply to the innovation partnership, namely: (i) the *procedural* reason; (ii) the

⁶⁰ Article 90, Directive 2014/24/EU established the date of 18 April 2016 as the deadline for the transposition of the Directive.

⁶¹ These numbers were taken from the platform <https://procuring-innovation.com>, which filters data from Opentender EU. The website was last visited on 18 November 2018. Curiously, these numbers are coincident with those presented orally by S Arrowsmith at the Nohrecon Annual Conference for Public Procurement in Copenhagen on 22 November 2018.

⁶² Telles and Butler categorise procurement procedures as standard when contracting authorities can use them in any circumstances and for any type of contract covered by the Directive. In that sense, the open procedure and the restricted procedure fit into this definition (art 26(2), Directive 2014/24/EU). See Telles and Butler, n 6, pp 131–185.

⁶³ In the same vein, European Commission, “Guidance on Innovation Procurement”, n 43, pp 33–35.

⁶⁴ The speech by Emanuel Macron, at the National Assembly, during the session of 6 July, on the project for a law of the National Assembly n° 691, text of the Commission n° 713, report n° 712, vol I and II, notice n° 707 to 710, stressed the potential of the innovation partnership, due to its unique characteristics: “S’agissant de l’innovation, l’acquisition de solutions innovantes joue un rôle essentiel dans l’amélioration de l’efficacité et de la qualité des services publics. Nous encourageons l’innovation en facilitant la passation des marchés à visée innovante par la création d’une procédure dédiée à ce type d’achat: le partenariat d’innovation. Là aussi, nous étions face à un paradoxe: nombre de nos politiques sur le plan budgétaire ou fiscal poussaient à l’innovation, mais les contraintes de la commande publique ne permettaient pas d’en tirer les conséquences, voire bloquaient les acheteurs publics. Le partenariat d’innovation permet d’y répondre et donne un cadre juridiquement sécurisé, visible, qui permet aux différents pouvoirs adjudicateurs de participer à l’innovation dans le pays par l’achat public”.

material scope/grounds of use; and (iii) the levels of flexibility and discretion of the public agent.

1.2.1 *The procedural reason*

Regarding the first category (the *procedural* reason),⁶⁵ it can be highlighted at the outset that, despite the fact that according to recital 49 of the Directive 2014/24/EU the innovation partnership procedure should be based on the procedural rules that apply to the competitive procedure with negotiation (article 29 Directive, 2014/24/EU), there are important differences between the two procedures.

It is important to mention that some authors had argued that this reference to the competitive procedure with negotiation reflected the lack of autonomy of the innovation partnership as a new procedure, and that its novelty lay only in the execution phase. Following this line of argument, the innovation partnership procedure would merely be a special way of conducting the competitive procedure with negotiation, due to the reference to the latter procedure set out in recital 49 of Directive 2014/24/EU.⁶⁶

I cannot agree with this position, since there are important differences at the procedural level, as we shall see. As a preliminary remark, it is worth pointing out that under the Commission Proposal for the 2004 Directive for the public sector, the competitive dialogue was presented not as a distinct award procedure but as a version of the negotiated procedure with notice, in order to avoid a “multiplicity of procedures”.⁶⁷ This provision was dropped, and in the final version of Directive 2004/18/EC, the competitive dialogue became an autonomous award procedure. In the context of the innovation partnership, this approach was not an option.

It is true that, in the Commission Proposal for the public sector 2014 Directive, article 29 was responsible for regulating the innovation partnership procedure. In

⁶⁵ In the context of this section the concept of *procedural* reason encompasses both the procedural aspects of the innovation partnerships as well those regarding the execution of the contract, which are also regulated under art 31 of Directive 2014/24/EU. In that sense, to regulate the innovation partnership as a procedure demands analysis of both the procedural phase and the contract execution phase.

⁶⁶ On the lack of autonomy of the innovation partnership as a procedure, see M Ángel Bernal Blay, “The strategic use of public procurement in support of innovation” (2014) 1 *European Procurement & Public Private Partnerships* 3–11.

⁶⁷ Article 30 of Commission, “Proposal for a Directive of the European Parliament and the Council on Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts” COM(2000) 275 final/2 points 11.8.2000, 3.2. and 3.4; Arrowsmith and Treumer, n 5, pp 28–30.

paragraph 3 of article 29 it was stated that the award phase of the innovation partnership procedure should follow the rules for the competitive procedure with negotiation. However, during the negotiations within the legislative procedure for the approval of the new Directive, the European Parliament was alert to the risk presented by this wording, since there were distinctions between both procedures, and advocated for a change. According to the European Parliament, the innovation partnership must be seen as an autonomous procedure. Furthermore, the Parliament pointed out that this type of procedure would demand room for more negotiation possibilities, due to the specific innovative nature of the procedure. Therefore, only the most important provisions regulating the competitive procedure with negotiation should apply to the innovation partnership procedure, mostly those ensuring transparency and fairness.⁶⁸ This latter proposal of the European Parliament was reflected in article 31(3)–(6) of Directive 2014/24/EU.

Furthermore, the reference in recital 49 of Directive 2014/24/EU to the fact that the procedural rules applicable to this procedure should be based on the rules that apply to the competitive procedure with negotiation was simply a legal legislative technique, in order to avoid loopholes in the law (gaps or *lacunae*)⁶⁹ and replications of provisions,⁷⁰ commonly referred to as “remission”. A remission occurs when legal norms are incomplete (*in casu*, article 31, Directive 2014/24/EU), and consequently they will demand elements from other norms or procedures in order for that concrete legal norm to be complete. In this case, we are facing an inter-systematic or internal remission, since the recital refers to legal norms present in the same legal *corpus* (legal text – Directive 2014/24/EU).⁷¹ The reference in recital 49 to the competitive procedure with negotiation nevertheless does not detract from the autonomy of the innovation partnership procedure; it simply has an integrative function in the law (Directive).⁷²

⁶⁸ European Parliament “Report on the proposal for a directive of the European Parliament and of the Council on public procurement” A7-0007/2013, 11.01.2013, amendment 126.

⁶⁹ On the definition of “loophole in the law” in legal theory, see CW Canaris, *Die Festsetzung von Lücken im Gesetz*, 2nd edn (Dunckner & Humboldt, 1983), pp 30–32.

⁷⁰ On this particular feature of remission see the work of Molfessis on the intersections between legislative techniques and linguistics, in N Molfessis “Les renvoi d’un texte à autre” in N Molfessis (ed), *Les Mots De la Loi* (Collection Études Juridiques –Economica, 1999), pp 55–69.

⁷¹ On the definition of remission and the different types of legal remissions, in particular the distinction between inter-systematic and extra-systematic remission, see R Guichard, “Tópicos Sobre Técnicas Legislativas” (2010) 17 *Revista De Ciências Empresariais e Jurídicas* 31–92.

⁷² In general legal theory, remission is a legislative technique regarding legal norms. Here, we are dealing with one legal norm and a recital. It is well established that the recitals are not law but merely hermeneutic auxiliary tools for legal provisions. To include an important legal requirement in the recitals would have the potential to create undesirable legal uncertainty. Treumer stressed several examples

Therefore, the competitive procedure with negotiation (article 29, Directive 2014/24/EU) works merely as a subsidiary procedure in relation to the innovation partnership procedure. Thus, when there is no express derogation from the rules applicable to the competitive procedure with negotiation in the articles devoted to the innovation partnership procedure, the relevant procedural rules are those rules. As a final argument for the autonomy of the innovation partnership procedure, it is worth noting that the transposition of the Procurement Directives that will be mentioned throughout this work turned the innovation partnership procedure into an independent award procedure.

As we can see from article 31, the innovation partnership involves three different phases,⁷³ namely:

- (i) First phase—*Pure Procedural Phase*. This encompasses the conduct of an innovation partnership award procedure under the Directive to choose the possible partner or partners who will participate in the innovation phase under the contract awarded at the end of the procedure.
- (ii) Second phase—*Innovation Phase/Contract Execution*. This phase aims to develop the proposed innovative good, service or work (innovation phase), which will occur *after* the award of the contract in the first phase. Thus, the innovation will be developed in this phase as a matter of the execution of the contract.
- (iii) Third phase—*Acquisition Phase*. This encompasses the placing of orders for the purchase of the results of the innovation phase conducted between the contracting authority and the chosen partner or partners. Again, this phase is part of the contract execution phase.

During the first phase, one of the most important aspects, which will be explored separately in section 3.1 and which has the potential to form an aspect of differentiation from the other special procedures, is connected with the selection of candidates. The

where the European legislator has had the tendency to regulate in the recitals what should have been important substantive provisions, because they contain obligations, concepts or other important elements. In the words of the author, several considerations in the recitals are “provisions in disguise”. This particular aspect is another provision in disguise, but despite some possible legal uncertainty, our legal reasoning remains unchanged. See S Treumer “Evolution of the EU Public Procurement Regime: The New Public Procurement Directive” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djof Publishing, 2014) pp 9–27.

⁷³ Cerqueira Gomes n 43, pp 211–218; S Arrowsmith *The Law of Public and Utilities Procurement*, vol I (3rd edn, Sweet & Maxwell, 2014) pp 1040–106 ; Telles and Butler, n 6, pp 131–185.

selection phase, regulated in article 31(6) of Directive 2014/24/EU, seems to have adopted a more flexible approach than that adopted in article 58(4) of Directive 2014/24/EU. Article 31(6) of Directive 2014/24/EU provides that in the selection phase, the contracting authority should pay special attention to the candidates' capacity in the field of research and development (R&D) of innovative solutions. This provision, if rightly used, has the potential to allow more SMEs and start-up companies to participate in the innovation partnership procedure.⁷⁴ Furthermore, the award criterion under the innovation partnership must always be the most economically advantageous tender, and the award must be made on the sole basis of the best price quality ratio, which is most suitable for comparing tenders for innovative solutions (recital 49, Directive 2014/24/EU).⁷⁵

The innovation partnerships procedure set out in article 31 of Directive 2014/24/EU allows contracting authorities, within the same procedure, during the second phase (contract execution), to provide for the development and purchase of an innovative good, service or work. The combination of the development phase and the purchase phase is a key element distinguishing the innovation partnership procedure. First, it marks a difference from the regime applicable to pre-commercial procurement.⁷⁶ In practice, to join the development and purchase phases within a single contract removed the need for contracting authorities to enter into separate agreements. The separation of these two phases (development and purchasing) contravened competition and therefore failed to attract new economic operators, especially to participate in a separate, advertised call to compete only for the purchase phase, due to the fact that the economic operators who had previously engaged in the development phase would enjoy an undeniable competitive advantage in the purchasing phase when compared to those who participated only in the latter phase.⁷⁷

⁷⁴ Cerqueira Gomes, n 43, pp 211–218.

⁷⁵ The requirement that innovation partnerships must be awarded solely on the basis of the best price quality ratio can only be found in the recital 49 Directive 2014/24/EU and not in art 31 Directive 2014/24/EU. On the problems with recitals working as provisions in disguise in the procurement context, see n 51 and Treumer, “Evolution of the EU Public Procurement Regime: The New Public Procurement Directive”, n 64, pp 9–27.

⁷⁶ Section 1.3 of ch 1.

⁷⁷ S Arrowsmith, n 73, pp 1046–1050; K Hennete-Jaouen, “Le Partenariat d’innovation, modes d’emplois” (2018) 184 *Contrats Publics* 26–31; A López Miño “La compra pública innovadora en los sistemas europeo y español de contratación pública” J José Pernas García (ed), *Contratación pública estratégica* (Thomson Reuters Aranzadi, 2013) pp 211–247.

Second, the circumstance that the contract execution phase is regulated under article 31(2) and (7) of Directive 2014/24/EU brought about new EU concepts, aimed at regulating the execution phase. On the one hand, in the legal text of the Directive (article 31(2), Directive 2014/24/EU) there is a mandatory requirement to structure the innovation partnership in successive phases and to set intermediate targets to be attained by the partner or partners.⁷⁸ Furthermore, the EU demands that the structure of the partnership shall reflect the degree of innovation of the proposed solution and the sequence of the research activities, and that the estimated value of supplies, services or works shall not be disproportionate in relation to the investment required (article 31(7), Directive 2014/24/EU). These features will be explored in the next sections of this work, mainly its relation to the EU law principles for public procurement and their ability to management the risk inherent in innovative projects.⁷⁹ However, the fact that the EU regulated this phase (execution) through new concepts will mark a shift from other procedures—mainly negotiated procedures or competitive dialogue.⁸⁰ One should remember that under article 26(4)(a)(ii) of Directive 2014/24/EU, the competitive procedure with negotiation and competitive dialogue can also be used when contracting authorities want to procure innovative solutions. However, there are important procedural features that distinguish those procedures from the innovation partnership procedure.

Regarding competitive dialogue (article 30, Directive 2014/24/EU) the development phase (possibly an innovative solution⁸¹) occurs during the award phase and not during the contract execution phase. To be more specific, the development of a possible innovative good, service or work will happen during the dialogue phase,⁸²

⁷⁸ These mandatory requirements, placed in the execution phase, aimed to satisfy the need more monitoring of contract performance, already mentioned in the Green Paper, n 4, point 4.3.

⁷⁹ On the topic of risk management under the innovation partnership procedure, see D Adda, “Les gestion des risques des partenariats d’innovation” (2016) 165 *Contrats Publics* 57–62.

⁸⁰ In the same vein, C Krönke, “Innovation Partnerships—Purpose, Scope of Application and Key Elements of a New Instrument of Strategic Procurement” (2018 forthcoming), pp 7–10.

⁸¹ According to article 26(4), Directive 2014/24/EU, innovation is only one of the possible grounds of use for competitive dialogue.

⁸² Arrowsmith and Treumer had advanced several models for developing a project in the dialogue phase. Each Member State has the discretion to choose one of these models whilst still complying with the requirements imposed by the Directives. First, the “own-solutions” model, where the economic operators discuss solutions with the contracting authority on a confidential basis, and later each submits a final tender based on the solutions proposed. This model can be seen in countries such as the UK, France, Germany and Italy. Second, the “designated solution” model, where the contracting authority elects the best solutions presented by the economic operators as their basis for final tenders. This second model requires a lawful redefinition of the tender documents. Lastly, the “hybrid” model, which is a mixture of the other two models: see S Arrowsmith and S Treumer, “Competitive Dialogue in EU law: a critical

which takes place before the award and logically not during the execution of the contract. It is true that the dialogue phase aims to develop and identify the best possible (innovative) solution. In this phase there is the possibility of reducing the number of the participants and solutions (article 30(3)–(8), Directive 2014/24/EU), by applying the award criteria laid down in the contract notice, consistent with the principles of equal treatment and transparency.⁸³ Other rules on how the dialogue phase should be conducted, namely to guarantee the principles of equal treatment, non-discrimination and transparency, can also be found in article 30(3)–(8) of Directive 2014/24/EU. In the context of the UK and prior to the approval of the 2014 Directive, an empirical study, conducted by Craven's, found that the fear of contravening the principle of equal treatment, during the meetings that took place in the dialogue phase, made contracting authorities excessively cautious. Thus full details of the meetings were drafted in advance and all participants were granted the same number of meetings of the same duration.⁸⁴ According to Arrowsmith, this cautious approach was not mandatory under EU law or the Directives, since the principle of equal treatment only forbids different treatment for bidders that are in a comparable position, and bidders may not always be in a comparable position due to the complexity or otherwise of their solutions.⁸⁵ Nonetheless, this risk aversion in the dialogue phase, mainly with respect to compliance with the EU principles of equal treatment and transparency, was also contravening the requirement for efficient purchase of innovative solutions suitable to satisfy specific public needs.⁸⁶

review" in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Public Procurement* (Cambridge University Press, 2009), pp 3–144. Nonetheless, Portugal seems to be an exception, since according to national law, contracting authorities have to adhere to a specific structure: P Telles, "Competitive Dialogue in Portugal" in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Public Procurement* (CUP, 2009), pp 388–398.

⁸³ On this topic, see Arrowsmith, n 73, pp 909–915. Regarding this possibility, see the Opinion of Advocate General Szpunar, delivered on 26 June 2018, in Case C-546/16 *Montte SL V Musikene*, ECLI:EU:C:2018:493, para 48: "To conclude: it cannot be inferred from the inclusion in Directive 2014/24 of a provision such as Article 66 of that directive concerning competitive procedures with negotiation and competitive dialogues that the staged evaluation of tenders in an open procedure is inadmissible, provided that it does not infringe the principles of procurement laid down in Article 18 of that directive and the general principles of EU law, and that it does not undermine the effectiveness of the provisions of that directive".

⁸⁴ During 2010, Craven held semi-structured interviews with key personal actors conducting the competitive dialogue procedure in the context of Public Private Partnerships. The findings of his study are set out in S Arrowsmith and R Craven, "Competitive Dialogue in the UK" in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Public Procurement*, n 82, pp 181–272.

⁸⁵ Arrowsmith, n 73, pp 913–915.

⁸⁶ Steinicke criticises the competitive procedural environment of the competitive dialogue and negotiated procedure as being not the best for innovation: M Steinicke, "The Public Procurement Rules and Innovation" in G S Ølykke, C R Hansen, C D Tvarno (eds), *EU Procurement Directives—Modernisation*,

It is important to stress that the risk aversion identified in Craven's empirical study, regarding the dialogue phase of the competitive dialogue procedure, related to the UK, which was one of the Member States with higher numbers of competitive dialogue procedures advertised in the OJEU.⁸⁷ As regards Member States with lower numbers using this procedure, I can only presume that the levels of risk aversion will be even greater. One thing to note is the risk of a given contracting authority applying excessive flexibility during the dialogue phase and consequently breaching the EU principle of equal treatment. Another is the simple risk aversion involved in using the procedure itself, due the lack of harmonisation of the core administrative law traditions, mainly discretion of the public officials.

The innovation partnership procedure, on the other hand, stresses that the development phase (innovation) takes place during the contract execution phase (article 31(2), Directive 2014/24/EU) and not in the award phase.⁸⁸ Article 31(2) of Directive 2014/24/EU requires contracting authorities to structure the development phase into successive stages. This condition is not an option but a mandatory requirement as to how the execution of the contract should take place, mostly to accommodate some concerns regarding compatibility with the principles of equal treatment and transparency.⁸⁹ To sum up, in the innovation partnership procedure the contract is for the development of the innovative good, service or work, and for possible future acquisition of the developed and tested innovation. In contrast, during the competitive dialogue procedure, as mentioned, the development phase occurs before the award of the contract, so the contract that will be signed after the award will be for delivery the proposed innovative solution and not for its development.

Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives (Jurist- og Økonomforbundets Forlag, 2012), pp 259–273.

⁸⁷ See n 23.

⁸⁸ Here, I am not aiming to tackle the issues of the legality of contract performance conditions. Article 70, Directive 2014/24/EU stresses that contract performance conditions are lawful if previously regulated in the tender documents and linked with the subject-matter of the contract. Furthermore, in the context of art. 70 Directive 2014/24/EU, innovation is one amongst other aspects expressly mentioned that might be subject to these type of contractual clauses. See directly on this issue, M Burgi, “Can secondary considerations in procurement contracts be a tool for increasing innovative solutions?” in GS Ølykke, CR Hansen and CD Tvarno (eds), *EU Procurement Directives—Modernisation, Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives* (Jurist- og Økonomforbundets Forlag, 2012) pp 275–290; I Gallego Córcoles, “La integración de cláusulas sociales, ambientales y de innovación en la contratación pública” (2017) 4 *Documentación Administrativa* 92–113.

⁸⁹ Cerqueira Gomes, n 44, pp 211–218.

Concerning the competitive procedure with negotiation (article 29, Directive 2014/24/EU), the main difference results from the same reasons mentioned for competitive dialogue. Therefore, under the competitive procedure with negotiation, the possible development of innovation happens before the award, during the negotiation phase (article 29(5), Directive 2014/24/EU), and not within the contract execution phase, which will only deliver the proposed innovative solution and not the its development.

As emphasised elsewhere, the innovation partnership is not a typical procedure but a partnership. The name of the new procedure, including the reference to “partnership” rather than “procedure” in its title, indicates the emergence of fundamental characteristics when purchasing innovation not necessarily found elsewhere, especially regarding the need for close cooperation between contracting authorities and economic operators during the innovation process, which occurs more effectively in the contract execution phase and not during the award phase when stricter procedural rules will apply.⁹⁰ Joining the development and purchase phases will foster such cooperation between contracting authorities and economic operators during the execution of the contract (innovation phase), which will increase the chances of that particular innovation’s being developed to better satisfy the given public need. Nevertheless, it has yet to be seen whether accommodating the innovation process during the execution of the contract and not during its award phase can better address the concerns with the principle of equal treatment and transparency.

1.2.2 The material scope or grounds of use

The second characteristic that differentiates the innovation partnership principally from other special procedures, such as negotiated procedures and competitive dialogue, lies in its material scope—or in other words the grounds for using the innovation partnership. In contrast with other procedures, the grounds for using the innovation partnership cannot be found in article 26 of Directive 2014/24/EU.⁹¹ Instead, they can

⁹⁰ M Steinicke, “The Public Procurement Rules and Innovation” in GS Ølykke, CR Hansen, CD Tvarno (eds), *EU Procurement Directives—Modernisation, Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives*, n 86, pp 259–273; Cerqueira Gomes, n 44, pp 211–218; R Caranta, “The changes to the public contract directives and the story they tell about how EU law works” (2015) 52(2) *Common Market Law Review* 394–395.

⁹¹ Arrowsmith, n 73, pp 1050–1051.

only be found in article 31(1) and (2) of the Directive. Consequently, innovation partnerships can only be used when there is a need for an innovative product, service or work that *cannot* be met by purchasing products, services or work already available on the market. Therefore, the two criteria used to allow contracting authorities to initiate are: (i) innovation; and (ii) market availability. Unlike other procedures, for example competitive dialogue or competitive procedure with negotiation (article 26(4), Directive 2014/24/EU),⁹² which provide for the need for an innovative solution to be one of several possible grounds for use, the innovation partnership specifies as the only ground for its use that the solutions already available in the market cannot satisfy in an innovative way the public needs identified by the contracting authorities.⁹³ Therefore, the scope of application of the innovation partnership will be more restricted, because of the specific focus on the development and purchase of innovation.⁹⁴

The object of the innovation partnership procedure is an essential requirement for its use, classification and differentiation. The innovation partnership has a specific contractual object, which demands that the contract must focus exclusively on R&D activities and the subsequent acquisition of the developed goods, services or works, in order to satisfy a specific public need.⁹⁵ In this context, the drawing of technical specifications in the tender documents, in terms of performance or functional requirements, will play a crucial role when linking the research activities that are to be conducted and the subject-matter of the contract, mostly due to absence of that good, service or work from the current market (article 42(1)(3)(d), Directive 2014/24/EU).⁹⁶

Some have argued that the innovation partnership will be reserved for “Big Innovation”. Krönke predicts, based on its very specific scope of application, coupled with the complex and unique procedural rules (procedural aspects and contract execution), that the innovation partnership procedure will be utilised only by large, centralised and experienced contracting authorities, dealing with crucial issues of public interest. The other EU procurement procedures, such as the open procedure, the

⁹² Despite the procedural differences found in arts 29 and 30, Directive 2014/24/EU, for the competitive procedure with negotiation and competitive dialogue, in art 26(4) of the new Directive the same grounds of use for both procedures were set out, abandoning the previous distinction whereby recourse to competitive dialogue was more restricted. On that point, see Davey, n 17, pp 103–111.

⁹³ E Badenhausen-Fähnle, “Die neue Vergabeart der Innovationspartnerschaft—Fünftes Rad am Wagen?” (2015) 6 *Verhaberecht* 743–758.

⁹⁴ Krönke, n 80, pp 5–6.

⁹⁵ É Pourcel “Le partenariat d’innovation, de vraies fausses novations contractuelles et procédurales?” (2015) 4(5) *Contrats et Marchés publics* 10–16.

⁹⁶ Burgi, n 88, pp 280–287.

restricted procedure, the competitive procedure with negotiation and competitive dialogue might, be more suited to smaller innovative projects.⁹⁷ Nonetheless, this is merely an assumption. Recital 49 of Directive 2014/24/EU states that “Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured ...”. So, the European legislator believes that the innovation partnership is also suitable for smaller projects, since it provides the best environment for close cooperation between the private and public actors. The words used by the European legislator—“large or smaller innovative projects”—in my opinion connect exclusively with the ground of the value or cost of the project, and not with its social impact. Nevertheless I agree with Krönke when he argues that only experienced contracting authorities with a specific institutional autonomy and cultural are likely to engage in innovation partnerships.

In section 2 I shall conduct a legal analysis of the grounds of use of the innovation partnership procedure, mostly through exploring the legal definition of “innovation” in the context of the Procurement Directives (article 2(22), Directive 2014/24/EU) and how it can be differentiated from the pure criterion of market availability, aiming to give some guidance as to when to use the innovation partnership procedure.

1.2.3 Reasons of discretion and flexibility

The third way in which the innovation partnership and other procedures may be differentiated is that using the former increases the levels of discretion available to contracting authorities and their public servants, by granting more flexibility when conducting this procedure.⁹⁸ In my view, this is the most challenging characteristic of this new procedure, and its comprehension demands further legal analysis.

Public procurement procedures, as regulated by the Procurement Directives, are generally described as being extremely detailed and formalistic. These elements, excessive formality and inflexibility, are typical obstacles to innovation—innovation in the public sector requires *more* flexibility and *more* room for negotiations.⁹⁹ I have

⁹⁷ Krönke, n 80, pp 9–10.

⁹⁸ Vaguely mentioning the innovation partnership as a flexible procedure, but without providing proper legal reasoning for that, see C Chiariello “Il Partenariato Per l’innovazione” (2016) 2 *Giustamm—Revisita di Diritto Amministrativo* 1–13.

⁹⁹ Steinicke, n 86, pp 259–262; Edquist and Hommen have provided an accurate picture of why the procedural phase is not suitable for innovation—as the authors put it, “In theory, awards of public technology procurement contracts involve fairly clear and definite agreements about costs and functional

shown that one element distinguishing the innovation partnership is the fact that the innovation occurs not during the procedural phase but during the execution of the contract. This element aims at avoiding the typical inflexibility of the procedural phase of procurement procedures. Nonetheless, I have argued that innovation partnerships could provide for more flexibility at the procedural level too, and the impact of this will be as important as increased flexibility in the contract execution phase.

Some authors have argued that when compared with other procurement procedures, the innovation partnership does not offer any further discretion or flexibility.¹⁰⁰ It is true that from the wording of the legal norms and recitals that regulate innovation partnerships in Directive 2014/24/EU, it is not clear how discretion and flexibility will apply in this context. However, this reasoning might be the result of difficulty in understanding what innovation really is; what the more suitable normative ingredients are that will enable innovation through public procurement; and how these normative ingredients should be interpreted in the context of EU law.

In fact, most of the time EU legal norms suffer from textual ambiguity, due to the political processes associated with EU law-making. Therefore, the political agreements reflected in the laws of the EU have the ability to transform the EU provisions into normative assumptions full of ambiguous normative formulas.¹⁰¹ In order to tackle the normative ambiguity of EU legal norms, a specific type of legal hermeneutics should be applied, by European and by national actors. Maduro argues that this specific sort of legal interpretation should comprehend both the teleological and the systematic elements—a *meta-teleological* method of legal interpretation. In the words of the author, *meta-teleological* interpretation consists of an association between the systematic element (context) and the teleological element. So it is not only the purpose of the legal rules that matters, but also the “telos” of the EU as a legal order (in the context of the European project).¹⁰² The “telos” of the EU as a legal order is shaped by

specifications. In practise, however, the final price and quality parameters of new and innovative technologies are unknown at the moment the contract is awarded.” See C Edquist and L Hommen, “Public technology procurement and innovation theory” in C Edquist, L Hommen and L Tsipouri (eds), *Public Technology Procurement and Innovation* (Kluwer Academic Publishers, 2000), pp 5–70.

¹⁰⁰ Accordingly, Arrowsmith argues that the innovation partnership procedure does not confer any further flexibility on contracting authorities but is simply a regulation in explicit terms of arrangements that would otherwise still be permitted with other procedures, provided there is no violation of the EU principles. Arrowsmith, n 73, pp 1049–1050.

¹⁰¹ MP Maduro, “Interpreting European Law—Judicial Adjudication in a Context of Constitutional Pluralism” (2008) Working Paper IE Law School, available at <https://ssrn.com/abstract=1134503> or <http://dx.doi.org/10.2139/ssrn.1134503>, pp 3–8.

¹⁰² *ibid.*

the foundational constitutional principles and reflected in the political choices and main strategy of the Union. As I have argued elsewhere in this work, in recent rulings from the CJEU regarding public procurement, for instance in the *RegioPost* case,¹⁰³ the systematic element (context) played its role. Consequently, and even despite the factual differences from former cases on the issue, such as *Rüffert and Bundesdruckerei*, a more flexible and strategic reasoning from the CJEU has arisen.¹⁰⁴ The EU context (crises) had demanded a more social Europe, which was reflected in the interpretation of public procurement provisions. The current political strategy of the EU calls for innovation, and the EU public procurement system was summed up as an engine of innovation as a demand-side policy. In order to promote the use of instruments capable of fostering such innovation, namely the innovation partnership procedure, the systematic element of context (favouring innovation) should be associated with the purposes of the provisions of Directive 2014/24/EU.

Having said that, it is worth pointing out that the contractual object that will emerge during an innovation partnership procedure will have its main focus on development and research activities, since the ground for the use of this procedure is the non-existence on the market of a certain good, service or work. From this circumstance, it is clear that the contracting authorities must be empowered, through law, to offer flexible procedural documents and a cooperative and flexible legal relationship in the contract execution phase, due to the uncertainties of the market (innovation market) in which they intended to operate. Only by doing so can the technical risks, the market risk and other uncertainties typical of any innovation process, either in the private sector or in the public sector, be measured and therefore regulated and minimised.¹⁰⁵

This possibility, of giving contracting authorities normative spaces of discretion, has been part of the positive legislative plan of the EU for a long time. According to S Treumer, discretion or freedom of action is allocated in fields where there is non-total harmonisation of the Public Procurement Directives, since in those fields the Directive does not lay down uniform and exhaustive EU rules¹⁰⁶, such as those classical fields of former institutional and procedural autonomy, as I had previously identified in section

¹⁰³ See section 2.2.2 of ch 1. Case C-115/14 *RegioPost GmbH & Co KG v Stadt Landau in der Pfalz* EU:C:2015:760, [2016] 2 CMLR 20 (ECJ (4th Chamber)).

¹⁰⁴ Section 2.2.2 of ch 1.

¹⁰⁵ For further developments and for pure public sector entrepreneurship in the USA, see DP Leyden and AN Link, *Public Sector Entrepreneurship* (Oxford University Press, 2015), pp 46–47.

¹⁰⁶ S Treumer, “The discretionary powers of contracting entities—towards a flexible approach in the recent case law of the European Court of Justice?” (2006) 3 *Public Procurement Law Review* 71–85.

4 of chapter 1. Therefore it serves the purpose of granting to contracting authorities normative freedom of action or a margin of discretion, provided that the EU principles applicable to procurement (equal treatment, transparency and competition) are respected. The importance of the EU principles, mainly transparency, as a limit on the discretionary power of contracting authorities was expressly recognised by the CJEU in *Succhi di Frutta*:

The principle of transparency ... is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents ...¹⁰⁷

In the context of EU public procurement, the most important margin of discretion of contracting authorities has lain at the core of the principle of conferral and subsidiarity.¹⁰⁸ In that way, the EU cannot determine what contracting authorities will buy or force contracting authorities to buy goods, services and works on the market. Regarding the latter possibility, contracting authorities can decide not to outsource their needs to a private supplier, in line with the principle of neutrality of ownership (article 345 TFEU).¹⁰⁹ Generally speaking, Member States can decide to keep all their activities in-house, if the requirements of article 12 of Directive 2014/24/EU are met. Moreover, service contracts to the person, such as social, health, cultural and educational services, due to different cultural traditions, can be reserved to non-profit undertakings pursuing a public service for a maximum of three years (article 77 and recital 114 Directive 2014/24/EU).¹¹⁰ Additionally, article 20 of Directive 2014/24/EU and recital 36 allow

¹⁰⁷ Case C-496/99 *Commission v CAS Succhi di Frutta* [2004] ECLI:EU:C:2004:236, para 111.

¹⁰⁸ On the political character of these two principles, see respectively T Tridimas, “Competence after Lisbon: The Elusive Search for Bright Lines” in D Ashiagbor, N Countouris and I Lianos (eds), *The European Union After Lisbon* (Cambridge University Press, 2011) pp 47–77; P Craig, “Subsidiarity: a Political and Legal analysis” (2012) 50 *Journal of Common Market Studies* 72–100.

¹⁰⁹ A Sánchez-Graells, “Against the Grain?—Member State Interests and EU Procurement Law” in M Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, forthcoming) pp 2–20, available at SSRN: <https://ssrn.com/abstract=3022053>.

¹¹⁰ This lighter regime is a codification of the decision in Case C-113/13, *Spezzino, ANPAS, Regione Liguria v San Lorenzo Soc. coop. sociale, Croce Verde Cogema cooperativa sociale Onlus* [2015] EU:C:2014:2440, paras 53 and 59: “59. Therefore, a Member State, in the context of its discretion to decide the level of protection of public health and to organise its social security system, may take the view that recourse to voluntary associations is consistent with the social purpose of the emergency ambulance services and may help to control costs relating to those services”. For further developments on the case and the legislative procedure on this issue, see Caranta, n 87, pp 421–423 and R Caranta, “After *Spezzino*: A Major Loophole Allowing Direct Awards in the Social Sector” (2016) 1 *European Procurement & European Public Private Partnerships* 14–21. Some commentators state that the

Member States the discretion to reserve the right to participate in public procurement procedures to economic operators that engage certain kinds of persons (the disabled or disadvantaged persons).¹¹¹ However, as rightly put by Andrecka, discretion comes into play not only in the decision of a contracting authority to place or not place a competitive tender onto the market, but also at the different stages of the procurement process.¹¹² Treumer pointed to some examples under Directive 2004/18/EC, where the CJEU had stressed the existence of normative spaces of discretion and their importance.¹¹³ Some of those examples and others will be analysed in the following sections, where I shall proceed with a legal analysis of the innovation partnership procedure, mainly through the lens of legal discretion.

