European Review of Digital Administration & Law - Erdal
2023, Volume 4, Issue 2, pp. 127-146
ISSN 2724-5969 – ISBN 979-12-218-1266-4 – DOI 10.53136/9791221812664 12

Challenges for Consolidation and Effectiveness of the Increase in Competitive Attendance Enabled by the Use of Electronic Means in Public Procurement *

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ABSTRACT This paper explores the impact of Information and Communication Technology (ICT) on enhancing competitive bidding within both national and European public-procurement frameworks. The European Union's directive-driven push towards a unified public-procurement market has historically centered on eradicating barriers and promoting economic efficiency through transparency and strategic procurement planning. Key legislative changes, particularly through Directives 2004/18/EC and 2014/24/EU, have set foundational standards aiming to harmonize procurement practices across member states, enhancing transparency and efficiency while tackling systemic corruption.

However, the actualization of ICT's potential in public procurement processes to foster a genuinely competitive market has faced substantial challenges. Despite regulatory frameworks encouraging the digitization of public procurement, empirical data suggests that the expected surge in cross-border participation and the dismantling of entry barriers for SMEs and international bidders have not materialized as anticipated. The study discusses the theoretical and practical disconnects that inhibit the seamless integration of ICT in procurement processes, such as security concerns, the digital divide between different regions and economic operators, and the complexity of legal and administrative frameworks.

Ultimately, the article aims to help elucidate some of the causes behind the limitations that appear to arise when electronic public-procurement systems genuinely promote the enhancement of internal and European competition in the public-procurement markets of Member States more significantly, as well as the possible actions that could overcome these limitations

1. *The European Single Market as the Primary, but Not Sole, Aim of European Public-Procurement Directives*

The pursuit of a European single market in public procurement has been the fundamental aim of European regulations since their earliest directives on the matter, long before the first proposals for implementing electronic means in the operation of administrative procedures.

In the regulation of public procurement by the European Union, started in the 1970s, the focus was on setting up a barrier-free internal market, including in public procurement. This goal was formulated as a development of Articles 100 — on the approximation of legal, regulatory, and administrative provisions of the Member States on the matter — and 57 of the Treaty of the European Communities — concerning the freedom of establishment of economic operators. Progressively, this focus shifted towards one of the primary expected effects of achieving a single public

procurement market: reducing the cost of providing the goods, services, and works demanded by various Public Administrations.

Given this prior reality, the implementation of electronic public-procurement solutions, even in a broad sense and without necessarily achieving an end-to-end e-procurement stage,[1] has been seen as an element with strong synergies with the European Union's strategy of creating a single public-procurement market.[2] In fact, the correlation between the use of ICT and the increase in the participation of economic operators in public-procurement procedures, from our point of view, far from necessarily requiring complete digitization and automation — nor non-

∗ Article submitted to double-blind peer review.

[1] European Commission, *End-to-end e-procurement to modernise public administration*, *COM(2013) 453 final, 26 June 2013*.

[2] A. Masucci, *Digitalization of public administration and electronic public services*, in *Diritto Pubblico*, 2019, no. 1, 120.

deterministic automation or AI solutions, as deterministic automation solutions may be more useful, affordable, and realistic[3] —, will rather require a selection of those procedures in which automation, given the state of technology and its affordability by the economic and personnel means of the contracting authorities, leads to a real and efficient increase in administrative activity.

However, the increase in competitive participation of economic operators, both nationally and across Europe, as a system for optimizing the price-quality ratio of the works, services, and supplies accessible to the contracting authorities, has ceased to be the only objective of the European Union in its public-procurement regulations, precisely considering the potentialities offered by ICT.[4] Specifically, it can be highlighted how Directive 2004/18/EC kept the concern for achieving greater economic efficiency, derived from reducing entry barriers for economic operators from other Member States, while also adding the promotion of transparency as a secondary principle to prevent the systemic corruption existing in the sector.[5] This point stood as a novelty of the 2004 Directive in terms of the expression of the aims of the European legislator, as they were expanded to include the prevention of deficiencies self-generated by the contracting authorities. Nevertheless, it is clear that such behaviours of consciously generating public inefficiency are linked to the intention of removing obstacles for the creation of a single market, also in terms of public procurement.[6]

Additionally, Directive 2004/18/EC explicitly proposed, in its Article 19, the need to perceive public procurement as a public-expenditure tool through which it is possible to achieve certain aims related to various public policies. In this case, the proposed goal exceeded, for the first time in this area, the creation of a single market, although it must be acknowledged that it fell within Article 11 of the Treaty on the Functioning of the European Union — hereinafter, TFEU.

