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Are the procurement rules a barrier for cross-border trade within the European market? 

A view on proposals to lower that barrier and spur growth

Dr Albert Sánchez Graells

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ABSTRACT
Public procurement rules were introduced in the European legal system as a device mainly intended to help build an effective internal market where competition is not distorted, in search for economic development. According to the supporting Cecchini Report, increasing cross-border competition for public contracts would generate major economic effects (both static and dynamic). Almost 40 years after, it is relevant to see if EU public procurement rules continue to be a boost for the internal market or, on the contrary, have become a true burden and a significant barrier to cross-border trade as some claim. Given the relevance of public procurement in the Europe 2020 Growth Strategy and the proposal for new procurement Directives sponsored by the European Commission, this issue seems particularly timely.

This paper proposes a slightly different approach to the assessment of whether EU public procurement rules are a potential obstacle to cross-border trade—moving from macroeconomic analysis towards a “better regulation” view of the chances to reduce red tape and simplify procurement processes—and offers a preliminary appraisal of some of the simplification measures and/or new devices included by the European Commission in the 2011 proposal for new procurement Directives (limiting the analysis to general provisions and, therefore, not covering procurement in the excluded sectors, concessions nor defence and security sensitive procurement).

KEYWORDS
Public procurement, internal market, economic growth, red tape, simplification.

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H57, K12, K23, K49, O10.

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1 asanchezgraells@gmail.com. Comments welcome. Lecturer at the Faculty of Law of Comillas Pontifical University (Madrid, Spain), appointed Lecturer at the Law School of the University of Hull (UK).
1. INTRODUCTION

EU public procurement law has always been strongly influenced by the goal of market integration. The relevance of the market integration objective was already clear in the first generation of procurement Directives, and this market integration aim has been renewed on every occasion the Union has included procurement policy in growth-related agendas. Indeed, in their effort to reach a fully functioning internal market, EU institutions placed market integration as the paramount goal of public procurement regulations and made it a key element in the 1992 strategy for the completion of the single market. Discrimination and protectionism in public procurement were considered a non-tariff barrier to intra-EU trade, and significant efforts were put into getting the Member States to abandon those policies. Given the political instrumentalization of public procurement, the EU institutions had to overcome a significant initial reluctance to market integration through public procurement by Member States. Non- or partial compliance with public procurement Directives was widespread among Member States and the ECJ had to issue numerous judgments condemning their resistance to opening up public procurement markets.


3 Currently, there are four significant public procurement Directives: only two of them are affected by new proposals and a fifth procurement Directive on concessions could be added to the “procurement family”. In this contribution, the analysis and considerations will be limited to current Directive 2004/18 and the proposal for its modernisation [see Commission’s Proposal for a Directive of the European Parliament and of the Council on public procurement, Brussels, 20.12.2011, COM(2011) 896 final <http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm> accessed 14 January 2012].


Such impulse and use of the public procurement Directives as a fundamental market integration and economic growth instrument has been recently renewed in the *Europe 2020 Growth Strategy*—which has made clear that “[p]ublic procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide”. In a more specific way, the Commission has included among its twelve key priority actions to be adopted by the EU institutions before the end of 2012, a “[r]evised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs”—without overlooking the fact that “this simplification must be carried out in a way that does not close procurement to cross-border competition”. And, even more precisely, the set goal is “to maximise the benefits of public procurement, which represent 18% of GDP, to boost growth [given that] [p]ublic procurement is an important channel for public finances in difficulty, it is a vector for medium and long-term investment, it plays a role in the response to our needs for infrastructure and services (public procurement contracts amounting to 420 billion Euros are announced each year at a European level)”. The Commission plans to achieve these growth aims through procurement “by providing simpler procedures to those who manage public procurement, allow[ing] them to support socially responsible and environmentally friendly approaches”. Therefore, the European Commission seems persuaded that there is still significant room for improvement of the contribution of public procurement to growth in the near future, through simplification and a new push for market integration in procurement markets (on the economic evidence that backs up this position, see *infra* §2).

In this regard, the Commission has included as the first objective of the current review of the EU procurement rules “to increase the efficiency of public spending. This includes on the one hand, the search for best possible procurement outcomes (best value for money). To reach this aim, it is vital to generate the strongest possible competition for public contracts awarded in the internal market. Bidders must be given the opportunity to compete on a level-playing field and distortions of competition must be avoided. […] More efficient procedures will benefit all economic operators and facilitate the participation of both SMEs and cross-border bidders. In fact, cross-border-participation in EU public procurement procedures remains low. The


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comparison with the private sector, where cross-border trade is much higher, shows that there is still considerable potential to be tapped”.¹³

To be sure, even if there are still significant difficulties to a truly integrated and booming internal market for procurement (or, to be more optimistic, significant room for further development), the situation has evolved positively in the last 20 years and the present generation of procurement Directives has contributed to the opening up of public procurement to cross-border trade [direct or indirect, which has gone from almost zero in 1990, up to 8.5% in 1999,¹⁴ and further up to 13.4% by value of the contracts awarded in the EU in 2006-2009¹⁵] and, hence, has made a substantial contribution to the attainment of the internal market.¹⁶