The importance of the latter analysis can be explained, because, as shown, innovation requires discretion and flexibility in both the procedural and the contract execution phases. Nonetheless, the increase in the levels of discretion, in order to afford room for more flexibility and cooperation in both phases, will also result in legal uncertainty that might compromise the use of the procedure. I have pointed out that national legal traditions, regarding the discretion of the public agent when conducting complex procedures, might lead to failure, in the case of some Member States, to use this new procedure, the innovation partnership. As mentioned in section 4 of chapter 1, it is not possible to harmonise or, in other words, equalise the discretion of the public agent only via legal instruments. Without further guidance or incentives there is a real risk of the innovation partnership's becoming a harmonisation fiasco—an instrument only capable of highlighting the structural, social and economic gaps between Member States. Therefore, in the final chapter of this work I shall advance the proposition that the creation of an EU model of oversight bodies for public procurement could minimise the contractual risk and uncertainties of strategic procurement, that is, innovative procurement. Such bodies would have the ability to tackle structural and institutional

Spezzino case is an example of the CJEU's new reasoning in the post-Lisbon era through the use of a balancing model to resolve tensions between different aims, mostly free movement and fundamental rights: see S Reynolds, "Explaining the Constitutional Drivers Behind a Perceived Judicial Preference for Free Movement Over Fundamental Rights" (2016) 53 *Common Market Law Review* 643–678.

¹¹¹ This possibility already existed under article 19, Directive 2004/18/EC, but under article 20, Directive 2014/24/EU it was expanded.

¹¹² M Andrecka, "Contracting Authorities and Strategic Goals of Public Procurement—A Relationship Defined by Discretion?" in S Bogojević, X Groussot and J Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Publishing, 2019 – forthcoming), pp 7–9.

¹¹³ Treumer, n 106, pp 71–85.

disadvantages, by providing legal advice, sharing practices and more legal certainty, and subsequently expanding the levels of innovation procurement.¹¹⁴

1.3 Partial conclusions

In conclusion, the innovation partnership is a special procedure specifically devoted to innovative procurement. The European legislator believed that this procedure would represent a step forward in the EU innovative procurement strategy. There are unique distinct features that distinguish the innovation partnership from other procedures, as has been stressed. Nonetheless, in order to fully comprehend these special features, several issues must be subject to detailed legal analysis. This legal analysis will need to focus in particular on the opportunities for discretion created by the European legislator, mainly through the use of open normative concepts or formulas.

Three further topics need to be addressed. First, the grounds of use of the innovation partnership will be examined further below, since they have an intrinsic connection with the definition of “innovation” in the context of Directive 2014/24/EU. Subsequently, the lack of knowledge of the public sector of the private (innovative) market will lead us to explore the problem of the prior participation of economic operators in the preparation of tender documents and the ability of those economic operators to tackle the problem of asymmetry of information explained by the agency theory.

Second, the selection of economic and award criteria will also be placed under our legal lens, since article 31 and recital 49 of Directive 2014/24/EU use different wording when compared to other procedures, which might indicate that both the criteria used in the selection of economic operators and the award criteria might afford room for more strategic procurement.

Third, the contract execution phase, which was also described more specifically as the innovation phase, regulated under article 31 of Directive 2014/24/EU, introduces two new EU legal concepts into the arena of the EU public procurement system—“successive phases” and “intermediate targets”. It is true that these new concepts are going to lighten the levels of discretion and flexibility during the execution phase.

¹¹⁴ Cerqueira Gomes, “A Lost Proposal in the 2014 Public Procurement Package”, n 43, pp 170–190; Cerqueira Gomes, “EU Public Procurement Oversight Bodies—the way forward”, n 43, pp 249–245.

Furthermore, these latter new concepts are going to be appropriated by the CJEU in future rulings and will gain a proper legal meaning, mainly because they will be considered materialisations of the EU principles of transparency, competition, equal treatment and proportionality. Moreover, it is also unclear how the EU doctrine of contract modifications (now article 72, Directive 2014/24/EU) is going to be applied in the uncertain context of an innovation partnership, and some legal certainty should be introduced in this regard. Lastly, the acquisition of intellectual property rights by contracting authorities needs to be explored further. Despite the fact that article 31(6) of Directive 2014/24/EU seems to leave regulation of this issue to national authorities, the potential impact on State aid law cannot be overlooked (article 107, TFEU).

2. Grounds of Use (Material Scope) of the Innovation Partnership Procedure

As mentioned in the preceding section, the innovation partnership procedure is a mandatory procedure that must be transposed into every Member State's national law (article 26(3), Directive 2014/24/EU). Furthermore, the first step for any contracting authority, before conducting an innovation partnerships procedure, lies in the legal inquiry as to whether the public need they have fulfils the grounds for use of this particular procedure, regulated under article 31(1) of Directive 2014/24/EU. According to that provision, contracting authorities must, in the procurement documents, identify “the need for an innovative product, service or work that cannot be met by purchasing products, services or works already available on the market”. In order to unpack this formula, the first methodological step demands that a definition of “innovation” be advanced in the context of the EU public procurement system.

2.1 What is public innovation in the context of the EU public procurement system? The quest for a coherent legal definition

2.1.1 *Initial quest for a legal definition of innovation for the public sector*

Sceptical voices have suggested that there is no possible definition of innovation: *you just know it when you see it*.¹¹⁵ This sceptical path was not followed by Schumpeter in his work in the first half of the twentieth century.¹¹⁶ The author had conceptualised the notion of innovation and the role of the entrepreneur as an economic agent. In Schumpeter's view, balanced economic growth can only be achieved through innovation.¹¹⁷ Nowadays, with the economic and financial crises and the emergence of knowledge-based and globalised economies, Schumpeterian voices have gained more and more strength.¹¹⁸

Innovation is the main engine for economic agents if they want to compete in a globalised economy, since it generally offers a competitive market advantage, or is even able to create new markets and give rise to new needs. According to Schumpeter's definition, innovation encompasses not only technological innovation, such as the introduction of new products or processes, but also the discovery of new resources, the opening of new, not yet developed markets, as well as new organisational methods within the economic process. Nevertheless, economists have reinterpreted the concept of "new"/"novel" as used by Schumpeter, since it is almost impossible to theorise the concept of novelty in objective terms.¹¹⁹ In that sense, a service, good or work is new when it constitutes a *specific form of change* that is perceived by an individual, a specific organisation or the public sector.¹²⁰ A specific form of change will be, as Osborne and Brown put it, a discontinuous change—a radical break with the past and not continuity with the recent past. The authors point to several examples of discontinuous change, such as the creation of a new organisation or process, or even

¹¹⁵ M Granieri and A Renda, *Innovation Law and Policy in the European Union—Towards Horizon 2020* (Springer, 2012), pp 3–4.

¹¹⁶ J Schumpeter, *The Theory of Economic Development* (Transaction Publishers, 1912); J Schumpeter, *Capitalism, Socialism and Democracy*, 3rd edn (George Allen & Unwin, 1942); J Schumpeter, *The theory of economic development: an inquiry into profits, capital, credit, interest and the business cycle* (Harvard College, 1934).

¹¹⁷ J Hagedoorn, "Innovation and Entrepreneurship: Schumpeter Revisited" (1996) 5(3) *Industrial and Corporate Change* 883–888.

¹¹⁸ K Śledzik, "Schumpeter's View on Innovation and Entrepreneurship" in S Hittmar (ed), *Management Trends in Theory and Practice* (Faculty of Management Science and Informatics, University of Zilina & Institute of Management by University of Zilina, 2013), available at <https://ssrn.com/abstract=2257783> or <http://dx.doi.org/10.2139/ssrn.2257783>.

¹¹⁹ EM Rogers, *Diffusion of Innovations*, 5th edn (The Free Press, 2003), pp 12–18.

¹²⁰ HA De Vries, VJJM Bekkers and LG Tummers, *Innovation in the Public Sector: A Systematic Review and Future Research Agenda* (2014) Speyer: EGPA conference, p 5, available at <http://www.lipse.org/userfiles/uploads/Innovation%20in%20the%20public%20sector%20-%20De%20Vries%20Bekkers%20Tummers.pdf>.

the development of a new technology/medicine for a given situation.¹²¹ This broader and mutable concept includes a huge variety of innovation typologies with different concretisations, such as private, public sector or social innovations.¹²² Thus, a specific form of change, expressed in subjective terms, will have different definitions depending on the context in which it will be applied, because its purposes will be diverse.

For instance, private innovation can exist merely when a particular product or service makes a specific contribution to the process of, for example, car-engine production, capable of reducing production costs, as perceived by the private company responsible for that production. Cost reduction was the only concern of the discontinuous change in the production process, and its importance for that private company is easily foreseen, given that it aims at profitability. But looking at it in the context of social innovation, this change may demand not only a reduction of production costs, but also the reduction of CO₂ emissions. This is because social innovation, as defined by the Commission, is not only about reducing costs but also “about new ideas that work to address unmet needs ... Innovations that are both social in their ends and means”.¹²³ Social innovation aims to stimulate a community locally, nationally or globally, by exploring and implementing new ideas about how society will respond to a number of challenges that are vital to the function of society as a political community, like ageing populations, global warming, health policy, and regenerating socially and economically deprived cities and regions.¹²⁴

What about the public sector? What does it mean to innovate in the public sector? Based on the definition already traced for innovation, innovation in the public sector must be defined as “the introduction of new elements into a public service—in the form of new knowledge, a new organization, and/or new management or procedural skills, which represents discontinuity with the past”.¹²⁵ The key differences between private and public innovation lie in the objectives. In the private sector, innovation is just a tool

¹²¹ SP Osborne and KA Brown, *Managing change and innovation in public service organizations* (Routledge, 2005), pp 5–6.

¹²² For the distinction between private and public innovation, see J Hartley, “Public and private features of innovation” in SP Osborne and L Brown (eds), *Handbook of Innovation in Public Services* (Edward Elgar Publishing, 2013), pp 44–49.

¹²³ HA De Vries, VJJM Bekkers and LG Tummers, *From Public Innovation to Social Innovation in the Public Sector: A literature review of relevant drivers and barriers* (2013) Speyer: EGPA conference, p 2.

¹²⁴ J Mulgan, *The Art of Public Strategy—Mobilizing Power and Knowledge for the Common Good* (Oxford University Press, 2009); De Vries, Bekkers and Tummers, n 120, p 2.

¹²⁵ De Vries, Bekker and Tummers, n 120, p 20.

to achieve a competitive advantage in the market to support profit. The objectives of the public sector, on the other hand, are multiple, and the definition of the public interest always requires a degree of altruistic motivation, in order to support the values of a political community, reflected in a certain public policy to achieve better public results. These public values can fluctuate, ranging from efficiency, effectiveness, and user or employee satisfaction, to social and environmental concerns.¹²⁶

The first voices in the public sector warning of the need for innovation were only highlighting its role in enhancing profitability and competitiveness among private firms in a globalised market. So in the beginning, public sector innovation was not seen as a tool to improve the public sector itself, or even as a more efficient tool to satisfy public needs. It was meant to create private rather than public value.¹²⁷ The appearance of new paradigms of public administration management in the 1990s had paved the way for public sector innovation autonomy. In the US, the movement for reinventing government performance in delivering public services was influenced by the appearance of the computer. Computer technology, when implemented into the public sector, was exclusively dedicated to the satisfaction of public needs: for instance, it reduced bureaucracy and increased efficiency gains in public services (“*doing more with less*”). In the last few years, the exponential growth in the use of automation to power and shape decisions, even in the public sector, through innovation is also an unquestionable reality. There was an increase in algorithmic decision-making fostered by Artificial Intelligence (AI) and datasets¹²⁸ that aimed to improved public service delivery and transparency in public decision-making, which are public values that are not merely a private value instrument.¹²⁹

¹²⁶ OECD, *Building Organisational Capacity for Public Sector Innovation* (2014), Background Paper prepared for the OECD Conference, “Innovating the Public Sector: from Ideas to Impact”, Paris, 12–13 November 2014, pp 4–5; OECD, *Fostering Innovation in the Public Sector* (OECD Publishing, 2017), pp 11–16.

¹²⁷ J Torfing and P Triamtafillou, “Enhancing Public Innovation by Transforming Public Governance?” in J Torfing and P Triamtafillou (eds), *Enhancing Public Innovation by Transforming Public Governance?* (CUP, 2016), pp 1–10.

¹²⁸ Balkin argues that we are rapidly moving from the age of the Internet to the Algorithmic Society. Moreover, the author defines an Algorithmic Society as “a society organized around social and economic decision making by algorithms, robots and AI agents; who not only make decisions but also, in some cases, carry them out”: JM Balkin, “The Three Laws of Robotics in the Age of Big Data” (2017) 78 *Ohio State Law Journal* 3–47.

¹²⁹ House of Commons, *Algorithms in decision-making—Fourth Report of Session 2017–19*, HC 351, 23 May 2018, paras 3–45. In this report it was advocated that British Government should play its part in the algorithms revolution in two ways. First, it should continue to make public sector datasets available for “big data” developers, but also for algorithm developers. Second, the Government should produce, publish and maintain a list of where algorithms with impact are being used by the central Government,

If we look to Europe, it was also with the emergence of a new public management paradigm of governance that public sector innovation gained an autonomous space. New public management triggered the debate that efficiency of public services would force public administrations to innovate. Nevertheless, as Torfing and Triantafyllou pointed out, the public sector innovation discourse seemed to have lost its momentum by the beginning of the new millennium.¹³⁰ The recent revival and expansion of public sector innovation was justified by two main factors of different natures: (i) market reasons; and (ii) societal and sustainability challenges. The latter reason also gave birth to what is known today as “*social innovation*”.

Market reasons, such as the economic/financial crises and the globalisation of the economy, had pushed the public sector to innovate in order to provide alternative ways to reduce State budget expenses,¹³¹ and to provide intelligent solutions for their citizens’ needs in an intelligent State, where AI and algorithms are taking a prominent role in the decision-making process of public entities.¹³² However, not only market reasons are capable of justifying the recent movement towards public-sector innovation. Societal challenges (social and public innovation) are also an important driver to increase the levels of innovation within the public sector.¹³³ Both the market

along with projects underway or planned for public sector algorithms, to aid not just private-sector involvement but also transparency, which is a public value (para 30). American legal scholars argue that due to the unique challenges robotics pose to administrative law, there is a need for a special agency that could build its own expertise around the effects of social technology on human behaviour and help develop standards for the industry and guidance for prosecutors and courts: see R Calo “Robotics and Lessons of Cyberlaw” (2015) 103 *California Law Review* 513–563. Also, on the issue on the liability of robots as public service providers, see T Dreier and IS Dohmann, “Legal aspects of services robotics” (2012) 9 *Poiesis & Praxis* 201–207.

¹³⁰ Torfing and Triantafyllou, n 127, p 6.

¹³¹ Hood points out that in times of severe fiscal constraint, governments express high hopes that public innovation will enhance the public sector’s capacity to get more for less in order to meet citizens’ demands: see C Hood, “Reflections on Public Service Reform in a Cold Fiscal Climate”, Paper for the Commission on Public Service Trust, 17 June 2010; for the same view, see A Agger and E Sørensen, “Designing collaborative policy innovation: Lessons from a Danish municipality” in C Ansell and J Torfing (eds), *Public innovation through collaboration and design* (Routledge, 2014), pp 188–208.

¹³² One of the more prominent risks of algorithmic decision-making in the EU law context, with an impact in the public sector, is the risk of discrimination in the decision-making process. However, this issue can be tackled, as argued by others, by individual access to rights under article 15(1), General Data Protection Regulation (GDPR), by which individuals could demand information on algorithmic bias. In addition, it would be up to national data protection authorities to audit algorithmic decision-making and enforce fairness metrics in algorithmic decisions: P Hacker, “Teaching fairness to artificial intelligence: Existing and novel strategies against algorithmic discrimination under EU Law” (2018) 55 (4) *Common Market Law Review* 2143–2186.

¹³³ Public innovation is also expected to produce new services that are more effective than existing ones when it comes to solving issues such as child obesity, gang-related crime, long-term unemployment and climate change: see K Levin, K Cashore, B Bernstein and G Auld, “Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change” (2012) 45(2) *Policy Science* 123–152.

and societal challenges are the leading factors forcing the public sector to innovate and to promote what can generically be described as *public* innovation. *Public* innovation can be seen as a joining of two types of innovation—public sector innovation and social innovation.

2.1.2 The definition of public innovation within Directive 2014/24/EU—a dual path towards legal uncertainty

The EU did not choose the sceptical path of those arguing for the impossibility of defining innovation. Directive 2014/24/EU has made an effort to define innovation in the European and procurement context, article 2(22), headed “Definitions”,¹³⁴ stating:

“innovation” means the implementation of a new or significantly improved good, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth ...

It is, however, surprising that after this legislative effort to conceptualise innovation in the context of the EU public procurement framework, the Directive seems to have followed another path regarding the legal definition of “innovation”. The rules governing innovation partnerships, which form the main procedure to promote innovation, do not make use of the same definition. Thus, article 31 and also recital 49 of Directive 2014/24/EU limit the scope of the use of partnerships to the need for an innovative product, service or work that cannot be met by purchasing products, services or works already available on the market. How do the two approaches compare?¹³⁵

In both cases “innovation” refers to novelty¹³⁶ and improvement, bringing something new, which goes beyond the status quo. However, when we are trying to

¹³⁴ According to Guichard, the EU typically uses a specific article for legal definitions. This common law tradition was imported by the EU to ensure coherence and legal certainty: see R Guichard, “Tópicos Sobre Técnicas Legislativas” (2010) 17 *Revista De Ciências Empresariais e Jurídicas* 31–92.

¹³⁵ Cerqueira Gomes, n 44, 211–218.

¹³⁶ Is important to stress that the term “novelty” should be wide enough to cover copyright, patents, industrial design, trade marks, etc. We must not fall into the common mistake of defining novelty too closely to the Patent Law requirement for novelty. For a deeper analyses of the requirement of novelty according to the European Patent Law Convention, see M Franzosi, “Novelty and Non-Obviousness—the relevant prior art” (2002) 7 *CASRIP Symposium Publication Series*, available at <http://www.law.washington.edu/casrip/symposium/Number7/>.

define innovation, two elements must be addressed: (i) *ontological*—the creation of new (or the efficient reallocation of existing) resources; (ii) *teleological*—a new product is considered to be innovative only to the extent that it contributes to social welfare in the long term.¹³⁷ Only the definition set out in article 2(22) of the Directive is capable of fulfilling both elements: (i) “implementation of a new or significantly improved good, service or process”, etc; and (ii) “with the purpose of helping to solve societal challenges”, etc.¹³⁸

The definition in article 31 aims more at market availability, and it is more profit-oriented, whereas that in article 2(22) seems to take a more absolute and restrictive approach to novelty, oriented towards the milestones of social welfare and Europe 2020 (economic growth, social and inclusive growth).¹³⁹ It is true that article 2(22) in its text uses the wording “inter alia” before it indicates the need for innovation to help “solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth” (*teleological* element). In my view, when the EU legislator listed Europe 2020 and the undetermined concept of societal challenges in a non-exhaustive way, it had a double purpose in mind.

First, it stresses that the EU only has legal competence to regulate *how* Member States conduct their public purchases. Therefore, the question of *what* Member States should acquire remains for each Member State to decide, due the principle of conferral and subsidiarity. As previously mentioned in section 2.2.3.2 of chapter 1, the European Commission Guidance on Innovation Procurement¹⁴⁰ states that, despite the lack of competence from the EU on enforcing *what to buy*, the EU should also provide more incentives on the latter aspect, without unlawfully prescribing it to the Member States. Thus, in the same Guidance the Commission concludes that innovation procurement is the most suitable tool to balance in a competitive way economic efficiency, cost-

¹³⁷ For further developments of these two elements, see Granieri and Renda, n 115, p 4.

¹³⁸ The *teleological* element may have different meanings at different times and in different places, so helping resolve the societal challenges and supporting the Europe 2020 strategy for smart, sustainable and inclusive growth. J Yeow, E Uyarra and S Gee have published an interesting Working Paper explaining the *potential* of sustainable innovation: see “Sustainable Innovation through Public Procurement: The case of ‘closed loop’ recycled paper”, *Manchester Business School Working Paper No 615* (2011), available at <http://www.mbs.ac.uk/cgi/apps/research/working-papers/>.

¹³⁹ M Andrecka criticises the fact that the European legislator had established a definition that will become outdated, as it refers to the *Europe 2020* strategy. Furthermore, the author argues that in general, the definition in art 2(22) of Directive 2014/24/EU is too complex and lacks clarity; he seems to prefer the one set out in article 31: see M Andrecka, “Innovation partnership in the new public procurement regime—a shift of focus from procedural to contractual issues?” (2015) 2 *Public Procurement Law Review* 48–62.

¹⁴⁰ European Commission, n 44, pp 3–48.

effectiveness, and environmental and social benefits. So, to use a non-exhaustive list as a legislative technique reflects the lack of a legal basis for the EU to enforce *what* Member States should procure.

Nevertheless, the use of a non-exhaustive list has also another normative value. It shows that a proper legal definition of innovation should have more than an *ontological* element, since it must also have a strategic component (*teleological* element) that goes beyond purely market orientations or considerations. This latter view is also consistent with the evolution already traced of the internal market as a market of *values* and public procurement as a European discipline. So, despite the fact that, the EU cannot enforce “what to buy” policies, it can tell Member States that the virtues of innovation within the public sector aim at more than simply achieving novelty or economic efficiency. One should remember that it is true that innovation is one of the main engines of economic growth, which always starts outside the market, but nowadays there is a wider consensus that economic growth does not have an automatic connection with the increase of well-being.¹⁴¹ Therefore, it is important to emphasise that innovation in the public sector means that a proper balance between economic and sustainable values should be achieved. This logically balanced approach is indicated in the Innovation Procurement Guidance, where the Commission identifies, as valid reasons to engage in public procurement of innovation, both market-oriented reasons and societal and sustainability challenges.¹⁴² On the market side the Commission mentions: (i) the delivery of higher-quality public service on an optimal budget basis; (ii) helping start-ups and innovative SMEs to be launched and grow, mostly because public entities, with their public buyer power,¹⁴³ can help start-ups and SMEs to integrate in a given market; (iii) moving markets towards innovation, since with a public buyer’s power, a public entity can easily put a product on a market.¹⁴⁴ On the side of societal and sustainability challenges, the Commission highlights: (i) addressing an arising need, mentioning as an example social issues such as tackling school or university drop-out rates, due to the fact that the majority of the young population are more keen to pursue interests in

¹⁴¹ OECD, *Foster Innovation to Address Social Challenges*, Workshop Proceedings (2011), pp 8–9.

¹⁴² As also stressed in section 1.1.1.

¹⁴³ On the topic of public buyer power and the connections with EU competition law, see A Sánchez-Graells, “Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It” Center for Competition Law and Policy, University of Oxford (CCLP), L (23) *Working Paper*, pp 1–73. More broadly, I Herrera Anchustegui, *Market Buyer Power in EU Competition Law* (Concurrences, 2017).

¹⁴⁴ European Commission, n 44, pp 3–48.

computer games than in maths or science; and (ii) modernising public services, for instance with the inclusion of more and more eco-innovation and social innovation.¹⁴⁵

Having said that, one might ask whether there is any conflict between the definitions set out in article 31 and article 2(22) of Directive 2014/24/EU, capable of causing legal uncertainty?

The inclusion of the *teleological* element in article 31 too would have been an important reminder to contracting authorities that the true purpose of such partnerships is not only an economic aim but an integrated balance of economic, social and environmental concerns.¹⁴⁶ Currently, the innovation partnership procedure regulated in article 31 of Directive 2014/24/EU is simply to be used when there is a need for the development of an innovative product or service or innovative works, and where the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market (criteria of market availability). With this approach the *teleological* element included in the definition of article 2(22) of the Directive has the potential to be forgotten. In fact, the criterion *specialia generalibus derogant* is a general criterion of legal theory that also applies in the context of EU law. It gives prevalence to special legal norms, such as article 31 of Directive 2014/24/EU, in comparison with general norms, *rectius* article 2(22) of Directive 2014/24/EU. However, as Tarello points out, despite the generic weak normative power of legal definitions (*debolezza*), some legal definitions have an inner expansive force capable of influencing legal actors (in this case, public agents), and can be considered express parts of other legal provisions set out in other systematic parts of a legal document (Directive).¹⁴⁷ Therefore, the definition laid out in article 2(22) of Directive 2014/24/EU might have the normative ability to influence public actors that have decided to engage in an innovation partnership, and use not only an *ontological* element but also a *teleological* one, capable of ensuring that the EU procurement system uses a true concept of *public* innovation.

Furthermore, another possible legal interpretation is to consider that there is no contradiction or derogation at all between article 31 and article 2(22) of Directive 2014/24/EU. When article 31 uses the wording “*innovative product, service or works*”,

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ G Tarello, “L’interpretazione della Legge” in *Trattato di Diritto Civile e Commerciale*, vol 1 (Giuffrè, 1980), pp 153–240.

the word “innovation” should be interpreted as being within the normative meaning of article 2(22) and, therefore, these innovative products, services and works should have a *teleological* public function, namely “the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”. Nevertheless, even if the latter legal interpretation is the most suitable from a systematic perspective and also more coherent, it does not completely escape the terrors of legal uncertainty, mainly because several Member States failed to include in their public procurement legislation a definition of “innovation” as set out in article 2(22) of Directive 2014/24/EU.

The French Public Contracts Code,¹⁴⁸ after the transposition of Directive 2014/24/EU into the French legal system, failed to provide any legal definition of “innovation” as in article 2(22) of Directive 2014/24/EU. Thus articles 21 and 93–95 of the French Code, mostly dealing with the innovation partnership, defined as the grounds for the use of innovation partnerships only those set out in article 31 of Directive 2014/24/EU, namely the market availability criteria. In the same way, the Portuguese legislator failed to provide a definition of “innovation” equivalent to article 2(22) of the EU Directive. Therefore, article 30-A of the Portuguese Public Contracts Code,¹⁴⁹ with the heading “Choice of Innovation Partnerships”, only mentions the criteria set out in article 31(2) of Directive 2014/24/EU. Following the same approach, the Spanish legislator did not provide any legal definition of “innovation” as in the Directive; articles 177–182 of the Spanish Law for public procurement¹⁵⁰ thus also copy article 31 of Directive 2014/24/EU as the basis for conducting an innovation partnership. On the other hand, the Italian legislator had included a definition of “innovation” in article 3 nnn of the Italian Public Contracts Code.¹⁵¹ Nonetheless, the definition established by the Italian Code fails to mention the *teleological* element of the European definition and merely defines “innovation” as:

¹⁴⁸ Approved by Décret n° 2016-360 du 25 mars 2016 (Code des Marchés Publics).

¹⁴⁹ Approved by the Law-Decree n.° 18/2008 of 29 of January, amended and republished by the Law-Decree n.° 111-B/2017 31 August 2017 (Código dos Contratos Públicos).

¹⁵⁰ Approved by the Law 9/2017 8 November 2017 (Código de Contratos Del Sector Público).

¹⁵¹ Approved by the Law-Decree of 18 of April 2016 n° 50, lastly modified by the Law 27 December 2017 n. 205 (Codice di Appalti).

Introduction of new or significantly improved supplies, services or processes including production or works activities, a new marketing method or a new organisational method in the fields of business practice, workplace organisation or external relations ...¹⁵²

Lastly, section 24(17) of the Danish Procurement Act¹⁵³ followed the same path as Italy and, despite the fact that the Danish Act defines “innovation”, also abandoned the *teleological* element codified by the Directive.

To sum up, the EU does not have the legal competence to impose “what to buy” measures on Member States. The poor reference to generic instruments and concepts, some even using expired data, such as societal challenges and strategy Europe 2020, discouraged some Member States from including a proper definition of innovation in their national laws with a *public* character. Thus each contracting authority at national level has the discretion to initiate an innovation partnership procedure (article 31, Directive 2014/24/EU), but mostly referring to an *ontological* element and therefore missing the virtues of public innovation, which most of the time emphasises the *teleological* element of the concept of innovation and demands a balanced approach between economic and environmental or social concerns. However, this does not mean that the EU cannot offer some guidance as to what the true concept of public innovation should be.

2.2 The subject-matter of the contract in an innovative partnership procedure—how to define it

The definition of the subject-matter of any public contract is first of all a condition of existence of any contract. Regarding EU public contracts, covered by Directive 2014/24/EU, the subject-matter of these contracts will be defined in the tender documents, according to the specific need of the contracting authority and with respect to the provisions of Directive 2014/24/EU. Specifically concerning the innovation partnership procedure, there also must be a specific link between the public need in question and the grounds for the use of the innovation partnership procedure. According

¹⁵² The translation is solely my responsibility.

¹⁵³ Approved by Act No 1564 of 15 December 2015. Section 24(17) “Innovation: Introduction of new or significantly improved supplies, services or processes including production or works activities, a new marketing method or a new organisational method in the fields of business practice, workplace organisation or external relations”.

to article 31 of Directive 2014/24/EU, contracting authorities should refer both to the public need and to the element of causation between that specific public need and the grounds for the use of the innovation partnership procedure.

Across Europe several examples can be found of the use of innovation partnership procedure. For instance, in Denmark the procedure was used for the development and possible purchase of new, innovative solutions that could prevent or alleviate dehydration and possibly also the effects of dehydration in the elderly; and also for the construction of the largest harbour bath in the city of Aarhus. In Germany it was also used for general planning services for outdoor installations, for object planning (civil engineering and traffic facilities) and for specialist planning (technical equipment and planning of construction logistics for the development of the southern line to Munich Airport). In Finland, the innovation partnership procedure has been used for the development of robotic and AI solutions for the City Library of Helsinki. In Spain, the procedure has been put into action for the supply of surgical meshes to health centres dependent on the Murcian Health Service. In France, the innovation partnership procedure was used for a contract concerning the study, development and realisation of breathing apparatus with automatic regulation of partial oxygen pressure; for another contract regarding the design and manufacture of electrical and instrumental cabinets for the Institute of Sciences of the Universe; or even for a contract for the development and experimentation of standard articulated electric buses; or even for the development, experimentation and operation of an innovative service for intelligent and shared parking management in the Paris-Saclay urban campus. In the Netherlands, it has been used for the design and initial deployment of innovative intelligent transport solutions in and between main urban-economic regions in the Netherlands. Lastly, the UK has used the procedure for the development and implementation of a patient information and entertainment platform for the Christie NHS Foundation Trust; or to attract innovative business to help the Innovation Partnership-United Utilities Innovation Lab, operating in the field of water and electricity, to tackle key issues of the industry in an innovative way.¹⁵⁴

These are all examples of public needs that contracting authorities across Europe believed could be satisfied in an innovative way and with recourse to the special

¹⁵⁴ This are merely some examples of how Member States have been using the innovation partnership procedure. The information was extracted from <https://procuring-innovation.com>, which contains official data from the EU.

procedure innovation partnership. However, in order to use this procedure contracting authorities are also required to fulfil another requirement, which is that these innovative goods, services or works cannot be found on the current market. The proof of these two conditions by contracting authorities will not be easy, due to the fact that most of the time they will lack knowledge of the relevant market for that yet-to-be-developed innovative good, service or work. This will leave room for possible litigation. For example, if a supplier proves that he has already developed a certain good appropriate for satisfying the public need being procured, and that precise good is already available in the market, the grounds for using the innovation partnership procedure (article 31, Directive 2014/24/EU) will not be met.

The lack of knowledge of the market by contracting authorities had been explained by the labours of the agency theory.¹⁵⁵ The agency theory commences from the assumption that there is an asymmetry of information between the two parties (agent and principal) in a given decision-making situation with multiple dimensions. One of the multiple dimensions of the agency theory worth pointing out, concerning public procurement, is when the relationship between the principal (contracting authority) and the agent (the private operators) can be affected by such an asymmetry of information, since the contracting authority knows which goods, services or works are needed but does not know how to obtain them on the market in an effective way.¹⁵⁶ This scenario will affect the legal certainty regarding the definition of the subject-matter of the contract and the lawfulness of the grounds of use of this procedure. Moreover, if contracting authorities do not possess knowledge of the market, the agency theory also concludes that the tender documents will be poorly drafted and have the consequence

¹⁵⁵ CR Yukins, “A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model” (2010) 40 *Public Contract Law Journal* 63–75; A Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart Publishing, 2015), pp 56–60. Others had argued that in the context of innovative procurement the economic methodology developed by W Edwards Deming PDCA-Cycle (“Plan-Do-Check-Act”) should be adopted to minimise the dangers of innovation in the public sector, A Romana Apostol “Public Procurement of Innovation—a structural approach” (2012) 4 *Public Procurement Law Review* 180–182.