These three pillars, which were forged as sectoral aims of the European legislator, would be kept, and intensified in Directive 2014/24/EU. Additionally, this latter directive added a new factor to the formula for increasing the efficiency of public procurement, namely the promotion of planned and strategic action by the contracting authorities. Ultimately, it aimed for minimum levels of internal quality in conducting this activity to avoid unintentional inefficiencies. This line of action had already been proposed in the first proposal for this new generation of directives from the Commission to the Parliament in December 2011 and in the associated working documents.[7] With these explicit references, the aim was to ensure not only that the contracting authorities act legally, morally and correctly, but also economic efficiency that allows for sustainable development. This latter concept, which we can define, following Brundtland,[8] as development that meets the needs of the present without compromising the ability of future generations to meet their own needs, classified into three dimensions: social, economic, and environmental.[9]

A new cornerstone of the European legislator's objectives in public procurement, which went beyond removing obstacles to creating a single public-procurement market. Following the severe financial crisis at the end of the first decade of the 21st century and the beginning of the second, the main aim was to optimize public expenditure by minimizing inefficiencies in public-procurement procedures. This was an ambitious objective, facing significant structural barriers, such as

[3] This kind of automation can be extensively analysed in A. Sánchez Graells, *Digital Technologies and Public Procurement. Gatekeeping and experimentation in digital public governance*, Oxford, Oxford University Press, 2024, 134 ff.

[4] In European Commission, *EU eGovernment Action Plan 2016-2020. Accelerating the digital transformation of government*, *COM (2016) 179 final, 19 April 2016*, it aimed to achieve its full implementation by 2018. However, this goal was not reached.

[5] A. Sánchez Graells, *Digital Technologies and Public Procurement. Gatekeeping and experimentation in digital public governance*, 129 and 130.

[6] As the Judgment of the General Court of the European Union (First Chamber), 16 September 2013, paragraph 67: "the principles of equal treatment and transparency constitute the basis of the directives on procedures for the award of public contracts".

[7] M.E. Comba, *Variations in the scope of the new EU public procurement Directives of 2014: Efficiency in public spending and major role of the approximation of laws*, in F. Lichère, R. Caranta, and S. Treumer (eds.), *Modernising Public Procurement: The New Directive*, Copenhagen, Djof Publishing, 2014, 38-41.

[8] World Commission on Environment and Development, *From one earth to one world: An overview*, Oxford, Oxford University Press, 1987.

[9] D.C. Dragos and B. Neamtu, *Sustainable public procurement in the EU: experiences and prospects*, in *Modernising Public Procurement: The New Directive*, 303.

the considerable fragmentation of contracting authorities in the European Union — primarily at the local level[10] —, which, generally entails the lack of necessary resources[11] and personnel for the proper management of public-procurement procedures — or at least the difficulty in obtaining them. Additionally, there is a significant dispersion of information about procurement procedures, which fosters an environment conducive to keeping inadequate and corruption-prone procurement systems and procedures.[12] As well as to address the structural changes required by the potential of ICT, such as abandoning "data silos" in favor of more innovative and effective forms of data management that ensure data quality and their utilization by both the public and the Administration to better navigate the design or participation in public-procurement procedures.[13]

This new goal presents significant differences from the previously mentioned goal of promoting public policies introduced in Directive 2004/18/EC. The second cited aim refers to the need for contracting authorities to make a series of intellectual efforts in defining their demands to favour and help various sectors of society. This aims at achieving procurement quality with extra effects beyond the procurement process itself. This is distinct from what we find in the strategic planning of public procurement, which aims to perfect the cost-benefit ratio of the transaction conducted by the contracting authority. In this latter case, the direct beneficiary is the budgetary balance of the Administration, aiming for it to be capable of obtaining the same or greater provisions with fewer resources. That is, it now responds to intra quality and effects. Although this will generate an indirect benefit for society, we are now faced with public-procurement policies aimed at expenditure containment as a result of designing demand that is oriented towards buying only truly necessary products through procedures that achieve the best quality-price conditions the market can offer.