Indeed, important progress has been made and the gradual liberalization of public procurement markets in the EU has taken place.¹⁷ However, in my view, current EU public procurement rules and practice still present the problem of being excessively focused on preventing discrimination based on nationality (which has overshadowed other discrimination problems, protectionist policies and competition restrictions and

¹³ European Commission, Green Paper on the modernisation of EU public procurement policy—Towards a more efficient European Procurement Market, Brussels, 27.1.2011, COM(2011)15 <http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm> accessed 15 January 2012 (emphasis added). In my opinion, the argument of the comparison with private sector cross-border trade is tricky, since public buyers usually buy final products, services or completed works and, consequently, do not participate (significantly) in intermediate markets, where cross-border trade may be more intense than in final (consumption) markets—and, consequently, has a structural lower level of cross-border penetration. In similar terms, stressing that “[t]he low level of public sector import penetration can be explained in large part by the nature of the goods and services that the public sector consumes”, Commission Staff Working Paper, Evaluation Report—Impact and Effectiveness of EU Public Procurement Legislation, Part 1, 133-134, Brussels, 27.6.2011, SEC(2011) 853 final <http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_en.htm> accessed 14 January 2012. However, this is an issue that exceeds by far the scope of this contribution and, consequently, it will not be pursued further.

¹⁴ Even if that figure was put into question by the Commission as potentially too low on the basis of data regarding cross-border participation rather than cross border award of public contracts (participation seemed to be of around 46% of interviewed bidders), effective cross-border procurement was unlikely to exceed 10% by the end of the 1990s, given that the success rate for foreign bidders was still somewhere between 25% and 35%, diverging for direct and indirect cross-border procurement; see European Commission, A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future, 3.2.2004 <http://www.oecd.org/document/7/0,3746,en_33638100_34612958_35025223_1_1_1_1,00.html> accessed 14 January 2012. See also Sandler, Susan R “Cross-Border Competition in the European Union: Public Procurement and the European Defence Equipment Market” [2008] Washington University Global Studies Law Review 7, 3, 373-454, 396-404.

¹⁵ Evaluation Report—Impact and Effectiveness of EU Public Procurement Legislation (n 13) 133-134.


distortions in European public procurement)\textsuperscript{18}—although a broader objective of fostering competition on the basis of fair and open access to procurement (not only for bidders from different Member States) can be identified in Directive 2004/18 and is further reinforced in the proposed new procurement Directive.\textsuperscript{19} Encouragingly, it seems to be getting clearer and clearer that market integration in procurement must go hand in hand with promoting and protecting effective competition for public contracts. In this regard, I think that it can be safely assumed that the goal of market integration is largely compatible with the fundamental principles of public procurement\textsuperscript{20}—which are about to be (finally) “consolidated” by article 15 of the proposed new public procurement Directive that clearly states that, in accordance with the controlling principles of procurement, “[c]ontracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way [and] [t]he design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition”. In short, market integration is clearly beneficial from a competition perspective, as greater openness of public procurement markets must promote increased competition for public contracts across the EU and, in more general terms, provide incentives for companies to increase efficiency.\textsuperscript{21} Moreover, EU public procurement rules place a strong emphasis on transparency and advertisement as a means to raise EU-wide awareness and to promote (cross-border) competition.

Hence, the only area where a clash of conflicting goals exists is that of the efficiency of the public procurement system. EU rules impose (increased) administration costs—particularly derived from EU-wide publicity and translation of documents—that need to be outweighed by the efficiencies deriving from increased competition. The basic assumption that has always been (expressly or impliedly) at the basis of procurement regulation in the EU is that the positive effects derived from increased competition will more than offset the increased costs of the system—which would make it a clearly desirable regulatory tool and an interesting policy area in terms of growth promotion.\textsuperscript{22} Therefore, unless such a trade-off analysis proved otherwise, there should be no


\textsuperscript{21} Geroski “European Industrial Policy” (n 6) 33.

significant reservations as regards the desirability of promoting market integration in the EU public procurement field (which is further explored in the following section).

2. SOME BASIC ECONOMIC EVIDENCE REGARDING THE IMPACT OF PROCUREMENT RULES ON THE WORKING OF THE INTERNAL MARKET

Most of the available economic evidence supports the conclusion that the EU public procurement rules generate net positive economic effects. However, what is farther from clear is how to measure such economic gains. The task of measuring the benefits is extremely difficult, since (even when good and recent data is available, which is not always the case) there is almost no information that can be used to build a counterfactual where completely unregulated procurement took place—so the setting of a proper benchmark for such studies remains elusive.23 Therefore, we need to resort to either relatively simple qualitative studies (which usually lack the sufficient volume of data to offer solid conclusions) or to highly complicated econometric studies (which can only measure the impact of certain aspects of the procurement regulations without making the models impossibly arcane24).