¹⁵⁶ I agree with A Sánchez-Graells, who highlights the inability of the agency theory to capture the external aspects of the relationship of agent and principle, such as the effect that public procurement can have on the dynamics of the market. However, for my purposes the agency theory captures the issue of asymmetry of information that exists between contracting authority and suppliers, regarding the knowledge of the market and therefore the consequent ineffectiveness of contracting authorities in drafting tender documents capable of wider and not restricting competition: see Sánchez-Graells, n 155, pp 57–58.

of restricting competition, for example the lack of information of the market will lead contracting authorities to award contracts using price as the sole award criterion.¹⁵⁷

In the context of the innovation partnership procedure, the lack of knowledge of the market is even more acute, since there is not yet a market for the good, service or work to be developed, and it will be not possible to measure with accuracy the impact these innovations will have on the market. With high predictability, one can assume that contracting authorities in this scenario will lack the specific and complex knowledge to draft detailed tender documents capable of attracting the best suppliers. The technical specifications should be flexible enough to attract the best solutions to satisfy the innovative public need and to increase the levels of flexibility that will allow for cooperation between the economic operators, who will have the specific knowledge or know-how in the given field of expertise.

However, the necessary levels of flexibility required in the tender documents might represent a danger to the principles of competition and transparency. Being aware of this possibility, the European legislator, at the end of recital 49 of Directive 2014/24/EU, recommends that contracting authorities set up innovation partnerships with several partners, because this might prevent possible restrictions on or distortions of competition.

Furthermore, in my view, before engaging in an innovation partnership, and to minimise the effects of this asymmetry of information between agent and principal and its dangers to the principles of competition and transparency, contracting authorities should first consult the market in a transparent way. They should use preliminary market consultations (article 40, Directive 2014/24/EU), or even conduct a new, separate tender procedure for consultancy services. However, the prior involvement of economic operators in the preparation of the tender documents might pose some legal issues.

2.2.1 The prior involvement of candidates or tenderers in the preparation of a tender procedure

¹⁵⁷ For empirical proof of that point, concerning Poland but with cross-applicability to other contracting authorities operating in different Member States, see A Crisidu-Budnik and J Prezedanska, “The Agency Theory Approach to the Public Procurement System” (2017) 7:1 *Wroclaw Review of Law, Administration & Economics* 154–167.

It is common for contracting authorities to engage in market consultations, in order to prepare for the launch of a procurement procedure and the tender documents. This phase is commonly referred to in the literature as a “technical dialogue phase”.¹⁵⁸ As remarked by others, preliminary market consultations may be useful to establish whether a specific good exists on the market or if the technical specifications are appropriate.¹⁵⁹ The only limitation, according to recital 8 of Directive 2004/18/EC, is that market consultations carried out before the launch of a procedure for the award of a public contract should not have the effect of contravening competition. As an example, competition could be violated if, as a result of a prior consultation of a given economic operator, the subsequent tender documents refer only to the software of that specific supplier, without allowing for any alternative that might be available on the market.¹⁶⁰

The CJEU in the *Fabricom* case¹⁶¹ ruled as unlawful a Belgian provision that stated that any person who had previously participated in research, experiments, studies or development in connection with the contract to be awarded was not allowed to participate in or submit a tender for that particular public contract, because according to the Court this went beyond what is necessary to attain the principle of equal treatment. In this scenario, the economic operator should be given the opportunity to prove that the experience he had previously acquired was not capable of distorting competition.¹⁶² According to Treumer, despite the CJEU in the *Fabricom* case ruling that the Belgian State had exceeded its margin of discretion in transposing Directive 2004/18/EC, for the author the balance achieved by the Court on this issue, concerning all the interests and principles involved (proportionality, equal treatment and competition), was a clear example of discretion and flexibility.¹⁶³ Thus, contracting authorities would have the discretion to evaluate case by case whether the prior

¹⁵⁸ S Treumer, “Technical Dialogue Prior to Submission of Tenders and the Principle of Equal Treatment of Tenders” (1999) 8 *Public Procurement Law Review* 147–155; P Trepte, *EU Public Procurement in the EU—A Practitioner’s Guide*, 2nd edn (Oxford University Press, 2007) pp 292–298.

¹⁵⁹ Arrowsmith, n 73, pp 650–654; L Butler “Innovation in Public Procurement: Towards the Innovative Union” in in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* n 6, pp 363–365; A Czajka, “La figura del ‘diálogo técnico’” in *Anuario da Faculdade de Direito da Universidade da Coruña* (2013) pp 231–233.

¹⁶⁰ In the same vein the European Commission, “Guidance on Innovation Procurement”, n 44, pp 30–32, “Under any circumstances, the consultation has to be transparent and non-discriminatory, ie without privileging one product, technology or process over others”.

¹⁶¹ Joined Cases C-21/03 and C-34/03 *Fabricom SA v État Belge* [2005] ECLI:EU:C:2005:127.

¹⁶² *ibid*, paras 34–36.

¹⁶³ Treumer, n 106, pp 75–76.

involvement of economic operators would have the impact of harming the principles of transparency and competition.

The flexibility achieved in the *Fabricom* case, allowing for the participation in a tender process of prior economic operators who were involved in the preparation of the tender documents, provided that competition was not distorted, was codified in article 41 of Directive 2014/24/EU.¹⁶⁴ One of the main dangers was that the technical specifications would be drafted in a specific way that restricted competition, favouring those economic operators previously involved in the preparation of the tender documents. Article 41 of Directive 2014/24/EU provides for a non-exhaustive list of possible measures to guarantee that competition is not distorted: “the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders”. Furthermore, another attempt to avoid the dangers to competition, transparency and equal treatment typical of technical dialogue was made in article 40 of Directive 2014/24/EU—preliminary market consultations. This article had also regulated, mostly by using normatively open formulas, the possibility for experts and authorities to give advice to contracting authorities in a pre-tender phase, “provided that the advice does not have the effect of distorting competition and does not result in any violation of the principles of non-discrimination and transparency”.¹⁶⁵ Consequently, in this regard, when competition is distorted, article 57(4)(f) of Directive 2014/24/EU, concerning the grounds for exclusion of economic operators due to their prior involvement in the preparation of the procedure in accordance with article 41 of Directive 2014/24/EU, states that the economic operator may be excluded only when his participation “cannot be remedied by other, less intrusive measures”.

It is clear that the European legislator is aware of the importance of allowing the market to cooperate with contracting authorities in the preparation of tender documents, due to the lack of knowledge of contracting authorities of the existence on the market

¹⁶⁴ M Steinicke, “Commentary on article 41 Directive 2014/24/EU” in M Steinicke and PL Vesterdorf (eds), n 1, pp 519–532; *Fabricom SA*, n 161, paras 26–31.

¹⁶⁵ On the importance of preliminary market consultations for innovation procurement, see A Miño López, “Preliminary Market Consultations in Innovation Procurement: A Principled Approach and Incentives for Anticompetitive Behaviours” (2017) 2 *Ius Publicum Network Review* 1–47. In the legal doctrine, see M Trybus, “The Division of Public Contracts into Lots under Directive 2014/24/EU: Minimum Harmonization and Impact on SMEs in Public Procurement” (2018) 3 *European Law Review* 313–343.

of a particular good, service or work they want to acquire. In the case of innovation partnerships, due to the uncertainties of the market surrounding the procedure and its possible dangers to the principles of transparency and competition, some Member States have demanded a mandatory requirement for contracting authorities to conduct preliminary market consultations (article 40, Directive 2014/24/EU) before launching an innovation partnership procedure.¹⁶⁶

In conclusion, the margin of discretion afforded to contracting authorities in consulting the market before engaging in any procedure is an important instrument. A stricter interpretation from contracting authorities in this regard would contribute to discouraging economic operators, for instance SMEs, from engaging in both the technical dialogue and public procurement procedures. This would contravene the spirit of the 2014 reforms, which aimed to transform public procurement into a more friendly environment for SMEs (recital 114, Directive 2014/24/EU).¹⁶⁷ Moreover, as mentioned by the European Commission, when procuring innovation, specifically with the innovation partnership procedure, preliminary market consultations can assume an even greater role in checking the state of the art and measuring the uncertainties of the market.¹⁶⁸

2.2.2 The importance of drafting technical specifications as functional requirements

The drafting of technical specifications plays a significant part in describing the subject-matter of any contract covered by Directive 2014/24/EU.¹⁶⁹ Technical specifications are responsible for laying down the characteristics required of works, services or goods. Therefore, the majority of the technical requirements of a given contract will fall under the EU definition of technical specifications (article 42 and Annex VII, Directive 2014/24/EU).

¹⁶⁶ With Law 2/2017 of 8 February, the autonomous community of Galicia in Spain had included such a mandatory requirement in the provisions of art 28: see in A García Jiménez, *Las Conexiones entre Contratación administrativa e innovación* (Editorial Tecnos, 2018), pp 114–115.

¹⁶⁷ The Commission consultation before the 2014 Directives had identified the need to guarantee better access of SMEs to public contracts: see Commission, “Green Paper on the modernisation of EU public procurement policy: Towards a more efficient European Procurement Market”, n 4, p 14. M Trybus, “The Division of Public Contracts into Lots under Directive 2014/24: Minimum Harmonisation and Impact on SMEs in Public Procurement?” (2018) 43(3) *European Law Review* 32–50.

¹⁶⁸ European Commission, “Guidance on Innovation Procurement”, n 44, pp 31–32.

¹⁶⁹ S Braconnier, *Précis du droit de la commande publique* (Editions Le Moniteur, 2017), pp 311–312; Steinicke, n 86, pp 262–263.

The main goal of the European legislator for setting legal rules aiming to regulate technical specifications is to promote competition and safeguard equal opportunities among economic operators, as reflected in article 42(2) of Directive 2014/24/EU. Regarding the latter aspect, which states that technical specifications must be legally constructed so as to afford equal access for tenderers, the CJEU, in *Grupo Hospitalario Quiron SA*, had considered it as an expression of the EU principle of equal treatment.¹⁷⁰ In this case, the CJEU ruled unlawful a technical specification posted by a Basque contracting authority, concerning a health services contract, due to the fact that as a minimum requirement the contracting authority demanded economic operators to be located in the Municipality of Bilbao. According to the judgment, this geographic constraint had the effect of automatically excluding tenderers who could not provide the services in question in an establishment situated within a given municipality, despite the fact that they might comply with the other technical specifications of the contract.¹⁷¹ In the same vein, the *VAR* decision of the CJEU reinforced the idea that technical specifications must afford equal access for tenderers and must not have the effect of creating unjustified obstacles to opening up public procurement to competition.¹⁷²

Directive 2014/24/EU is clear regarding the legal consequences of not complying with the minimum requirements set out in the tender specifications—the tender must be rejected (article 56(1)(a), Directive 2014/24/EU).¹⁷³ However, as pointed out by Arrowsmith, not all technical requirements of a given contract will fall within the definition of “technical specifications”.¹⁷⁴ The *Max Havelaar* case contributed to setting a clearer distinction between those technical requirements that are technical specifications and those that are categorised as contract performance conditions (article 70, Directive 2014/24/EU).¹⁷⁵ In this case the CJEU ruled that the label “Max Havelaar”, which described products of fair trade origin, did not correspond to the

¹⁷⁰ Case C-552/13 *Grupo Hospitalario Quiron SA v Departamento de Sanidad del Gobierno Vasco, Instituto de Religiosas Siervas de Jesús de la Caridad* [2015] ECLI:EU:C:2015:713, para 26.

¹⁷¹ Case C-552/13 *Grupo Hospitalario Quiron SA*, n 170, paras 28–29.

¹⁷² Case C-14/07 *VAR Srl (VAR) Azienda Trasporti Milanesi SpA (ATM) v Iveco Orecchia SpA* [2018] ECLI:EU:C:2018:568, para 20.

¹⁷³ A Semple, *A Practical Guide to Public Procurement* (Oxford University Press, 2015), pp 106–111. See also Case C-561/12 *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium ('Nordecon')* [2013] ECLI:EU:C:2013:793, paras 37–39.

¹⁷⁴ Case C-368/10 *European Commission v Kingdom of the Netherlands (Max Havelaar)* [2012] ECLI:EU:C:2012:284.

¹⁷⁵ S Arrowsmith *The Law of Public and Utilities Procurement*, vol II (3rd edn, Sweet & Maxwell, 2018), pp 587–598.

definition of “technical specifications” under paragraph 1(b) of Annex VI to Directive 2004/18/EC. Consequently, the definition of “technical specifications” only encompasses the characteristics of the products themselves, their manufacture, packaging or use, and not the conditions under which the supplier acquired them from the manufacturer. The CJEU had held that the “Max Havelaar” label could only fall within the concept of a condition for the performance of a contract (article 26, Directive 2004/18/EC),¹⁷⁶ and subsequently the Court also held that the restrictions in article 42(4) of Directive 2014/24/EU, regarding technical specifications, were not applicable to the “Max Havelaar” label.¹⁷⁷ This case was also a clear example of an attempt by the CJEU to legitimise social concerns within public procurement.¹⁷⁸

The EU allows for two different forms of technical specifications (article 42(3), Directive 2014/24/EU) in the procurement documents (article 2(1)(13), Directive 2014/24/EU). Contracting authorities can include technical specifications in the tender documents covering: (i) terms of performance or functional requirements; and (ii) reference to specified standards.¹⁷⁹ A question that is worth exploring is which type of technical specification best favours innovation.

It has already been shown that the use of standards can also have a positive impact in promoting innovation. The Steppin project (Standards in European Public Procurement Lead to Innovation) was one of the Six Standards Networks promoted by the European Commission for enhancing the competitiveness of innovative European companies on global markets.¹⁸⁰ One of the conclusions of the study was that the use of open standards formulated in terms of performance or functionality, as opposed to detailed standards, would have a more positive impact on innovation.¹⁸¹ However, this study also concluded that contracting authorities suffer from a generic lack of knowledge of the possible standards available, and an even greater absence of

¹⁷⁶ Case C-368/10 *Max Havelaar* n 174, paras 73–77.

¹⁷⁷ M Steinicke, “Commentary on article 42 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, n 1, pp 544–565.

¹⁷⁸ Article 43(1) of Directive 2014/24/EU on Labels regulates the possibility under the EU public procurement framework to refer to environmental and social labels in technical specifications, award criteria and contract performance conditions.

¹⁷⁹ Arrowsmith, n 175, pp 587–598.

¹⁸⁰ Steppin Handbook available at <http://www.innovation-procurement.org/resources/search?country=256&category=3&topic=32&language=0&product=0&level=0&q=&page=2>.

¹⁸¹ AR Apostol, “Formal European Standards in Public Procurement: a strategic tool to support innovation” (2010) 2 *Public Procurement Law Review* 61–63.

knowledge of those standards capable of fostering innovation.¹⁸² The study made several recommendations, among them the need for greater political and administrative support from both the EU and the Member States to encourage those standards that are more friendly to innovation.¹⁸³ The need for more guidance and political support from both the EU and the Member States, presented by the above-mentioned study, reinforces the argument for an EU oversight body for public procurement, with which I shall deal in chapter 3.

Recital 74 of Directive 2014/24/EU emphasises that the use of technical specifications in terms of functional and performance requirements can have a twofold advantage when compared with the use of specified standards and their possible equivalents. First, it prevents contracting authorities from favouring a particular supplier, and consequently it also reduces the risk of competition being artificially narrow. Second, functional and performance requirements are also the ones that best favour innovation in public procurement.¹⁸⁴

The Commission Guidance for Innovative Procurement also mentions that descriptive technical specifications with reference to international, European or national standards cannot extend beyond what is currently available on the market. Therefore, the market is more likely to offer different and innovative solutions if technical specifications are set in terms of performance or functional requirements. In the latter scenario, economic operators will enjoy the necessary levels of openness and flexibility to offer solutions that foster innovation.¹⁸⁵

In the context of the innovation partnership the premise in recital 74 of Directive 2014/24/EU that technical specifications in terms of performance or functional requirements can easily foster innovation will gain an even deeper meaning. In the context of that procedure, Burgi advocates that functional requirements in technical specifications could play a decisive role in initiating an innovation partnership procedure (article 31, Directive 2014/24/EU). The author believes that the grounds of use of the innovation partnership procedure that demand the partnership to be structured for the development of an innovative good, service or work not yet available on the

¹⁸² Butler, n 159, pp 367–368.

¹⁸³ Apostol, n 181, pp 71–72.

¹⁸⁴ In the legal doctrine see Caranta, n 90, pp 407–408; Butler, n 158, pp 366–372; OS Pantilimon Voda, “Innovative and sustainable procurement: framework, constraints and policies” in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing, 2016), pp 222–223.

¹⁸⁵ European Commission, “Guidance on Innovation Procurement”, n 44, pp 33–34.

market (article 31(1), Directive 2014/24/EU) are not compatible with only using detailed standards. In fact, it is important to remember that technical specifications in terms of performance or functional requirements (article 42(3), Directive 2014/24/EU) permit contracting authorities to focus on asking the market to concentrate on the real impact of the solution proposed by the economic operators and not on the materials and standards that will be used.¹⁸⁶ For instance, in a public tender for the acquisition of cleaning services, the use of performance and functional requirements will allow public bodies to draw attention to *how* tenderers should propose to clean a certain area, not to the number of hours used or the materials used to clean that particular area. Through the description of the function of the product/service/work the contracting entity can ask the market for innovative solutions for that particular need and not for a particular method or product.

As I have shown, the grounds for using the innovation partnership procedure will require both innovative solutions and solutions that cannot be found on the market. In this context, the technical specifications in the procurement documents designed by the public body need to be able to ask for functional solutions for a public need that cannot yet be satisfied by market resources, and which will be developed in cooperation with the private sector during the innovation phase of the procedure. This fact does not exclude the presence of certain standards, which might help the market to understand important aspects the innovative solution must have, for example standards connected with the protection of health and safety or with consumer protection, but it will certainly decrease their importance when compared with technical specifications in terms of performance and functional requirements.

Another aspect is also worth exploring here. More reasoning on proportionality is required from the CJEU regarding the means of proof of equivalent technical specifications, which could have a more positive impact on fostering innovation¹⁸⁷ due

¹⁸⁶ ST Poulsen, PS Jakobsen and SE Kalmose-Hjelmborg, *EU Public Procurement Law*, 2nd edn (Djof Publishing, 2014), pp 284–285.

¹⁸⁷ It is worth pointing out that the ruling in the *UNIX* case (Case C-359/93 *Commission of the European Communities v Kingdom of the Netherlands (UNIX)* [1995] EU:C:1995:14) has clarified that contracting authorities cannot exclude products that meet the functional requirements of the good being procured and consequently must accept equivalents, even if the word “equivalent” was missing from the procurement documents. In the same vein, the *Dundalk* case (Case C-45/87 *Commission of the European Communities v Ireland (Dundalk)* [1988] EU:C:1988:435). On both cases, see Trepte, n 158, pp 282–284.

to the capacity to attract economic operators with a strong innovative component, namely SMEs and start-ups. Nevertheless, the recent *VAR* case chose a different path.¹⁸⁸

The *VAR* case concerned a procurement procedure for the supply of original spare parts and/or original equipment for buses and trolley-buses manufactured by Iveco. The technical specifications in the procurement documents demanded “original spare parts” made by the vehicle manufacturer itself, or those made in compliance with the manufacturer’s standards or even “equivalent spare parts” made by any economic operator that could certify the quality of those parts and components. Having said that, the CJEU faced the question whether article 34(8) of Directive 2004/17/EC¹⁸⁹ must be interpreted as meaning that it requires proof that the products to be supplied are equivalent to the original products to be presented at the stage of submission of the tender. The Court ruled that article 34(8) of Directive 2004/17/EC must be interpreted as meaning that when an economic operator has to provide proof that it has an equivalent solution to a specific mark, origin or production method referred to in the technical specifications, contracting authorities should require the tenderer to submit that proof in its tender.¹⁹⁰ On the other hand, the Opinion of Advocate General Campos Sánchez-Bordona in this case took a more balanced view:

In a situation like that in the instant case, in view of the number of spare parts for which certificates of equivalence were required, I believe it is appropriate that submission of the relevant certificates of equivalence should be accepted at a time after submission of the initial tenders or even after the award of the contract, since the contract documents include strict criteria for confirming the technical ability of tenderers ...¹⁹¹

Moreover, Advocate General Campos Sánchez-Bordona believed that the circumstance of the proof of equivalence being provided after the submission of the

¹⁸⁸ For more developments on the case see S Smith, “At what stage in a tender process must a tenderer provide proof that products which it proposes to deliver are equivalent to those defined in the technical specifications? Case C-14/17 *VAR* and *ATM*” (2018) 6 *Public Procurement Law Review* NA151-NA154.

¹⁸⁹ The case concerned the Utilities Directive. Nevertheless, article 34(8) of Directive 2004/17/EC has the same wording as article 42(4) of Directive 2014/24/EU, so the ratio of the decision can be applied to this work.

¹⁹⁰ Case C-14/07 *VAR*, n 172, para 35.

¹⁹¹ Opinion of Advocate General Campos Sánchez-Bordona on 28 February 2018 in Case C-14/17 Case C-14/07 *VAR**Srl (VAR) Azienda Trasporti Milanesi SpA (ATM) v Iveco Orecchia SpA* [2018] ECLI:EU:C:2018:568, para 63.

tender did not, *per se*, contravene the principle of equal treatment.¹⁹² In my opinion, the *VAR* ruling also failed to conduct a proportionality test. The value of the contract and the number of spare parts to be presented with the tender might also be factors to be taken into account. To require economic operators to provide this proof at the tender phase and not after they have submitted their tenders, with a proportionality test, could also have a negative impact in relation to competition, due to the fact that only the manufacturer and companies with strong financial capacity would be able to fulfil that requirement.

To sum up, innovation and especially innovation partnerships benefit from the use of technical specifications in terms of performance or functional requirements. Only in this way will the best innovative economic operators have the flexibility to propose the best solutions yet to be developed in true cooperation with the public body. Regarding the innovation partnership procedure, the need for technical specifications to be set in terms of performance and functional requirements becomes even more pressing due to the specific grounds of use of the procedure. It is true that contracting authorities have the discretion to set technical specifications in terms of performance and functional requirements. Nonetheless, the CJEU in future rulings, mostly connected with innovation procurement, should welcome the use of a proportionality test concerning the proof of equivalence of the solutions proposed by economic operators when compared with the ones presented by the contracting authorities in the procurement documents. In my view the *VAR* ruling could have a negative impact on the market, since it might deter innovative SMEs and start-ups from participating in public tenders. The possible economic burden that economic operators will need to shoulder before being certain of being awarded a contract, to prove that equivalent and perhaps innovative solutions are compatible, might have a negative impact as regards opening the public procurement markets to more innovative and competitive solutions.

¹⁹² *ibid*, para 51: “I do not believe, therefore, that the equal treatment of tenderers is jeopardised because proof of equivalence may be submitted during the stage of performance of the contract. On the contrary, requirement of such proof at an earlier stage could discriminate against tenderers by giving a manufacturer of original spare parts an advantage over a tenderer who tenders for equivalent spare parts, where the latter has not already made those parts. It must be assumed that, in many cases (and this would be one), a tenderer who tenders for equivalent spare parts is not in possession, beforehand, of all the certificates relating to each model ...”.

2.2.3 Does it makes sense to use variants (article 45, Directive 2014/24/EU) in the innovation partnership procedure?

The possibility allowed to economic operators participating in a public tender of submitting “variants” in their proposals has been regulated in article 45 of Directive 2014/24/EU. Variants have been vaguely defined by the CJEU as alternative solutions for certain requirements set out in technical specifications.¹⁹³ To allow variants is also compatible with the principle of equal treatment. The *Storebaelt* case has recognised that, despite the fact that the principle of equal treatment of tenderers compels all tenders to comply with the tender conditions set by the contracting authorities, in order to ensure an objective comparison among the tenders variations can be allowed, if provided for by the tender conditions in the procurement documents.¹⁹⁴

According to article 45(1) of Directive 2014/24/EU, contracting authorities have the discretion to ask economic operators to submit variants as a mandatory requirement or simply as an option, provided this possibility is clearly stipulated by the procurement documents. To allow alternative solutions (variants) regarding the fulfilment of certain technical aspects in any proposal can have an impact on the subject-matter of the contract, since such alternatives can provoke the mutation of the technical specifications. Therefore, article 45(1) of Directive 2014/24/EU provides that in both cases, variants, whether mandatory or optional, must be linked to the subject-matter of the contract (article 45(1), Directive 2014/24/EU).¹⁹⁵ This latter requirement reflects the suspicion of the European legislator regarding the possible distorting impact the use of variants may have on competition. Also regarding impact on the subject-matter of the contract, however, the European legislator felt the need to clarify that if the use of lawful variants leads to a change in the nature of the contract, for example an initial public service contract being transformed into a public supply contract or vice versa, those variants shall not be rejected for that reason alone (article 45(3) *in fine* Directive 2014/24/EU).

¹⁹³ Case C-421/01 *Traunfellner GmbH v Österreichische Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2003] ECLI:EU:C:2003:549, paras 2528. For further case law developments, see Sánchez-Graells, n 5, pp 396–397.

¹⁹⁴ Case C-243/89, *Commission of the European Communities v Kingdom of Denmark (Storebaelt)* [1993] ECLI:EU:C:1993:257, paras 37–38. The case does not concern itself with use of the variants in the sense of article 45 of Directive 2014/24/EU, but the reasoning can be applicable.

¹⁹⁵ Arrowsmith describes the novelty of this requirement in art 45(1) of Directive 2014/24/EU as merely a clarification of the previous rules, namely art 24 of Directive 2004/18/EC. Arrowsmith, n 73, pp 801–802.

Article 45(2) requires contracting authorities to regulate in the procurement documents the minimum requirements that will still need to be met by the variants and any specific requirements for their presentation.¹⁹⁶ This legal provision will require contracting authorities to distinguish between those minimum unchangeable requirements and those requirements with which economic operators do not have to comply when submitting proposals for variants.¹⁹⁷ Arrowsmith points out that the provisions on variants (article 45, Directive 2014/24/EU) cover only alternative proposals for technical specifications and not other conditions, such as financial or legal conditions. In the author's view, this fact does not mean that contracting authorities may not seek alternative proposals on those matters. The Directive does not preclude this possibility. It merely signifies that alternative proposals on financial and legal matters are not governed by article 45 of Directive 2014/24/EU, despite being lawful from a pure EU law perspective.¹⁹⁸ On this aspect, article 45(3) adds that only those variants capable of meeting the minimum requirements laid down by the contracting authority should be taken into consideration. Finally, article 45(2) demands that the chosen award criteria have to be applicable both to variants meeting the minimum requirements and to other conforming tenders that are not variants.¹⁹⁹

Recital 48 of Directive 2014/24/EU highlights the importance of using variants when procuring innovation.²⁰⁰ The reasoning behind this is easy to understand. The possibility of submitting alternative solutions when compared to those previously established by the contracting authorities affords the market the possibility to innovate in the use of goods, services or works not yet deemed possible by public entities.

¹⁹⁶ Case C-423/07 *European Commission v Kingdom of Spain* [2010] ECLI:EU:C:2010:211, para 65, "the Court, in the context of a public works contract, has declared unlawful a reference from tender specifications to national legislation concerning the possibility that tenderers may submit variants of their tenders, in accordance with the first and second paragraphs of Article 19 of Directive 93/37, having regard to the fact that the minimum conditions which those variants were to meet were not specified in the tender specifications".

¹⁹⁷ Sánchez-Graells, n 5, pp 396–397.

¹⁹⁸ Arrowsmith, n 73, p 801.

¹⁹⁹ The predecessor art 24(1) of Directive 2004/18/EC stated that contracting authorities might use variants only when the criterion for the award was the most economically advantageous. This requirement disappeared from the current art 45 of Directive 2014/24/EU. So, it can easily be said that in the current legal framework variants can be used when the only criterion for the award of the contract is the price. In that vein, see Arrowsmith, n 73, p 802. The Commission Guidance on Innovation Procurement mentions that "The use of variants is most efficient when combined with functional requirements and award criteria that enable comparison of various solutions in terms of their performance, efficiency, cost effectiveness, versatility or durability. Without these parameters, it is difficult to compare the variants": European Commission, "Guidance on Innovation Procurement", n 44, pp 34–35.

²⁰⁰ In the same vein, European Commission, "Guidance on Innovation Procurement", n 44, pp 34–35.

Besides it creates good competitive pressure among tenderers to come up with possible solutions, and has also the potential to overcome the lack of knowledge of contracting authorities.

Steinicke argues that in the context of the negotiated procedures, such as the competitive procedure with negotiation (article 29, Directive 2014/24/EU) and competitive dialogue (article 30, Directive 2014/24/EU), the use of variants can be difficult to reconcile with the possibility-for-negotiation phases of both procedures. Regarding the former procedure, however, the author clarifies that if the main purpose of variants is to obtain solutions other than those the contracting authority might have initially foreseen then, during the negotiation phase of this procedure (article 29(5), Directive 2014/24/EU), the same alternative solutions can be brought out by the tenderers.²⁰¹ Having said that, there is no prohibition on the use of variants in the competitive procedure with negotiation. However, the inclusion of a negotiation period concerning other requirements not classified as “minimum requirements” may have the same outcome as the preliminary appearance of variants in the tender documents. The author applies partly the same reasoning to the competitive dialogue procedure, since negotiations can also occur in the dialogue phase during this procedure. In fact, article 30(6) of Directive 2014/24/EU clarifies that the final proposal submitted by tenderers is the result of the dialogue phase.²⁰²

The same ratio analyses of Steinicke can be applied to the innovation partnership procedure (article 31, Directive 2014/24/EU).

In fact, as I have said elsewhere, despite some distinguishing features, there are features in common between the innovation partnership procedure and other special procedures with room for negotiation or dialogue, such as the competitive procedure with negotiation and the competitive dialogue. Besides, the European legislator, in recital 49 of Directive 2014/24/EU, provided that the same procedural rules that apply to the competitive procedure with negotiation should apply to the innovation partnership. As I have argued elsewhere, this legislative technique, commonly referred to as “remission”, aims at avoiding loopholes in the law or replication of provisions.²⁰³ In any case, article 31 of Directive 2014/24/EU clearly distinguishes two different times

²⁰¹ M Steinicke “Commentary on article 45 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, n 1, pp 557–559.

²⁰² *ibid*, pp 558–559.

²⁰³ Section 1.2.1.

for negotiation. In the first, negotiation would take place during the first phase of the procedure (procedural phase), that is before the award phase. In this regard, article 31(3)–(4) of Directive 2014/24/EU replicates the rules of article 29 of Directive 2014/24/EU. Due to the “remission” in recital 49 of the Directive, this replication of legal provisions was not necessary, but the European legislator felt the need to clarify once more that the same rules apply, in order to increase the levels of legal certainty. The second time for negotiation under article 31 of Directive 2014/24/EU is allocated to the execution (innovation) phase; article 31(5) regulates this type of negotiation.

To conclude, the use of variants can be an important tool to support innovation in public procurement procedures, mostly in the open and restricted procedures. It is also clear that the lawful use of variants can provoke small adjustments to the subject-matter, due to its ability to give alternative technical solutions that can have an innovative character. However, when it comes to procedures with room for negotiation, such as the innovation partnership procedure, despite the use of “variants” being lawful, it is questionable whether one cannot achieve the same results during the times set for negotiation incorporated in those procedures. Having said that, in an innovation partnership, contracting authorities will have the discretion to use variants (article 45) in the procurement documents and a negotiation phase (article 31(3)(4)) simultaneously, regardless of the fact that the simultaneous use of both may lead to the same final outcome – giving the contracting authority alternative solutions when compared with those previously included in the procurement documents.

3. Particularities of the Selection and Award Phases in the Innovation Partnership Procedure

3.1 Can the innovation partnership procedure be a new paradise for innovative SMEs? A debate regarding the selection phase (article 31(6), Directive 2014/24/EU)

The new Directive 2014/24/EU implemented several measures to increase the participation of SMEs in public procurement procedures.²⁰⁴ Nevertheless, Directive

²⁰⁴ On this topic, see M Trybus and M Andrecka, “Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU” (2017) 3 *European Procurement & Public Private Partnership Law Review* 1–

2014/24/EU failed to provide a holistic definition of SMEs.²⁰⁵ Article 2, “Definitions”, does not offer a possible legal definition of SMEs for public procurement purposes. Only in article 83(3) of Directive 2014/24/EU does the European legislator offer such a definition. This article states that for the purposes of article 83(3)–(4), “‘SME’ shall be understood as defined in Commission Recommendation 2003/361/EC”.²⁰⁶ Nonetheless, article 83(3) of Directive 2014/24/EU uses the latter definition of SMEs exclusively for the purpose of monitoring activities, and consequently to report information to the European Commission, such as statistics and data, regarding procurement activities. Article 83(4)(a), on the other hand, requires Member States to issue information and guidance on the interpretation and application of Union public procurement law for free, in particular to contracting authorities and SMEs. The latter obligation can also be seen as a tool to facilitate the participation of SMEs in public procurement procedures. Despite the fact that article 83(4)(a) specifically mentions SMEs in its wording, this obligation must benefit any economic operator, regardless of whether the entity is classified as an SME or not.

Recital 124 of Directive 2014/24/EU acknowledges the importance of encouraging the participation of SMEs in public procurement procedures, due to its potential for job creation, growth and innovation. Therefore, SMEs’ potential to foster innovation in the procurement context is recognised not only by the European legislator, but also by the

7; M Trybus, “The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive*, n 72, pp 255–280; M Fana and G Piga “SMEs and Public Contracts: An EU Based Perspective” in GS Ølykke, CR Hansen and CD Tvarno (eds), *EU Procurement Directives—Modernisation, Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives*, n 88, 33–54; S De La Rosa, *Droit Européen de la comande Publique* (Bruylant, 2017) pp 477–480; DG for Internal Market, Industry, Entrepreneurship and SMEs (European Commission) and GHK Consulting Technopolis, “Evaluation of SMEs’ access to public procurement markets in the EU” 2014.04.01; European Commission “Commission Staff Working Document—*European Code of Best Practices Facilitating the Access by SMEs to Public Procurement Contracts*” SEC(2008) 2193, 25.06.2008.

