8 Public Procurement Policy Then and Now

Trends in Public Procurement Harmonisation II

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Dear Conference Participants, dear Hungarian FIDE Association,

Standing at this point of the backward-looking as well as future-searching line of the Conference, let me start my speech with a personal hint. It makes me feel good and proud, even to this day, that I could serve the European integration of our country, the process of preparation for the accession to the European Union for almost one and a half decades within the frameworks of the Ministry of Justice, and it was also possible to experience the historic moment. At the same time, I would never have thought that after a breakthrough, which was not easily made, these achievements could prove to be so fragile.

With Ágota Török, we have brought the topic of public procurements to the Conference also because the public procurement policy and legislation of the European Union, 60 years after, allow for the possibility to draw conclusions, more general findings that go beyond this horizontal policy, if we consider its arc of development, certain problems encountered and their solutions and if we draw its key features.

1. Before depicting the arc of development of the Community's/EU's public procurement policy and legislation, we consider two preliminary findings important. There are a number of different approaches that may be taken to consider the topic of public procurements; here we would point out that this area is a 'meeting point' between the public sector and the market, and the problems that arise in these sectors are thus amplified at this intersection. And the size of the so-called public market is not negligible, neither within the EU single market nor at Member State level, taking into account its ratio to the GDP, or even the number of tendering (public procurement) procedures which take place before the conclusion of public contracts or the number of contracting authorities and entities required to carry out such procedures.[1]

It is also worth bearing in mind that, at first (and still in evidence today), the purpose of national and Community public procurement legislation is different. As for the Member States, the main focus was typically the control of the use of public funds, the guar-

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1 See also in the paper of Ágota Török.

antee rules related to the tendering process leading to the conclusion of contracts, rather based on the acts of contracting authorities and preventing corruption. As regards the Community *policy*, the starting point is the creation of a genuine single market also in the public markets, ensuring equal opportunities for economic operators, equal and non-discriminatory treatment, fair competition and transparency – the harmonisation of laws at Community level takes place in order to achieve this. At the same time, the differences in approach have interacted with each other, and there is a kind of convergence. Naturally, there are fundamental differences in the legislation of the various EU Member States as well. While the harmonisation of legislation at Community level has developed in view of the procurement legislation and practices of the so-called old Member States (of different origins, as the case may be), as for the new Member States of Central and Eastern Europe, an appropriate model rarely existed to revive the legal institution of public procurement, however, to that effect, the Community acquis to be transposed only included the standards necessary to achieve the objectives mentioned.

2. If we look at *the development of the Community / EU policy and legislation*, we may recognize the following *main milestones*. The celebrated *Treaty of Rome* establishing the European Economic Community signed in 1957 did not contain any explicit provisions as regards the topic of public procurement. At the same time, the principles and rules of the common market resulting from the Treaty had to prevail also on the public sector markets. Nevertheless, the first directives serving the legislative harmonisation and liberalisation, that had an impact on public procurement, appeared relatively early. *Commission Directive 70/32/EEC* already explicitly called on the Member States to eliminate the obstacles to the free movement of goods and discriminatory practices (negative harmonisation).

The further Community public procurement legislation *in the 1970s* moved towards the so-called *positive legal harmonisation*;[2] however, there has been no breakthrough in this field and the Commission continued to consider that the level of competition at Community level was low, and, as regards public procurements, a genuine internal market was not yet established. Thus, the *White Paper of 1985 of the Commission* (the so-called Delors White Paper)[3] can be considered as a significant forward-looking initiative, which has identified the problems and priorities also in the field of public procurements, by the treatment of which and by the implementation of the specific steps recommended a single market for public procurements may be attainable.

2 Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts; Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts.