Qualitative studies tend to indicate high economic gains derived from procurement. For instance, the supporting studies published during the 2004 procurement rules revision indicated that compliance with the then current Directives generated a rough 30% decrease in prices compared to non-compliant or unregulated procurement.25 On the other hand, quantitative studies tend to offer a much more meagre view of the potential savings. Along these lines, the outcome of the recent 2011 estimate of the benefits generated by the procurement Directives clearly supports that “good procurement practice in general has a beneficial effect on procurement outcomes”26—however, more specifically, the study finds that savings due to the use of open procedures or the associated increase in the number of bidders remain in the environment of 5% of the procurement value. Therefore, the claimed benefits from proper procurement vary significantly depending on the methodology and data used in the corresponding studies and, as a consequence, the use of economic evidence as the basis for policy should remain along the general trends (good procurement generates significant savings) while the specific numbers should be taken with a pinch of salt.

Be it as it may, even achieving savings in the lower level of the estimated range would be highly relevant27. Bearing in mind that public procurement represents around 20% of the EU GDP, the lowest of the estimates would imply that public procurement rules

23 For some interesting considerations on the difficulties of appraising the effect of procurement rules, see Nielsen, Jørgen and Hansen, Lars “The EU Public Procurement Regime—Does It Work?” [2001] Intereconomics 36, 5, 255-263.
25 Commission Report on the functioning of public procurement markets in the EU (n 14) 14-20, where it is found that the application of the Directives generated lower prices (around 34-40% lower) than procurement that did not comply with the EU rules.
26 However, it should be borne in mind that the study follows closer an analysis of “good procurement practices” than an analysis of strict compliance with EU rules; Europe Economics, Estimating the Benefits from the Procurement Directive—A Report for DG Internal Market, London, 13 May 2011 <http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_en.htm> accessed 14 January 2012. The study is particularly interesting in its literature review section.
alone could generate savings of up to 1% of the GDP (which, in these days of economic crisis, would mean doubling the economic growth of most of the Member States). Further, as has been clearly indicated, even savings at this level (0.5 to 1% GDP) could generate relevant long-run macroeconomic effects.\(^28\)

Therefore, for the purposes of this commentary, it suffices to know that—even with a very conservative approach to the analysis of the available economic evidence of the effects of public procurement rules—there are significant long-run economic gains to be obtained from the design and enforcement of public procurement rules based on good practices—ie competition-promoting public procurement rules (be it cross-border or not). Therefore, the question does not seem to be whether we want or need common procurement rules in order to foster economic growth in the EU, but what type of procurement rules are more indicated for that job. And, as in most instances in the field of EU Economic Law, the answer requires an analysis of the costs and trade offs implied in the design of such rules.\(^29\)

3. A SLIGHTLY DIFFERENT APPROACH: FOCUS ON SIMPLIFICATION AND REDUCTION OF RED TAPE

As is clear from the prior sections, the most relevant issue does not seem to be whether procurement rules set a barrier to cross border trade—since it seems clear that they make a positive contribution to the cross-border activities of firms and, hence, to the development of the internal market, which is promoted by the transparency and advertising requirements of the Directives. Therefore, one could simply dismiss the question by answering that public procurement rules do not pose a barrier to the development of the internal market. However, that could imply that current procurement rules eliminate all obstacles to cross-border (intra-EU) trade in procurement markets—and that would not reflect reality.\(^30\)

Consequently, in my view, the broader question of how to obtain further advantages from the internal market (and the underlying fundamental freedoms) in the area of public procurement should revolve around the cost at which these advantages come—or, in other terms, the analysis and reform proposals should focus on the impact of the

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\(^30\) It suffices to look at the public consultation following the Green Paper [Synthesis document 14-15 <http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm> accessed 14 January 2012)] or the Evaluation Report—Impact and Effectiveness of EU Public Procurement Legislation (n 13) 14-18, to see that there still are significant hurdles to cross-border participation in procurement, particularly for SMEs.
Directives in terms of transaction costs and red tape. Maybe some better questions would be “Are the procurement rules excessively costly to comply with? Is there a way to increase the efficiency of the EU public procurement system, particularly by reducing red tape and other types of (direct and indirect) costs?”. Again, maybe both questions could be easily dismissed by saying that yes, the (perceived) costs generated by EU procurement rules are too high and, consequently, they can (and should) be reduced. However, in my view, both questions deserve some further analysis.

Regarding the costs that current EU procurement rules generate, it is worth noting that a recent study prepared for the European Commission reaches (amongst many others) three basic findings that, in my view, are particularly relevant. First, although this is just a reminder (but, granted, of something that tends to be overlooked in most debates and analysis), the study stresses that procurement “costs are not fully attributable to the procurement directives [for] purchasers would regardless have to procure their goods and services and costs would be incurred with or without the directives” (emphasis added). This reminder is important because we need to keep in mind that there is no such thing as “cost-free procurement” and, therefore, the design of the system should be oriented towards a minimisation of procurement costs, but never aim to their complete elimination (which is off reach).