²⁰⁵ Trybus and Andrecka, n 204, pp 2–5.

²⁰⁶ European Commission, “Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises” (2003/361/EC), 20.5.2003. See art 2 of the Commission Recommendation: “1. The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. 2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million. 3. Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million ...”.

legal doctrine, mostly focusing on the flexibility SMEs can have in offering innovative solutions, as has been widely recognised.²⁰⁷

The repealed Directive 2004/18/EC contained few direct measures aimed at increasing the levels of participation of SMEs in public procurement procedures, mostly due to the threat that such measures can pose to the principles of equal treatment and non-discrimination.²⁰⁸ In Directive 2014/24/EU, on the other hand, legal doctrine has identified four main measures meant to increase the levels of participation in procurement, namely: (i) the possibility of dividing contracts into lots (article 46);²⁰⁹ (ii) the use by economic operators of the European Single Procurement Document (ESPD), which is an updated self-declaration intended to work as evidence in replacement of certificates issued by public authorities or other accredited parties (article 59);²¹⁰ (iii) a limitation on the discretion of contracting authorities to impose excessive requirements, concerning the economic and financial standing of economic operators, namely article 58(3), which provides that the minimum yearly turnover contracting authorities can require economic operators to have shall not exceed “two times the estimated contract value”, except in justified cases where the nature of the contract means that there is a special risk attached to it;²¹¹ and (iv) the possibility for the contracting authority to pay subcontractors directly (article 71(3)).²¹²

²⁰⁷ Previous legal doctrine had also pointed out the ability of SMEs to innovate in procurement, because of their organisational simplicity and lack of bureaucracy, which affords a flexibility to respond to market needs that larger economic groups do not have. See G O’Brien, “Public Procurement and the Small or Medium Sized Enterprise” (1993) 2 *Public Procurement Law Review* 82–88; A Erridge, “Involvement of SMEs in Public Procurement” (1998) 7 *Public Procurement Law Review* 37–49; M Burgi, “Small and Medium-Sized Enterprises and Procurement Law—European Legal Framework and German Experiences” (2007) 4 *Public Procurement Law Review* 284–290.

²⁰⁸ For a discussion of lawful and unlawful measures to promote SMEs in Directive 2004/18/EC, such as set-asides, see N Hatzis, “The Legality of SME development policies under EC procurement law” in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law—New Directives and New Directions* (Cambridge University Press, 2009), pp 343–365.

²⁰⁹ See recital 78 of Directive 2014/24/EU. On the impact of article 46 of Directive 2014/24/EU and how it can promote SMEs, see M Trybus, n 165, 313–343; IH Anchustegui, “Division into lots and demand aggregation—extremes looking for a correct balance?” in G Ølykke Skovgaard and A Sánchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules*, n 43, pp 125–146.

²¹⁰ GM Racca, “Electronic Qualitative Selection of Economic Operators: the challenge of the European Single Procurement Document (ESPD)” in M Burgi, M Trybus and S Treumer (eds), *Qualification, Selection and Exclusion in EU Procurement* (Djof Publishing, 2016), pp 303–326.

²¹¹ Recital 83 of Directive 2014/24/EU states that overly demanding requirements concerning economic and financial capacity can constitute unjustified obstacles to the involvement of SMEs in public procurement. Consequently, the same recital provides that the restriction on the minimum annual turnover able to be requested by contracting authorities (art 58(3)) is a consequence of the principle of proportionality. On this topic, see CR Hamer, “Commentary on article 58 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, n 1, pp 647–653.

²¹² Recital 78 *in fine* Directive 2014/24/EU mentions that not only the division of larger contracts into lots could be a measure facilitating the involvement of SMEs in public procurement, but also mechanisms

However, as rightly pointed out by Trybus and Andrecka, these four provisions are not measures capable of directly favouring SMEs but merely provisions that will improve or simplify the tender conditions, and consequently possible facilitate the participation of SMEs in public procurement procedures.²¹³ In fact, the authors emphasise that measures directly favouring SMEs, such as those found in the US Small Business Act, where it is required that a fair proportion of the total purchases and contracts for goods and services of the Government in each industry category shall be awarded to small business concerns,²¹⁴ would compromise the principles of non-discrimination (on grounds of nationality) and equal treatment, and could even constitute unjustified restrictions on competition and the free-movement rules. Nonetheless, it is true that on an exceptional basis the EU public procurement system can favour certain categories of operators. Consequently, articles 20 and 77 of Directive 2014/24/EU deal with this possibility. Merely as an example, article 20 Directive 2014/24/EU allows Member States the discretion to reserve the right to participate in procurement procedures to sheltered workshops and other social business whose main goal is to support the social and professional integration of disabled and disadvantaged persons, provided that at least 30% of the employees of such workshops, etc are disabled or disadvantaged workers.²¹⁵ The reason for this lies in the fact that these workshops or businesses would not obtain public contracts in normal competitive market conditions.²¹⁶ However, no similar provision can be found in Directive 2014/24/EU regarding the participation of SMEs.²¹⁷ In the Green Paper issued by the

for direct payments to subcontractors, as regulated under art 71(3) of Directive 2014/24/EU. The complexity of subcontracting and subcontractors' involvement in public procurement procedures are beyond the scope of this study. Case-law references from the CJEU on the topic include: Case C-389/92 *Ballast Nedam Groep NV v Belgian State* [1994] ECR I-1289, para 13; Case C-176/98 *Holst Italia SpA v Comune di Cagliari* [1999] ECR I-8607, para 26; Case C- 314/01 *Siemens v Hauptverband der österreichischen Sozialversicherungsträger* [2004] ECR I-2549, para 45. On the legal doctrine see M Trybus, n 204, pp 275–280; R Craven, “Subcontracting matters: Articles 43 and 71 of the 2014 Directive” in G Ølykke Skovgaard and A Sánchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules*, n 43, pp 295–318.

²¹³ Trybus and Andrecka, n 204, pp 2–4. Burgi distinguishes between “SME-fair” and “SME-favouring” measures, the former being lawful and the others potentially unlawful from a pure EU law perspective: Burgi, n 205, pp 287–288.

²¹⁴ Trybus and Andrecka, n 204, pp 2–4; US Small Business Act (Public Law 85-536, as amended), § 15(a)(1)(C). For a comparison of the US and the European systems, see MV Kidalov, “Small Business Contracting in the United States and Europe: A Comparative Assessment” (2011) 2 *Public Contract Law Journal* 443–509.

²¹⁵ Caranta, n 90, pp 399–400.

²¹⁶ Recital 36, Directive 2014/24/EU.

²¹⁷ Nonetheless, art 21(4) of Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and services contracts by contracting authorities or entities in the field of defence and security, and amending Directive 2004/17/EC and 2004/18/EC, OJ L216,

European Commission prior to the proposal from the Commission for a new Directive for the public sector, some stakeholders argued that to increase the participation of SMEs in public procurement procedures it would be necessary to practise positive discrimination, such as quotas reserved exclusively for SMEs. The Commission believed that such actions would contradict the principle of equal treatment of tenderers, as previously noted.²¹⁸ So, no positive discrimination favouring SMEs can be found in Directive 2014/24/EU.

Having said that, it seems that most of the legal doctrine had failed to capture other possible measure capable of improving the tender conditions for SMEs within the innovation partnership procedure. As I have pointed out, according to recital 49 of Directive 2014/24/EU, the procedural rules of the innovation partnership are largely those that govern the competitive procedure with negotiation set out in article 29 of the Directive. So, article 29 should work as a subsidiary procedure to fulfil the procedural gaps left by article 31 of Directive 2014/24/EU.²¹⁹ However, article 31(6) deviates from article 29, and also from the general rule in article 58 of Directive 2014/24/EU, regarding the selection of economic operators. Article 31(6) adds that in the selection phase, the contracting authority should pay special attention to the candidates' capacity in the field of R&D of innovative solutions. Here we can clearly see that the drafters of the Directive felt the need to explain not only that these considerations could be taken into account when selecting the economic operators, but that contracting authorities should focus on these considerations without running the risk of being discriminatory and consequently breaching the principle of equal treatment.²²⁰

Article 31(6) of Directive 2014/24/EU aims to provide more legal certainty than would be given by the general criteria set out in article 58(4), and arguably is a step towards the recognition that purchasing innovation demands different selection criteria, due to the necessity for specialised knowledge in that field.

Article 58(4) deals with the selection criteria, specifically with the technical and professional ability that an economic operator must have in order to perform a certain public contract. In this provision, there is an emphasis on the experience economic

20.8.2009, cannot be seen as a set-aside requirement or reserve contract but as a further endeavour by the EU to increase the participation of SMEs in the context of defence procurement: L Butler, *Transatlantic Defence Procurement—EU and US Defence Procurement Regulation in the Transatlantic Defence Market* (Cambridge University Press, 2017), pp 305–307.

²¹⁸ Commission, n 4, pp 27–28; Fana and Piga, n 204, pp 50–51.

²¹⁹ Section 1.2.1..

²²⁰ Cerqueira Gomes, n 44, pp 211–215.

operators must have, as a requirement to assess its capacity to perform the particular contract. Moreover, article 60(4) of and Annex XII to Directive 2014/24/EU regulate the means of proof that contracting authorities may require from economic operators, in order for them to provide evidence of their experience and technical abilities. Article 31(6), on the other hand, only requires contracting authorities to pay special attention to the candidate's capacity in the field of R&D. One could argue that when recital 49 states that most of the procedural rules that will govern the innovation partnership procedure will be those that govern the competitive procedure with negotiation, the general criterion set out in article 58(4) should be that governing the selection of candidates, regarding their technical and professional ability. However, one might question why the European legislator felt the need to include article 31(6) of Directive 2014/24/EU, and how this article should be interpreted.

It should be noted that the initial proposal by the European Commission for a new directive for the public sector, article 29 made reference not only to the tenderers' capacity in the field of R&D, but also to their experience.²²¹ In this scenario, the selection of economic operators within the innovation partnership procedure should take into account both the capacity and the experience of tenderers in the field of R&D activities. However, during the trialogue negotiations for the approval of Directive 2014/24/EU there were some adjustments to this initial formula. The final draft of the Directive removed the reference to experience, following the report of the European Parliament on the Commission Proposal for a new Directive. The European Parliament did not give any direct explanation for this particular change. In fact, the European Parliament advocated several amendments to article 29 of the Commission Proposal, responsible for regulating the innovation partnership procedure, including the removal of the criteria of experience when selecting economic operators. The justification for those amendments was that only the most important procedural rules of the competitive procedure with negotiation aiming transparency and fairness of the procedure should apply to the innovation partnership, in order to guarantee room for more negotiations during the procedural phase of the innovation partnership procedure.²²²

In my view, the change in the wording of this provision, which removed from the selection criteria the requirement for experience of economic operators in the field of

²²¹ European Commission, n 1.

²²² European Parliament, n 11, pp 163–164.

R&D, allows contracting authorities to select innovative SMEs or start-up companies that generally have the that generally have the R&D capacity but not the experience of a large company.²²³

As we know, start-ups represent a crucial part of the innovation market, and they can revolutionise a product or a service within months or a few years, a paradigmatic example being the social network Facebook or sharing economy businesses, such as Airbnb, Uber and even Skyscanner. The European Commission Communication of 2016, regarding the possible barriers and opportunities for start-up companies in the internal market, *inter alia* mentions public procurement as a possible opportunity for start-up companies in the internal market.²²⁴ The Commission specifically highlights the role of the innovation partnership procedure as a crucial tool for start-up companies to show their projects to public buyers in a friendlier environment. However, the Commission also recognises that national contracting authorities are not aware of how to achieve this, and consequently more guidance, for instance on how to draft an innovation partnership, may be helpful to increase the level of participation of start-up companies in the innovation partnership procedure.²²⁵ Having said that, article 31(6), if interpreted correctly, may become a crucial instrument to push start-up companies and innovative SMEs to enter the procurement world.

For Arrowsmith, article 31(6) of Directive 2014/24/EU does not include any obligation on contracting authorities to view article 31(6) as laying down specific selection criteria when compared with article 58 of Directive 2014/24/EU. For the author, article 31(6) should merely been seen as a discretionary provision clarifying that, in the context of the innovation partnership, contracting authorities may use as selection criteria the economics operators' capacity in the field of R&D and of developing and implementing innovative solutions.²²⁶ I cannot totally agree with this view.

First, the wording of article 31(6) of Directive 2014/24/EU clearly states that when selecting candidates, “contracting authorities shall in particular apply criteria concerning the candidates’ capacity in the field of research and development and of

²²³ Cerqueira Gomes, n 44, pp 211–215;

²²⁴ European Commission “Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions - Europe's next leaders: the Start-up and Scale-up Initiative” COM(2016) 733 final, 22.11.2016, point 3.2.

²²⁵ Commission, n 224, point 3.2.

²²⁶ Arrowsmith, n 73, pp 1054–1055.

developing and implementing innovative solutions”. From this the European legislator’s emphasis on the fact that, during the selection phase, contracting authorities must have a special focus on the tenderers’ capacity in the field of R&D and the implementation of the particular innovative solution is clear.²²⁷ Therefore, when a contracting authority wants to assess a tenderer’s technical and professional ability to participate in a innovation partnership, these should be the paramount criteria and not the other elements of article 58(4) of Directive 2014/24/EU, which can be used but must play a secondary role in comparison with the criteria in article 31(6). In addition, from the preparatory works it is clear that the level of experience of economic operators in R&D and the implementation of innovative solutions should not be a decisive criterion in the innovation partnership procedure because during the legislative procedure this element vanished, as I have previously pointed out.

In my view this is how article 31(6) Directive 2014/24/EU should be interpreted. Nonetheless, I acknowledge that the European legislator failed to provide more consistency and clarity on how article 31(6) and article 58(4) should be understood. Furthermore, it also failed to provide for how an economic operator can prove its capacity without mentioning its experience.²²⁸ This scenario is another example of where the apparent discretion given to contracting authorities by the European legislator, in order for them to prioritise the criteria in article 31(6), may fail. Consequently, the legal uncertainty surrounding what article 31(6) demands will undermine its ability to attract more start-up companies and innovative SMEs, which normally have the capacity to conduct R&D activities but lack the experience, without contravening the EU equal treatment principle and the obligation not to discriminate. In addition, if we look to the transposition of the Directive in some Member States, such as France,²²⁹ Germany,²³⁰ Italy,²³¹ Spain,²³² Portugal²³³ or Denmark,²³⁴ they all

²²⁷ Telles and Butler argue that, despite the fact that art 58 still applies in this context, art 31(6) of Directive 2014/24/EU demands a more specific assessment of capacity: Telles and Butler, n 6, pp 164–165.

²²⁸ In the same vein, see Telles and Butler, n 6, pp 164–165.

²²⁹ Art R217-28, Code de la Commande Publique (approved by the Decree n° 2018-1075 of December 3).

²³⁰ §19(1)(4) VgV (Vergabeverordnung, approved by the law of 12 April 2016 (Federal Law Gazette I), amended by art 4 of the Act of 10 July 2018 (Federal Law Gazette I).

²³¹ Art 65(9) Codice di Appalti (approved by the Law-Decree of 18 April n° 50, last modified by the Law, 27 December 2017, n 205).

²³² Art 178(3) Código de Contratos Del Sector Público (Approved by Law 9/2017, 8 November 2017).

²³³ Art 218-A n° 3 (c) Código dos Contratos Públicos (approved by Law-Decree n.º 18/2008 of 29 January, amended and republished by Law-Decree n.º 111-B/2017, 31 August 2017).

²³⁴ Section 75 (2) of Danish Public Procurement Act (approved by Act No 1564 of 15 December 2015).

copy out the its provisions regarding this issue, as predicted due to the sometimes irrational antagonism of the Commission towards gold-plating. This approach might fail to capture the real intention of the European legislator with this article, which is that innovation does not necessarily require experience, and that it should facilitate the entrance of innovative SMEs and start-up companies into the internal market.

To sum up, only those economic operators selected with reference to the criteria laid down in article 31(6) and (secondarily) the criteria contained in article 58 may submit research and innovation projects that aim to meet the needs identified by the contracting authority which cannot be met by existing solutions. Moreover, the number of suitable candidates to be invited to participate in the procedure can be limited pursuant to articles 31(1) and 65 of Directive 2014/24/EU.

3.2 Negotiations, confidentiality and award criteria (article 31, Directive 2014/24/EU)—almost nothing new ...

The negotiation phase in the innovation partnership procedure, as in any other procurement procedure, will take place before the award of contract and consequently before entering the contract execution stage. The contract execution phase in the context of the innovation partnership is also commonly referred as the “innovation phase”, and it is worth reminding ourselves that at the time of execution of the contract, the contracting authority may decide to set up the innovation partnership with one partner or with several partners, provided that they conduct separate R&D activities (article 31(1), Directive 2014/24/EU).

In the innovation partnership procedure, regulation of the negotiation phase is made by article 31(3)–(5) of Directive 2014/24/EU. Nevertheless, the majority of these provisions merely replicate those of the competitive procedure with negotiation as far as their negotiation momentum is concerned (article 29(3)–(6), Directive 2014/24/EU).²³⁵ Consequently, with one exception, they will not be covered in the course of this work since they are not specific to the innovation partnership procedure.

²³⁵ The EU approach towards negotiations in public procurement procedures is quite cautious. Steinicke, in a comparison with the European system, says that unlike in the US, where negotiations are the basis for competition, in the European system negotiations are seen as a limit: M Steinicke, “Public procurement and negotiation procedure—a lesson to learn from US Law? (2011) 8 *European Competition Law Review* 331–339. In the same vein, Caranta, n 90, pp 451–452. The *Manova* case from the CJEU is clear example of how the EU sees negotiation as a limit: “The principle of equal treatment

Article 31 does not contain a provision similar to article 29(4) of Directive 2014/24/EU, under which, within a competitive procedure with negotiation, contracting authorities are allowed to award the contract based on the initial tenders without conducting any negotiation, provided that this possibility is indicated in the contract notice or in the invitation to confirm interest.²³⁶ This possibility is not available in article 31 of Directive 2014/24/EU.²³⁷

Arrowsmith argues that the decision of the European legislator not to include a provision similar to article 29(4) in article 31 indicates that, during the innovation partnership procedure, negotiations must always form part of the award procedure, due to the fact that in the innovation partnership we are dealing with the award of more complex arrangements when compared to those arising from a competitive procedure with negotiation.²³⁸ To this reasoning one might add the open character of the object of this particular type of contract. As I have mentioned several times, the innovation partnership aims to establish a partnership with one or more partners, to conduct R&D of an innovative good, service or work that does not yet exist on the market. This inevitably calls for more dialogue between the public and private sector, since the proposed solution must be developed and negotiated in close cooperation. Consequently, it is to be expected that negotiations will be mandatory in an innovative partnership procedure.

The complexity of the arrangements surrounding an innovation partnership procedure demands a mandatory period for negotiations before the award of the contract. This complexity, requiring more room for negotiations, is, as we have seen,

and the obligation of transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer concerned ...”: Case C-336/12 *Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S*, [2013] ECLI:EU:C:2013:647, para 31. However, as I have said, Directive 2014/24/EU seems to favour negotiations, in order to allow for more flexibility in the procurement procedures: see M Burnett, “The New Rules for Competitive Dialogue and the Competitive Procedure with Negotiation in Directive 2014/24—What Might They Mean for PPP?” (2015) 2 *European Procurement & Public Private Partnership Law Review* 63–70; F Lichère, “Quid de la place nouvelle des procédures négociées et du dialogue compétitif?” (2014) *Mai-Juin Bulletin Juridique des Contrats Publics* 164–170; Treumer, n 20, pp 135–150.

²³⁶ Caranta mentions that despite the fact that the *raison d’être* of the competitive procedure with negotiation is negotiations, when an optimal or near optimal tender has been submitted it does not make sense for contracting authorities to spend time and resources in negotiations without a relevant outcome: R Caranta, “Commentary on article 29 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, n 1, pp 406–407; Davey, n 17, pp 108–111.

²³⁷ In the same vein, see Telles and Butler, n 6, pp 176–177.

²³⁸ Arrowsmith, n 73, pp 1054–1055.

one of the factors suggesting that some Member States will not use this procedure as much as others.

In addition, article 31(4) of Directive 2014/24/EU requires contracting authorities to preserve the confidential nature of the information they have acquired from candidates or tenderers during the negotiations, in accordance with article 21 Directive 2014/24/EU (“Confidentiality”). Confidential information can only be disclosed with the express agreement of the tenderer, and this form of agreement cannot constitute the form of a general waiver.²³⁹ This provision replicates, once more, article 29(5) of Directive 2014/24/EU regarding the competitive procedure with negotiation, which also gives concrete expression to article 21 of the Directive.²⁴⁰ In this connection, the CJEU had ruled in the *Varec* case that the right to protection of confidential information in a procurement context was not absolute, since it needed to be balanced against other interests, such as the maintenance of fair competition and the necessary requirements for safeguarding effective legal protection for those with legal standing.²⁴¹ Albert Sánchez-Graells alerts to the dangers of the *Varec* ruling, warning that there is a risk that bidders will use the bid protest mechanism to try to gain access to confidential information from their competitors. In addition, the author notes that excessive transparency in the market can promote collusion between tenderers.²⁴² All these premises are valid in the context of the innovation partnership procedure, but since they do not constitute provisions exclusively applicable to that procedure they are not addressed further in the course of this work. Nonetheless, article 31(6) of the

²³⁹ On the issue see KM Halonen, “Disclosure Rules in EU Public Procurement: Balancing Between Competition and Transparency” (2016) 16(4) *Journal of Public Procurement* 528–553; Arrowsmith, n 73, pp 634–637; G Ginter, N Parrest and MA Simovart, “Access to content of public procurement: the case for a general EU-law duty of disclosure” (2013) 4 *Public Procurement Law Review* 156–164; G Skovgaard Olykke, “How does the Court of Justice of the European Union pursue competition concerns in a procurement context” (2011) 6 *Public Procurement Law Review* 186–188; MM Razquin Lizarraga, “El principio de confidencialidad en la contratación pública” in CA Amoedo-Souto and JM Gimeno Feliú (eds), *Estudio sistemático de la ley de contratos del sector público* (Thomson Reuters Aranzandi, 2018) pp 867–911.

²⁴⁰ Andrecka mentions that despite the misleading systematic place of the provision in art 31 of Directive 2014/24/EU, which prohibits contracting authorities from sharing solutions and confidential information, this prohibition should be extended not only in the contract execution phase, but also to the procedural phase, thus precluding contracting authorities from cherry-picking tenderers’ solutions without their express agreement, which must not be given in form of a general waiver: Andrecka, n 139, pp 48–62.

²⁴¹ Case C-450/06 *Varec SA v État Belge*, ECLI:EU:C:2008:91, paras 50–52. On the case, see D Capitant, “Secret des affaires et marchés publics devant le juge” (2008) 35 *Reveu Lamy Des Collectivités Territoriales* 24–27.

²⁴² A Sánchez-Graells, n 5, pp 470–471. See also A Sánchez-Graells, “Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives” (2013) 13 *University of Leicester School of Law Research Paper*, available at ssrn.com/abstract=2353005.

Procurement Directive extends the same obligation not to disclose information to the contract execution phase (innovation phase) when the partnership is established with several partners.²⁴³ Unlike the confidentiality obligations in the procedural phase, the issue of confidentiality of information in the contract execution phase represents a novel feature of the innovation partnership, but with fewer changes from what confidentiality implies in the procedural phase. Consequently, this issue will not be dealt with further in this work.

Finally, article 31(1) and recital 49 of Directive 2014/24/EU require the innovation partnership procedure to make awards on the “sole basis of the award criterion of the best price–quality ratio”, thus excluding the lowest price as an award criterion.²⁴⁴ The best price–quality ratio can encompass, in accordance with article 67(2) of Directive 2014/24/EU: (i) quality, including technical merit; (ii) aesthetic and functional characteristics; (iii) accessibility and design for all users; (iv) social, environmental and innovative characteristics; (v) the organisation, qualification and experience of staff assigned to perform the contract, when the staff quality is relevant to the performance of the contract; (vi) after-sales and technical assistance; (vii) delivery conditions.²⁴⁵ Therefore, since article 67 allows a great degree of discretion to contracting authorities, as to how the best price–quality ratio should be assessed, contracting authorities are free to choose the most suitable criteria to evaluate innovative solutions, as long as they do not exclusively use the criterion of lowest price.

Recital 49 Directive 2014/24/EU states that use of the price criterion alone is not suitable for comparing tenders for innovation solutions. To effectively compare proposed solutions based on their price, it would be necessary not only to measure the capacity and quality of the good, service or work accurately, but also its impact on the market. Of course if the good, service or work has not yet been developed it does not have any impact on the market. Despite its being possible to estimate the market impact of the developed solution, a fully accurate prediction of the value of the contract cannot be made. This uncertainty regarding the value of an innovation partnership contract is reflected in article 5(6) of Directive 2014/24/EU, which provides that when calculating

²⁴³ Arrowsmith, n 73, pp 1056–1057.

²⁴⁴ *ibid*, pp 1057–1058; Cerqueira Gomes, n 44, pp 211–213; Telles and Butler, n 6, pp 166–170; Caranta, n 47, pp 427–428.

²⁴⁵ On this topic, see R Caranta, “Award criteria under EU Law (old and new)” in M Comba and S Treumer (eds), *Award of Contract in EU Procurements* (Djøf Publishing, 2013) pp 21–38; P Faustino, “Award Criteria in the New EU Directive on Public Procurement” (2014) 23 *Public Procurement Law Review* 124–134.

the value of the contract in an innovation partnership procedure, contracting authorities must take into account the “maximum estimated value” of both (i) R&D activities and (ii) the value of the developed and procured good, service or work.²⁴⁶ In this regard, article 31(7) of the Directive requires that the estimated value of the R&D activities and the proposed solution shall not be disproportionate in relation to the investment required for their development. This proportionality requirement aims to avoid State-aid violations.²⁴⁷

The maximum estimated value might not correspond to the total amount spent by the contracting authorities. Article 31(2) of the Directive requires contracting authorities, during the contract execution phase, to remunerate their partners after intermediate targets have been reached. Furthermore, based on those targets the contracting authority can decide to either terminate the partnership or reduce the number of partners, provided this possibility and its conditions have been indicated in the procurement documents. This possibility is supported by the risk comprehended by the development of innovations.²⁴⁸

To sum up, negotiations, procedural confidentiality and the award criteria display only minor particularities regarding the innovation partnership procedure (article 31, Directive 2014/24/EU) when compared with the requirements to be found in other provisions. Nonetheless, it is worth pointing out that during the procedural phase of an innovation partnership room for negotiation is mandatory, unlike in the competitive procedure with negotiation. In practice, of course, more negotiations demand more discretion and more flexibility from contracting authorities and, according to the premise put forward in chapter 1, only certain Member States will have the legal culture necessary to conduct these types of negotiations. Moreover, despite the great margin of discretion allowed in setting the award criteria in the innovation partnership, both the complexity of the arrangements and the possibility to award the contract to several partners might pose insurmountable legal problems for less well-prepared contracting authorities.

²⁴⁶ X Matharan, “La détermination du prix dans les partenariats d’innovation” (2018) *Montiteur Juris* 1–8.

²⁴⁷ Caranta, n 47, pp 427–428.

²⁴⁸ Arrowsmith, n 73, pp 462–463.

4. Contract Execution: Innovation Phase

In the course of this work I have concluded that the development of innovation in other special procedures, namely the competitive procedure with negotiation (article 29, Directive 2014/24/EU) or the competitive dialogue procedure (article 30, Directive 2014/24/EU), occurs during the negotiations or in the dialogue phase, that is, before the award phase. In these procedures, the contract execution phase will not encompass the development of the proposed innovation solution but merely the delivery of the proposed solution. The innovation partnership procedure, on the other hand, requires the development of innovation to take place during the contract execution phase and not in the award phase (article 31(2), Directive 2014/24/EU).²⁴⁹ Development of innovation in the contract execution phase and not in the procedural phase is one of the unique features of the innovation partnership procedure when compared with other procurement procedures regulated under Directive 2014/24/EU. As some legal doctrine has pointed out, the development of innovation in the execution phase allows for close cooperation and flexibility between the contacting authority and the economic operators throughout the innovation process, which occurs more effectively in the contract execution phase than during the award phase where stricter procedural rules apply.²⁵⁰ Moreover, combining the development and purchase phases within the contract execution phase will increase the chances of that particular innovation's being developed to better satisfy the given public need.²⁵¹

However, despite the room for more flexibility, discretion, negotiation and cooperation in the contract execution phase of the innovation partnership procedure, the European legislator decided to underpin these characteristics with two requirements, namely: (i) the obligation to structure the execution phase into successive phases; and (ii) the requirement to set intermediate targets to be attained by the partners (article 31(2), Directive 2014/24/EU). As I shall show, these two requirements are manifestations of the EU principles of transparency, equal treatment and proportionality, and aim to control the level of discretion of contracting authorities.²⁵²

²⁴⁹ Section 1.2.1.

²⁵⁰ Steinicke, n 86, pp 259–273; Cerqueira Gomes, n 44, pp 211–218; Caranta, n 90, pp 394–395.

²⁵¹ Section 1.2.1.

²⁵² In the same vein, Arrowsmith argues that the main reason to structure the partnership is to ensure transparency and equal treatment in the choices made in the execution of the contract, : Arrowsmith, n 73, pp 1056–1057.

In the context of EU public procurement, due to the novelty of the procedure, they have yet to be ruled on by the CJEU and there is thus no case law yet from the Court on these two concepts. Nevertheless, one can already discern their proper legal meaning and its connections to the European principles.

4.1 The obligation to structure the innovation partnership execution phase into successive phases (article 31(2), Directive 2014/24/EU)

Designing a process to promote innovation is not only a matter of combining good ideas, but also of ensuring an adequate and structured process.²⁵³ Only by structuring the creative process one can both control the risk associated with the uncertainties of developing innovation and make sure that the good, service or work to be developed will meet the specific need of the public sector.²⁵⁴ Article 31(2) of Directive 2014/24/EU requires contracting authorities to structure the contract execution phase of the innovation partnership into successive phases following a sequence of steps. These steps will start with research and innovation activities, and progress to the development and possible manufacture of goods, services or works by the partner or partners.²⁵⁵ Within this sequence of structural steps, article 31(2) of Directive 2014/24/EU requires contracting authorities to set intermediate targets to be attained by the partners, which will be explored in section 4.2 of this chapter.

I have argued elsewhere that, despite the requirement to structure the innovation partnership into successive phases, the European legislator does not stipulate the detail

²⁵³ Cerqueira Gomes, n 44, pp 214–215. According to Telles and Butler, the Directive does not define R&D activities, or prototyping or even manufacturing processes. The authors claim that comparable guidance found in the Pre-Commercial Procurement Guidance regarding the R&D steps should be made available under the innovation partnership procedure: Telles and Butler, n 6, p 167. In the same vein, see Arrowsmith, n 73, pp 1058–1059; and AR Apostol, *Trials and Tribulations in the Implementation of Pre-Commercial Procurement in Europe* (Springer, 2017) pp 221–222. On the comparison in the Pre-Commercial Procurement Guidance between the definitions of R&D activities, one in Directive 2009/81/EC on defence and security procurement and the other under the grounds for the use of the negotiated procedure with prior publication (article 32(2)(a), Directive 2014/24/EU), see Butler, n 159, pp 353–363.

²⁵⁴ Normally, the main problem is not a lack of good ideas but the recognition of the potential of those ideas. For example, Xerox developed the first personal computer but did not invest enough in the technology and allowed Apple to take up the opportunity: see D Burkus, “Innovation Isn’t an Idea Problem” (July 2013) *Harvard Business Review Blog Network*, available at <https://hbr.org/2013/07/innovation-isnt-an-idea-proble>, last accessed 1 March 2019.

²⁵⁵ Cerqueira Gomes, n 44, pp 214–215.

of these successive phases. In fact, this must be seen as mirroring the flexibility intended by the European legislator in the innovation phase. These types of contracts for research, development and possible manufacture of a not-yet-developed good, service or work require flexibility and cooperation between the parties. The parties must work in close cooperation, the economic operators having the specific capacity/know-how in a given field and the contracting authority, which normally does not have the requisite knowledge of that innovative field, being aware of the public need it means to satisfy with this good, service or work. Only by doing so can the parties adapt and adjust the dynamics of the innovative process towards the satisfaction of a specific public need.²⁵⁶

However, despite this apparent flexibility in structuring the partnership, the European legislator, in article 31(2) of Directive 2014/24/EU, reminds contracting authorities of important limitations, particularly that the performance levels and maximum costs must be agreed before the initiation of the innovation process.²⁵⁷ Moreover, with reference to the way in which the innovation partnership must be structured, article 31(7) of Directive 2014/24/EU provides that the duration and value of the different phases must reflect the degree of innovation of the proposed solution and the sequence of research and innovation activities required for the development of an innovative solution not yet available on the market. Article 31(7) states that the estimated value of supplies, services or works shall not be disproportionate in relation to the investment required for their development.

In the Commission proposal for a new procurement directive for the public sector, article 29(2) had different wording when compared with article 31(7) of Directive 2014/24/EU. In fact, article 29(2) of the Commission proposal stated that the value and duration of the partnership should remain within appropriate limits, taking into account the need to recover the costs, including those incurred in developing an innovative solution, and to achieve an adequate profit.²⁵⁸ Apostol argues that article 29(2) of the Commission proposal granted even more discretion to contracting authorities, in deciding the value and duration of the contract, when compared to the eventual article 31(7) of Directive 2014/24/EU.²⁵⁹ As noted by the legal doctrine, the new wording of

²⁵⁶ *ibid*, pp 215–216.

²⁵⁷ Telles and Butler, n 6, pp 166–168.