3 The Commission's White Paper on the completion of the internal market. Brussels, 14 June 1985, COM(85) 310 final.

Pursuant to the White Paper cited, in the second half of the 1980s and during the 1990s, *the first major reform* was implemented. Through the directives adopted at that time[4] and through the *consolidation of some of them in 1993*,[5] the Community-level minimum standards and frameworks for public procurements have been extended and also 'strengthened', which are the core EU standards of this field of law to the present day. Thus, the key concepts which are crucial in terms of the scope of the directives 'co-ordinating' public procurement procedures (e.g. public contract, subjects of public procurements, contracting authorities, definitions of types of procedure); other rules ensuring the publication of public purchasing needs at Community level, transparency and equal opportunities; the requirements for the technical specification of the subject of the procurement; provisions governing the types of procedure, the selection of economic operators and the evaluation of tenders can be highlighted. However, the process of regulatory reform has not yet been completed.

However, the *reform package of 2004* following from the so-called Green Paper drawn up in 1996[6] (the two 'new' directives)[7] did not lay new foundations for the former Community legislation, but it attempted to contribute to improving the transparency of a fragmented legal provisions and to its simplification. In the context of modernization, the introduction of certain types of procedures ensuring more room for manoeuvre (for the so-called classical contracting authorities); the promotion of the use of electronic devices, techniques and procedures, and the recognition of the enforceability of certain so-called horizontal (environmental and social) aspects in the field of public procurements were given more emphasis even back then.[8]

The Europe 2020 strategy developed by the European Commission in 2010, which envisages an important role for public procurement as one of the market-based instruments in achieving the environmentally friendly and energy-efficient solutions as well as innovation and employment objectives, also had a significant impact on the EU public

4 Worth highlighting: Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications *sectors*; Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public *service* contracts. (These include the so-called Remedies Directives which will be mentioned later.)

5 Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

6 The Commission's Green Paper: Public Procurement in the European Union: Exploring the way forward. Brussels, 27.11.1996, COM(96) 583 final.

7 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

8 Anita Németh, 'Az új közbeszerzési irányelvek' (The new Public Procurement Directives), in: Tünde Tátrai (ed.), *Közbeszerzési kézikönyv nem csak pályázóknak* (Public Procurement Manual Not Just For Tenderers), Budapest, Szaktudás Kiadó Ház, 2005, pp. 63-72.

procurement policy. Furthermore, the strategy paper points out that "public procurement policy must ensure the most efficient use of public funds and procurement markets must be kept open EU-wide."[9] This approach as well as other EU documents and investigations[10] lead to the latest step of modernisation, that is to the adoption of the *2014 directives*.[11] The separate directive on the so-called procurement concessions was finally adopted.[12] Thus, the former directives was mainly revised with a view to making better use of public procurement to support common economic and social objectives, increasing the efficiency of public expenditure and facilitating the participation of small and medium-sized enterprises (SMEs) in public procurement. An aspect of the revision was again to allow to make the legislation simpler and more flexible, to implement e-procurement and to incorporate certain aspects of the relevant established case law of the Court of Justice of the European Union (hereinafter: Court of Justice).[13]

3. It can be established that *the initial and primary objectives* of the Community / EU public procurement policy, which actually meant the achievement of the single market principles and operation in the public procurement markets, have undergone *significant changes*. In our interpretation, this shift did not only demonstrate the recognition of the so-called secondary, originally subsidiary objectives, but also the 'focusing on' the latter. The policy seeking public procurements which serve sustainable, strategic objectives (environmental, innovation, social objectives) places more emphasis on the promotion of better opportunities for the participation of SMEs in public procurements, on the effective implementation of public procurements, and anti-corruption action has also become an aspect. Does all this mean that the primary objectives have been met, or is the opposite

9 The Commission's Communication: Europe 2020: A strategy for smart, sustainable and inclusive growth. Brussels, 03.03.2010, COM(2010) 2020 final. 26.

10 *See, in particular*: The Commission's Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market. Brussels, 27.01.2011, COM(2011) 15 final; the Communications from the Commission regarding the Single Market Act. Brussels, 27.10.2010, COM(2010) 608 final, 13.04.2011, COM(2011) 206 final SEC(2011) 467 final, 03.10.2012, COM(2012) 573 final; Commission Staff Working Paper: Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation. Brussels, 27.06.2011, SEC(2011) 853 final.

11 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance.