Second, that “the cost of public procurement in Europe is estimated at about 1.4 percent of purchasing volume” of which “businesses account for 75 percent”. Even without readily available benchmarks, nonetheless, it seems that an overall procurement cost of around 1.5% of the total procurement value, even if significant (since the aggregate is about 5.26 billion euro), would not be disproportionately high. Also, the natural split of costs between public buyers and businesses (larger in number for any given tender, or at least desirably so) puts an emphasis on the need to focus the regulatory efforts on reduction of participation costs for business, since that is the area where larger effects can be expected.

And third, that “[t]here is practically no relationship between contract value and procurement costs except in the very high value range”—which means that procurement costs are fixed costs in their majority and, consequently, “in contracts with a value close to the threshold above which EU procurement directives become compulsory (125,000 euro) total procurement costs for business and government amount to about 30 percent of the contract value”. However, such a finding needs to be properly contextualized.

31 In similar terms, see Commission Report on the functioning of public procurement markets in the EU (n 14) 21: “any evaluation of market performance must also take into account the costs of operating in these markets for firms and authorities. There are costs associated with making procurement markets more transparent and competitive. Transaction cost minimisation is essential to ensure good market performance”. Also along these lines, Jurčík, R. “The economic impact of the EC procurement policy” [2007] Agric. Econ. – Czech, 53, 7, 333-337.
33 Ibid 89-90.
34 Ibid 125, which reaches similar conclusions: “There are considerable process costs, in particular for participating businesses and these can become a significant burden on the system particularly for the low value contract ranges in which most purchasing takes place”.
for it may misrepresent reality and, hence, could prompt the adoption of extreme or disproportionate policy options that may not be desirable.

According to the data available in the study itself, the proportion of cost-to-value decreases quite rapidly and, consequently, procurements of a slightly higher value (of about 200,000 euro—ie almost all type-value contracts covered by Directive 2004/18, which amount to roughly 60% of the number of contracts covered by the study36) would imply costs of between 11% and 20%. Whereas at “390.000 euro, the median contract value, costs reach between 6 and 9 percent”. Therefore, the 30% cost-to-value upper estimate will be rarely the actual situation in procurement covered by the Directives.

Moreover, it must be taken into account that this cost-to-value proportion varies by procedure and contract type, as reported by the study.

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Figure 2.17 Total procurement cost (firms and government) as share of contract values (HiLo estimates)


Figure 2.18 Procurement cost (firms and government) as share of contract values


36 Ibid 41, where it is reported that works amount to 39% of award notices, services reach 35% and supplies 25% of the TED database for the 2006-2010 period.
Hence, as the report itself stresses, “works is as expected relatively more expensive compared to contract values [while] supplies have a lower share”. In this regard, given that works contracts must only comply with EU procurement rules when they exceed a value of 5 million euro (off the charts of the study), and that supplies contracts have a relatively lower cost-to-value, it seems that the issue mainly concerns relatively low value services contracts.

All in all, in my view, given that

- works services contracts covered by the Directive have a value over 5,000,000 euro and, consequently, a proportional cost of around or below 2 to 4%;
- most services and supplies contracts covered by the Directive are of a value above 200,000 euro and, hence, have a cost-to-value of between 11% and 20% (with a median at 6-9%); and
- the rest of services and supplies contracts covered by the Directive have a value in excess of 130,000 euro and have a proportional cost of 18 to 20%;

the aggregate estimate of cost-to-value proportion should be presented as reaching a maximum of 20% for services and supplies contracts, and a maximum of 4% for works contracts—which seem to be far less alarming figures than those stressed by the study, while still requiring regulatory attention and justifying certain reforms (particularly in those countries where cost figures exceed the EU average).

In any case, even when duly contextualised, this finding is particularly relevant because it clearly brings to the table the fact that some bidders may refrain from participating in low value tenders due to disproportionate costs (particularly if they are risk averse and/or appraise negatively their likelihood of winning the tender). In this regard, focusing the regulatory reform efforts on lowering participation costs particularly for low value procurement, the potential centralisation or aggregation of procurement—or even exploring the possibility of making some costs recoverable for losing bidders—seem prima facie good regulatory initiatives.

An alternative road could be to increase the value thresholds that make EU procurement rules mandatory (in order to improve the cost-to-value ratio). However, since it seems unlikely that costs generated by other types of procurement (under national rules, or otherwise) are more variable than the costs generated by EU-compliant procurement, that possibility seems hardly able to provide substantially better outcomes [diminishing, on the contrary, the likely benefits derived from EU-wide (potential) competition].