²⁵⁸ On this provision, see Steinicke, n 86, pp 270–271.

²⁵⁹ Apostol, n 253, pp 222–224.

article 31(7) can be viewed as a true proportionality test.²⁶⁰ Thus, contracting authorities should conduct such a test when setting the value and the duration of the innovation partnership and the outcomes that may result from it. Following such a proportionality test, contracting authorities are required to structure and carry out the successive phases of the contract's execution, which may be controlled by the courts.²⁶¹ Furthermore, recital 49 of Directive 2014/24/EU states that the innovation partnership should be structured in a way that it can provide the necessary "market-pull" without foreclosing the market. This warning in the recitals, of the potential risks that the innovation partnership might pose to competition, is connected with the uncertainties regarding the impact this type of procedure can have on the market, since the future goods, services or works developed can have commercial exploitation beyond their use by the public buyer.²⁶² This issue will be developed further in section 4.3, given its connections with the provisions on intellectual property rights and State aid law.

In sum, therefore, the European legislator decided to give contracting authorities considerable flexibility and discretion regarding the structure of the successive phases of the innovation partnership. However, this flexibility will demand complex financial and performance arrangements to be put in place between contracting authorities and their partners in order to minimise the risks intrinsic in R&D activities. This flexibility is only limited by the EU principles, particularly by a proportionality test covering the value and duration of the partnership and the investment required for the development of the innovative goods, services or works (article 31(7) Directive 2014/24/EU). In addition, recital 49 alerts to the dangers the structure of an innovation partnership can pose for competition, which will be dealt with in section 4.3.

It is true that discretion and flexibility are essential ingredients for innovation, but the risks involved in the execution of the contract and lack of guidance from the EU, mostly in the form of soft law, in order to help contracting authorities in drafting these arrangements in compliance with the provisions, as explained in chapter 1, mean that in States where the national administrative legal culture demonstrates structural difficulties in successfully addressing the question of more flexibility and discretion of the public officials, this procedure will not be used.

²⁶⁰ *ibid*, pp 222–224; Telles and Butler, n 6, pp 168–169.

²⁶¹ According to Arrowsmith, art 31(7) of Directive 2014/24/EU it is an important provision in controlling compliance with the EU principles of equal treatment and transparency: Arrowsmith, n 73, p 1059.

²⁶² Sánchez-Graells, n 53, pp 48–49.

Nonetheless, it will be important to conceptualise the simple obligation to structure the process into successive phases in such a way as to help increase the levels of transparency and prevent unlawful behaviours, such as corruption or possible collusion. In my view, contracting authorities should be required to document all the successive phase steps, in accordance with the principle of transparency and its important role in monitoring public procurement activities.²⁶³ It can be argued that the requirement set out in article 84(2) of Directive 2014/24/EU must be extended to the contract execution phase of the innovation partnership procedure. It is true that article 84(2) only requires contracting authorities to document the progress of all procurement procedures by keeping sufficient records at all stages of the procedure, including justifications for the decisions taken, for a period of at least three years from the award of the contract.²⁶⁴ However, despite the fact that article 84(2) merely refers to the procedural phase and not to the contract execution phase, it can be argued that the same obligation can be extended *mutatis mutandis* to the contract execution phase of the innovation partnership, as a requirement enforced by the EU principle of transparency, in order to allow for an effective monitoring function over procurement activities in the Member States. This has the potential to assist the monitoring function connected with procurement activities, as explored in chapter 3.

4.2 The importance of setting intermediate targets (article 31(2), Directive 2014/24/EU)

As mentioned in section 4.1, the contract execution phase of the innovation partnership procedure must be structured into successive phases, and within these successive phases article 31(2) of Directive 2014/24/EU provides that the contracting authority shall set intermediate targets to be attained by the partners and provide for payment in

²⁶³ According to Arrowsmith, Linarelli and Wallace, a comprehensive and precise definition of this principle in public procurement involves four distinct but complementary aspects: (i) publicity for contract opportunities; (ii) publicity of the rules governing each procedure; (iii) a principle of rule-based decision-making that limits the discretion of contracting authorities or officers; and (iv) verification and enforcement of the rules. All of these four dimensions can be found in the current Procurement Directives. In this context I am referring to the dimensions in (iii) and (iv). See S Arrowsmith, J Linarelli and D Wallace, *Regulating Public Procurement: National and International Perspectives* (The Hague Kluwer Law International, 2000) pp 72–73; S Arrowsmith, “The Purpose of the EU Public Procurement Directives: Ends, Means, and the Implications for National Regulatory Space for Commercial and Horizontal Policies” (2012) 14 *Cambridge Yearbook of European Legal Studies* 20–25.

²⁶⁴ Cerqueira Gomes, n 44, pp 215–216.

appropriate instalments. In this context, intermediate targets will play a decisive role in evaluating the partners' capacity and levels of performance in reaching the targets previously set.

This aspect of the process involves obligations to produce results, in contrast with other phases of the innovation process where the obligations require only the use of means to achieve a hypothetical solution. Based on the targets, contracting authorities may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting authority has indicated in the procurement documents the conditions for their use, in particular the arrangements regarding intellectual property rights.²⁶⁵

The setting of intermediate targets will allow contracting authorities to evaluate not only the performance of the partners under the contract, but also the proportionality of the results of R&D activities and the investment already made (article 31(7), Directive 2014/24/EU). Based on the targets, the contracting authority can continue with or terminate the partnership.

Directive 2014/24/EU does not provide further guidance on how the targets should be set and what they should encompass, other than the fact that they should be as proportionate as possible, comply with the EU principles and have a link with the subject-matter of the contract. The Commission Guidance on Innovation Procurement broadly speaks of technical, operational or economic performance targets.²⁶⁶ So in principle contracting authorities have a wider discretion in setting intermediate targets. In order to control this discretion, the same obligation derived from the principle of transparency, to publish the results of the targets, that I defended in the context of the successive phases (section 4.1) should apply here too.²⁶⁷

As indicated by the Telles and Butler, when the partnership involves several partners, various legal issues might arise concerning the intermediate targets. The authors list these issues almost exhaustively, but they do not advance a possible solution to them. Nonetheless, I would stress the legal uncertainty surrounding compliance with

²⁶⁵ In theory the partnership could be concluded with one partner or several, but the Directive, in recital 49, seems to establish a preference for the partnership to be concluded with several partners: "Contracting authorities should therefore not use innovation partnerships in such a way as to prevent, restrict or distort competition. In certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects." In the same vein, see Cerqueira Gomes, n 44, pp 216–217.

²⁶⁶ European Commission "Guidance on Innovation Procurement", n 44, pp 44–45.

²⁶⁷ Cerqueira Gomes, n 44, pp 216–217.

the principle of equal treatment and the setting up of intermediate targets.²⁶⁸ First, can different targets, in terms of content, form and time, apply to different partners without contravening the principle of equal treatment? Second, can the principle of equal treatment allow contracting authorities to use those targets not only to evaluate their partners, but also to compare their performance? Third, when the R&D activities lead to a different outcome from the one that was initially planned in the target, but with greater economic value, what happens to the contract and to lawfulness of the public financing? Will the EU rules on modification of contracts apply? These are issues capable of fostering legal uncertainty, and in my view the European Commission should clarify these issues through further guidance.

Finally, article 31(2) of Directive 2014/24/EU requires contracting authorities to pay the partners in appropriate instalments. It is not clear from the wording of article 31(2) at what stage the contracting authority should make payment.²⁶⁹ However, it may be logical for it to pay instalments after reaching each intermediate target, not only because the performance of the partners may be evaluated at that time, but also because the contracting authority has the ability to terminate the partnership, or to terminate the partnership with one or more partners and continue with the others, provided this possibility is regulated in the tender documents. Furthermore, this provision aims to avoid the situation where the public financing given to economic operators by contracting authorities would constitute unlawful State aid (article 107 TFEU). This issue will be dealt with in section 4.3.

²⁶⁸ Telles and Butler, n 6, pp 171–175.

²⁶⁹ Arrowsmith, n 73, p 1058.

Chapter 3

The EU Public Procurement Oversight Bodies: a Possible Strategy to Increase the Effectiveness of the EU Harmonisation Process and Consequently Increase the Level of Equality in Innovation Public Purchases

1. Introductory Background

During my work I have pointed out that the EU process of harmonisation of public procurement has proved to be ineffective. When the European legislator harmonises the field of public procurement only through law it generates perfectly lawful legal norms, but they suffer from the inability to penetrate and adapt when they come into contact with core national administrative law traditions. As I have shown, this does not only create legal uncertainty, but also increases the level of inequality among Member States, mainly when using strategic procurement tools or procedures. As an example, the numbers of special procedures used by actors at the centre of Europe are much greater than the numbers used by actors on the periphery. The reason behind it lies in the circumstance that different contracting authorities among Member States have different institutional and cultural backgrounds. The more complex the procurement procedure, the less easily it can be harmonised only through law (that is, by transposing a directive into national law using a copy-out method). For instance, the innovation partnership procedure, due to its intrinsic features, requires more flexibility, discretion, mandatory negotiations and the making of complex arrangements during the contract execution phase.

According to the European legislator, the innovation partnership procedure is not the only public procurement procedure covered by Directive 2014/24/EU with the ability to foster innovation. In fact, as showed in chapter 2, every public procurement procedure has the ability to generate innovation, for instance through the design of open technical specifications in terms of performance or functional requirements. However, in the eyes of the European legislator, the innovation partnership procedure represents

a step forward, when compared with other procurement procedures covered by the Directive, since it guarantees more flexibility and discretion, which are essential ingredients for the research and development of innovative goods, services or works in close cooperation with the public sector, in order for such innovations to serve public purposes. Nevertheless, the extremely complex structure of the innovation partnership procedure, with its three possible phases (procedural phase; contract execution phase; and possible acquisition phase), calls for a substantial level of negotiation and flexibility. However, during this phase, compliance with the EU principles and legal framework leads to legal uncertainty and a tendency to risk aversion from contracting authorities in general. Contracting authorities operating in Member States with structural disadvantages and with national administrative law traditions less keen to embrace procedural discretion and negotiations will face even greater challenges, as mentioned in chapter 1. Having said that, given those characteristics, it can easily be concluded (with help from the premise developed in chapter 1) that some Member States will not use the innovation partnership procedure in the same way as others.

Addressing this issue—that is to increase the level of use of special procedures such as the innovation partnership procedure—is a crucial requirement of the EU harmonisation process in the field of EU public procurement. Only then can the EU public procurement system evolve into a strategic system in which innovation plays a decisive role. Moreover, due to the importance innovation plays in many modern societies nowadays, if a strategic field, such as public procurement, is ineffective in some Member States in promoting innovation in public services, goods or works, due to the EU's inability to build procedures that benefit Member States equally, it will only widen the gap between Member States with dangerous political results. Thus, the EU strategy for public procurement must be able to leverage the numbers of future innovative public purchases in the EU, through a more egalitarian use of the innovation partnership procedure (article 31, Directive 2014/24/EU).

Recalling the reasoning of Azoulai in chapter 1, concerning the “integration through law” formula, the author argues that this formula needs to be reinterpreted at the current evolutionary stage of the European project. The author states that the “integration through law” formula should be recast in the light of the current crises in the EU, which have led to a lack of trust among the European actors, and that it requires

a redefinition of the role of the law itself in the process of integration.¹ One of the five possible strategies advanced by the EU mentions stronger cooperation between the EU and all Member States to guarantee the effective implementation of EU legislation.² Therefore, “integration through law” needs to increase both the levels of loyalty beyond article 4(3) TEU and the forms of collective responsibility, by creating and empowering legal structures and legal relationships capable of imposing a new kind of collective rationality (EU; Member States and citizens) in which distinct cultures, sensibilities and values are accommodated.³

In the public procurement context, decentralised regulatory and oversight bodies under the control of the European Commission could fill this role. This possibility will be explored in this chapter as a potential way of minimising certain failures in the EU harmonisation process in public procurement, thus increasing the effectiveness of the EU harmonisation process in the field of public procurement as a tool to raise the levels of co-responsibility between the EU actors, Member States and citizens across the Union. The creation of decentralised regulatory and oversight bodies among the Member States can have several advantages, such as diminishing the levels of legal uncertainty regarding the EU public procurement framework, increasing the levels of monitoring of compliance with the procurement rules and, finally, helping EU legal norms to better adapt when they touch the core of national administrative law traditions.

In my view, this approach will favour, among other possibilities, the use of the innovative partnership procedure by the Member States in a more egalitarian way; and article 31 Directive 2014/24/EU might no longer be just a legal procedural nightmare for some and an exclusive tool for others.

¹ L Azoulay, “‘Integration Through Law’ and us” (2016) 14(2) *International Journal of Constitutional Law* 449–463.

² European Commission, “White Paper on the Future of Europe—Reflections and Scenarios for the EU27 by 2025” (2017) COM(2017) 1.03.2017, pp 8–26. The Bratislava Declaration also mentions that it is necessary for the EU to strengthen the mechanism for reviewing the implementation of decisions taken by increasing the levels of loyal cooperation and communication of Member States and Institutions, in Consellium of Europe, “The Bratislava Declaration” (2016) 16.09.2016, pp 5–6. However, it is worth pointing out that art 20 TEU and arts 326–334 TFEU already allow for more cooperation between Member States. Nonetheless, in my opinion it is necessary to achieve not just selective cooperation between certain Member States but an holistic dialogue of cooperation between the EU and Member States without compromising the EU principles, namely, the principle of unity. On the latter issue, see S Peers, “Enhanced cooperation: the Cinderella of differentiated integration” in De Witte, Ott and Vos (eds), n 193, pp 76–91; P De Pasquale “L’Unione Europea e le nuove forme di integrazione” (2017) 3 *Diritto Pubblico Comparato ed Europeo* 671–686.

³ L Azoulay. “‘Integration Through Law’ and us”, n 1, 449–463.

2. The EU Oversight Public Body for Public Procurement

The European Commission's original proposal for a new directive on public procurement,⁴ in the recent round of legislative reform, proposed a mandatory requirement for Member States, namely, the creation of a single oversight public body with specific functions. However, this proposal faced strong opposition during the legislative procedure that eventually resulted in the adoption of the 2014 Public Procurement Directive.⁵

This specific body was to have served as a contact point with the Commission and, amongst other functions, was to have been responsible for monitoring procurement activities; providing legal advice to economic operators and contracting authorities; and issuing its own guidance. Moreover, this entity was to have been empowered with legal standing to take proceedings before a competent body where a breach of the rules was detected (article 84(3), 2011 Proposal).⁶

This proposal reflects an old Commission wish to reshape the enforcement of and compliance with EU public procurement rules in order to achieve a more pro-active system, since the one currently in force mainly depends on the willingness of private players in the market to challenge unlawful procurement decisions.⁷ This approach would have followed the example of other areas of EU economic law, such as competition law, where the enforcement model comprises a decentralised model of parallel competences between the Commission, national competition authorities and national courts.⁸

However, both the Council and the Parliament argued, during the legislative negotiations, that this provision in article 84 of the 2011 Proposal was contrary to the principle of subsidiarity in article 5(3) TEU and would have created an undesirable

⁴ European Commission, "Proposal for a Directive of the European Parliament and of the Council on public procurement" COM(2011) 896 final, 20.12.2011.

⁵ Directive 2014/24/EU of the European Parliament and the Council of February 26, 2014 on public procurement and repealing Directive 2004/18/EC [2004] OJ L94/65.

⁶ For more detail and analysis of this point, see P Cerqueira Gomes, "A lost proposal in the 2014 Public Procurement Package: is there any life for the proposed public procurement oversight bodies?" in G Skovgaard Ølykke and A Sánchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing, 2016), pp 170–190.

⁷ Cerqueira Gomes, n 6, pp 170–180.

⁸ KJ Cseres, "Rule of Law Values in the Decentralized Public Enforcement of EU Competition Law" in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (OUP, 2017), pp 182–199; I Maher, "Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement" (2007) 31 *Fordham International Law Journal* 1720–1721.

administrative burden on Member States in the context of an economic and financial crisis.⁹ Thus the provision that was finally adopted, in article 83(2) of Directive 2014/24/EU, places on Member States only a general duty to monitor the application of the public procurement rules and an obligation to provide advice on the 2014 legislative package. The performance of these obligations can be assigned to one or more authorities or structures, rather than being entrusted to a single specialist oversight body, as had been the original aim of the Commission.

In my view, the non-approval of the Commission Proposal represents a step back in the EU public procurement system. Here I shall present two core arguments, where this step back can be seen more as a harmonisation failure than as a national victory for autonomy:

- (i) *A need for coherence in guidance/legal advice.* In this regard, the increasing complexity and programmatic content of new EU public procurement norms prove that there is a need for more and consistent guidance, in order to overcome certain administrative law traditions; without it, these programmatic provisions will be a *dead letter* for some Member States. The innovation partnership procedure is an example where integrated legal advice (Commission, Member States and contracting authorities) could increase the use of this procedure.
- (ii) *An effective duty of monitoring,* capable of both giving *effectiveness* to the EU remedy of ineffectiveness when infringements are based on violations of mandatory requirements to publish in the *Official Journal of the European Union* (OJEU) and correcting unlawful behaviours, by contracting authorities, where there is no element of intent in their contravening public procurement rules but merely difficulty in adapting new EU law provisions to national administrative law traditions.

⁹Note from the Presidency of the Council [9696/12], 11 May 2012, 9, at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209696%202012%20INIT>, accessed 15 January 2019. P Valcárcel Fernández and R Acevedo Fernández, “Órganos Consultivos y de Recursos para el Control de la Contratación Pública en España” in D Sorace (ed), *Amministrazione Pubblica dei Contratti* (Editoriale Scientifica, 2013) pp 316–317.

2.1 Why has the position changed? The role of a public procurement oversight body under the 2011 Proposal and Directive 2014/24/EU

It is true that article 83 of Directive 2014/24/EU still includes a general duty for Member States to monitor procurement activities. It also includes a minimal requirement to provide legal advice.¹⁰ However, the differences between the actual provisions of article 83 of the Directive and article 84 of the 2011 Commission Proposal are striking.

First, the mandatory requirement for a unique and independent body (article 84(1), 2011 Proposal) was withdrawn and Member States now have the discretion to assign this monitoring function to one or more entities at their discretion. This jeopardises the independence and specialisation and the monitoring function, and also the level of cooperation with the European Commission.

Second, almost all the specialised functions that this body was to have performed have been abandoned under article 84(3) of the 2011 Proposal.

As already mentioned, the principle of the institutional autonomy of Member States as a manifestation of the principle of subsidiarity, allied with the concern not to impose more of an administrative burden on Member States in the context of economic and financial crises, as argued by the Council and the Parliament, has led to the plans contained in the Commission's Proposal being transformed into what is merely a vague and unspecialised monitoring function. This is despite the clear constitutional competence of the EU to adopt substantive and remedial provisions on public procurement¹¹ (articles 53, 62 and 114 TFEU).¹² The decision to reject an independent authority in public procurement law was a political choice to allow Member States to monitor the compliance of the public procurement rules within their current national

¹⁰ As Arrowsmith points out, the general duty to monitor regulated under art 83(2) of Directive 2014/24/EU requires some effective structure to be set up. However, it seems doubtful that this general obligation is legally enforceable, given its lack of specificity: S Arrowsmith, *EU Procurement Law I*, Module Guide Book 4 (University of Nottingham, unpublished; 2016/17).

¹¹ On the topic of the EU competence to regulate procurement, see S Arrowsmith, "The Purpose of EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies" (2012) 14 *Cambridge Yearbook of European Legal Studies* 1–5; R Caranta, "The changes to the public contract directives and the story they tell about how EU law works" (2015) 52 *Common Market Law Review* 391–415.

¹² Cerqueira Gomes, n 6, 172–179. Protocol No 2 on the application of the principle of subsidiarity and proportionality provides a plausible justification for both the Council and the Parliament, during the legislative ordinary procedure, to kill a measure proposed by the Commission.

structures, for example through audit officers, court of auditors or departments of existing regulatory entities.

This final decision of the European legislator will affect the degree of independence and specialisation of the entity pursuing the duty of monitoring, both of which are crucial characteristics of any effective monitoring system and independent effective legal advice. Recitals 49 and 50 of the 2011 Proposal clearly stated the need for a single, specialised and independent authority for the more consistent and systematic implementation and functioning of public procurement, in order to establish a level playing field for all market players, avoid legal uncertainty, correct structural deficiencies and increase cross-border trade, but this vision has not been realised. It seems the European and national actors taking part in the legislative procedure for the approval of the new Directive not only did not rely on the Commission's opinion, but also failed to put forward other solutions for this core issue of the EU harmonisation process in the field of public procurement.

The Commission Report on the effectiveness of the Remedies Directives,¹³ although it may not seem to resurrect this debate, ends, in point 5(V) ('Consistent enforcement activities and monitoring'):

[T]he Commission will take appropriate measures to bring relevant national practices into line with EU rules. In that context, the Commission will focus on the most significant and systematic breaches that undermine the effective functioning of the remedies systems in Member States.

It is submitted that this reflects the fact that there is still a need to (re)think the monitoring function and the provision of legal advice on procurement at a national level. The recent statement of the Commission on the Single Market Strategy reinforces that view when affirming that further improvements to EU public procurement law are not to be made in the area of legal reform (with the exception of the remedies rules) but through the development of a culture of legal compliance, which requires training, monitoring, exchange of information and professionalization.¹⁴

¹³ Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement, COM (2017) 28 final Brussels, 24.1.2017.

¹⁴ Upgrading the Single Market more opportunities for people and business, 28.10.2015 COM (2015) 550 final, 13; G Skovgaard Ølykke and A Sánchez-Graells, "Introduction" in G Skovgaard Ølykke and A Sánchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing, 2016) pp 8–9; European Semester: Thematic Factsheet: Public procurement

2.2 Can the dream of EU public oversight bodies across Member States still live? The principle of institutional autonomy in the EU public procurement world and national organisational changes

In the absence of EU law provisions, the enforcement of EU law at the national level is governed by the institutional and procedural rules of Member States. However, according to the case law of the Court of Justice of the European Union (CJEU),¹⁵ the principle of the procedural and institutional autonomy of Member States must respect both the principle of equivalence (prohibition on treating EU rights less favourably when compared to national rights in similar situations) and the principle of effectiveness (that is, it must not be impossible or extremely onerous in practice to exercise an EU right).¹⁶

It is worth noting that regarding public procurement, the principle of procedural autonomy is reduced to a minimal standard¹⁷ in view of the in-depth regulation provided by the Remedies Directives based on article 114 TFEU.¹⁸ These rules aim to create a preventative regime to resolve public procurement disputes by the use of the standstill period and automatic suspension requirements.¹⁹ Moreover, the issues of

14.11.2016, COM (2016), 4.1, available at https://ec.europa.eu/info/sites/info/files/european-semester-thematic-factsheet-public-procurement_en.pdf.

¹⁵ Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5.

¹⁶ M Bobek, “Why There is No Principle of ‘Procedural Autonomy’ of the Member States” in B de Witte and H Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia, 2011) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614922&download=yes.

¹⁷ C Harlow, “At Risk: National Administrative Procedure within the European Union” (2015) 7 *Italian Journal of Public Law* 60–61.

¹⁸ Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395 (hereinafter Directive 89/665); Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L76; Directive 2007/66/EC 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 of 11 of December 2007, OJ L335/31 (hereinafter Directive 2007/66/EC). See D Galleta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer, 2010).

¹⁹ Article 2(3), (4) and (5) and art 2a of Directive 2007/66/EC.

causation,²⁰ ineffectiveness²¹ and damages²² are also regulated under the Remedies Directives, in order to ensure effective and timely review for aggrieved suppliers.

On the other hand, the principle of institutional autonomy does not suffer any direct restriction under the EU procurement remedies system. In fact, notwithstanding the preferences of some of authors²³ for an independent administrative body as a first instance review body, the Remedies Directive, even as it was later amended by Directive 2007/66/EC, which substantially reformed the system, does not force this type of review body on Member States, leaving the choice between a judicial or administrative review body to the space of sovereignty and autonomy of national parliaments/governments.²⁴ Reinforcing this position, the Commission Report on the effectiveness of the Remedies Directives²⁵ states that the Commission will merely encourage (not impose) first instance administrative review bodies rather than courts, as already announced in the Single Market Strategy aiming at cooperation, information exchange, the efficient functioning of national review bodies and the creation of a first instance review bodies' network.

However, in the field of public procurement the CJEU has already indirectly limited the institutional autonomy of Member States, as seen in Case C-444/06 *Commission v Spain*.²⁶ In this specific case, the necessity to adapt the Spanish system to the demands of the Remedies Directives in terms of timely and specialised review of public procurement challenges, coupled with a finding of infringement by the CJEU for

²⁰ On the issue of causation and the concept of “real chance”, see R Caranta, “Damages for Breaches of EU Public Procurement Law: Issues of Causation and Recoverable Losses” in D Fairgrieve and F Lichère (eds), *Public Procurement Law—Damages as an Effective Remedy* (Hart Publishing, 2011).

²¹ For a general and integrative perspective on the EU remedy of ineffectiveness, see J Golding and P Henty “The New Remedies Directive of the EC Standstill and Ineffectiveness” (2008) 17 PPLR 146; M Clifton, “Ineffectiveness—the new deterrent: will the new Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors?” (2009) 18 PPLR 165; R Caranta, “Many Different Paths, But Are They All Leading to Effectiveness?” in S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJØF Publishing, 2011) p 53; K Struckman and P Hodal, “Private Enforcement of Contract Ineffectiveness: A Practitioner’s Point of View” (2014) 1 *European Public-Private Partnerships Law Review* 27.

²² On the topic of damages, see H Schebesta, *Damages in EU Public Procurement Law* (Springer, 2015); and S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011).

²³ Highlighting the advantages of administrative review bodies, see Caranta, n 21.

²⁴ Art 2(9) of Directive 2007/66/EC. On the requirements for an Independent Administrative Review Body in this context, see MP Chitti, *Diritto Administrativo Europeo*, 4th edn (Giuffrè Editore, 2011) pp 163–164.

²⁵ European Commission, Report, n 13, Point 5 (III).

²⁶ Muñoz Machado recognised the possibility for the CJEU to limit indirectly the institutional autonomy of Member States: M Machado, *Tratado de Derecho Administrativo y Derecho Publico General III. La organización Territorial del Estado. Las Administraciones Públicas* (Iustel, 2009) p 616.

violations of the standstill period, ultimately indirectly forced an institutional change in the Spanish remedies system in public procurement.²⁷ The Spanish legislature created a new review forum in the form of independent administrative bodies, because it considered that the administrative courts could not meet the demands of the EU. This is an interesting example of indirect promotion of structural changes in Member States.

28

In addition, legal costs, an area considered by some legal writing²⁹ as a classic area of procedural and institutional autonomy (subsidiarity) that even the principle of effectiveness could not reach, were recently subject to evaluation by the CJEU in *Orizzonte Salute*,³⁰ which subjected legal costs to the ultimate scrutiny of the Court of Justice, although indicating that in the type of case before it the level of costs did not violate EU law. Thus it can be seen that the CJEU has already proved in the field of public procurement that the institutional autonomy of Member States is no longer a sacred cow. It can thus be argued that the principle of effectiveness may indirectly force Member States to make institutional changes to ensure the effectiveness of the monitoring and legal advice functions that are required by article 83 of Directive 2014/24/EU.

3. The Need for Legal Advice as a Tool to Increase the Effectiveness of the EU Harmonisation Process When Dealing with Core National Administrative Law Traditions

Two of the primary objectives of the revision of the EU public procurement legislative package were simplification of the procedures and rendering them more flexible.³¹ However, in practice the new Procurement Directives of 2014 resulted in an even more complex regime than before, undermining compliance with the EU rules at the national

²⁷ J Giméno Feliú, *Reformas Legales de la ley 30/2007, de Contratos del Sector Público: Alcance y Efectos Prácticos* (Civitas, 2011) pp 47–108; Case 444/06 *Commission v Spain*, EU:C:2008:190.

²⁸ Cerqueira Gomes, n 3, p 189.

²⁹ D Pachnou, “The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece”, PhD Thesis, University of Nottingham, 2003, p 78.

³⁰ Case 61/14 *Orizzonte Salute*, EU:C:2015:665, para 69. See also Case C-495/14 *Tita and Others*, EU:C:2016:2030.

³¹ S Treumer, “Evolution of the EU Public Procurement Regime: The New Public Procurement Directive” in F Lichère, R Caranta, S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djøf Publishing, 2014), pp 9–17.

level.³² A clear indication of that complexity is the strategic and programmatic content of some recitals and provisions, which aim, among others objectives, to increase the use of innovative procurement. Innovation procurement represents a crucial strategy of the EU for the field of public procurement, as I have demonstrated. The innovation partnership procedure is a new procurement procedure with unique features,³³ created by the European legislator with the 2014 Directives, specifically designed for procuring innovative goods, services or works not yet available in the market (article 31 and recital 49, Directive 2014/24/EU). This new procedure, as I have previously explained, is consistent with the new European strategy for a more innovative EU economy.³⁴ Furthermore, in the eyes of the European legislator, the innovation partnership procedure aims to tackle certain failures of the procedures available under the repealed 2004/18/EC Directive, which were not suitable for conducting public procurement of innovation, namely regarding the procedural flexibility and discretion given to the contracting authorities to interact with economic operators when developing and implementing innovation. The contractual object of this new procedure, that is the research, development and possible implementation of an innovative good, service or work, demanded additional procedural flexibility and mandatory negotiations, as already explained (article 31(6), Directive 2014/24/EU).

Despite all the possible virtues of this new procedure, the EU legislator seemed to have overlooked the national administrative law traditions of some Member States, particularly the structural disadvantage and institutional traditions of contracting authorities operating mostly in those Member States on the periphery, and the legal culture of those public agents with a strong aversion to risk (discretion) when conducting this procedure.

The fact that different countries have different administrative law traditions may create extra difficulties in the application of flexible award procedures, in particular in view of the lack of capacity of the public agents to deal with this type of procedural flexibility. The data provided in chapter 1, concerning the use of special procedures, and in chapter 2, regarding the use of the innovation partnership procedure, are proof that the EU harmonisation process is benefitting certain Member States over others.

³² S Arrowsmith, “Special Issue—The New EU Procurement Directives: Part I: Editor’s Note” (2014) 23 *Public Procurement Law Review* 81. Treumer, n 31, p 11. P Cerqueira Gomes, “EU Public Procurement Oversight Bodies—the way forward” (2017) 6 *Public Procurement Law Review*, 249-253.

³³ See ch 2.

³⁴ Caranta, n 11, pp 406–407.

Moreover, the transposition of article 31 of Directive 2014/24/EU by many EU countries has simply involved copying the text of the Directive without additional detailed transposition.³⁵ This approach follows the European Commission's recommendation for Member States to avoid gold-plating. However, article 31 of Directive 2014/24/EU lacks the regulatory detail to be accurately understood by national actors. The lack of further guidance regarding the innovation partnership procedure will only generate legal uncertainty, risk aversion and lack of knowledge of how to couple this procedure with the administrative culture of some Member States.³⁶

To overcome these issues, a model of single specialised oversight bodies, as envisaged in the Commission proposal, empowered with strong competences to give legal advice to contracting authorities and economic operators and in the dependence of the Commission, would be more effective than the minimal legal requirement in article 83 of Directive 2014/24/EU. Trusting national regulatory authorities to harmonise administrative law traditions and ensure a level playing field among national public administrations is not enough. Without specialised oversight bodies, the consistency principle (article 7 TFEU) that justifies the EU legal basis for stimulating innovative procurement will be converted into a legitimating principle of legislative discrimination, favouring only some national public administrations.

Other examples could also be given, regarding the need for more consistent interplay between the EU public procurement regime and general administrative law, on topics such as modification of contracts, horizontal procurement, exclusion of tenders and even the legality principle³⁷, but they are not part of this work. Only by ensuring such consistency can Member States make the required changes to their national legal traditions, and also allow a new rhetoric of co-responsibility between Commission, Member States and citizens to emerge, decreasing the levels of ineffectiveness of the law and legal uncertainty.

³⁵ As examples, French Procurement Code—arts 93–95; Italian law—art 65.^o of the new Codice dei Contratti Pubblici; Danish law—Public Procurement Act, ss 73–79.

³⁶ It is also worth noting that for the opposite reasons, the UK tradition towards administrative discretion, leaving the operation of the procedures merely up to the contracting authority officials and not regulations, encountered some difficulties in complying with the EU law requirements according to S Arrowsmith n 33, 227; Cerqueira Gomes, n 32, pp 252–255.

³⁷ On this topic, see A Sánchez-Graells, “‘If it ain’t broke, don’t fix it?’ EU requirements of administrative oversight and judicial protection for public contracts” in S Torricelli and F Lalliot (eds), *Administrative Oversight and Judicial Protection for Public Contracts* (Laciar, 2017), pp 3–7.

4. The Duty of Monitoring in Public Procurement

Notwithstanding the presence of a duty of monitoring in the 2014 Directive, this duty should also have (cross-)applicability in the Remedies Directive. This is justified because of the specific nature of the duty of monitoring in article 83(2) of the 2014 Directive.