The described expansive vocation of the proposed and regulated purposes of the European regulations generated suspicions in certain scholars, notably Arrowsmith and Kunzlik, who argue that the primary and sole objective supported by the original EU law in public procurement consists of the development of the internal market in this area, based on three main elements: the prohibition of discrimination, the requirement for transparent procedures to verify compliance with the previous prohibition, and the removal of any entry barriers for economic operators from other Member States. Consequently, the pursuit of economic efficiency in public procurement, independently from achieving or automatically deriving effects from the establishment of free competition among economic operators from all Member States, could not constitute a valid objective. It would be concluded that "saving on public expenditure and improving the quality of services simply cannot be framed within nor contribute by themselves to the creation of a single market", just as seeking efficiency does.[14] Other scholars, on the contrary, took

[10] In Italy, 70% of municipalities have a population of less than 5,000 inhabitants, see M.P. Guerra, *Dalla spending review a un «sistema» del public procurement? La qualificazione delle stazioni appaltanti tra centralizzazione e policentrismo*, in *Astrid Rassegna*, vol. 20, 2016, 1. A percentage that, in the case of Spain, rises to 84%: information obtained from the report *Distribución de los municipios por comunidades y ciudades autónomas y tamaño de los municipios*, Instituto Nacional de Estadística, available at www.ine.es/jaxiT3/Tabla.htm?t=2851&L=0.

[11] In this context, the implementation of e-Government solutions, including those of e-public procurement, creates a complex scenario for public authorities, which may find themselves in a weaker position in the contractual relationship, as noted by A. Sánchez Graells, *Digital Technologies and Public Procurement. Gatekeeping and experimentation in digital public governance*, 54 ff. Therefore, as indicated by J. Miranzo Díaz, *Inteligencia artificial y Derecho Administrativo,* Madrid, Tecnos, 2023, 260 and 261, administrative cooperation is established as a desirable element that, in practice, has led to successful cases.

[12] M.P. Guerra, *Dalla spending review a un «sistema» del public procurement? La qualificazione delle stazioni appaltanti tra centralizzazione e policentrismo*, 1. In the same sense, see L. Vandelli, *Les réformes territoriales en France et en Italie: parallélismes et divergences*, in *Audition au Senat sur le projet de loi portant nouvelle organisation territoriale de la Republique*, Paris, 27 November 2014.

[13] G. Gallone, *Blockchain and Big Data in the Public Sector: Some Considerations About G.D.P.R. Compliance*, in *European Review of Digital Administration & Law*, vol. 2, no. 2, 2021, 110.

[14] S. Arrowsmith and P. Kunzlik, *Public procurement and horizontal policies in EC law: general principles*, in S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions*, Cambridge, Cambridge University Press, 2009, 30-37. Actions that, as notes M.E. Comba, *Variations in the scope of the new EU public procurement Directives of 2014: Efficiency in*

an opposite position. Among others, Bovis has emphasized that it should not be forgotten that the European Economic Community, first, and the European Union, later, have started customs integration for the free movement of goods, people, capital, and services, which ultimately aim at achieving an economic and monetary union. This implies that economic integration will determine the level of success of the political integration of the Member States, the latter being "the ultimate objective stipulated in the treaties.[15] Therefore, a "legal" perspective or approach to public procurement would be incomplete if it were limited solely to the removal of internal market barriers and not to the other aims and provisions contained in the aforementioned Treaties.[16] Especially given its previously mentioned transversal and instrumental nature. This latter line of thought seems to have finally aligned with the European legislator in Directive 2014/24/EU, where public procurement is presented as "one of the market-based instruments that should be used to achieve smart, sustainable, and inclusive growth, while ensuring more efficient use of public funds". This highlights how the European legislator, after reaffirming the primary objective derived from the original EU law, consisting of the establishment of a single public-procurement market — as stated in the first recital of the directive — establishes other principles or objectives that are not consequences of a competitive European market, but rather utilize or stem from public procurement to achieve different and independent objectives.[17]

The legal basis for surpassing the establishment of a single European public-procurement market as the sole objective — with various approaches — of European regulations could be found in Articles 119 to 126 and Protocols no. 12 and 13 of the TFEU, in relation to the competencies attributed to the Union in Articles 3 and 5 of the same legal

public spending and major role of the approximation of laws, 42, can be summarized as the prohibition of discrimination against economic operators from other Member States, since the other two have an instrumental character with respect to the first.