As a preliminary conclusion and in view of all the prior economic evidence, both on the economic advantages resulting from increased cross-border procurement derived from compliance with EU procurement rules and the costs that they generate; there seems to be sufficient proof that their net effect is positive. As indicated by the Commission in the Impact Assessment accompanying the proposed new procurement Directive:

“The evaluation found that the Directives have had positive impacts: transparency has increased and there are good levels of competition for many public procurement contracts (on average 5.4 bids per invitation). This has resulted in a net increase in benefits - the total cost of the procurement process [...] for those procedures covered by the EU Directives has been estimated at
€5.6 billion per year or 1.3% of the total value of contracts published. This is more than offset by the estimated savings, which are around 5% of the total i.e. €20 billion in 2009, without making any allowance for improvements in quality and wider environmental or social benefits. However there is some evidence that the current procedures are not as efficient as they could be (average cost of an above threshold procedure is approximately €28,000) which sometimes leads to higher costs for certain parties. Cross-border procurement is still not as high as had been expected, accounting for around just 1.6% of contract awards (3.5% of total value)” (emphasis added).37

The Commission has also rightly identified areas for improvement and, consequently, has included a range of refinements to existing techniques and/or new tools to further the efficiency of the EU procurement system, towards which the next section moves.

4. PRELIMINARY APPRAISAL OF SOME SIMPLIFICATION MEASURES ORIENTED TO REDUCE COSTS AND FOSTER CROSS-BORDER PARTICIPATION

On the basis of the prior economic orientations to procurement reform, and as mentioned in passing, it seems adequate that the Commission has focused part of its efforts on simplification and the ensuing reduction of red tape and other costs of conducting and participating in public tenders. This section briefly analyses some of the reform proposals more closely linked to these concerns.

4.1. Reduction of red tape: introducing the European Procurement Passport and (honour) self-declarations

One of the relatively simple ways to reduce red tape—at least at first sight—is to lower the documentary requirements and formalities that bidders have to complete in order to participate in public tenders. In this regard, the proposal for a new procurement Directive (propDir)38 includes two new tools that may seem to contribute to lower red tape and unburden bidders and contracting authorities and entities—but, in my opinion, generate higher risks and difficulties than benefits, at least in their current configuration.

On the one hand, articles 22 and 57 propDir introduce the mandatory acceptance of self-declarations as prima facie evidence for selection purposes. Under this new system, bidders would be able to file declarations on honour that they have not and will not engage in illicit conduct (art 22 propDir) and self-declarations39 whereby they represent that they are not affected by exclusion grounds, that they meet selection and short-listing criteria (as applicable) and that they will be able to produce hard documentary evidence of such circumstances without delay, upon request of the

39 It may be a purely terminological issue, but the difference between declarations on honour and self-declarations remains unclear and it may be desirable to unify this (or clarify the differences).
contracting authority [art 57(1) propDir]. The contracting authority will be free to request submission of such documents at any point of the process where this appears necessary to ensure the proper conduct of the procedure and, in any case, prior to awarding the contract [art 57(2) propDir]. Failure to support any of the prior declarations (or proof of their falsity) will generate an impediment to award under article 68 propDir.

In my view, this proposal clearly reduces the costs of participating in the tender for unsuccessful bidders (increasing the incentive to participate), but generates a relatively small advantage for successful bidders (only a time gain, and of an uncertain length at that), increases the length of the procedure (there is no regulation concerning the time that the authority must give the successful tenderer to produce the requested documents prior to award) and generates a risk of potential award to non-compliant bidders that would require second or ulterior awards (with the corresponding difficulties regarding the need to ensure that other bidders keep their offers open, new award notices, etc). In order to complete this proposal, I think that it would be necessary to set speedy but reasonable time limits to produce the requested documents and to strengthen the consequences of failing to produce supporting evidence for the self-declarations, which should not only be an impediment to award, but also be clearly identified as a ground for exclusion [most easily, as an undeniable instance of grave professional misconduct under art 55(3)(c) propDir]—and maybe expressly set it as a head of damage that allows contracting authorities to recover any additional expenses derived from the need to proceed to a second-best, delayed award of the contract (without excluding the eventual enforcement of criminal law provisions regarding deceit or other types of fraud under applicable national laws). Also, rules on annulment of the awarded contract and other sanctions are needed for those instances where the discovery of the falsity of the documents occurs after contract award.

On the other hand, following article 59 propDir (and the additional criteria in Annex XIII) the actual production of documentary evidence aims to be facilitated by a new standardised document, the European Procurement Passport, which is a means of proof of absence of grounds for exclusion. At the request of any economic operator established in the relevant Member State and interested in participating in cross-border procurement, the corresponding national authority shall issue a European Procurement Passport. These risks are identified in the Impact Assessment of the Proposal for a Directive (n 37) 70, but simply dismissed on the hope that self-declarations would bring a significant reduction of time and costs and a potential automatisation of selection and award procedures. In my view, the analysis conducted in the impact assessment is overly optimistic, eg: “If measures reducing the information obligations placed on firms were to be implemented (e.g. through generalising the “winning bidder provides” provisions), this could theoretically reduce the efficiency of the evaluation process for contracting authorities and entities if, in some cases, a firm identified as a winner fails the evidentiary tests (and the contracting authority or entity would have to go to their second choice or repeat the process). From the information available, such instances are not that common, and in most cases contracting authorities and entities should save time by accepting self-certification of compliance from bidders who ultimately do not win the contract. Also, if more firms feel able to bid, competition could increase, which could lead to greater price savings or improvements in quality for the contracting authority or entity.” The premise that instances where the winner fails to meet the evidentiary tests are rare simply cannot be imported from an ex ante full control scenario to an ex post verification paradigm. In my view, the increase in risks based on strategic behaviour by bidders and the potential difficulties in meeting short submission deadlines prior to award of the contract are just not comparable with the current situation—at least, unless stronger consequences are attached to failing to provide the requested documentation or, more clearly, in cases of falsity of declarations.
Passport [art 59(1) propDir] in a standard form (to be adopted by the European Commission in implementing, delegated acts) containing the following information [Annex XIII propDir]:

(a) Identification of the economic operator;
(b) Certification that the economic operator has not been the subject of a conviction by final judgment for one of the reasons listed in article 55(1);
(c) Certification that the economic operator is not the subject of insolvency or winding-up proceedings;
(d) Where applicable, certification of enrolment in a professional or trade register prescribed in the Member State of establishment;
(e) Where applicable, certification that the economic operator possesses a particular authorisation or is member of a particular organisation;
(f) Indication of the period of validity of the Passport, of not less than 6 months.

The European Procurement Passport (EPP) shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification—which, however, may be related to the fact that the passport was issued more than six months earlier [art 59(4) propDir].

Given the scarce regulation of the procedures and formalities involved in the obtaining of the EPP, it remains unclear whether red tape will be effectively reduced—and there is no guarantee that it will establish a level playing field across the EU, as it is rather easy to anticipate diverging requisites (and costs) in the application process before different Member States, as well as different remedies in case of denial or cancellation, etc. In a favourable scenario, maybe it can be assumed that the EPP would generate simplification for undertakings that keep an active participation in cross-border tenders (ie at least two or three bids every semester, in order to reduce the number of times they must effectively supply information) and, in any case, it remains unclear what advantage the EPP would generate over existing official contractors lists and certifications systems, other than harmonisation and standardisation—which could probably be attainable by adjusting the regulation of these already existing systems. Moreover, there is a risk that contracting authorities and entities impose or push tenderers to participate on the basis of their EPP (most likely, informally, since it would be against the Directives to impose this particular way to proof compliance with participation, selection or short-listing criteria), or that undertakings feel the need to obtain it as some kind of certification—which may generate redundant or unnecessary compliance costs, particularly for those economic agents that could easily and readily resort to other types of documentation. Rather than a move towards reduction of formalities, it seems to me that the EPP (as proposed) may still raise the red tape that undertakings have to comply with in order to participate in cross-border procurement.

Moreover, in my view, according to the basic elements of the regime created by article 59 propDir, and even if national authorities remain under a duty of cooperation and

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41 Sánchez Graells Public Procurement and the EU Competition Rules (n 18) 266-268.
42 An argument that, in my opinion, the Commission has overemphasised in the Impact Assessment of the Proposal for a Directive (n 37) 71 “The EU public procurement passport would contain information, validated at Member State level, confirming that a business is compliant with certain, frequently requested criteria. Such measures would remove any uncertainty relating to the validity or appropriateness of a given piece of evidence, even when written in an unfamiliar language”. Regarding the relevance of language for cross-border procurement, see infra §5.
must provide each other information regarding the authenticity and content of any EPP issued by them—there is a significant risk of abuse of the EPP due to the unforeseeable nature of changes in the information that it covers. Subject to scrutiny by the contracting authority or entity (based on sufficient justification, which may not exist), obtaining an EPP seems to almost be an undisputable pass or safeguard to participate in cross-border tenders for at least 6 months [even if the underlying circumstances concerning the economic operator have materially adversely changed]. Contracting authorities are unlikely to systematically double check the content and validity of an EPP issued less than 6 months before [assuming they even could adopt such systematic check procedures, which could be against the tenor of art 59(4) propDir and, consequently, may generate liability], and issuing authorities do not have a good way to effectively liaise with them to communicate any changes in issued EPP (since they are in no position to know in which specific tenders any given EPP is being used) [assuming, at any rate, that they have the means to closely monitor in almost real time the evolution of the underlying circumstances covered by the EPP, which also seems rather implausible]. Therefore, for the first 6 months after issuance of the EPP, there is a risk of coordination and diffusion of information that may result in the award of contracts to holders of an EPP whose circumstances have actually changed and no longer qualify. Given this risk, the same cautionary and sanctioning devices proposed regarding the use of self-declarations and declarations on honour should be adopted (ie impediment to award, grounds for exclusion, damages claims and other types of applicable sanctions, above).