In the words of K Herzmann,³⁸ monitoring may be defined as “a regular observation of a certain activity and the subsequent evaluation of concrete situations/behaviour of complex systems, by a public authority”. Transposing Herzmann’s definition to the monitoring function of the EU public procurement market, this will demand a two-phase approach:

- (i) First, a *static moment* of observation of all the procurement activity, on the initiative of the entity responsible for this function or upon the receipt of information of specific violations or systemic problems, regarding potential unlawful behaviour, legal uncertainty, structural problems and also levels of participation of SMEs.³⁹
- (ii) Second, a *dynamic moment* of evaluation of the results detected in the first moment. On this point the Directive is unclear. For instance, it is not possible to give a definitive answer to the question whether the entity responsible for monitoring should be empowered with legal standing, since the wording of the Directive does not state it in express terms,⁴⁰ as opposed to the Commission Proposal for a new Directive.⁴¹

This monitoring activity will be beneficial for both contracting authorities and potential aggrieved suppliers. As a result it will not only increase compliance with the public procurement rules, but also help aggrieved suppliers detect violations of their subjective rights, which is the main aim of the Remedies Directive. Furthermore, it will also

³⁸ K Herzmann, “Monitoring als Verwaltungsaufgabe” [2007] *Deutsches Verwaltungsblatt* (DVBl) vol 122 11 670, 674.

³⁹ This was taken from art 83(3) of the 2014 Directive.

⁴⁰ Art 83(2) of the 2014 Directive provides “monitoring authorities or structures ... shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof”.

⁴¹ Art 84(3) of the 2011 Proposal states “Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities’ decisions where it has detected a violation in the course of its monitoring and legal advising activity”.

contribute to the openness of public procurement markets in the EU, through a reduction of discriminatory behaviour and trade barriers (one of main goals of the substantive Directives).⁴²

I shall start by analysing the connections between the duty of monitoring and the EU remedy of ineffectiveness. The introduction of the sanction for ineffectiveness⁴³ was one of the major innovations brought about by Directive 2007/66/EC⁴⁴ to tackle illegal direct awards.⁴⁵ Ineffectiveness is seen by the European legislator as the best way to restore competition and create new business opportunities for those who have been illegally deprived of the opportunity to compete.⁴⁶ The effects of a declaration of ineffectiveness create a stronger willingness for economic operators to challenge the decisions of contracting authorities, because the prospect of a genuine opportunity to re-tender and win the contract is much more attractive than damages claims.⁴⁷ In addition, it has a corrective effect on the behaviour of contracting authorities.

Concerning the type of illegal direct awards that are governed by this sanction, provided for by article 2d(1)(a) of Directive 2007/66/EC, it is not possible to rely on the market in the form of economic operators for detection, even though the Remedies Directive allows for the possibility of legally challenging such awards.⁴⁸ The main reason for that is the fact that the primary mechanism used by the EU to help suppliers monitor compliance with the rules—transparency—is itself being contravened. The principle of transparency plays a strategic role in the openness of EU public procurement markets and in creating the Internal Market.⁴⁹ It ensures the possibility of monitoring compliance with the non-discrimination obligations⁵⁰ and of deterring corrupt practices, discriminatory practices and corruption constituting the two main reasons why contracting authorities engage in illegal direct awards, as the Commission

⁴² S Arrowsmith, “The purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies” (2011/2012) 14 *Cambridge Yearbook of European Legal Studies* 1. For a complementary and integrative perspective on the aims of the substantive Directives, see A Sánchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart Publishing, 2015).

⁴³ See n 21.

⁴⁴ Directive 2007/66/EC of 11 of December 2007, [2007] OJ L335/31.

⁴⁵ *ibid*, recital 13.

⁴⁶ *ibid*, recital 14.

⁴⁷ Struckman and Hodal, n 21, pp 28–29.

⁴⁸ P Trepte, *Public Procurement in the EU—A Practitioner’s Guide*, 2nd edn (OUP, 2007); C Bovis, “Legal Redress in Public Procurement Contracts” in M Trybus, R Caranta and G Edelstam (eds), *EU Public Contract Law—Public Procurement and Beyond* (Bruylant, 2014), pp 377–378.

⁴⁹ S Arrowsmith, “The EC Procurement Directives, national procurement policies and better governance: the case for a new approach” (2002) 3 *European Law Review* 3–4.

⁵⁰ *ibid*, pp 8–9.

has pointed out.⁵¹ However, situations such as unlawful amendments to existing contracts, illegal in-house awards, use of the negotiated procedure without prior publication without lawful grounds or simply a disregard for the rules on advertising, are almost impossible to detect, since the main means used for verifying compliance with the rules, transparency, is being completely disregarded.

Therefore, it is almost paradoxical to rely on this principle of transparency as a main means for suppliers to detect illegal direct awards. It is submitted that it is therefore necessary to develop a more proactive system of verification and enforcement to deter such awards. In this regard, the creation of an independent body, at national level, with powers of supervision and enforcement, helping to identify breaches of transparency and positive acts of discriminatory/restrictive behaviour, can contribute significantly to a more effective application of the EU public procurement rules.⁵²

In addition to this, the duty of monitoring can have a positive effect in helping national administrative law traditions to better accommodate new EU legal requirements. This duty could help contracting authorities interpret the legal framework provided by the EU and also be capable of imposing fines on contracting authorities, aiming to correct and change behaviours. Here, the monitoring function can also have a positive impact in correcting administrative unlawful behaviours, where the element of “intent” is mostly justified by national legal traditions and not by a clear “intent” to contravene EU rules, for example when contracting authorities abuse the discretion given by the European legislator without realising it violates EU law principles and provisions.

It is submitted that a duty of monitoring within an effective entity, as set out above, can be regarded as an extrinsic important component of the EU remedy of ineffectiveness to promote effectiveness of the public procurement rules, mainly when the ground of ineffectiveness is that of article 2d(1)(a) of Directive 2007/66/EC regarding illegal direct awards. Furthermore, it can help to correct behaviours brought about by EU law failures to penetrate into national administrative law traditions.

Certainly any monitoring function must pay special attention to the detection of illegal direct awards, given that they are considered by the CJEU to constitute the most

⁵¹ European Commission, *Impact Assessment Report—Remedies in the field of public procurement*, 4 May 2006, SEC (2006) 557, point 4.1.

⁵² Arrowsmith argues for the same solution, but combined with a simplification of the rules and “attestation”: S Arrowsmith, “The EC Procurement Directives, national procurement policies and better governance: the case for a new approach” (2002) 27 *European Law Review* 19–20.

serious breach of EU public procurement rules.⁵³ Moreover, a true monitoring function could also help to correct other unlawful behaviours by contracting authorities, where there is no direct element of “intent” to violate the rules but simply interpretative and adaptation difficulties concerning compliance with EU public procurement law and the Member States own national administrative law traditions.

That said, when the structure given responsibility by national law for the monitoring function fails to pursue investigations, upon information given or complaints made by suppliers, or to detect unlawful behaviour on its own initiative, it is questionable whether the principle of effectiveness can correct this structural deficiency, since non-legal factors that have the capacity to make it impossible or extremely onerous to exercise an EU right are inherent limits on the principle of effectiveness.

Nevertheless, in the *VEBIC* case,⁵⁴ the creationist element of the principle of effectiveness made it possible to empower existing competition authorities with legal standing.⁵⁵ There seems to be no reason why the same reasoning could not be applied to require Member States to create or empower their current administrative structures likewise in the field of public procurement, if those structures are not capable of receiving tenderers’ complaints and pursuing them in court.⁵⁶

5. Partial Conclusions

The creation of an independent review system in Member States has long been the wish of the Commission in order to increase the level of compliance with the EU public procurement framework. Following developments in EU law, the principle of institutional autonomy that has been put forward against such an approach is now, however, in the field of public procurement, merely a political argument, which should be urgently revisited by the EU institutions in this field.

The EU harmonisation process in the field of public procurement not only needs to increase the levels of compliance with EU provisions, but also to ensure that the rules derived from the European legislator are benefiting all Member States on equal terms. Therefore, I have put forward arguments advocating the revision of the current

⁵³ Case C-26/03, *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energieverwertungsanlage TREA Leuna*, paras 36, 37 and 39.

⁵⁴ Case C-439/08 *VEBIC*, EU: C:2010:739.

⁵⁵ M Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014) pp 128–130.

⁵⁶ Cerqueira Gomes, n 6, pp 170-180.

approach to institutional autonomy of the Member States in public procurement, by favouring a stronger independent specialised oversight structure in the dependence with the European Commission, to overcome with effective legal advice the difficulties EU public procurement law has experienced in penetrating national administrative law traditions. This approach will help national actors to better understand and use the procurement rules, which are complex and increasingly programmatic, such as the innovative partnership procedure. More consistency and the clearer guidance that specialised oversight can provide could help contracting authorities to overcome the legal uncertainty and difficulties posed by national administrative law traditions. In addition, it is also necessary to create national administrative law structures with the capacity to monitor the application of EU rules, which could help detect illegal direct awards capable of triggering the EU remedy of effectiveness, since the market is not capable of monitoring compliance with the rules or to effect changes in national administrative law traditions.

Conclusion

It is undeniable that, since 2000, innovation had been a European policy star. However, it is also true that the cascade of crises that had recently affected the European project sped up the process of transforming innovation into a holistic EU policy with a strong normative impact in several areas of EU competence. Both the policy instruments and the European legislator gave expression to the belief that public procurement could play a role as a demand-side measure to promote levels of innovation within the EU, due to the impact of public procurement on the European GDP.

The new generation of directives (my focus has been on Directive 2014/24/EU) has tried to avoid the typical hindrances, previously identified in the procurement system, to promoting innovation. One of the most important examples has been the creation of the new tailor-made procurement procedure—the innovation partnership (article 31, Directive 2014/24/EU), which is one of the main actors in procuring innovation. However, in order to know whether the innovation partnership procedure will constitute a procedural upgrade for all Member States, it is crucial to conduct a two-prong analysis.

First, by analysing the rulings of the CJEU, the new Directive 2014/24/EU and other EU soft-law instruments, I have concluded that the EU public procurement system is evolving into a more strategic one in which innovation plays a central role. Nonetheless, despite the advantages presented by the promotion of innovation, it will not benefit all Member States equally. It is true that at national level public procurement has been undergoing the progressive process of Europeanisation, which has imposed restrictions on the typical fields of institutional and procedural autonomy of the Member States. However, this progressive Europeanisation is posing several problems. As an example, the numbers of special procedures used by actors at the centre of Europe are much greater than the numbers used by actors on the periphery. This reflects the inability of the method of harmonising national laws to guarantee the same level of effectiveness in the implementation of EU law, where structural differences arise, which cannot be explained by law alone. It is clear that the process of harmonising national laws faces considerable difficulties when it clashes with administrative law traditions. With this in mind, I have advanced examples of possible clashes between

national administrative law traditions and the process of Europeanisation in the field of public procurement, and their consequences. I have concluded that when the level of discretion left to the national actors increases, so do the difficulties encountered in lawfully applying EU law. This premise has allowed me to conclude that, regarding the use of complex procedures with more room for discretion and flexibility, such as the innovation partnership, it is not possible to guarantee effective harmonisation through law alone, since the institutional background will play a crucial role. Consequently, I have explained that, with its increased procedural discretion and flexibility, which do not depend on harmonisation of national laws, the innovation partnership procedure is one of the most suitable procedures for conducting innovative public purchases.

I have stressed three main reasons that distinguish the innovation partnership from other procurement procedures covered by Directive 2014/24/EU: procedural reasons; grounds of use; flexibility and discretion. The development of the innovative good, service or work takes place not in the award phase but within the contract execution phase. In addition, there are specific and complex grounds of use that demand a legal definition of “innovation”. Finally, the wider levels of discretion and flexibility during the innovation partnership, which hopefully will create a friendlier environment for the development of innovation, though risking legal uncertainty, will enable some Member States to use the innovation partnership in a way that suits them best.

In addition, several issues have been pointed out as problematic and as requiring further guidance, namely the selection of economic operators and the applicability of the regime of contractual modifications (article 72, Directive 2014/24/EU). Other issues were also briefly mentioned, which are potentially challenging but which, due to the constraints of my research, were not able to be covered in depth, such as the connections with State aid law and the ownership of intellectual property rights.

In conclusion, I have advocated the need for more protective models of oversight and legal advice at the EU level, to overcome the difficulties EU public procurement law has experienced in penetrating national administrative law traditions. In that sense, it is crucial for contracting authorities to have access to more legal certainty in interpreting the complex and increasingly programmatic procurement rules. This will allow the structural disadvantages of some European States, regarding the use of special procedures, to decrease, and consequently allow the innovation partnership to be a reality in all Member States. Only with this model we can see more compliant Member

States, and generally a fairer, more equal and consequently more prosperous Europe for all.

References

BOOKS

- Alonso de León, S, *Composite administrative in the European Union* (Lustel, 2017).
- Apostol, AR, *Trials and Tribulations in the Implementation of Pre-Commercial Procurement in Europe* (Springer, 2017).
- Arrowsmith, S and Kunzlik, P (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge University Press, 2009).
- Arrowsmith, S and Treumer, S (eds), *Competitive Dialogue in EU Procurement* (Cambridge University Press, 2012).
- Arrowsmith, S, *Government Procurement in the WTO* (Kluwer Law International, 2003).
- Arrowsmith, S, *Remedies for Enforcing the Public Procurement Rules* (Winteringham Earls Gate Press, 1993).
- Arrowsmith, S, *The Law of Public and Utilities Procurement* vol. 2 (2nd edn Sweet & Maxwell, 2018).
- Arrowsmith, S, *The Law of Public and Utilities Procurement*, vol I (3rd edn, Sweet & Maxwell, 2014).
- Arrowsmith, S; Linarelli, J and Wallace, D, *Regulating Public Procurement: National and International Perspectives* (The Hague Kluwer Law International, 2000).
- Assis Raimundo, M, *A Formação dos Contratos Públicos – uma concorrência ajustada ao interesse público* (AAFDL, 2013).
- Auby, JB, *Globalisation, Law and the State* (Hart Publishing, 2017).
- Bovis, C, *EU Public Procurement Law*, 2nd edn (Edward Elgar, 2012).
- Braconnier, S, *Précis du droit de la commande publique* (Editions Le Moniteur, 2017).
- Butler, L, *Transatlantic Defence Procurement—EU and US Defence Procurement Regulation in the Transatlantic Defence Market* (Cambridge University Press, 2017).
- Canaris, CW, *Die Festsetzung von Lücken im Gesetz*, 2nd edn (Dunckner & Humboldt, 1983).
- Cane, P, and Kritzer, H, (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010).
- Caranta, R and Trybus, M (eds), *The Law of Green and Social Procurement in Europe* (Djøf Publishing, 2010).
- Caranta, R, *I Contratti Pubblici* (G Giappichelli Editore Torino, 2012).
- Caringella, F and Protto, M, *Il Codice Dei Contratti Pubblici Dopo Il Correttivo* (Dike Giuridica Editrice, 2017).

- Cassese, S, (ed), *Research Handbook on Global Administrative Law* (Edward Elgar, 2016).
- Cassese, S, *La Spazio Giuridico Globale* (Laterza, 2003).
- Chalmers, D, Jachtenfuchs, M and Joerges, C (eds), *The End of the Eurocrats Dream* (Cambridge University Press, 2016).
- Chapus, R, *Droit Administratif Général*, Vol 1 (12rd edn Montchrestien, 1985).
- Chieppa, R and Lopilato, V, *Studi di Diritto Amministrativo* (Giuffrè Editore, 2007).
- Chitti, MP, *Diritto Amministrativo Europeo*, 4th edn (Giuffrè Editore, 2011).
- Chitti, MP, *Diritto amministrativo Europeo* (Giuffrè, 2008).
- Cloots, E, *National Identity in EU Law* (Oxford University Press, 2015).
- Conway, G, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012), 114.
- Cooter, RB Jr and Ullen, T, *Law and economics* (Pearson, 2014).
- Corvaglia, MA, *Public Procurement and Labour Rights* (Hart Publishing, 2017).
- Costa Gonçalves, P, *Direito dos Contratos Públicos* vol I (3rd edn, Almedina, 2018).
- Cownie, F, *Legal Academics* (Hart Publisher, 2004).
- Craig, P *The Lisbon Treaty—Law, Politics, and Treaty* (Oxford University Press, 2010).
- Craig, P; Hofmann; H, Schneider, JP; and Ziller, J et al, *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press, 2017).
- De La Rosa, S, *Droit Européen de la comande Publique* (Bruylant, 2017).
- Díez Sastre, S, *La Tutela de los Licitadores en la Adjudicación de Contratos Públicos* (Marcial Pons, 2012).
- Fabbrini, F (ed), *The Law & Politics of Brexit* (Oxford University Press, 2017).
- Fernández Martín, JM *The EC Public Procurement Rules: A critical Analyses* (Oxford University Press, 1996).
- Flogaitis, S, *The Evolution of Law and the State in Europe – Seven Lessons* (Hart Publishing, 2017).
- Frosini, JO, *Constitutional Preambles: At a Crossroads between Politics and Law* (Santarcangelo di Romagna: Maggioli, 2012).
- Galleta, D, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer, 2010).
- García Jiménez, A, *Las Conexiones entre Contratación administrative e innovación* (Editorial Tecnos, 2018).
- Giméno Feliú, J, *Reformas Legales de la ley 30/2007, de Contratos del Sector Público: Alcance y Efectos Prácticos* (Civitas, 2011).
- Granieri, M and Renda, A, *Innovation Law and Policy in the European Union—Towards Horizon 2020* (Springer, 2012).
- Grimm, D, *The Constitution of European Democracy* (Oxford University Press, 2017).

- Habermas, J, *Between Facts and Norms—Contributions to a Discourse Theory of Law and Democracy* (MIT Press Editions, 1996), 194.
- Hansen, CR, *Contracts not Covered or not Fully Covered by the Public Sector Directive* (Djøf Publishing, 2012).
- Herrera Anchustegui, I, *Market Buyer Power in EU Competition Law* (Concurrences, 2017).
- J Mulgan, *The Art of Public Strategy—Mobilizing Power and Knowledge for the Common Good* (Oxford University Press, 2009).
- Jakab, A and Kochenov, D (eds), *Enforcement of EU Law and Values* (Oxford University Press, 2016).
- Janssen, WA, *EU Public Procurement Law and Self-organisation—A Nexus of Tensions and Reconciliations* (Eleven International Publishing, 2018).
- Jones, A and Surfin, B, *EU Competition Law: Text, Cases, and Materials*, 6th edn (Oxford University Press, 2016).
- Kau, M, *Rechtsharmonisierung -Untersuchung zur europäischen Finalität dargestellt am Beispiel des Grenzkontroll-, Ausländer- und Asylrechts* (Mohr Siebeck, 2016).
- Kaupa, C, *The Pluralist Character of the European Economic Constitution* (Hart Publishing, 2016).
- Klamert, M, *The Principle of Loyalty* (Oxford University Press, 2014).
- Krönke, C, *Governmental Paternalism* (Nomos, 2017).
- Lasser, M, *Judicial Deliberations. A comparative study of Judicial Transparency and Legitimacy* (Oxford University Press, 2009).
- Leyden, DP and Link, AN, *Public Sector Entrepreneurship* (Oxford University Press, 2015).
- Lopes Martins, L, *Empreitada de obras públicas – o modelo normative do Regime do Contrato Administrativo e do Contrato Público (Em especial, o equilibrio economico-financeiro)* (Almedina, 2014).
- Machado, M, *Tratado de Derecho Administrativo y Derecho Publico General III. La organización Territorial del Estado. Las Administraciones Públicas* (Iustel, 2009).
- Maletic, I, *The Law and Policy of Harmonisation in Europe`s Internal Market* (Edward Elgar, 2013).
- Mantini, P, *Nel Cantiere Dei Nouvi Appalti Pubblici—simplificcazione, efficienza, concorrenza, anticorrezza* (Giuffrè Editore, 2015).
- Marelli, E and Signorelli, M, *Europe and the Europe—Integration, Crisis and Policies* (Palgrave Macmillian, 2017).
- Maurer, H, Hartmut, *Allgemeines Verwaltungsrecht*, 17th edn (CH Beck, 2009).
- McCruden, C, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press, 2007).

- Mendoza Jimenez, J, *The Committee of the Regions: a springboard for the citizens in Europe: Exploring the ways for bigger influence from the citizens in the EU decision-making process* (Lambert Academic Publishing, 2014).
- Molinier, J, (ed), *Les principes fondateurs de l'Union européenne* (Presses Universitaires de France, 2005).
- Moreno Molina, JA, *Derecho global de la contratación pública* (Ubijis Editorial México, 2011).
- Morlino, E, *Procurement by International Organizations – A Global Administrative law Perspective* (Cambridge University Press, 2019).
- Napolitano, G *La Logica del diritto amministrativo* (Il Mulino, 2014).
- Oberg, J, *Limits to EU Powers—A Case Study of EU Regulatory Criminal Law* (Hart Publishing, 2017).
- OECD, *Foster Innovation to Address Social Challenges*, Workshop Proceedings (2011).
- OECD, *Fostering Innovation in the Public Sector* (OECD Publishing, 2017).
- Oliveira Pais, S, *Entre a Inovação e a concorrência – em defesa de um modelo europeu* (Universidade Católica, 2011).
- Osborne, SP and Brown, KA, *Managing change and innovation in public service organizations* (Routledge, 2005).
- Perfetti, R, *Codice Dei Contratti Pubblici Commentato* (Wolters Kluwer, 2017).
- Pez, T, *Le Risque Dans Les Contrats Administratifs* (L.G.D.J. Éditions, 2013).
- Pila, J and Torremans, P, *European Intellectual Property Law* (Oxford University Press, 2015).
- Poaires Maduro, M, *We the Court: The European Court of Justice and the European Economic Constitution: a critical reading of article 30 of the EC Treaty* (Hart Publishing, 1998).
- Poulsen, ST; Jakobsen, PS and Kalmose-Hjelmborg, SE, *EU Public Procurement Law*, 2nd edn (Djof Publishing, 2014).
- Ramalho, A, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer, 2016).
- Richer, L and Lichère, F, *Droit des Contrats Administratifs*, 10th edn (L.G.D.J. Éditions, 2016).
- Richer, L, *L'Europe des marchés publics* (L.G.D.J., 2009).
- Rogers, EM, *Diffusion of Innovations*, 5th edn (The Free Press, 2003).
- Rosenfeld, M, *The Identity of the Constitutional Subject* (Routledge, 2010).
- Sánchez Graells, A, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart Publishing, 2015).
- Sauter, W, *Competition Law and Industrial Policy in the EU* (Oxford University Press, 1997).
- Schebesta, H, *Damages in EU Public Procurement Law* (Springer, 2016).

- Schumpeter, J, *Capitalism, Socialism and Democracy*, 3rd edn (George Allen & Unwin, 1942).
- Schumpeter, J, *The Theory of Economic Development* (Transaction Publishers, 1912).
- Schumpeter, J, *The theory of economic development: an inquiry into profits, capital, credit, interest and the business cycle* (Harvard College, 1934).
- Schütze, R, *European Constitutional Law* (Cambridge University Press, 2012).
- Semple, A, *A Practical Guide to Public Procurement* (Oxford University Press, 2015).
- Shuibhne, NN, *The Coherence of EU Free Movement Law—Constitutional Responsibility and the Court* (Oxford University Press, 2013).
- Siegel, T, *Europeización del Derecho Público—marco de condiciones y puntos de interacción entre el Derecho Europeo y el Derecho administrativo nacional* (Marcial Pons, 2016).
- Siems, M, *Comparative Law* (Cambridge University Press, 2014).
- Sjåfjell, B and Wiesbrock, A (eds), *Sustainable Public Procurement under EU Law* (Cambridge University Press, 2016).
- Somek, A, *The Legal Relation – Legal Theory after Legal Positivism* (Cambridge University Press, 2017).
- Somma, A, *Temi e Problemi di Diritto Comparato*, vol IV (G Giappichelli Editore-Torino, 2003).
- Sousa e Silva, N, *The Ownership Problems of Overlaps in European Intellectual Property* (Nomos, 2014).
- Tavares da Silva, S, *Direito Administrativo Europeu* (Coimbra University Press, 2010).
- Touri, K, *European Constitutionalism* (Cambridge University Press, 2015).
- Trepte, P, *EU Public Procurement in the EU—A Practitioner’s Guide*, 2nd edn (Oxford University Press, 2007).
- Trepte, P, *Regulation Procurement* (Oxford University Press, 2004).
- Treumer, S and Lichère, F, (eds), *Enforcement of the EU Public Procurement Rules* (Djøf Publishing, 2011).
- Tsoukalis, L, *In Defence of Europe—Can the European Project be Saved* (Oxford University Press, 2016).
- Voermans, W, Stremmer, M and Cliteur, P, *Constitutional Preambles—A Comparative Analysis* (Edward Elgar, 2017).
- Waldo, D, *The Administrative State: A Study of the Political Theory of American Public Administration* (Ronald Press Company, 1948).
- Weatherill, S, *Law and Values in the European Union* (Oxford University Press, 2016).
- Weatherill, S, *The Internal Market as a Legal Concept* (Oxford University Press, 2017).
- Wolk, S, *EU Intellectual Property Law and Ownership in Employment Relationships* (Wahlgren, 2010).
- Wollenschläger, F, *Verteilungsverfahren* (Mohr Siebeck, 2010).

Yi, Sung-Kyung, *Zwingende Erfordernisse als Grenze für den europäischen Gesetzgeber* (Nomos, 2016).

PERIODICALS AND CONTRIBUTIONS TO COLLECTED WORKS

Adda, D, “Les gestion des risques des partenariats d’innovation” (2016) 165 *Contrats Publics*, 57.

Agger, A and Sørensen, E, “Designing collaborative policy innovation: Lessons from a Danish municipality” in C Ansell and J Torfing (eds), *Public innovation through collaboration and design* (Routledge, 2014), 188.

Albors-Llorens, A, “The direct effect of EU directives: Fresh controversy or a storm in a teacup?” (2014) 39 *European Law Review*, 850.

Ambroziak, AA, “Review of the Literature on the Theory of Industrial Policy” in AA Ambroziak (ed), *The New Industrial Policy of the European Union* (Springer, 2017), 15.

Anchustegui, IH, “Division into lots and demand aggregation—extremes looking for a correct balance?” in G Ølykke Skovgaard and A Sánchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules*, (Edward Elgar Publishing, 2016), 125.

Anderson, R, “The Renegotiation of the WTO Agreement on Government Procurement (GPA)” (2013) *Paper Presented Global Revolution VI*, pp 9–10 (not published), 1.

Andrecka, M “Innovation partnership in the new public procurement regime—a shift of focus from procedural to contractual issues?” (2015) 2 *Public Procurement Law Review*, 48.

Andrecka, M, “Contracting Authorities and Strategic Goals of Public Procurement—A Relationship Defined by Discretion?” in S Bogojević, X Groussot and J Hettne (eds), *Discretion in EU Public Procurement Law* (Hart Publishing, 2019 – forthcoming), 7.

Ángel Bernal Blay, M, “The strategic use of public procurement in support of innovation” (2014) 1 *European Procurement & Public Private Partnerships*, 3.

Apostol, AR, “Formal European Standards in Public Procurement: a strategic tool to support innovation” (2010) 2 *Public Procurement Law Review*, 61.

Apostol, AR, “Pre-commercial procurement in support of innovation: regulatory effectiveness?” (2012) 6 *Public Procurement Law Review*, 213.

Apostol, RA, “Public Procurement of Innovation—a structural approach” (2012) 4 *Public Procurement Law Review*, 180.

Arana Muñoz, JR, “The principles of the global law of public procurement” (2016) 2 *Diritto pubblico comparato ed europeo*, 509.

Aroso Almeida, M, “Contratos Administrativos e seu regime de modificação” in J Miranda (eds) *Estudos em Homenagem ao Professor Doutor Sérvulo Correia* (Almedina, 2011), 811.

- Aroso de Almeida, M, “Novas Dimensões do Direito dos Contratos Públicos” in J Rodríguez-Arana Munoz et al (eds), *Bases y Retos de La Contratación Pública en el Escenario Global* (Fundacion Editorial Juridica Venezolana, 2017), 6.
- Arrowsmith, S “The Purpose of the EU Public Procurement Directives: Ends, Means, and the Implications for National Regulatory Space for Commercial and Horizontal Policies” (2012) 14 *Cambridge Yearbook of European Legal Studies*, 1.
- Arrowsmith, S and Craven, R, “Competitive Dialogue in the UK” in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Public Procurement* (Cambridge University Press, 2009), 181.
- Arrowsmith, S and Kunzlik, P, “EC Regulation of Public Procurement” in Arrowsmith and Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law* (CUP, 2009), 12.
- Arrowsmith, S and Treumer, S, “Competitive Dialogue in EU law: a critical review” in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Public Procurement* (Cambridge University Press, 2009), 3.
- Arrowsmith, S, “The EC Procurement Directives, national procurement policies and better governance: the case for a new approach” (2002) 3 *European Law Review*, 3.
- Arrowsmith, S, “The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?” (2006) 35 *Public Contract Law Journal*, 337.
- Arrowsmith, S, Priess, HJ and Friton, P, “Self-cleaning as a Defence to Exclusions for Misconduct—An Emerging Concept in EC Public Procurement Law” (2009) 18 *Public Procurement Law Review*, 257.
- Assis Raimundo, M, “Good Contracting Authorities Can Predict the Future: A Note on *Finn Frogne*” (2017) 2 *European Papers*, 411.
- Audit, M and Schill, SW “Transnational Law of Public Contracts: an Introduction” in M Audit and SW Schill (eds), *Transnational Law of Public Contracts* (Bruylant, 2016), 3.
- Auricchio, V, “The problem of discrimination and anti competitive behaviour in the execution phase of public contracts” (1998) 7 *Public Procurement Law Review* 113.
- Azoulai, L, “Integration Through Law” and us” (2016) 14(2) *International Journal of Constitutional Law*, 449.
- Azoulai, L, “The Complex weave of harmonization” in Arnall and Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015), 592.
- Badenhausen-Fähnle, E, “Die neue Vergabeart der Innovationspartnerschaft—Fünftes Rad am Wagen?” (2015) 6 *Verhaberecht*, 743.
- Balkin, JM, “The Three Laws of Robotics in the Age of Big Data” (2017) 78 *Ohio State Law Journal*, 1.
- Bergstrom, CF, “Shaping the new system for delegation of powers to EU agencies: *United Kingdom v European Parliament and Council (Short Selling)*” (2015) 52 *Common Market Law Review*, 219.

- Biaggini, G, “Legal Conceptions of Statehood” in A Von Bogdandy, PM Huber, S Cassese (eds), *The Max Planck Handbooks in European Public Law—Administrative State*, vol 1 (OUP, 2017), 563.
- Blanke, HJ and Perlingeiro, R, “Essentials of the Right of Access to Public Information: An Introduction” in HJ Blanke and R Perlingeiro (eds), *The Right of Access to Public Information—An International Comparative International Legal Survey* (Springer, 2018), 2.
- Bobek, M, “Europeanization of Public Law” A Von Bogdandy, PM Huber, S Cassese (eds), *The Max Planck Handbooks in European Public Law—Administrative State*, vol 1 (OUP, 2017), 631.
- Bobek, M, “Why there is no principle of ‘procedural autonomy’ of Member States” in B Witte and H Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2011), 305.
- Bobek, M, “Why There is No Principle of ‘Procedural Autonomy’ of the Member States” in B de Witte and H Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia, 2011), 20.
- Bogdanowicz, P, “Article 56 and the Principle of Proportionality” in A Sánchez-Graells (ed), *Smart Public Procurement and Labour Standards—pushing the discussion after RegioPost* (Hart Publishing, 2018), 40.
- Bogdanowicz, P, “The Application of the Principle of Proportionality to Modifications of Public Contracts”(2016) 3 *European Procurement & European Public Private Partnerships*, 198.
- Borońska-Hryniewiecka, K, “From the Early Warning System to a ‘Green Card’ for National Parliaments—Hindering or Accelerating EU Policy-making?” in D Jančić (ed), *National Parliaments After the Lisbon Treaty and the Euro Crisis—Resilience or Resignation?* (OUP, 2017), 247.
- Bovis, C, “Legal Redress in Public Procurement Contracts” in M Trybus, R Caranta and G Edelstam (eds), *EU Public Contract Law—Public Procurement and Beyond* (Bruylant, 2014), 1.
- Bradley, K St C “Legislating in the European Union” in C Barnard and S Peers (eds), *European Union Law*, 2nd edn (OUP, 2017), 106.
- Braun, P, “A Matter of Principles(s)—The Treatment of Contracts Falling Outside the Scope of the European Public Procurement Directives” (2000) 9 *Public Procurement Law Review*, 39.
- Brenncke, M “Case note on European Court of Justice, C-58/08, Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform” (2010) 47 *Common Market Law Review*, 1793.
- Brodec, J and Janeek, V, “How does the substantial modification of public contract affect its legal regime” (2015) 3 *Public Procurement Law Review*, 90.
- Brown, A, “The Lawfulness of a regional law requiring tenders for a public contract to undertake to pay workers performing that contract the minimum wage laid down in that law: Case C-115/14 *RegioPost*” (2016) 25 *Public Procurement Law Review*, NA54.