[15] Following the differentiation carried out by C. Bovis, *EC Procurement Law: case Law and regulation*, Oxford, Oxford University Press, 2006, 9 and 10.

[16] See C. Bovis, *EC Procurement Law: case Law and regulation*, 13, in relation to M. E. Comba, *Variations in the scope of the new EU public procurement Directives of 2014: Efficiency in public spending and major role of the approximation of laws*, 45. At this point, we must highlight that, as indicates the Judgment of the General Court of the European Union, case 15/13, 8 May 2014 (Fifth Chamber), par. 22, "the principal objective of the EU rules in the field of public procurement is the opening-up to undistorted competition in all the Member States"; in accordance with its Judgement in the case C-454/06, 19 June 2008, (Third Chamber), par. 31, where it was noted together with the aforementioned objective the need to "ensure the free movement of services"; that is, the main objective, but not the only one. This definition as the main objective, which we share as it could not be otherwise, is tempered by social-policy considerations that are progressively being introduced in public procurement — see J.M. Gimeno Feliú, *El necesario big bang en la contratación pública: hacia una visión disruptiva regulatoria y en la gestión pública y privada, que ponga el acento en la calidad,* in *Revista General de Derecho Administrativo*, vol. 59, 2022, 2. A good example of this is the provisions in Article 20 of Directive 2014/24/EU, aimed at what we have come to call strategic ad extra planning of a social nature. In this line, see Judgement of the General Court of Justice of the European Union (Third Chamber) C-368/10, 10 May 2012, par. 76. For its part, in the Judgement of the General Court of Justice of the European Union C-513/99, 17 September 2002, pars. 57 and 59 to 62. In the same vein, see its Judgement in the case C-448/01, 4 December 2003, (Sixth Chamber), pars. 33, 34, 40 and 41, where it is established that, given the recognition of environmental care and sustainable development in the EC Treaty — Articles 3 and 6 — as one of the Community's objectives, its pursuit in the field of public procurement is entirely feasible as long as the other material and procedural requirements established in the applicable regulations are respected.

[17] Content of Directive 2014/24/EU which emphasizes what was already indicated in European Commission, *Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final, 27 January 2011, 4 and 5, by stating that: "Given the key role of public procurement in coping with today's challenges, […] Several complementary objectives are to be achieved: The first objective is 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 afforded the opportunity to compete on a level-playing field and distortions of competition must be avoided. At the same time, it is crucial to increase the efficiency of procurement procedures as such: Streamlined procurement procedures with targeted simplification measures meeting the specific needs of small contracting authorities could help public procurers to achieve the best possible procurement outcomes for the least possible investment in terms of time and public money. 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 [9]. The comparison with the private sector, where cross-border trade is much higher, indicates that there remains significant untapped potential. This objective of more efficient public procurement is addressed mainly through the questions in parts 2 (improve the toolbox for contracting authorities) and 3 (a more accessible European procurement market) of the Green Paper".

text. These provisions foresee the EU's participation in adopting coordinated economic policies, for which common goals have been designed, always respecting free competition and the market economy. These provisions imply not only the non-transgression of the principle of subsidiarity by proposing strategic-planning objectives in European directives, but they also embody a relevant common orientation of the European Union concerning public expenditure and its efficiency with respect to a significant area of the GDP of the Member States.[18] However, as it is clear, the regulatory developments promoted in pursuit of this new programmatic objective of public procurement must be conducted within the scope of competence of the Union or the Member States, as appropriate.

In any case, these four goals, summarized in current Directive 2014/24/EU, share the common feature that the use of electronic means has been considered as an instrument to ease their pursuit.