12 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

13 On the development of the Community / EU public procurement policy and legislation, *see, e.g.*: Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK,* Vol. I, Third edition, Sweet and Maxwell, 2014, p. 1449; Attila Dezső (ed.), *Magyarázat az Európai Unió közbeszerzési jogához* (Commentary to the procurement law of the European Union), Budapest, Wolters Kluwer, 2015, p. 1255. We do not address the development and issues of the "external dimension" of public procurements covered by the common commercial policy of the European Union, however, Ágota Török discusses this topic.

true? Does this involve a shift in the system of objectives, a change in the positioning of diversity and public procurement by EU policy, or do other factors contribute to this as well?

The issue can also be put on the agenda in so far as, in recent years, a number of studies supported by the European Commission were again carried out which examined the realization of the primary objectives and the extent to which the abolished borders of the Member States have an impact on the EU procurement market. In other words, to what extent this public market is fragmented along the 'map of the Member States', to what extent and how successfully do economic operators, tenderers established in another Member State participate in public procurement procedures conducted under national legislation harmonized pursuant to the EU public procurement law. This so-called *border-effect* in the European public procurements was examined by a study which found that 'local' bidders were more than 900 times more likely to be awarded a contract than 'foreign' bidders. A further remarkable finding of the study is that similar phenomena can be observed within the Member States in certain regions, in the case of cross-border public procurements.[14]

The Commission also addressed the measurement of impact of cross-border penetration in European public procurements in its 2017 Report.[15] The data of the public procurements of all Member States carried out between 2009 and 2015, which were published in the TED database[16] (together with other data, if applicable) were analysed so that trends can also be followed as compared to the previous report.[17] The Report laid down how it interprets cross-border procurement, dividing it into direct and indirect modalities. Based on the methodology, we can distinguish between four possible scenarios, summarized in the table below:

a. Domestic procurement: where the successful bidder is based within the same country as the contracting authority and is domestically owned;
b. Direct cross-border procurement: where the successful bidder is not located in the same country as the contracting authority and is not domestically owned;
c. 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 company;

14 Benedikt Herz & Xosé-Luís Varela-Irimia, *Border Effects in European Public Procurement,* 1-3, Created by GROW.DDG2.G.4, 01.06.2017. Source: http://ec.europa.eu/docsroom/documents/26201.

15 The Commission's Final Report: Measurement of impact of cross-border penetration in public procurement. February 2017. Source: https://publications.europa.eu/en/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1.

16 Tenders electronic daily: http://ted.europa.eu.

17 The Commission's Final Report: Cross-border Procurement above EU thresholds. *Ramboll* and HTW Chur, March 2011. Source: https://publications.europa.eu/en/publication-detail/-/publication/0e081ac5-8929-458d-b078-a20676009324/language-en.

d. Indirect domestic procurement: where the successful bidder is not located in the same country as the contracting authority but it is a subsidiary of a domestic company.[18]

Table 8.1 Different forms of domestic and cross-border procurement

Winner / Parent	Domestic owner	Foreign owner
Domestic company	*Direct domestic procurement*	*Indirect cross-border procurement*
Foreign company	*Indirect domestic procurement*	*Direct cross-border procurement*

Source: The Commission's 2017 Report, 24.

From the many interesting data series in the Report, we, in conclusion, only highlight here that cross-border public procurement remains very *low* (with some increasing tendency) compared to all relevant public procurement. In the category of *direct* cross-border cases, the number of procedures is approximately 2% and approximately its extent is 3.5% in proportion to the value of procurements; while in the case of *indirect* cross-border procurement, both data are approximately 20%, but, compared with the general import data, this magnitude can be considered low.[19]