- Brown, A, “Whether a new tendering procedure is required when a public contract is amended under a settlement agreement: the EU Court of Justice ruling in Case C-549/14 *Finn Frogne A/S*” (2017) 1 *Public Procurement Law Review*, NA5.
- Bruynincks, T, “Modification of contracts during their term: principle or exception? - a view from the perspective of externalities” in GS Ølykke and A Sánchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar Publishing, 2016), 274.
- Búrca, G de, “Europe’s Raison d’être” in D Kochenov and F Amtenbrink (eds), *The European Union’s Shaping of the International Legal Order* (CUP, 2013), 2.
- Burgi, M, “Can secondary considerations in procurement contracts be a tool for increasing innovative solutions?” in GS Ølykke, CR Hansen and CD Tvarno (eds), *EU Procurement Directives—Modernisation, Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives* (Jurist- og Økonomforbundets Forlag, 2012), 275.
- Burgi, M, “Public Procurement Law in the Federal Republic of Germany – Report” (2012) 2 *Ius Publicum Network Review*, 8.
- Burgi, M, “Small and Medium-Sized Enterprises and Procurement Law—European Legal Framework and German Experiences” (2007) 4 *Public Procurement Law Review* 284
- Burnett, M, “The New Rules for Competitive Dialogue and the Competitive Procedure with Negotiation in Directive 2014/24—What Might They Mean for PPP?” (2015) 2 *European Procurement & Public Private Partnership Law Review*, 63.
- Butler, L, “Innovation in Public Procurement: Towards the Innovative Union” in in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive*, 363.
- Calo, R “Robotics and Lessons of Cyberlaw” (2015) 103 *California Law Review* 513.
- Cantillon, G “Labels écologiques et sociaux: vers une utilisation facilitée par une extension du lien à l’objet du marché” (2014) 144 *Contrast Publics*, 29.
- Cappelletti, M and Seccombe, M and Weiler, JHH “Methods, tools and institutions. Book 3, Forces and potential for a European identity” in M Cappelletti, M Seccombe and J HH Weiler, *Integration Through Law* (Gruyter, European University Institute Series, 1986), 3.
- Caranta, R “After *Spezzino* (Case C-113/13): A Major Loophole Allowing Direct Awards in the Social Services Sector” (2016) 1 *European Procurement & Public Private Partnerships Law Review*, 14.
- Caranta, R “Remedies in EU public contract law: the proceduralisation of EU public procurement legislation” (2015) 8(1) *Review of European Administrative Law*, 75.
- Caranta, R “The Borders of EU Public Procurement Law” in Dragos and Caranta (eds), *Outside the EU Procurement Directives—Inside the Treaty* (DJØF Publishing, 2012), 25.
- Caranta, R, “The changes to the public contract directives and the story they tell about how EU law works” (2015) 52(2) *Common Market Law Review*, 394.

- Caranta, R, “Award criteria under EU Law (old and new)” in M Comba and S Treumer (eds), *Award of Contract in EU Procurements* (Djøf Publishing, 2013), 21.
- Caranta, R, “Commentary on article 26 Directive 2014/24/EU” in M Steinicke and PL Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law* (CH Beck, Hart, Nomos, 2018), 380.
- Caranta, R, “Commentary on article 29 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, (CH Beck, Hart, Nomos, 2018), 406.
- Caranta, R, “Damages for Breaches of EU Public Procurement Law: Issues of Causation and Recoverable Losses” in D Fairgrieve and F Lichère (eds), *Public Procurement Law—Damages as an Effective Remedy* (Hart Publishing, 2011), 15.
- Caranta, R, “Many Different Paths, But Are They All Leading to Effectiveness?” in S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJOF Publishing, 2011), 53.
- Caranta, R, “Sustainable Procurement” in M Trybus, R Caranta, G Edelstam (eds), *EU Public Contract Law—Public procurement and beyond* (Bruylant, 2014), 166.
- Caranta, R, “Upholding General Principles v Distinguish Cases: On the Use of Precedent in EU Public Procurement Law (A case study)” in Sánchez-Graells (ed), *Smart Public Procurement and Labour Standards—pushing the discussion after RegioPost* (Hart Publishing, 2018), 59.
- Cassese, S, “Diritti amministrative nazionali e diritto amministrativo comunitario” in MP Chiti and G Greco (eds), *Trattato di Diritto Amministrativo Europeu* (Giuffrè, 2007), 11.
- Cassese, S, “L’Europa vivi di Crisi” in *L’Unione European in crisi*, *Revista Trimestrale di Diritto Pubblico* (Giuffrè, 2017), 164.
- Cassese, S, “The Administrative State in Europe” in A Von Bogdandy, PM Huber, S Cassese (eds), *The Max Planck Handbooks in European Public Law—Administrative State*, vol 1 (OUP, 2017), 57.
- Cavallo Perin, R and Racca, GM, “La cooperazione amministrativa europea nei contratti e servizi pubblici” (2016) 6 *Rivista Italiana di Diritto Pubblico Comunitario*, 1457.
- Cavina, A, “Organismo di Diritto Pubblico e mercato concorrenziale: un indizio che non fa la prova- Consiglio di Stato, Sez. V, 16 gennaio 2017, n. 108 - Pres. Caringella - Est. Contessa - Ubiest S.p.a. c. Aci Global S.p.a.” (2017) 4 *Urbanistica e Appalti*, 507.
- Cerqueira Gomes, P “The innovative Innovation Partnerships under the 2014 Public Procurement Directives” (2014) 4 *Public Procurement Law Review*, 211.
- Cerqueira Gomes, P, “A Lost Proposal in 2014 Public Procurement Package: Is there any Life for the Proposed Public Procurement Oversight Bodies?” in GS Ølykke and A Sanchez-Graells (eds), *Reformation and Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016), 170.
- Cerqueira Gomes, P, “EU Public Procurement Oversight Bodies—the way forward” (2017) 6 *Public Procurement Law Review*, 249.

- Cerqueira Gomes, P, “Políticas Horizontais no Novo Government Procurement Agreement (GPA)” (2015) 4(6) *Revista dos Contratos Públicos*, 131.
- Cheve, L and Moore, J, “Negotiated Procedures Overrated—Evidence from France Questions the Commission’s Approach in the Latest Procurement Reforms” (2012) 7 *European Procurement & Public Private Partnerships*, 228.
- Chiariello, C, “Il Partenariato Per l’innovazione” (2016) 2 *Giustamm—Revisita di Diritto Amministrativo*, 1.
- Chirita, AD, “The Impact of the European Union Current Crisis on Law, Policy and Society” (2014) 16 *Cambridge Yearbook of European Legal Studies*, 255.
- Chiti, E, “Directive 2007/66 and The Difficult Search for Balance in Judicial Protection Concerning Public Procurement” (2010) 1 *Italian Journal of Public Law*, 125.
- Chiti, E, “In the Aftermath of the Crisis—The EU Administrative Law System Between Impediments and Momentum” (2015) 17 *Cambridge Yearbook of European Legal Studies*, 311.
- Clancy, MS and Moschini, G “Incentives for Innovation: Patents, Prizes and Research Contracts” (2013) 35 2 *Applied Economic Perspectives and Policy*, 206.
- Clarizia, P and Peci, K, “Il mercato dei contratti pubblici” in L Torchia (ed), *La Dinamica del Diritto Amministrativo* (Il Mulino, 2017), 193.
- Clarke, C, “The Meaning and Requirements of the Term ‘Contracting Authority’ under EU Public Procurement Law: A Critique of Developments from the ECJ Jurisprudence” (2012) 7 *European Procurement & Public Private Partnership Law Review*, 57.
- Clifton, M, “Ineffectiveness—the new deterrent: will the new Remedies Directive ensure greater compliance with the substantive procurement rules in the classical sectors?” (2009) 18 *Public Procurement Law Review*, 165.
- Comba, M, “Variation in the scope of the New Public Procurement Directives of 2014: Efficiency in Public Spending and a Major Role of the Approximation of the Laws” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: the New Directive* (Djof Publishing, 2014), 31.
- Cornish, W, “The Expansion of Intellectual Property Rights” in G Schricker, T Dreier and A Kur (eds), *Geistiges Eigentum im Dienst der Innovation* (Nomos, 2001), 16.
- Costa Gonçalves, P, “Acórdão Presstext: modificação de contrato existente vs adjudicação de novo contrato” (2009) 73 *Cadernos de Justiça Administrativa*, 3.
- Costa Gonçalves, P, “Gestão de Contratos Públicos em Tempos de Crise” in *Estudos de Contratação Pública*, vol III (Coimbra Editora, 2011).
- Costamagna, F, “Minimum Wage between Public Procurement and Posted Workers: Anything New after the RegioPost Case?” (2017) 1 *European Law Review*, 101.
- Craig, P, “Brexit: A Drama in Six Acts” (2016) 4 *European Law Review*, 3.
- Craig, P, “Shared Administration and Networks: Global and EU Perspectives” (2009) 6 *Legal Research Paper Series*, 1.
- Craig, P, “Subsidiarity: a Political and Legal analysis” (2012) 50 *Journal of Common Market Studies*, 72.

- Craven, R “Subcontracting matters: Articles 43 and 71 of the 2014 Directive” in G Ølykke Skovgaard and A Sanchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules*, (Edward Elgar, 2016), 295.
- Crisidu-Budnik, A and Prezedanska, J, “The Agency Theory Approach to the Public Procurement System” (2017) 7:1 *Wroclaw Review of Law, Administration & Economics*, 154
- Cseres, KJ, “Rule of Law Values in the Decentralized Public Enforcement of EU Competition Law” in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (OUP, 2017), 182.
- Czajka, A, “La figura del ‘diálogo técnico’” in *Anuario da Facultade de Dereito da Universidade da Coruña* (2013), 231.
- Daniele, L, “Vingt-Cinq Ans D’Interprétation Conforme: Une Principe Encore en Quête de Définition” in B Nascimbene and F Picod (eds), *L’Italie et Le Droit de L’Union Européenne* (Bruylant, 2010), 181.
- Davey, J, “Procedures involving negotiation in the new Public Procurement Directive: Key reforms to the grounds for use and procedural rules” (2014) 3 *Public Procurement Law Review*, 103.
- Davies, G “The Competence to Create an Internal Market” in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States—Reflection on the Past, The Present and the Future* (Hart Publishing, 2017), 77.
- Dawson, M and Witte, B, “Welfare Policy and Social Inclusion” in A Arnall and D Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015), 966.
- Dawson, M, “Better Regulation and the Future of EU Regulatory Law and Politics” (2016) 53 *Common Market Law Review*, 1221.
- De Falco, V, “L’idealtipo di procedimento amministrativo europeo e le influenze delle tradizioni giuridiche nazionali” (2018) 3 *Diritto Pubblico Comparato ed Europeo*, 559.
- De Nictolis, R, “I poteri dell’ANAC dopo il correttivo” (2017), available at www.giustizia-amministrativa.it, 1.
- De Pasquale, P, “L’Unione Europea e le nuove forme di integrazione” (2017) 3 *Diritto Pubblico Comparato ed Europeo*, 671.
- De Witte, B, “The Competence to Protect. The Pursuit of Non-market Aims through Internal Market Legislation” in P Syrpis (ed), *The Judiciary, the Legislature and the Internal Market* (CUP, 2012), 25.
- De Witte, B, “Variable geometry and differentiation as structural features of the EU legal order” in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration—the Trajectory of Differentiation in EU Law* (Edward Elgar, 2017), 9.
- Della Cananea, G “Le ‘Model Rules’ como esempio di codificazione innovativa” (2018) 2 *Rivista Italiana di Diritto Pubblico Comunitario*, 333.
- Della Cananea, G, “*Ius Publicum Europeaum*: Divergent National Traditions or Common Legal Patrimony” M Ruffert (ed), *Administrative Law in Europe*:

- Between Common Principles and National Traditions* (Europa Law Publishing, 2013), 134.
- Della Cananea, G, “Transnational Public Law in Europe: beyond the *lex alius loci*” in M Maduro, K Tuori and S Sankari (eds), *Transnational Law—Rethinking European Law and Legal Thinking* (CUP, 2014), 322.
- Deodato, C, “L’Attuazione Normativa Del Codice Dei Contratti Pubblici: Configurazione Giuridica, Struttura e Questioni Applicative” (2018) 9 *Il Foro Amministrativo*, 1560.
- Dickson, J and Eleftheriadis, P, “Introduction: The Puzzles of European Union Law” in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP, 2012), 1.
- Dragos, DC and Racolta, B, “Comparing Legal instruments for R&D&I: State Aid and Public Procurement” (2017) 4 *European Procurement & Public Private Partnership Law Review*, 408.
- Dragos, DC, and B Neamtu, B, “Sustainable Procurement in the EU: Experience and Prospects” in *Modernising Public Procurement. The New Directive* (Djøf Publishing, 2014), 301.
- Dreier, T and Dohmann, IS, “Legal aspects of services robotics” (2012) 9 *Poiesis & Praxis*, 201.
- Edler, J and Uyarra, E, “Public procurement of innovation” in SP Osborne and L Brown (eds), *Handbook of Innovation in Public Services* (Edward Elgar, 2013), 228.
- Edquist, C and Hommen, L, “Public technology procurement and innovation theory” in C Edquist, L Hommen and L Tsipouri (eds), *Public Technology Procurement and Innovation* (Kluwer Academic Publishers, 2000), 5.
- Edquist, C, “Striving Towards a Holistic Innovation Policy in European Countries—But Linearity Still Prevails!” (2014) 5(2) *Science Technology and Innovation Policy Review*, 1.
- Edwards, HT, “The Growing Disjunction Between Legal Education and the Legal Profession” (1992) 91 *Michigan Law Review*, 34.
- Elder, J and Fangerber, J, “Innovation policy: what, why, and how” (2017) 33(1) *Oxford Review of Economic Policy*.
- Elder, J, “Demand oriented innovation policy” in R Smiths, S Kuhlman and P Shapira (eds), *The Theory and Practise of Innovation Policy: An International Research Handbook* (Edward Elgar, 2010), 2.
- Erridge, A, “Involvement of SMEs in Public Procurement” (1998) 7 *Public Procurement Law Review*, 37.
- Fana, M and Piga, G “SMEs and Public Contracts: An EU Based Perspective” in GS Ølykke, CR Hansen and CD Tvarno (eds), *EU Procurement Directives—Modernisation, Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives*, (Djøf Publishing, 2012), 33.
- Faustino, P, “Award Criteria in the New EU Directive on Public Procurement” (2014) 23 *Public Procurement Law Review*, 124.

- Fossum, JE and Pollak, J “Which Democratic Principles for the European Union? What Deficit?” in S Piattoni (ed), *The European Union: Democratic Principles and Institutional Architectures in Times of Crises* (OUP 2015), 29.
- Fruhman, M, “Austria” in U Neergaard, C Jacqueson & G Skovgaard Ølykke (eds) *Public Procurement Law – Limitations, Opportunities and Paradoxes – The XXVI FIDE Congress* (Djøf Publishing, 2014), 240.
- Gallego Córcoles, I, “La integración de cláusulas sociales, ambientales y de innovación en la contratación pública” (2017) 4 *Documentación Administrativa*, 92.
- Gallego Córcoles, I, “Los procedimientos de adjudicación en la nueva Directiva sobre contratación pública” in *Observatorio de los contratos públicos 2013* (Thomson Reuters Aranzadi, 2014), 165.
- Galleta, DU, Hofman, H and Schneider, JP “Information Exchange in the European Administrative Union: An Introduction” (2014) 1 *European Public Law*, 65.
- Garofoli, R, “L’organismo di diritto pubblico” in MA Sandulli, R De Nictolis and R Garofoli (eds), *Trattato dei Contratti pubblici*, vol I (Giuffrè, 2008), 569.
- Garoupa, N and Ulen, TS, “The Market for Legal Innovation: Law and Economics in Europe and the United States (2008) 59 *Alabama Law Review*, 1555.
- Gimeno Feliu, JM, “La Contratación Pública Como Estrategia: El fomento de la Innovación” (2018) 1 *Ius Publicum Network Review*, 1.
- Ginter, G; Parrest, N and Simovart, MA, “Access to content of public procurement: the case for a general EU-law duty of disclosure” (2013) 4 *Public Procurement Law Review*, 156.
- Giuffrè, F, “Le Autorità Indipendenti Nel Panorama Evolutivo Delle Stato di Diritto: Il Caso Dell’Autorità Nazionale Anticorruzione” in IA Nicotra (ed), *L’Autorità Nazionale Anticorruzione—tra prevenzione e attività regolatoria* (G Giappichelli Editore, 2016), 9.
- Golding, J and Henty, P, “The New Remedies Directive of the EC Standstill and Ineffectiveness” (2008) 17 *Public Procurement Law Review*, 146.
- Golding, J and Henty, P, “The new Remedies Directive of the EC: standstill and ineffectiveness” (2008) 3 *Public Procurement Law Review*, 146.
- Greco, G, “La Direttiva 2007/66/CE: illegittimità comunitaria, sorte del contratto ed effetti collaterali indotti” (2008) 1 *Rivista Italiana di Diritto Pubblico Comunitario*, 1029.
- Greenberg, D, “The ‘Copy-Out’ Debate in the Implementation of European Union Law in the United Kingdom” (2012) 6 *Legisprudence*, 243.
- Gretschmann, K and Schepers, S, “Revisiting Innovation: Revolutionising European Innovation Policy by Means of an Innovation Ecosystem” in K Gretschmann and S Schepers (eds), *Revolutionising EU Innovation Policy* (Palgrave Macmillan, 2016).
- Grimm, D, “Historische Erfahrungen mit Rechtsvereinheitlichung” (1986) 50 *RabelsZ*, 61.
- Guichard, R, “Tópicos Sobre Técnicas Legislativas” (2010) 17 *Revista De Ciências Empresariais e Jurídicas*, 31.

- Guillou, S, “Convergence of EU and US industrial policy—the obsession of competitiveness” (2014) 145 *Reveu d’economie industrielle*, 181.
- Guistetic, J L, Crusan, J, Rader, S and Ortega, S “Outcome-driven open innovation at NASA” (2015) 34 *Space Policy*, 11.
- Hacker, P, “Teaching fairness to artificial intelligence: Existing and novel strategies against algorithmic discrimination under EU Law” (2018) 55 (4) *Common Market Law Review*, 2143.
- Hage, J, “The Method of a Truly Normative Legal Science” in M van Hoecke (ed), *Methodologies of Legal Research*, (Hart Publishing, 2011), 19.
- Hagedoorn, J, “Innovation and Entrepreneurship: Shumpeter Revisited” (1996) 5(3) *Industrial and Corporate Change*, 883.
- Halonen, KM, “Disclosure Rules in EU Public Procurement: Balancing Between Competition and Transparency” (2016) 16(4) *Journal of Public Procurement*, 528.
- Hamer, CR, “Commentary on article 58 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, Law (CH Beck, Hart, Nomos, 2018), 647.
- Hansen CR, “Defining a servisse concession contract: will the proposed new definition of servisse concessions contracts increase legal certainty in the field of concessions in GS Ølykke, CR Hansen and CD Tvarno (eds), *EU Procurement Directives—Modernisation, Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives* (Djøf Publishing 2012), 239.
- Harlow, C, “Global Administrative Law: The Quest for Principles and Values” (2006) 17(1) *The European Journal of International Law*, 187.
- Harlow, C, “At Risk: National Administrative Procedure within the European Union” (2015) 7 *Italian Journal of Public Law*, 60.
- Hartlev, K and Liljenbøl, MW, “Changes to existing contracts under EU public procurement rules and the drafting of review clauses to avoid the need for a new tender” (2013) 2 *Public Procurement Law Review*, 51.
- Hartley, J, “Public and private features of innovation” in SP Osborne and L Brown (eds), *Handbook of Innovation in Public Services* (Edward Elgar Publishing, 2013), 44.
- Hatzis, N, “The Legality of SME development policies under EC procurement law” in S Arrowsmith and P Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law—New Directives and New Directions* (Cambridge University Press, 2009), 343.
- Hebby, JM and Meesters, J, “The principle of proportionality principle in the Dutch Public Procurement Act” (2014) 4 *European Procurement Public-Private Partnerships Law Review*, 266.
- Helleringer, G and Purnhagen, K, “On the Terms, Relevance and Impact of a European Legal Culture” in G Helleringer and K Purnhagen (eds), *Towards a European Legal Culture* (CH Beck, Hart, Nomos, 2014), 3.
- Hennete-Jaouen, K, “Le Parternariat d’innovation, modes d’emplois” (2018) 184 *Contrats Publics*, 26.

- Henty, P, “Is the stanstill a step forward? The proposed revision to the EC Remedies Directive” (2006) 5 *Public Procurement Law Review*, 253.
- Herlin-Karnell, E and T Konstadinides, T, “The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration” (2013) 1 *Cambridge Yearbook of European Legal Studies*, 139.
- Hernández González, FL, “The evolving concept of works and services concessions in European Union Law” (2016) 2 *Public Procurement Law Review*, 51.
- Herzmann, K, “Monitoring als Verwaltungsaufgabe” (2007) *Deutsches Verwaltungsblatt* (DVBl) vol 122 11, 670.
- Hettne, J, “Strategic Use of Public Procurement—Limits and Opportunities” (2013) 7 *European Policy Analysis*, 1.
- Heuschling, L, “The complex relationship Between Administrative Law and Constitutional Law” in A Von Bogdandy, PM Huber, S Cassese (eds), *The Max Planck Handbooks in European Public Law—Administrative State*, vol 1 (OUP, 2017), 257.
- Hoecke, MV, “Legal Doctrine: Which Method(s)” in M V Hoecke (eds) *Methodologies of Legal Research*, (Hart Publishing, 2011), 14.
- Hofmann, HCH, “European administration: nature and developments of a legal and political space” in C Harlow, G Della Cananea and L Sandberg (eds), *Research Handbook in EU Administrative Law* (Edward Elgar, 2016), 21.
- Huber, PM, “The Europeanization of Public Procurement in Germany” (2001) 7 1 *European Public Law*, 33.
- Indén, T and Naundrup Olesen, K, “Legal Aspects of Public Private Innovation” (2012) 4 *European Procurement & Public Private Partnerships Law Review*, 265.
- Indén, T, “Commentary on Article 72 Directive 2014/24/EU” in Steinicke and Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law*, (CH Beck, Hart, Nomos, 2018), 764.
- Jans, JH; Squintani, L; Aragão, A; Macrocry, R and Wegener, BW, “Gold plating of European Environmental Measures” (2009) 6.4 *Journal for European Environmental & Planing Law*, 417.
- Joerges, C, “Re-Conceptualising European Law as Conflicts Law’ the ECJ’s Labour Law Jurisprudence and Germany’s Federal Constitutional Court” in B Verschraegen (ed), *Interdisciplinary Studies of Comparative and Private International Law*, vol I (Jan Sramek Verlag, 2010), 7.
- Kamert, M, “What We Talk When We Talk about Harmonisation” (2015) 17 *Cambridge Yearbook of European Legal Studies*, 360.
- Kauffmann, P, “La Politique industrielle dans l’Union européenne” in JB Auby and P Idoux (eds), *Le Gouvernement économique européen* (Bruylant, 2017), 234.
- Kaupa, C, “Public Procurement, Social Policy and Minimum Wage Regulation for Posted Workers: Towards a More Balanced Socio-Economic Integration Process? (2016) 1 *European Papers*, 135.

- Kbres, W, “Die juristische Method im Verwaltungsrecht” in E Schmidt-Aßmann and W Hoffmann-Riem (eds) *Methoden der Verwaltungsrechtswissenschaft* (Baden-Baden, Nomos, 2004), 220.
- Kelsen, H, “Law, State and Justice in the Pure Theory of Law” (1948) 3 *Yale Law Journal* 378.
- Kidalov, MV, “Small Business Contracting in the United States and Europe: A Comparative Assessment” (2011) 2 *Public Contract Law Journal*, 443.
- Kingsburg, B, “The Concept of ‘Law’ in Global Administrative Law” (2009) 20(1) *The European Journal of International Law*, 23.
- Klammert, M “Judicial Implementation of Directives and Anticipatory Indirect Effect: Connecting the Dots” (2006) 43 *Common Market Law Review*, 1251
- Knauff, M, “Das Kaskadensystem im Vergaberecht - ein Regelungsmodell mit Zukunft?”, (2010) 1 *Neue Zeitschrift Fur Baurecht Und Vergaberecht (NZBau)*, 657.
- Knibbe, J, “Whether the award procedures laid down by Directive 2004/18 are exhaustive: Commission v France (C-299/08)” (2010) 3 *Public Procurement Law Review*, NA91.
- Knill, C, “European Policies: The Impact of National Administrative Traditions” (1998) 18 *Journal of Public Policy*, 1.
- Komárek, J, “Legal Reasoning in EU Law” in Arnall and Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP, 2015), 28.
- Kotsonis, T, “Green Paper on the Modernisation of EU Public Procurement Policy: Towards a More Efficient European Public Procurement Market” (2011) 3 *Public Procurement Law Review*, NA51.
- Král, R, “On the choice of methods of transposition of EU Directives” (2016) 41:2 *European Law Review*, 230.
- Krönke, C “Innovation Partnerships—Purpose, Scope of Application and Key Elements of a New Instrument of Strategic Procurement” (2018 forthcoming), 1.
- Kukovec, D, “Law and the Periphery” (2015) 21(3) *European Law Journal*, 406.
- Kukovec, D, “Taking Change Seriously, A Discourse of Justice and the Reproduction of the Status Quo” (22 September 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302389. 1.
- Kunzlik, P “Neoliberalism and the European Public Procurement Regime” (2013) 15 *Cambridge Yearbook of European Legal Studies*, 283.
- Kunzlik, P, “From suspect practice to market-based instrument: policy alignment and the evolution of EU law’s approach to “green” public procurement” (2013) 3 *Public Procurement Law Review*, 111.
- La Chimia, A and Valaguzza, S, “A new approach to implementing the 2014 public procurement Directives in Italy: ANAC’s soft law regulatory powers amidst uncertainty and need for clarity” (2017) 4 *Public Procurement Law Review*, 165.
- Legrand, P “Paradoxically, Derrida: For a Comparative Legal Studies” (2005) 27 *Cardozo Law Review*, 631.

- Legrand, P, “European Legal systems are not converging” (1999) 45 *International and Comparative Law Quarterly*, 52.
- Legrand, P, “The Return of the Repressed, Moving Comparative Legal Studies Beyond Pleasure” (2001) 75 *Tulane Law Review*, 1033.
- Leino-Sandberg, P and Salminen, J, “A Multi-Level Playing Field for Economic Policy Making: Does EU Economic Governance Have Impact?” in T Beukers, B de Witte and C Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (CUP, 2017), 68.
- Leino, P, “Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU” (2014) 4 *European Public Law*, 681.
- Lenaerts, K and Gutiérrez-Fons, JA, “To say what the law is: methods of interpretation and the European Court of Justice” (2014) 20 *Columbia Journal of European Law*, 10.
- Levin, K; Cashore, K; Bernstein, B and Auld, G “Overcoming the tragedy of super wicked problems: constraining our future selves to ameliorate global climate change” (2012) 45(2) *Policy Science*, 123.
- Lichère, F, “Quid de la place nouvelle des procédures négociées et du dialogue compétitif? (2014) *Mai-Juin Bulletin Juridique des Contrats Publics*, 164.
- Lombard, F, “La codification du critère de distinction marché – concession: le critère du risque opérationnel” in S De La Rosa (eds) *L’Encadrement des Concessions Par le Droit Européen de La Commande Publique* (Société de Legislation Comparée, 2014), 37.
- López Miño, A, “La compra pública innovadora en los sistemas europeo y español de contratación pública” J José Pernas García (ed), *Contratación pública estratégica* (Thomson Reuters Aranzadi, 2013), 211.
- Maher, I, “Regulation and Modes of Governance in EC Competition Law: What’s New in Enforcement” (2007) 31 *Fordham International Law Journal*, 1720.
- Marchetti, B, “Il sistema di risoluzione delle bid disputes nel modello federale statunitense di public procurement” (2009) 1 *Rivista Italiana di Diritto Pubblico Comunitario*, 963.
- Marchianò, G, “La regolamentazione nella domanda pubblica alla luce della legge delega di recepimento delle nuove direttive: il ruolo dell’amministrazione” (2016) 1 *Rivista Italiana di Diritto Pubblico Comunitario*, 17.
- Matharan, X, “La détermination du prix dans les partenariats d’innovation” (2018) *Montiteur Juris*, 1.
- Matias Pereira, P and Machado, C, “Modificação e Rescisão de Contratos” (2016) 12 *Revista dos Contratos Públicos*, 75.
- Matteucci, SC and Gardini, G, “Il primato del diritto comunitario e l’autonomia processuale degli Stati membri: alla ricerca di un equilibrio sostenibile” (2013) 1 *Diritto Pubblico*, 2.
- Mazzucato, M, “The Myth of the ‘Meddling’ State” in G Cozzi, S Newman and J Toporowski (eds), *Finance and Industrial Policy—Beyond Financial Regulation in Europe* (OUP, 2016), 113.

- McCruden, C, “International Economic Law and the Pursuit of Human Rights: a Framework for Discussion of the Legality of Selective Purchasing” (1999) 2 *Journal of International Economic Law*, 30.
- Melica, L “The unconstitutional development of the European legal framework” (2018) 3 *Diritto Pubblico Comparato ed Europeo*, 627.
- Menéndez, AJ, “The Crisis of Law and the European Crises: From the Social and Democratic *Rechtsstaat* to the Consolidating State of (Pseudo-)technocratic Governance” in M Bartl and M Karavias (eds), *Austerity and Law in Europe* (Wiley Blackwell, 2017), 56.
- Meny, J, “‘It’s politics, stupid’ the hollowing out of politics in Europe—and its return, with a vengeance” in *Stato e mercato* (2015 n° 103).
- Miettinen, S and Kettunen, M, “Travaux to the EU Treaties: Preparatory Work as a Source of EU Law” in (2015) *Cambridge Yearbook of European Legal Studies*, 145.
- Miño López, A, “Preliminary Market Consultations in Innovation Procurement: A Principled Approach and Incentives for Anticompetitive Behaviours” (2017) 2 *Ius Publicum Network Review*, 1.
- Molfessis, N, “Les renvoi d’un texte à autre” in N Molfessis (ed), *Les Mots De la Loi* (Collection Études Juridiques –Economica, 1999), 55.
- Molinier, J, (ed), *Synthèse—Les principes fondateurs de l’Union européenne* (Recherche réalisée avec le soutien du GIP Mission de recherche Droit et Justice, 2004), 10.
- Morbidelli, G, “Linee guida dell’ANAC: comandi o consigli?” (2016) 3 *Diritto Amministrativo*, 273.
- Morlino, E, “International public procurement” in S Cassese (ed), *Research Handbook on Global Administrative Law* (Elgar, 2016), 82.
- Mörtl, M, “M Kau, Rechtsharmonisierung -Untersuchung zur europäischen Finalität dargestellt am Beispiel des Grenzkontroll-, Ausländer- und Asylrechts (Mohr Siebeck 2016)—Book Review” (2017) 54 *Common Market Law Review*, 663.
- Mostroianni, R, “Italie” in U Neergaard, C Jackson and GS Ølykke (eds), *Public Procurement Law: Limitations, Opportunities and Paradoxes—The XXVI FIDE Congress*, vol 3 (Djøf Publishing 2014), 560.
- Neumann, U, “Teoria Científica do Direito” in A Kaufmann and W Hassemer (eds.) *Introdução à Filosofia do Direito e à Teoria do Direito Contemporâneas* 3th edn (Lisboa: Fundação Calouste Gulbenkian, 2015), 472.
- Nicolaides, P and Ruse, I, “Competitive Selection of Undertakings and State Aid: Why and When it does not eliminate the Advantage” (2012) 1 *European Procurement & Public Private Partnerships*, 131.
- Nielsen, HK, “Labour clauses in public contracts: ILO Convention no 94 in the European Union after RegioPost” (2017) 5 *Public Procurement Law Review* 201.
- Noguello, R, “L’eupéanisation du droit des contrats administratifs” in JB Auby and J Dutheil de la Rochère (eds) *Traité de droit administrative européen* (2 ed, Bruylant, 2014), 1163.

- O'Brien, G, "Public Procurement and the Small or Medium Sized Enterprise" (1993) 2 *Public Procurement Law Review*, 82.
- Olivera, RH, "Modifications of Public Contracts – Transposition and Interpretation of the new EU Directives" (2015) 1 *European Procurement & European Public Private Partnerships*, 40.
- Ortega Gómez, N "Política Industrial" in M Ortega Gómez (ed), *Las Políticas de La Unión Europea en el siglo XXI* (Bosch Editor, 2016), 427.
- Pacnhou, D, "Enforcement of the EC Procurement Rules: The Standards Required of national Review Systems Under EC Law in Context of the Principle of Effectiveness" (2000) 9 *Public Procurement Law Review*, 55.
- Pajno, A, "Verso la codificazione del procedimento amministrativo dell'Unione europea? le 'model rules' di ReNEUAL" (2018) 2 *Rivista Italiana di Diritto Pubblico Comunitario*, 325.
- Panara, C and Varney, M, "Introduction—Local Government in the EU Layered System of Governance" in C Panara and M Varney (eds), *Local Government in Europe, The "fourth level" in the EU multilayered system of Governance* (Routledge, 2013), 6.
- Panasiuk, A and Jarocki, L, "The Court of Justice of the European Union and Its Influence on European and National Public Procurement Regulations: The Case of Poland" (2017) 12 *European Procurement & Public Private Partnership Law Review*, 192.
- Pantilimon Voda, OS, "Innovative and sustainable procurement: framework, constraints and policies" in C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Edward Elgar Publishing, 2016), 222.
- Pauliat, H, "La Décision administrative et les algorithmes: une loyauté à consacrer" (2018) 3 *Reveu Du Droit Public*, 642.
- Peers, S, "Enhanced cooperation: the Cinderella of differentiated integration" in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration—the Trajectory of Differentiation in EU Law* (Edward Elgar, 2017), 76.
- Perfetti, LR, "Discrezionalità amministrativa, clausole general e ordine giuridico della società" (2013) 3 *Diritto Amministrativo* 372.
- Peterson, Z, "Below-threshold contract award under EU primary law: Federal Republic of Germany v Commission (T-258/06)—case comment" (2010) 6 *Public Procurement Law Review*, 215.
- Pez, T, "Le Risque, les concessions et les marchés" (2016) *Revue Française de Droit Administratif*, 237.
- Pitschas, C, "Secondary Criteria and their compatibility with the EC and WTO Procurement—The Case of the German Scientology Declaration" (2000) 9 *Public Procurement Law Review*, 171.
- Poiars Maduro, M "Interpreting European Law—Judicial Adjudication in a Context of Constitutional Pluralism" (2008) Working Paper IE Law School, 3.
- Pollicino, O, "Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint" (2004) 5 (3) *German Law Journal*, 289.

