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Public Procurement as Economic and Policy Exercise

Introduction

The regulation of public procurement in the European Union has been significantly influenced by the internal market project. The White Paper for the Completion of the Internal Market\(^1\) and the Single European Act represent the conceptual foundations of the regulation of public markets of the Member States. The identification of public procurement as a major non-tariff barrier has revealed the economic importance of its regulation.\(^2\) Savings and price convergence appeared as the main arguments for liberalising the trade patterns of the demand (the public and utilities sectors) and supply (the industry) side of the public procurement equation.\(^3\) The economic approach to the regulation of public procurement aims at the integration of public markets across the EU. Through the principles of transparency, non-discrimination and objectivity in the award of public contracts, it is envisaged that the regulatory system will bring about competitiveness in the relevant product and geographical markets, will increase import penetration of products and services destined for the public sector, will enhance the tradability of public contracts across the common market, will result in significant price convergence and finally it will be the catalyst for the needed rationalisation and industrial restructuring of the European industrial base.\(^4\)

Parallel with the economic arguments, legal arguments emerged supporting the regulation of public procurement as a necessary ingredient of the fundamental principles of the Treaties such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on nationality grounds.\(^5\) The legal significance of the regulation of public procurement in the common
market has been well documented. Public procurement liberalisation reflects the wish of European institutions to eliminate preferential and discriminatory purchasing patterns by the public sector and create seamless intra-community trade patterns between the public and private sectors. Procurement by Member States and their contracting authorities is often susceptible to a rationale and policy that favours indigenous undertakings and *national champions*\(^6\) at the expense of more efficient competitors (domestic or Community-wide). As the relevant markets (product and geographical) have been sheltered from competition, distorted patterns emerge in the trade of goods, works and services destined for the public sector. These trade patterns represent a serious impediment in the functioning of the common market and inhibit the fulfilment of the principles enshrined in the Treaties.\(^7\)

Legislation, policy guidelines and jurisprudence have all played their role in determining the need for integrated public markets in the European Union, where sufficient levels of competition influence the most optimal patterns in resource allocation for supplying the public sector as well as the public utilities with goods, works and services. Public procurement has now been elevated as a key objective of the EU’s vision in becoming the most competitive economy in the world by 2010.\(^8\)

### The new approach towards the integration of public markets

The rationale behind the whole process of the integration of public markets of the Member States has been the establishment of an effectively competitive regime, similar to that envisaged for the operation of private markets.\(^9\) European Institutions have intellectually supported such an attempt by reference to liberal economic theories,\(^10\) where a regime of enhanced competition in public markets could bring about beneficial effects for the supply side of the equation (the industry), by means of optimal allocation of resources within the European industries, rationalisation of production and supply, promotion of mergers and acquisitions and elimination of sub-optimal firms and creation of globally competitive industries. These effects have been also deemed to yield substantial purchasing savings for the public sector.\(^11\) The European institutions envisaged the creation of such a competitive regime in public markets through the establishment of a legal framework which aims at abolishing discrimination on grounds of nationality and at eliminating preferential public procurement practices which favour *national champions*.\(^6\)