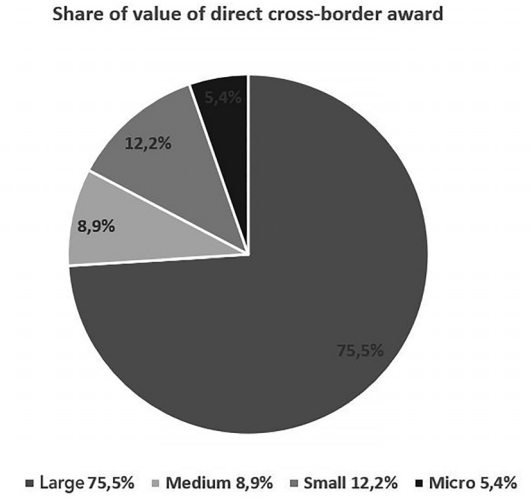
It is also worthwhile seeing how, within these data, the situation of direct and indirect cross-border procurement looks like *according to the size of bidders*. The following tables show the ratios based on the value of public procurement. (By the way, these remain within the same order of magnitude as the data on the number of procedures.) On the basis of these data, it is not surprising that the EU also prioritises the positioning of SMEs in cross-border public procurement.

The overwhelming 97.2% share of large companies in indirect cross-border public procurement (this ratio is 97, 7% in terms of the number of procedures) shows that these economic operators establish typically in another Member State through a subsidiary, maybe just to overcome the *obstacles* identified in cross-border public procurement, summarized in the Figure 8.3

18 The Commission's Final Report: Measurement of impact of cross-border penetration in public procurement. 24.

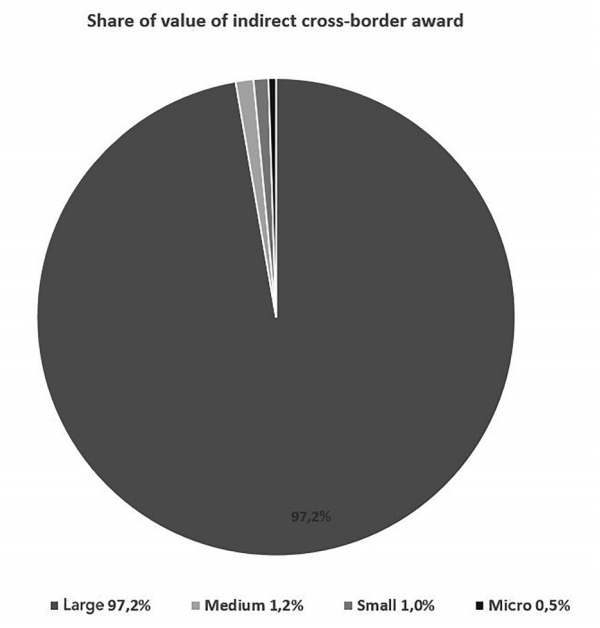
19 The Commission's Final Report: Measurement of impact of cross-border penetration in public procurement. xiv.

Figure 8.1 Distribution of direct cross-border procurement by size of bidder



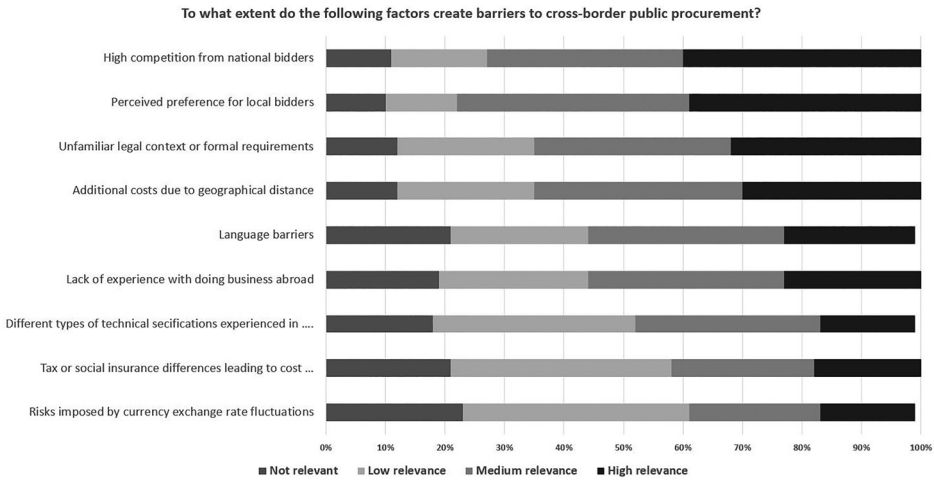
Source: The Commission's 2017 Report, 74.