- Pollitt, C and Hupe, P, “Talking about government: The role of magic concepts” (2011) 13(5) *Public Management Review*, 641.
- Ponzio, S “Joint Procurement and Innovation in the New EU Directive and in Some EU-Funded Projects” (2014) 2 *Ius Publicum*, available at http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf, 1.
- Posner, A, “The Decline of the law as an autonomous discipline: 1962-1987” (1987) 100 *Harvard Law Review*, 761.
- Posner, R, “The Future of Law and Economics Movement in Europe” (1997) 17 *International Review of Law and Economics*, 2.
- Pourcel, É, “Le partenariat d’innovation, de vraies fausses novations contractuelles et procédurales?” (2015) 4(5) *Contrats et Marchés publics*, 10.
- Prechal, S, “Europeanisation of National Administrative Law” in JH Jans, S Prechel and RJGM Widdershoven, *Europeanisation of Public Law*, 2nd edn (Europa Law Publishing, 2015), 39.
- Priess, HJ, “Revision of the Implementation of the Remedies Directives in Germany” (1997) 1 *Public Procurement Law Review*, 47.
- Quaedvlieg, A, “Authorship and Owership: Authors, Entrepreneurs and Rights” TE Synodinou *Codification of European Cpyright Law* (Wolters Kluwer, 2012), 197.
- Racca, GM, “Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement” (2010) 8 *Public Procurement Law Review*, 119.
- Racca, GM, “Derogations from standstill period, ineffectiveness and remedies in the new tendering procedures: efficiency gains vs. risk of increasing litigation” in S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJOF Publishing, 2011), 95.
- Racca, GM, “Eletronic Qualitative Selection of Economic Operators: the challenge of the European Single Procurement Document (ESPD)” in M Burgi, M Trybus and S Treumer (eds), *Qualification, Selection and Exclusion in EU Procurement* (Djøf Publishing, 2016), 303.
- Radosevic, S, “Challenges of converging innovation policies in a multi-tier Europe: a neo-Schumpeterian perspective” in S Radosevic and A Kaderabkova, *Challenges for European Innovation Policy—Cohesion and Excellence from a Schumpeterian Perspective* (Edward Elgar, 2011), 9.
- Rasmussen, M, “The Benefits and Reward of Innovation Policies” in K Gretschmann and S Shepers (eds), *Revolutionising EU Innovation Policy* (Palgrave Macmillan, 2016), 29.
- Razquin Lizarraga, MM, “El principio de confidencialidad en la contratación pública” in CA Amoedo-Souto and JM Gimeno Feliú (eds), *Estudio sistemático de la ley de contratos del sector público* (Thomson Reuters Aranzandi, 2018), 867.
- Reillon, V, *EU Innovation Policy—Part I: EU policies and instruments supporting innovation* (European Parliamentary Research Service, 2016).

- Reynolds, S, “Explaining the Constitutionaal Drivers Behind a Perceived Judicial Preference for Free Movement over Fundamental Rights” (2016) 53 *Common Market Law Review*, 674.
- Richer, L, “La concession du servisse en droit communautaire: hiérarchie des critères ou critère unique” (2009) 2 *Tierres du Droit*, 111.
- Rittberger, B, Leuffen, D and Schimmelfenning, F, “Differentiated Integration of Core State Powers” in P Genschel and M Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (OUP, 2014), 189.
- Ritzen, J, “Forward to a second chance for Europe” in J Ritzen (ed), *A second chance for Europe—Economic, Political and Legal Perspectives of the European Union* (Springer, 2017).
- Rosenfeld, M, “Constitutional Identity” in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (CUP, 2012), 683.
- Ruffert, M “Dogmatik und Praxis des subjektiv-öffentlichen Rechts unter dem Einfluß des Gemeinschaftsrechts” (1998) *DVBl*, 69.
- Ruffert, M, “Common Principles and National Traditions: Which Perspective for European Administrative Legal Scholarship” in M Ruffert (ed), in M Ruffert (ed), *Administrative Law in Europe: Between Common Principles and National Traditions* (Europa Law Publishing, 2013), 239.
- Ruthig, J, “Die Konzeption des subjektiven öffentlichen Rechts im Gemeinschaftsrecht” in W Kluth and K Rennert (eds) *Entwicklungen im Verwaltungsprozessrecht* (2th ed Halle, Universitätsverlag Halle-Wittenberg, 2009), 41.
- Sánchez Graells, A “A Deformed Principle of Competition?—The Subjective Drafting of Article 18(1) of Directive 2014/24” in GS Olykke and A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules in 2014* (Edward Elgar Publishing, 2016), 80.
- Sánchez Graells, A “Assessing the Public Administration’s Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?” (2016) 18 *Cambridge Yearbook of European Legal Studies*, 93.
- Sánchez Graells, A, “Public procurement and state aid: reopening the debate? (2012) 21 *Public Procurement Law Review*, 213.
- Sánchez Graells, A, “The implementation of Directive 2014/24/EU in the United Kingdom” in S Treumer and M Comba (eds), *Modernising Public Procurement—The Approach of EU Member States* (Edward Elgar Publishing, 2018), 282.
- Sánchez-Graells, A “Economics analysis of law, or economically informed legal research” in D Watkins and M Burton *Research Methods in Law* 2edn (Routledge, 2018), 170.
- Sánchez-Graells, A “Against the Grain? Member State Interests and EU Procurement Law” in M Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, forthcoming), 2.
- Sánchez-Graells, A, “‘If it ain’t broke, don’t fix it’ EU requirements of administrative oversight and judicial protection for public contracts” in S Torricelli and F Lalliot

- (eds), *Administrative Oversight and Judicial Protection for Public Contracts* (Lacier, 2017), 30.
- Sánchez-Graells, A, “Collaborative Cross-Border Procurement in the EU: Future or Utopia?” (2016) 3(1) *Upphandlingsrättslig Tidskrift* 11
- Sánchez-Graells, A, “Is Joint Cross-Border Public Procurement Legally Feasible or Simply Commercially Tolerated?—A Critical Assessment of the BBG-SKI JCBPP Feasibility Study” (2017) 12 (2) *European Procurement & Public Private Partnership Law Review*, 97.
- Sánchez-Graells, A, “Truly Competitive Public Procurement as a Europe 2020 Lever: What Role for the Principle of Competition in Moderating Horizontal Policies?” (2016) 22:2 *European Public Law*, 377.
- Sánchez-Graells, A, “You Can’t Be Serious: Critical Perspective on the Liability Threshold for Damages Claims for Breach of EU Public Procurement Rules After the EFTA Court’s Fosen-Linjen Opinion” (2018) *Nordic Journal of European Law*, forthcoming, 1.
- Sandulli, M, “Inefficacia del contratto e sanzioni alternative” in Guido Greco (ed), *Il sistema Della Giustizia Amministrativa Negli Appalti Pubblici in Europa* (Giufree Editore, 2011), 17.
- Scharph, F, “The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”” (2010) 8(2) *SocioEconomic Review*, 211.
- Schmidt-Aßmann, E, “Administrative law in Europe: Between common principles and national traditions” in M Ruffert (ed), *Administrative Law in Europe: Between Common Principles and National Traditions* (Europa Law Publishing, 2013), 3.
- Schmidt-Assmann, E, “Basic Principles of German Administrative Law” (1993) 35 *Journal of the Indian Law Institute*, 65.
- Schmidt, M and Bogdanowicz, P, “The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU” (2018) 4 *Common Market Law Review*.
- Schneider, P, “strukten des Europäischen Verwaltungsverbunds - Einleitende Bemerkungen die verwaltung” (2009) 8 *Die Verwaltung*, 9.
- Schønberg, S and Frick, K, “Finishing, Refining, Polishing: On the Use of *Travaux Préparatoires* as an Aid to the Interpretation of Community Legislation” (2003) 28(2) *European Law Review*, 149.
- Schooner, SL, “Desiderata: Objectives for a System of Government Contract Law” (2011) *GWU Law School, Public Law Research Paper* 37, 1.
- Schutze, R, “Direct Effects and Indirect Effects of Union Law” in R Schutze and T Trimidas (eds), *Oxford Principles of European Union Law*, Vol I: *The European Union Legal Order* (Oxford University Press, 2018), 290.
- Schutze, R, “Limits to the Internal Market Competences” in L Azouli (ed), *The Question of Competence in the European Union* (OUP, 2014), 225.
- Schwarze, J, “European Administrative Law in the Light of the Treaty of Lisbon” (2012) 18(2) *European Public Law*, 285.
- Siems, MM “Legal Originality” (2008) 1 *Oxford Journal of Legal Studies*, 147.

- Skovgaard Ølykke, G and Sanchez Graells, A, "Introduction" in G Skovgaard Ølykke and A Sanchez Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar Publishing, 2016), 8.
- Skovgaard Ølykke, G, "How does the Court of Justice of the European Union pursue competition concerns in a procurement context" (2011) 6 *Public Procurement Law Review*, 186.
- Śledzik, K, "Schumpeter's View on Innovation and Entrepreneurship" in S Hittmar (ed), *Management Trends in Theory and Practice* (Faculty of Management Science and Informatics, University of Zilina & Institute of Management by University of Zilina, 2013), 1.
- Smith, K, "A risk worth taking? Practical application of the law on contractual modification in the context of PPP accommodation projects" (2019) 1 *Public Procurement Law Review*, 16.
- Smith, S, "At what stage in a tender process must a tenderer provide proof that products which it proposes to deliver are equivalent to those defined in the technical specifications? Case C-14/17 VAR and ATM" (2018) 6 *Public Procurement Law Review*, NA151.
- Smits, JM, "Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures" (2007) 67 *Lousina Law Review*, 1181.
- Smits, JM, "What is legal doctrine? – On the aims and Methods of Legal-Dogmatic Research" R Van Gestel, H W Micklitz and E L Rubin (eds) *Rethinking Legal Scholarship – A Transatlantic Dialogue* (Cambridge University Press, 2017), 207.
- Somek, A "Unity and Community: A Tale of Two Monsters and One Unanswered Question" in MP Maduro and M Wind (eds), *The Transformation of Europe—twenty-five years on* (CUP, 2017), 249.
- Somek, A, "The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury" (2010) 20(4) *The European Journal of International Law*, 985.
- Sommermann, KP, "Europaisches Verwaltungsrecht oder Europaisierung des Verwaltungsrechts?" (1996) *DVBl*, 889.
- Steinicke, M, "Commentary on article 41 Directive 2014/24/EU" M Steinicke and PL Vesterdorf (eds), *Brussels Commentary on EU Public Procurement Law* (CH Beck, Hart, Nomos, 2018), 51.
- Steinicke, M, "Public procurement and negotiation procedure—a lesson to learn from US Law? (2011) 8 *European Competition Law Review*, 331.
- Steinicke, M, "The Public Procurement Rules and Innovation" in G S Ølykke, C R Hansen, C D Tvarno (eds), *EU Procurement Directives—Modernisation, Growth and Innovation—Discussions on the 2011 Proposals for Procurement Directives* (Jurist- og Økonomforbundets Forlag, 2012), 259.
- Strazza, G, "La nozione di organismo di diritto pubblico, attualmente prevista dall'art. 3, comma 1, lett. d) del d.lgs. n. 50 del 2016 (in recepimento dell'art. 2, par. 1, n. 4 della direttiva 2014/24/UE, dell'art. 3 par. 4 della direttiva 2014/25/UE, nonché dell'art. 6, par. 4 della direttiva 2014/23/UE), ricalca pedissequamente la definizione già delineata dalle direttive 2004/17/CE, 2004/18/CE e recepita, nel

- nostro ordinamento giuridico, dall'art. 3, comma 26, d.lgs. 12 aprile 2006, n. 163” (2018) *L'Amministrativista - Il Portale Sugli Appalti e I Contratti Pubblici*, 5.
- Struckman, K, and Hodal, P, “Private Enforcement of Contract Ineffectiveness: A Practitioner’s Point of View” (2014) 1 *European Public-Private Partnerships Law Review*, 27.
- Syrpis, P, “RegioPost—A constitutional Perspective” in Sánchez-Graells (ed) *Smart Public Procurement and Labour Standards—pushing the discussion after RegioPost* (Hart Publishing, 2018), 24.
- Tarrello, G, “L’interpretazione della Legge” in *Trattato di Diritto Civile e Commerciale*, vol 1 (Giuffrè, 1980), 153.
- Telles, P “Competitive Dialogue: should the rules be fine-tuned to facilitate innovation” in G Skovsgaard Ølykke, C Risvig Hanse and C Tvarnø (eds), *EU Public Procurement Modernisation, Growth and Innovation—Discussions on the 2011 proposals for Procurement Directives* (Djøf Publishing, 2012), 232.
- Telles, P and Butler, L, “Public Procurement Award Procedures in Directive 2014/24/EU” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djof Publishing, 2014), 131.
- Telles, P, “Competitive Dialogue in Portugal” in S Arrowsmith and S Treumer (eds), *Competitive Dialogue in EU Public Procurement* (Cambridge University Press, 2009), 388.
- Telles, P, “The Good, the Bad and the Ugly: EU’s Internal Market Thresholds and Cross-Border Interest” (2013) 43 *Public Contract Law*, 3.
- Thym, D, “Competing models for understanding differentiated integration” in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration—the Trajectory of Differentiation in EU Law* (Edward Elgar, 2017), 23.
- Torchia, L, “La nuova direttiva europea in materi di appalti servizi e forniture nei settori ordinari” (2015) 2–3 *Rivista Diritto Amministrativo*, 298.
- Torfin, J and Triamtafillou, P, “Enhancing Public Innovation by Transforming Public Governance?” in J Torfin and P Triamtafillou (eds), *Enhancing Public Innovation by Transforming Public Governance?* (CUP, 2016), 1.
- Trepte, P, “The Contracting Authority as Purchaser and Regulator: Should the Procurement Rules Regulate What We Buy” in G Skovgaard Olykke, C Risvig Hansen, CD Tvarno (eds), *EU Public Procurement—Modernisation, Growth and Innovation—Discussions on the 2011 proposals for Procurement Directives* (Djof Publishing, 2012), 87.
- Treumer, S “Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues” in S Treumer and F Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJOF Publishing, 2011), 1.
- Treumer, S, “Contract Changes and the duty to re-tender under the new EU public procurement Directive” (2014) 3 *Public Procurement Law Review*, 148.
- Treumer, S, “Cross-Broader Interest and Application of EU Law Principles in the Context at National Level” in D Dragos and R Caranta (eds), *Outside the EU Procurement Directives—Inside the Treaty* (DJØF Publishing, 2012), 335.

- Treumer, S, “Evolution of the EU Public Procurement Regime: The New Public Procurement Directive” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djøf Publishing, 2014), 9.
- Treumer, S, “Flexible Procedures or Ban on Negotiations? Will More Negotiation Limit the Access to the Procurement Market?” in G Skovsgaard Ølykke, C Risvig Hanse and C Tvarnø (eds), *EU Public Procurement Modernisation, Growth and Innovation—Discussions on the 2011 proposals for Procurement Directives* (Djøf Publishing, 2012), 135.
- Treumer, S, “Regulation of contract changes leading to a duty to retender the contract: the European Commission’s proposal of December 2011” (2012) 5 *Public Procurement Law Review*, 153.
- Treumer, S, “Technical Dialogue Prior to Submission of Tenders and the Principle of Equal Treatment of Tenders” (1999) 8 *Public Procurement Law Review*, 147.
- Treumer, S, “The discretionary powers of contracting entities—towards a flexible approach in the recent case law of the European Court of Justice?” (2006) 3 *Public Procurement Law Review*, 71.
- Treumer, S, “The Field of Application of Competitive Dialogue” (2006) 15 *Public Procurement Law Review*, 307.
- Treumer, S, “Towards an Obligation to Terminate Contracts Concluded in Breach of the EC Procurement: The End of the Status of Concluded Contracts as Sacred Cows” (2007) 16 *Public Procurement Law Review*, 371.
- Tridimas, T, “Competence after Lisbon: The Elusive Search for Bright Lines” in D Ashiagbor, N Countouris and I Lianos (eds), *The European Union After Lisbon* (Cambridge University Press, 2011), 47.
- Tridimas, T, “The principle of Proportionality” in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law*, vol I: *The European Union Legal Order* (OUP, 2018), 246.
- Troper, M, “L’influence du droit européen sur les concept structurels du droit public français: Introduction” in JB Auby (ed), *L’influence du droit européen sur les catégories du droit public* (Daloz, 2010), 1.
- Trybus, M “Public Contracts in European Union Internal Market Law: Foundations and Requirements” in R Noguellou and U Stelkens (eds), *Droit comparé des contrats publics* (Bruylant, 2010), 81.
- Trybus, M and Andrecka, M, “Favouring Small and Medium Sized Enterprises with Directive 2014/24/EU” (2017) 3 *European Procurement & Public Private Partnership Law Review*, 1.
- Trybus, M, “European Union Law and Public Procurement” (1 September 2017), English version of Spanish paper “El Derecho de la Unión Europea y la contratación pública” in A Montaña Plata and JI Rincón Córdoba (eds), *Contratos Públicos: Problemas, Perspectivas y Prospectivas Administrativo* (Universidad Externado de Colombia, 2017), 743.
- Trybus, M, “The Division of Public Contracts into Lots under Directive 2014/24/EU: Minimum Harmonization and Impact on SMEs in Public Procurement” (2018) 3 *European Law Review*, 313.

- Trybus, M, “The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive” in F Lichère, R Caranta and S Treumer (eds), *Modernising Public Procurement: The New Directive* (Djøf Publishing, 2014), 255.
- Usai, A, “A Professional Association as a ‘Body Governed by Public Law’ within the Meaning of Directive 2004/18/EC Judgment of the Court of Justice (5th Chamber) of 12 September 2013 in Case C-526/11- IDV GmbH & Co. KG v Aerztekkammer Westfalen-Lippe” (2014) 9 *European Procurement & Public Private Partnership Law Review*, 70.
- Uyarra, E, “The impact of public procurement of innovation” in J Edler, P Cunningham, A Gök and P Shapira (eds), *Handbook of Innovation Policy Impact* (Edward Elgar Publishing, 2016).
- Valcárcel Fernández, P, “The Relevance of Promoting Collaborative and Joint Cross Border Public Procurement for Buying Innovative Solutions” (2017) 1 *Ius Publicum Network Review*, 1.
- Valcárcel Fernández, P, and Acevedo Fernández, R, “Órganos Consultivos y de Recursos para el Control de la Contratación Pública en España” in D Sorace (ed), *Amministrazione Publica dei Contratti* (Editoriale Scientifica, 2013), 316.
- Van Gestel, R; Micklitz, HW and Poiares Maduro, M, ‘Methodology in the New Legal World’ (2012) *EUI Working Paper Law 2012/13*, 1.
- Vandenbroucke, F, “The Idea of a European Social Union: A Normative Introduction” (December 2016), paper submitted for publication as an introductory chapter in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union After the Crisis* (CUP, forthcoming).
- Vinti, S, “Note critiche in merito all’elevazione dell’organismo di diritto pubblico ad archetipo della personalità giuridica a ‘regime amministrativo’” in *Studi in onore di Franco Bassi* (Edizioni Scientifiche Italiane, 2015), 1283.
- Viola, L, “L’intelligenza artificiale nel procedimento e nel processo amministrativo: lo stato dell’arte” (2018) 3 *Rivista di Diritto Comparato e Europeo*, 1598.
- Von Bogdandy, A and Bast, J (eds), *Principles of European Constitutional Law*, 2nd edn (Hart Publishing, 2011), 1.
- Von Bogdandy, A, “Founding Principles of EU Law—A Theoretical and Doctrinal Sketch” (2010) 12 *Revus* 35.
- Von Bogdandy, A, “The Idea of European Public Law Today” in A Von Bogdandy, PM Huber, S Cassese (eds), *The Max Planck Handbooks in European Public Law—Administrative State*, vol 1 (OUP, 2017), 8.
- Vos, E and Weimer, M “Differentiated integration or uniform regime? National Derogations from EU internal market measures” in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration—the Trajectory of Differentiation in EU Law* (Edward Elgar, 2017), 304.
- Walker, N, “The European Union’s Unresolved Constitution” in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (CUP, 2012), 1185.

- Weatherill, S, “Maximum versus minimum harmonization: Choosing between unity and diversity in the search for the soul of the internal market” in N Shuibhne and L Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP, 2012), 200.
- Weatherill, S, “The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has become a Drafting Guide” (2011) 12 *German Law Journal*, 827.
- Weiler, JHH, “60 Years since the First European Community: Reflections on Messianism” (2011) 22 *European Journal of International Law*, 303.
- Weiler, JHH, “The Transformation of Europe Revisited: The Things that Do Not Transform” in Maduro and Wind (eds), *The Transformation of Europe—twenty-five years on* (CUP, 2017), 348.
- Weiler, JHH, “The Transformation of Europe” (1991) 100(8) *Yale Law Journal*, 2474.
- Wolff, D and Burgi, M “Scaling down the cascade: a critical analysis of the implementation of Directive 2014/24/EU” in Treumer and Comba (eds), *Modernising Public Procurement—The Approach of EU Member States* (Edward Elgar Publishing, 2018), 117.
- Wollenschläger, F, “Germany” in U Neergaard, C Jacqueson & G Skovgaard Ølykke (eds) *Public Procurement Law – Limitations, Opportunities and Paradoxes* n 321, 438.
- Wyn Jones, R and Scully, R, “Introduction: Europe, Regions and European Regionalism” in R Wyn Jones and R Scully (eds), *Europe, Regions and European Regionalism* (Palgrave Macmillan, 2010), 3.
- Xanthaki, H, “Improving the Quality of EU Legislation” in S Garben and I Govaere (eds), *The EU Better Regulation Agenda—a critical assessment* (Hart Publishing, 2018), 29.
- Yukins, CR, “A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model” (2010) 40 *Public Contract Law Journal*, 63.

WORKING PAPERS AND OTHER ACADEMIC WORKS

- Arrowsmith, S, *EU Procurement Law I*, Module Guide Book 4 (University of Nottingham, unpublished; 2016/17).
- Berman, T and Squire, M, “Demand-side innovation policies in Australia” in *OECD Demand-side Innovation Policies* (OECD Publishing, 2011).
- Borrás, S and Edquist, C, *Conceptual Underpinnings for Innovation Policy Design—Indicators and Instruments in Context*, Paper prepared for the OECD Blue Sky Conference III, 19–21 September 2016 in Het Pand, Ghent, Belgium, available at <https://www.oecd.org/sti/019%20-%20Borras-Edquist%20Blue%20Sky%20SUBMITTED%2025th%20July.pdf>.
- D Burkus, “Innovation Isn’t an Idea Problem” (July 2013) *Harvard Business Review Blog Network*, available at <https://hbr.org/2013/07/innovation-isnt-an-idea-proble>.

- De Vries, HA; Bekkers, VJJM and LG Tummers, *From Public Innovation to Social Innovation in the Public Sector: A literature review of relevant drivers and barriers* (2013) Speyer: EGPA conference.
- De Vries, HA; Bekkers, VJJM and LG Tummers, *Innovation in the Public Sector: A Systematic Review and Future Research Agenda* (2014) Speyer: EGPA conference.
- Edquist, C and Zabala-Iturriagoitia, JM, *Why Pre-Commercial Procurement is not Innovation Procurement* (Centre for Innovation, Research and Competence in the Learning Economy (CIRCLE) Lund University, 2012), available at <https://charlesedquist.files.wordpress.com/2013/04/201211-revised-edquistzabala-as-circle-electronic-paper-final.pdf>.
- Edquist, C, *Efficiency of Research and Innovation Systems for Economic Growth and Employment*, Final Report from the 2014 ERAC Mutual Learning Seminar (MLS) on Research and Innovation Policies: SESSION I (2014), available at https://charlesedquist.files.wordpress.com/2015/04/201408_edquist.pdf.
- Franzosi, M, “Novelty and Non-Obviousness—the relevant prior art” (2002) 7 *CASRIP Symposium Publication Series*, available at <http://www.law.washington.edu/casrip/symposium/Number7/>.
- Hood, C, “Reflections on Public Service Reform in a Cold Fiscal Climate”, Paper for the Commission on Public Service Trust, 17 June 2010;
- Pachnou, D, “The effectiveness of bidder remedies for enforcing the EC public procurement rules: a case study of the public works sector in the United Kingdom and Greece”, PhD Thesis, University of Nottingham, 2003.
- Ramo, JC, “The Beijing Consensus”, The Foreign Policy Center (May 2004), available at <http://fpc.org.uk/fsblob/244.pdf>.
- Sánchez Graells, A “Distortions of Competition Generated by the Public (Power) Buyer: A Perceived Gap in EC Competition Law and Proposals to Bridge It” Center for Competition Law and Policy, University of Oxford (CCLP), L (23) *Working Paper*.
- Sanchez Graells, A, “CJEU: Vertical Effect of Directives goes both ways (C-425/12)”, available at <http://www.howtocrackanut.com/blog/2013/12/cjeu-vertical-effect-of-directives-goes.html>.
- Sánchez-Graells, A “Difficult Balance between Transparency and Competition in Public Procurement: Some Recent Trends in the Case Law of the European Courts and a Look at the New Directives” (2013) 13 *University of Leicester School of Law Research Paper*, available at ssrn.com/abstract=2353005.
- Yeow, J; Uyarra, E and Gee, S, “Sustainable Innovation through Public Procurement: The case of ‘closed loop’ recycled paper”, *Manchester Business School Working Paper No 615* (2011), available at <http://www.mbs.ac.uk/cgi/apps/research/working-papers/>.

OFFICIAL DOCUMENTS

European Commission

European Commission, “Guidance on Innovation Procurement” COM(2018) 3051 final, 15.5.2018.

European Commission, Innovation Union Scoreboard 2017, Brussels, available at <http://ec.europa.eu/DocsRoom/documents/24829>.

European Commission, Measurement of impact of cross-border penetration in public procurement—Final Report—Study (2017), available at <https://publications.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1>.

European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions—Making Public Procurement Work in and for Europe”, COM(2017) 572 final, 3.10.2017.

Report from the European Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement, COM (2017) 28 final Brussels, 24.1.2017.

European Commission Staff Working Document—Better Regulation Guidelines, SWD (2017) 350, 7 July.

European Commission “Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Investing in a smart, innovative and sustainable Industry – A Renewed EU Industrial Policy Strategy” COM(2017)479 final, 13.9.2017.

European Commission “White Paper on the Future of Europe – Reflections and Scenarios for the EU27 by 2025” (2017) COM(2017) 1.03.2017.

European Commission “Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions - Europe's next leaders: the Start-up and Scale-up Initiative” COM(2016) 733 final, 22.11.2016.

European Commission, DG-GROW G4-Innovative and e-procurement, Public Procurement Indicators 2014, 2 February 2016.

European Commission, “BBG – SKI, Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States” December 2016, available at <http://ec.europa.eu/DocsRoom/documents/22102/>.

European Commission, “Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee of the Regions on Upgrading the Single Market: more opportunities for people and business” COM (2015) 550 final, 28.10.2015.

European Commission communication “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of

- the Regions, “Better regulation for better results—An EU agenda”, COM/2015/0215 final 19.05.2015,
- European Commission, Public Procurement as a Driver of Innovation in SMEs and Public Services (European Union, 2014).
- European Commission “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions For a European Industrial Renaissance”(2014) COM/2014/014 final, 12.09.2014.
- European Commission, State of innovation union. Taking stock 2010–2014, COM (2014) 339 10.6.2014.
- European Commission Communication, “Communication from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the Regions on Single Market Act II Together for new growth” Brussels COM (2012) 573 final, 3.10.2012.
- European Commission, “Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market Brussels” COM (2011) 15 final, 27.1.2011.
- European Commission, “The Commission’s original proposal for a new Public Procurement Directive” COM(2011) 896 final, 20.12.2011.
- European Commission, “Impact assessment accompanying the document ‘Proposal for a Directive of the European Parliament and of the Council on Public Procurement’” (2011), SEC(2011) 1585 final, 20.12.11.
- European Commission, “Modernising European public procurement to support growth and employment—Press Release” (2011) IP/11/1580.
- European Commission Communication, “Communication from the Commission to the European Parliament the Council, the European Economic and Social Committee and the Committee of the Regions, Single Market Act: Twelve levers to boost growth and strengthen confidence ‘Working together to create new growth’”, Brussels, COM (2011) 206 final, 13.04.2011.
- European Commission “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions An Integrated Industrial Policy for the Globalisation Era, Putting Competitiveness and Sustainability at Centre Stage” COM(2010) 614 final, 28.11.2010.
- European Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth (Communication) COM(2010) 2020 final 3.3.2010.
- European Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Smart Regulation in the European Union” COM(2010) 543 final, 8.10.2010.
- European Commission Communication “Europe 2020, Flagship Initiative. Innovation Union” Brussels, SEC(2010) COM(2010) 546 final, 6.10.2010.
- European Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of

- the Regions, “Third Strategic Review of Better Regulation in the European Union”, COM (2009) 15 final, 28.01.2009.
- European Commission “Commission Staff Working Document—European Code of Best Practices Facilitating the Access by SMEs to Public Procurement Contracts” SEC(2008) 2193, 25.06.2008.
- European Commission Communication “Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe”, Brussels, COM (2007) 799 final, 14.12.2007.
- European Commission Interpretative Communication on the Community law applicable to contracts not or not fully subject to the provisions of the Public Procurement Directives, 1 August 2006, (2006) OJ C-179/02.
- European Commission, Impact Assessment Report—Remedies in the field of public procurement, 4 May 2006, SEC (2006) 557.
- Expert Group Report presented to the European Commission, Public procurement to research and development procurement practises favourable to R&D, Brussels, Belgium (2005), EUR 21793.
- Report to the European Commission from an Independent Expert Group, Raising EU R&D Intensity: Improving the Effectiveness of Public Support Mechanisms for Private Sector Research and Development: Direct Measures, 2003.
- European Commission, “Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises” (2003/361/EC), 20.5.2003.
- European Commission Communication “Innovation Policy: updating the Union’s approach in the context of the Lisbon strategy”, Brussels, COM (2002) 112 final, 11.03.2003.
- European Commission Communication, “More Research for Europe Towards 3% of GDP”, Brussels, COM (2002) 499 final, 11.09.2002.
- European Commission, “Industrial policy in an enlarged Europe, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions”, Brussels, COM(2002) 714 final, 1.04.2002.
- European Commission Interpretative Communication of Concessions under Community Law, 29 April 2000, (2000) OJ C-121/2.
- European Commission, “Green Paper Public Procurement in the European Union—Exploring the Way Forward” COM (96) 583 final, 27.11.1996.
- European Commission, “The Cost of Non-Europe in Public Sector Procurement” in *The Cost of Non-Europe, Basic Findings*, vols 5A and 5B (1988).

Others

- European Parliament, “Report on public procurement strategy package of 27 June 2018”, (2017/2278(INI), available at

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0229+0+DOC+XML+V0//EN#title1>.

House of Commons, “Algorithms in decision-making—Fourth Report of Session 2017–19”, HC 351, 23 May 2018.

European Bank for Reconstruction and Development, “Capacity Building in Procurement” (December 2012); OECD, “Developing public procurement capacity in Europe” (2017).

European Semester: Thematic Factsheet: Public procurement 14.11.2016, COM (2016), 4.1, available at https://ec.europa.eu/info/sites/info/files/european-semester-thematic-factsheet-public-procurement_en.pdf.

Consellium of Europe “The Bratislava Declaration” (2016) 16.09.2016.

European Parliament, Directorate General (DG) for Internal Policies, “Gold-plating the EAFRD: To what extent to national rules unnecessarily add to complexity and, as a result, increase the risk of errors?” (2014).

OECD, “Building Organisational Capacity for Public Sector Innovation” (2014), Background Paper prepared for the OECD Conference, “Innovating the Public Sector: from Ideas to Impact”, Paris, 12–13 November 2014.

DG for Internal Market, Industry, Entrepreneurship and SMEs (European Commission) and GHK Consulting Technopolis, “Evaluation of SMEs’ access to public procurement markets in the EU” 01.04.2014.

European Parliament, “Position of the European Parliament, adopted at first reading on 15 January 2014, with a view to the adoption of Directive 2014/.../EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC” EP-PE_TC1-COD(2011)0438, 15.1.2014.

High Level Group on Innovation Policy Management, Report & Recommendations, June 2013.

UK Guidance on the Implementation of the EU Directives, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf, 23 April 2013.

Opinion of the European Economic and Social Committee on the “Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors” COM(2011) 895 final — 2011/0439 (COD) 7.2.2013.

European Parliament, “Report on the proposal for a directive of the European Parliament and of the Council on Public Procurement” COM(2011) 0896-C7-0006/2012-2011/0438(COD) 11.01.2013.

Opinion of the Committee of the Regions on “Public procurement package” 2012/C 391/09, 18.12.2012.

Note from the Presidency of the Council [9696/12], 11 May 2012, 9, at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209696%202012%20INIT>.

EPEC (European PPP Expertise Centre), “Procurement of PPP and the Use of Competitive Dialogue in Europe—A Review of Public Sector Practises across

the EU (2011)", available at http://www.eib.org/attachments/epec/epec_procurement_ppp_competitive_dialogue_en.pdf.

Presidency Conclusions, Barcelona, European Council 15 and 16 March 2002, point 47, Document (SN 100/1/02 Rev 1).

Presidency Conclusions, Göteborg, European Council, 15 and 16 June 2001, point 21, Document (SN 200/1/01 Rev 1).

WS Atkins Management Consultants, "The Cost of Non-Europe in Public Procurement, vol 5A" (WS Atkins, 1998).

Index