2. *Theoretical Ways ICT Contributes to the Establishment of a Single Public-Procurement Market*

As previously mentioned, the potential of ICT to achieve competitive advantages has been emphasized, stemming from the greater dissemination of procurement processes, the possibility of participating in the tender remotely, and, therefore, the reduction of entry barriers[19] — primarily bidding costs. This results in an increased number of economic operators in procurement procedures, including those belonging to groups traditionally facing entry difficulties such as SMEs and bidders from other Member States, on whom the European legislator focuses their attention.[20] These advantages would address inefficiencies on the supply side, even allowing us to consider mitigating situations where the current market structure of the Member States has led to bilateral monopoly situations.[21]

On the other hand, we must highlight the behavioural advantages or the shaping of the will of the contracting authority that are attributed or linked to the implementation of ICT, given the greater transparency and trust in the impartiality of the procurement procedures that supposedly will result from their use and the new operating system and mode of operation of the agents involved in the procurement processes,[22] thus adding to or

[18] According to European Court of Auditors, *Public procurement in the EU, Less competition for contracts awarded for works, goods and services in the 10 years up to 2021,* Special report no. 28/2023, 4, public procurement expenditure channeled by the European Union is estimated at two trillion euros, which is 14% of its gross domestic product.

[19] A.G. Orofino, *Forme elettroniche e procedimenti amministrativi*, Bari, Cacucci Editore, 2008, 238.

[20] European Commission, *Action plan for the implementation of the legal framework for electronic public procurement,* COM(2004) 841 final, 29 December 2004, heading 3 and 4.2.4; European Commission, *The Role of eGovernment for Europe's Future,* COM(2003) 567 final, 26 September 2004, heading 4.17; European Commission, *Report on the implementation of the Internal Market Strategy (2003-2006),* COM(2004) 22 final, 21 January 2004, 3; European Commission, *Internal market Strategy - Priorities 2003-2006,* COM(2003) 238 final, 7 May 2003, and Recital 52 of Directive 2014/24/UE. On this issue, the examples found in D. Broggi, *Consip: Il significato di un'esperienza. Teoria e pratica tra e-procurement ed e-government*, Milano, FrancoAngeli, 2008, 40 and 41.
Among the reasons for focusing on SMEs, as noted by F. Caringella and M. Protto, *Il codice dei contratti pubblici dopo il correttivo. Commento organico al codice e alle linee guida ANAC alla luce del decreto correttivo del 19 aprile 2017, n. 56*, Roma, Dike Giuridica Editrice, 2017, 261, we find their high number at the European level and their corresponding potential in favoring the search for the most economically advantageous tender among all possible offers, as well as the possibility of using their inclusion in public procurement as a support for these — and their great importance in the economic and business fabric of the Member States — in the face of the economic crisis experienced and as a stimulus for technological innovation. In this regard, we can highlight, following G. Piga, *La nuova disciplina sui contratti pubblici: il punto di vista dell'economista*, in *La nuova disciplina dei contratti pubblici. Tra esigenze di semplificazione, rilancio dell'economia e contrasto alla corruzione*, Milano, Giuffrè Editore, 2016, 85, the so-called "Small Business Discrimination Index in Public Contracts," which highlights the marked difference between the participation of SMEs in the overall economy and in the public procurement market.

[21] We agree with A. Sánchez Graells, *Reflexiones críticas en torno a la disciplina de comportamiento del mercado del comprador público*, in *La contratación pública a debate: Presente y futuro*, Cizur Menor, Thomson Reuters-Civitas, 2014, 276, when he states that "the impact of public procurement on the competitive dynamics of the market" has been little addressed by both economic and legal scholarship.

[22] European Commission, *Action plan for the implementation of the legal framework for electronic public procurement,* COM(2004) 841 final, 29 December 2004, 9; European Commission, *Green paper. Public procurement in the European Union. Exploring the way forward,* COM(1996) 583 final, 1996, 27; European Commission, *The Role of eGovernment for Europe's Future,* COM(2003) 567 final, 26 September 2003, heading b); Recital 52 of Directive 2014/24/EU; Presidenza del Consiglio dei Ministri, *Uso della Posta elettronica cer-*

diverging from the traditional anti-corruption approach, which is fundamentally based on intensifying regulation to constrain the discretionary powers of the competent administration, consequently resulting in a slower and more difficult decision-making process.[23]

These advantages are set up to overcome inefficiencies in public procurement from the demand side, generally by allowing greater public exposure of actions, which will increase the risk for the awarding entity of being discovered if it makes decisions that disregard the public interest. Thus, the higher levels of transparency generated by these anticipated behavioural advantages would themselves form an important tool that encourages the administration to act ethically, efficiently, and effectively, ensuring the greatest economic benefit for the citizens,[24] since in the functioning of the public-procurement market, both the awarding entity and its sponsoring entity will be directly exposed to those who, in turn, are their ultimate sponsors: the voters.[25] Such effects contribute to foster a market in which economic operators can compete on equal terms and without bearing entry barriers artificially established by the contracting authority.