Figure 8.2 Distribution of indirect cross-border procurement by size of bidder



Source: The Commission's 2017 Report, 74.

Figure 8.3 Barriers to cross-border public procurement in view of economic operators



Source: The Commission's 2017 Report, 90.

According to the Report, almost half of micro enterprises (46%) also reported that identifying sources to access information on cross-border public procurement was a challenge.[20]

In conclusion, we may consider that enterprises operating in another Member State continue to participate only to a very small extent in public procurement procedures. From the identified obstacles, the most important ones at the beginning of the above list (competition from national bidders, perceived preference for them, legal divergences) are those factors in respect of which the Community public procurement policy formulated the initial objectives. The more favourable statistical data relating to indirect cross-border public procurements also indicate that these barriers can be reduced by establishing in the country where the contracting authority is seated. Therefore, we cannot say that the primary objectives of EU public procurement policy and legislation have been met, but, in our view, in addition to one of the results of the change in the objectives, the impact of the financial and economic crises, which, due to the scarce resources, has strengthened the objective of a sustainable and effective public procurement policy, is just as important. There is more to do also in the future for the completion of an open and well-regulated public procurement market of the European Union.

20 The Commission's Final Report: Measurement of impact of cross-border penetration in public procurement. xiii.

4. In addition to the above-mentioned shift in the objectives of EU public procurement policy and legislation, it is also worth highlighting and summarizing that *significant changes* have also taken place as regards the *scope*, extent and depth *of* Community / EU *public procurement legislation* over the last 50 years. The initial *personal scope* of the directives relating to the so-called classical contracting authorities and their *substantive scope* affecting the 'typical', 'simple' subjects of procurements (procurement of goods, works, certain services) were gradually *extended*. The personal scope was extended to so-called public service providers which, in certain sectors, do not operate in real conditions of competition,[21] and, as for the subject of legislation, services and, later, a broader range of services were – not easily but finally – covered,[22] and the works and services concessions (so-called procurement concessions) were also provided for in a separate directive.[23]

In addition to the normative penetration of Community public procurement legislation, the *Court of Justice of the European Communities* has also played an important role in this process, in particular by following a *functional, broad interpretation*[24] deduced from the objectives of the directives when interpreting the basic concepts of scope of the Public Procurement Directives, and attributed a distinct, *sui generis EU concept, meaning* to certain key definitions.[25] This approach ensured that the norms of the directives driven by Community / EU objectives are transposed sufficiently broadly and uniformly in the legislation of the Member States.

If we consider *the subject-matter and depth of the directives*, there is a *similar expansion process*. Initially, as presented above, a so-called minimum and fragmented legislation was typical, which, in addition to defining the scope of the directives, only provided for certain procedural guarantees. Today's more extensive legislation is distinguished by the fact that, on the one hand, the harmonisation under the directives goes beyond certain procedural issues in the strict sense and extends its norms to the preparatory phase of public procurement procedures and to the post-contractual phase (performance and con-

21 See first the Directive 90/531/EEC and the subsequent legislation replacing it; effective: Directive 2014/25/EU.

22 See the first so-called service directive, Directive 92/50/EEC. The change of models in the field of services was realized through the 2014 directives.

23 See Directive 2014/23/EU on the award of concession contracts.

24 For the personal scope (the concept of contracting authority), *see for example*: Judgment of 10 November 1998 in Case C-360/96, *Gemeente Arnhem and Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821, point 62; Judgment of 1 February 2001 in Case C-237/99, *Commission of the European Communities v. French Republic*, [2001] ECR 939, paras. 41-43; Judgment of 15 May 2003 in Case C-214/00, *Commission of the European Communities v. Kingdom of Spain*, [2003] ECR 4667, para. 53; Judgment of 27 February 2003 in Case C-373/00, *Adolf Truley GmbH v. Bestattung Wien GmbH*, [2003] ECR 1931, paras. 43 and 45; Judgment of 13 January 2005 in Case C-84/03, *Commission of the European Communities v. Kingdom of Spain*, [2005] ECR 139, para. 27. Functional interpretation is important also with regard to the objective scope (public contracts, subject-matters of procurements, works in particular).