Maybe these problems could be overcome in the future, by means of advanced digital certification technology that allow for daily or weekly updates of the information covered by the proposed EPP [in line with the provision in art 59(2) propDir, which requires the EPP to exclusively be issued electronically no later than two years after entry into force, ie mid 2016] but, at present, it seems a weak device to ensure compliance with participation, selection and award requirements. Also, the costs of setting up this device can be considerable (particularly in Member States with lower existing procurement capacities) and may be hard to finance in a scenario of contracting public expenditure. So, all in all, maybe the EPP is a good theoretical idea that remains too hard to implement, at least for the moment.43

4.2. Reduction of information and search costs: administrative support through knowledge centers and soft law proposals

A second block of proposals to reduce participation hurdles regards information and search costs. The propDir includes two sets of soft instruments in this area. On the one hand, the art 87 propDir introduces knowledge centres to assist and guide contracting authorities and businesses in the carrying out of their procurement activities. More specifically, according to article 87(2) propDir, with a view to improving access to public procurement for economic operators (in particular SMEs) and in order to facilitate correct understanding of the applicable procurement rules, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance. And, further, article 87(3) propDir imposes even more specific duties towards economic operators intending to

43 Again, some of these risks are identified in the Impact Assessment of the Proposal for a Directive (n 37) 71, but simply dismissed: “[w]hile the set up costs of such systems could be quite large in some countries where little such infrastructure exists, the use of such passports would be beneficial both within a country as well as outside”.

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participate in a procurement procedure in another Member State, whose assistance shall at least cover administrative requirements in the Member State concerned, as well as possible obligations related to electronic procurement.

The doubts that this proposal raises are almost automatic and refer to the level of resources (human and other) required to set up such knowledge centres or one-stop-shop procurement information centres. The Commission is itself aware of such difficulties but, quite boldly, dismisses them in the explanatory memorandum of the propDir in the following terms: “It is not foreseen that requirements concerning oversight bodies and knowledge centres will generate overall additional financial burden for Member States. If some costs are expected to re-organise or fine tune the activities of existing mechanisms and structures, they will be neutralised by a reduction of litigation costs (both for contracting authorities and business), costs related to delays in the attribution of contracts, due to misapplication of public procurement rules or to the bad preparation of the procurement procedures, as well as costs related to the fact that advice to contracting authorities is currently provided in a fragmented and inefficient manner”.

While providing better information and assistance to contracting authorities (ie investing in capacity building, even in a centralised manner) should have some of the positive, offsetting effects, providing such advice to businesses may as well generate the opposite. In any case, it seems naïve to expect Member States to assume that there will be no increase in financial burden and, more fundamentally, that they will be able to find additional finance to set up such knowledge centres (at least, with sufficient dimensions to actually be operational and readily available for businesses). Therefore, this proposal and related soft law initiatives (such as the issuance of general guidance documents, etc as suggested in some policy documents\(^ {44}\)) seem difficult to implement in the current circumstances and may deserve some additional thought, such as fostering advice functions by chambers of commerce and business associations, which may already be in a relatively good position to do so.

4.3. Measures primarily intended for SME access to procurement: capping of turnover requirements and introduction of the “divide or explain” principle

A third group of proposals imposes limitations on requirements for participation with the aim of fostering SME access to procurement—following some of the recommendations of the 2008 European Code of Best Practices facilitating access by SME to public procurement contracts.\(^ {45}\) In particular, article 56(3) propDir limits turnover requirements to three times the estimated contract value, except in duly justified cases, and article 16 propDir complements this relative reduction of participation requirements by ensuring that any conditions for participation by groups of economic operators—an instrument the Commission considers of particular relevance for SMEs—must be justified by objective reasons and proportionate. Therefore, it must be considered a positive development that the proposed Directive sets absolute limits to


the level or requirements that contracting authorities and entities can require to be met in order to participate in the tenders.\textsuperscript{46} Notwithstanding this development, it is still important to stress that contracting entities and authorities still have to comply with the requirement of article 56(1) \textit{in fine propDir}, so that within that limit the specific requirement set still are “related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition”.

The second line of reform in this area is a more aggressive policy towards the division of contract requirements in lots by the \textit{adoption of a principle of “divide or explain”} for contracts above 500,000 euro in article 44 \textit{propDir}, according to which “where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons”.\textsuperscript{47} The policy is well directed and forces contracting authorities or entities to make a division feasibility analysis that could have been easily overlooked or disregarded under the current procurement rules. However, given that more than 50\% of public procurement procedures have an estimated value below the 500,000 euro threshold (see figure below), there would be further potential for developments in this area if the threshold was removed and contracting authorities or entities had to conduct a case by case analysis of the feasibility of splitting their requirements into lots—unless it proved disproportionately more costly or complicated to run the tender by lots, in which case they could always provide sufficient explanation as to why they tender a single lot.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure18.png}
\caption{Figure 1.8 Frequency of all contract values 2006-2010 (Thousand € increments)}
\end{figure}


An issue that is not addressed in the \textit{propDir}, but that is considered in preparatory documents, is the possibility to establish mandatory set-asides for SMEs.\textsuperscript{48} Given the

\textsuperscript{46} \textit{European Code of Best Practices facilitating access by SME (n 45) 14-15} and Sánchez Graells \textit{Public Procurement and the EU Competition Rules} (n 18) 258.