25 For the personal scope, *see for example*: Case C-373/00, *Adolf Truly*, paras. 43 and 45; Case C-84/03, *Commission v. Spain*, para. 27.

tractual amendment) serving mainly the clarity of competition, equal opportunities and transparency.[26] Here, the so-called Remedies Directives developed alongside the directives aiming to harmonise certain issues of public procurement procedures must also be mentioned, which – without determining the institutional system and procedural details of the national remedies – aim that the redress procedure to be provided primarily at Member State level should be efficient and quick and preferably in the pre-contractual phase.[27] On the other hand, regarding certain procedural issues of competitive tendering, EU-level norms have evolved in such a way that it has resulted in a more detailed legislation (e.g. the rules for selection and evaluation).[28] From the number of Articles in the directives of the 1970s, which was around 30, we get to the regulation of the 2014 Public Procurement Directives currently in force containing around 100 Articles each and following modified objectives, while the legal basis for EU-level legislation remains unchanged. In the area of public procurement, Community / EU legislative activism is indisputable. It is also interesting to evaluate this in the light of the fact that, as presented above, the primary legislative objectives have not really been met in practice. Meanwhile, it is a recurring expectation of both EU and Member State legislation to make it simpler, to reduce the administrative burdens and to support the implementation of effective public procurement.

5. From the *significant changes or even twists* of the long process of harmonisation of public procurement laws by the EU, we would highlight two cases or topics in a concise way. One of the examples shows how the interpretation or reinterpretation of a key principle affects the relationship between national and EU legislation, and how it expands (widespread belief) a part of the active public procurement requirements primarily to procurement transactions of lower value not reaching the EU thresholds. It is about the requirement and principle of *transparency*.

Case C-324/98, the *Telaustria* case had a significant impact on the interpretation of the procurement requirements of the EU and of the concept of transparency, where it was stated in a case, which is not subject to the directives, that the principle of non-discrimination enshrined in the Treaty includes the requirement of transparency and, hence, the appropriate publication of such procurements. Consequently, the procurement needs must be previously published by the contracting authority in the interest of potential bidders not only in the case of public procurements the value of which reaches or exceeds the EU thresholds and which are subject to the directives, but also in the case of procurement transactions which are not subject to the directives, *e.g.* the value of which does not

26 See for example the new norms of Directive 2014/24/EU with regard to the conflicts of interest, preparation; performance, amendment and termination of contract (Arts. 24, 40, 46, 70-73).

27 See the following directives: Council Directive 89/665/EEC; Council Directive 92/13/EEC; Directive 2007/66/EC of the European Parliament and of the Council amending these.

28 See for example the relevant Arts. 56-64 of Directive 2014/24/EU.

reach the EU thresholds and is relatively lower but which are of cross-border interests, considering that the obligations stemming from primary EU law should also be applied in areas not covered by secondary directives. According to the Court of Justice of the European Communities and the Commission at least. On the basis of the case law on this subject, in 2006 the *Commission* issued an *Interpretative Communication*[29] in which, to support the appropriate national and judicial approach, it summarized all the requirements applicable for public procurements not or only partially covered by the directives due to the Treaty. In Case T-258/06,[30] Germany sought the annulment of this Communication, with the supporting intervention of several Member States, in essence, on the ground that the Communication went beyond the obligations arising from the existing Community law and, thus, introduced new rules and produced binding legal effects for which the Commission does not have competence. The General Court dismissed the action as inadmissible, since, according to it, the Communication did not contain such new obligations.

In view of the uncertainties surrounding the interpretation of primary law requirements and of the fact that the obligation arising from the Treaties is still more distant from the persons applying the law than the national legislation transposing the norms of directives, a large number of the Member States tried to regulate public procurements the value of which do not reach the EU thresholds or parts of them adequately, taking into account, where appropriate, also the expectations summarized in the Communication cited.

6. The other example is *reverse*, and, at the same time, it shows how the European Court of Justice can reach a solution in a very important and 'ordinary' conflict which represents a reasonable compromise from a European integration perspective. It is about *the issue of in-house exception*.

In the background of this legal dispute, the public procurement tendering regime, the expected benefits of it are in conflict with the freedom of the fulfilment of public service assignments and the institutional-procedural autonomy. In other words, the specific issue is whether for example a legal entity established by a local government in relation to the performance of its tasks carried out in the public interest should be tendered or it is allowed to conclude a contract directly with it, excluding this legal relationship from the scope of public procurement rules.

In the landmark Case C-107/98, the *Teckal* case, by means of a particular interpretation of the term 'contract', the Court of Justice of the European Communities has concluded that if, on the one hand, the local government concerned exercises over the person

29 Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives 2006/C 179/02.

30 Judgment of 20 May 2010 in Case T-258/06, *Federal Republic of Germany v. European Commission*, [2010] ECR 2027.

concerned a control which is similar to that which it exercises over its own departments (the issue of control) and, on the other hand, the person carries out the essential part of its activities for the local government (aspects of competition), the two legal entities are only formally distinctive and the contract between them is not a public contract. (This is called extended in-house, that is services provided 'internally'.) Otherwise, the transaction is subject to the Public Procurement Directives.

These so-called Teckal-criteria (structural and economic criteria), which are cumulative, were later interpreted and extended by the Court of Justice of the European Communities *in a number of cases*. Case C-480/06, *Commission v. Germany* (so-called *Hamburg* case) is of similar importance, in which the Court examined the conditions of the Teckal-test on the basis of 'purely' contractual (so-called horizontal) cooperation between public entities and, at the same time, created a new kind of exception. The case law recognizing the non-application of the Public Procurement Directives was finally *codified* in the 2014 directives. However, the cases now treated as an exception have been further expanded, as the so-called reverse in-house and the transactions between in-house companies were recognized among the exceptions.[31] All this can be summarized by stating that the development of law originating from the original compromise finally led to a big leakage of the body of European public procurement law.

7. The latest public procurement reform and the series of directives of 2014 and a kind of discussion of it were understandably on the agenda of the *2014 FIDE Congress in Copenhagen*. To summarize the public procurement sections, we may conclude that, through the modernization efforts, the new directives have made progress, but the aspect of simplification entirely lost on its object. With regard to the new directives and their interpretation, there were more questions than answers, without disputing the fact that the European Court of Justice continues to have a significant role to play. Regarding the strategic application of public procurements, the need was unanimously identified that the practice would require further methodology materials, guidelines and the dissemination of best practices both at national and EU level. Professor Roberto Caranta, who was invited as General Rapporteur for the Public Procurement Section, summarized his thoughts in the Congress Publication stating that advancements were there, but it was still a long and winding road to a complete and coherent EU law of public contracts and a longer and more winding one to rules applicable to all instances where the State or any other public law entity disbursed money or granted benefits or privileges on a selective

31 *See, for example*, the relevant Art. 12 of Directive 2014/24/EU.

basis.[32] We also agree with this view and the required solution, despite the fact that currently the travelling this way to the end is hardly on the agenda of the Member States.[33]

Most of the provisions of the new 2014 directives had to be *transposed* into national law by the Member States within two years, until mid-April 2016. A surprising number of the Member States failed to meet these requirements, so the European Commission initially called upon 21 Member States (including Austria and the Scandinavian countries); and finally sent a reasoned opinion to 15 Member States in December 2016.[34] The fulfilment of this harmonisation task is therefore still on the agenda; as well as the full implementation of e-procurement in 2018.