\textsuperscript{47} This is in line with my proposal that “public procurement rules should encourage lot division, unless it proves to be inadequate or disproportionate to the nature and amount of works, supplies and services concerned”, Sánchez Graells \textit{Public Procurement and the EU Competition Rules} (n 18) 286-290. The rest of the rules on tendering for lots and evaluating bundled offers also seem well designed in the \textit{propDir}, although their analysis exceeds the scope of this commentary.

\textsuperscript{48} \textit{Executive Summary of the Impact Assessment} (n 44) 7.
bad experience of a similar practice in other jurisdictions, it seems better to not develop it.

4.4. e-procurement

According to the explanatory memorandum of the propDir, it includes six specific procurement techniques and tools intended for aggregated and electronic procurement: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement. Compared to the existing Directive, these tools have been improved and clarified with a view to facilitating e-procurement. However, even if e-procurement seems to be a very promising area of potential development, however, it proofs very elusive and difficult to implement—most likely, due to a lack of the resources required investing in enabling technologies and equipment, as well as training. Certainly, the hurdles for the implementation of e-procurement mechanisms do not seem to be primarily regulatory. In this regard, it will be particularly interesting to see more specific proposals by the informal e-procurement expert group set up by the European Commission to develop a blue-print for common e-tendering/e-submission solutions.

5. THE ELEPHANT IN THE ROOM: LANGUAGE DIFFICULTIES AND COST DIFFERENTIALS

Overall, the proposals included by the Commission in the draft Directive seem to dance around one or two of the major obstacles to the true expansion of cross-border procurement: language difficulties and cost differentials. The issue of language barriers deserves some commentary and further attention. It should be noted that “direct cross-border procurement takes place to a higher extent between Member States with common or similar languages” or, put differently, that “a common language facilitates cross-border procurement”. This should not be surprising, in light of the fact that, according to recent surveys, more than 75% of respondents give high (50%) or medium (25%) relevance to language barriers as a significant obstacle to cross-border participation (second only to lack of experience abroad, which seems a twin issue, or at least a very closely-connected one).

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49 Sánchez Graells Public Procurement and the EU Competition Rules (n 18) 287.
50 The new possibilities and cost reduction potential of e-Procurement was already very clearly stressed in the prior process of revision of the procurement Directives; see Commission Report on the functioning of public procurement markets in the EU (n 14) 2.
51 Impact Assessment of the Proposal for a Directive (n 37) 116-117 and Summary of the Responses to the Green Paper on Expanding the Use of e-procurement in the EU 2 [“Almost 60% of respondents consider that the most significant challenges to the take-up of e-procurement and to cross-border participation in on-line procurement are correctly identified in the Green paper i.e. “overcoming inertia and fear”; “the lack of standards”; “no means to facilitate mutual recognition of national electronic solutions”; “onerous technical requirements”; and “managing a multi-speed transition to e-Procurement”. Overall, “Overcoming inertia and fears” is clearly identified as the main challenge to take-up of e-procurement] <http://ec.europa.eu/internal_market/publicprocurement/e-procurement/consultations/index_en.htm> accessed 15 January 2012.
53 Cross Border Procurement Above the EU Thresholds (n 16) 79-80.
54 Ibid 80 and Impact Assessment of the Proposal for a Directive (n 37) 129.
The issue of language barriers is mentioned in passing every now and then in policy documents and some automatic translation initiatives linked to the Common Procurement Vocabulary are being explored. However, further than that, actions that can be taken to reduce language barriers are very limited, since they are highly significant in two phases of procurement where there is few to be done (other than promoting a single working language for all procurement processes, which is very unlikely to find sufficient political support). Indeed, language proficiency is key, at least, in negotiations (and this seems to be more and more relevant as flexibility is introduced in the system) and during contract execution, particularly when it involves rendering services to the general public. Therefore, it seems to a great extent unavoidable that cross-border public procurement remains highly regional due to linguistic barriers and to unavoidable cost differentials—which will be particularly relevant in cases where transport costs are significant and/or it is necessary or advisable to have a permanent office in the place of execution of the procured works or services. Therefore, a certain degree of adjustment (lowering) of expectations for the development of cross-border procurement throughout the entire EU seems in place, given that there are natural barriers that will be very hard to overcome, regardless of the design of public procurement rules.

6. CONCLUSIONS

Very briefly, it can be concluded that cross-border public procurement is not restrained by EU public procurement rules (but the opposite)—since the procurement system generates a net positive contribution to economic growth and market integration. Nonetheless, there is room for improvement and some of the proposals included in the draft new procurement Directive seem well directed. Others, however, require further development. In any case, the existence of certain natural barriers that unavoidably limit the development of cross-border public procurement in the EU must be acknowledged.

55 Impact Assessment of the Proposal for a Directive (n 37) 71: “Encouraging more language provision through wider translation possibilities in OJ/TED (as a minimum through greater standardisation of structured data and less reliance on free text which requires translation) would also improve access to business opportunities for all firms (including SMEs), allowing firms to decide if the opportunities presented in a particular market are worth the costs of entry [in fn 82] However, improved translation in OJ/TED can not remove the language barriers; firms would still have to operate in the language of the country and obey its laws, which are unlikely to be available in a 2nd language”.