In addition to the difficult present, positive developments can also be highlighted. We consider it a right direction that the Commission seeks to explore the EU public procurement market more and more with substantial and objective analysis. The so-called Public Procurement Scoreboard[35] examined the public procurement practices of all Member States on the basis of the statistical figures for the year 2016. The essence of the methodology is that a comprehensive picture of the public procurement in the Member States is given according to 9 indicators weighted accordingly classifying the countries finally into one of the three main categories (satisfactory, medium, and inadequate). Indicators include test factors such as the frequency of one bidder procedures, the use of negotiated procedures without notice, the publication rate of public procurements, the use of cooperative procurements, the award criteria (the application of the lowest price criterium) or the decision speed. A European map colouring according to the categories mentioned provides a familiar view. Further research would be needed to gain a deeper understanding of the entire public procurement market and its processes.

32 *See*: Ulla Neergaard, Catherine Jacqueson & Grith Skovgaard Ølykke (eds.), 'Public Procurement Law: Limitations, Opportunities and Paradoxes', The XXVI FIDE Congress in Copenhagen, 2014, *Congress Publications*, Vol. 3, Copenhagen DJØF Publishing, 2014, p. 811. Roberto Caranta, 'General Report', in: *Congress Publications*, Vol. 3, p. 175. I prepared the Hungarian national report at the request of the Hungarian FIDE Association, as one of its members – Anita Németh, 'National Report (Hungary)', in: *Congress Publications,* Vol. 3, pp. 473-521.

33 Anita Németh, 'Tájékoztató a XXVI. FIDE Kongresszus (Koppenhága, 2014) közbeszerzési jogi szekciójáról és kiadványáról' (Information notice on Public Procurement Law Section and of the XXVI FIDE Congress (Copenhagen, 2014) and its Publication.), *Közbeszerzési Szemle*, 2014/6, pp. 3-4.

34 *See*: http://ec.europa.eu/growth/content/public-procurement-commission-requests-15-eu-countries-transpose-new-eu-rules-public-0_en.

35 The Commission's Single Market Scoreboard on public procurements in 2016, 2017. *Source*: http://ec.europa.eu/internal_market/scoreboard/_docs/2017/public-procurement/2017-scoreboard-public-procurement_en.pdf.

8. We can highlight the public procurement aspects of the inevitable *Brexit* case by referring to a relatively recent study.[36] The author of the study is Professor Sue Arrowsmith, one of the most respected experts in EU and UK public procurement law. The study presents 4 possible approaches and their consequences, such as the EEA model; the GPA model; and the 'EEA-minus' model between the previous two and the 'GPA-plus' model. The study also addresses the public procurement-specific issues which are to be dealt with in the exit contract or in a subsequent trade agreement.

The Commission's *2017 White Paper* (the so-called Juncker White Paper),[37] which outlines five possible paths for Europe by 2025, also looks to the future. From the point of view of EU public procurement policy and legislation, all five scenarios (Carrying on; Nothing but the Single Market; Those who want more do more; Doing less more efficiently; Doing much more together) may be applicable. If we look over the past 60 years and the current contradictory situation presented, the 'less' and the 'more' scenarios could be a reality in public procurement integration, but regression hardly played a role in the trends so far, while the protectionist attitude of the Member States seems to be intensifying.

It is worth recalling the Delors conclusion in 1985 (and comparing it with the 2017 White Paper), as it illustrates what kind of determination and vision the Commission, which, despite the difficulties of integration, is the heart of the Community in a way, had: "Europe stands at the crossroads. We either go ahead – with resolution and determination – or we drop back into mediocrity. […]"[38]

Considering the far-reaching and now reverse changes of the period between the two White Papers, for our part, we still believe that competition, equal treatment and non-discrimination as well as the principle of transparency are *values* for the maintenance and completion of which it is still worth thinking and acting together both on the European and on the national stage, and not just in the field of public procurements.

36 Sue Arrowsmith, *Consequences of Brexit in the area of public procurement,* IP/A/IMCO/2016-23, April 2017. Source: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602028/IPOL_STU(2017)602028_EN.pdf.

37 The Commission's White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2025. Brussels, 1 March 2017. COM(2017) 2025 final.

38 White Paper from the Commission: Completing the Internal Market. 55.