And finally, we find the expected informational advantages of the contracting entity in terms of market knowledge, to correct inefficiencies caused by unintentional demand-side factors[26] by favouring the knowledge by the contracting entities of the characteristics and parameters of the public-procurement market they are going to face. Given that the configuration of the public-procurement procedure, as Otto Mayer already indicated, leads to the fact that 'the individual submits to predetermined rules that cannot be disputed', while the Administration - or the contracting entity - holds a position of superiority to the extent of obtaining 'quasi-judicial' powers regarding those points of the contract that require interpretation due to lack of agreement between the parties, given the enforceability of decisions by public authorities. However, these powers are held 'in a provisional and reviewable manner by the judge' and generally oriented towards safeguarding public interests and the proper use of public funds involved in the contractual activities of the Administration.[27] However, inadequate design of the tender documents that affects the equality of bidders and contravenes regulations will bring such challenge before the courts, which constitutes a higher bidding cost and therefore an entry barrier. On the other hand, if the 'error' in the design is of a technical-economic nature, for not correctly adapting the award criteria and the base budget for bidding to the characteristics of the offer structure being faced and the nature of the product, we would find ourselves within the realm of administrative discretion, which is impossible or difficult to challenge.

The strong expectations of the aforementioned advantages with the implementation of ICT will largely depend on characteristics associated with their operation, such as:[28]

- "Deterritorialization", which consists of the disconnection of activities conducted on the network from a well-defined physical space, which is replaced by the "telematic space" that scholarship has come to refer to as

tificata nelle amministrazioni pubbliche, Circolare no. 1/2010; P. Costanzo, voce *Internet (Diritto Pubblico)*, in *Digesto discipline pubblicistiche. Aggiornamento*, Torino, Utet giuridica, 2000, 358; B.G. Mattarella, *Disciplina dei contratti pubblici e prevenzione della corruzione*, in *La nuova disciplina dei contratti pubblici. Tra esigenze di semplificazione, rilancio dell'economia e contrasto alla corruzione*, Milano, Giuffrè Editore, 2016, 352. The latter is highlighted by the citation of L. *Brandeis, What publicity can do*, in *Harper's Weekly*, 1913, which points out that: "sunlight is said to be the best of disinfectants; electric light the most efficient police-man"; D. Vaiano, *Art. 29. Principi in materia di trasparenza*, in *Codice dei contratti pubblici, vol.* I, R. Garofoli, and G. Ferrari (eds.), Molfetta, Neldiritto editore, 2017, 585 and 586.

[23] A. Pajno, *La nuova disciplina dei contratti pubblici. Tra esigenze di semplificazione rilancio dell'economia e contrasto alla corruzione*, Milano, Giuffrè Editore, 2016, 42.

[24] A. Corrado, *La trasparenza negli appalti pubblici, tra obblighi di pubblicazione e pubblicità legale*, in *Federalismi.it*, no. 1, 2018, 1.

[25] In this regard, see the relationship between transparency and bringing citizens closer to the public administration established in M.R. Spasiano, *I principi di pubblicità. Trasparenza e imparzialità*, in *Codice dell'azione amministrativa*, M.A. Sandulli (ed.), Milano, Giuffrè Editore, 2017.

[26] All these types of advantages derived from the introduction of ICT in public-procurement procedures were already foreseen in Il *Piano d'azione per l'e-government, del 23 giugno 2000*, Roma.

[27] G. Pittalis, voce *Appalto Pubblico*, in *Digesto delle discipline Pubblicistiche,* vol. I, Torino, Unione Tipografico-Editrice Torinese, 1987, 294.

[28] G. Pascuzzi, *Il diritto dell'era digitale*, Bologna, Il Mulino, 2016, 323 to 344.

a "non-place".[29]

- "Destatalization", as the activity conducted online tends -easily and naturally- to surpass the confines of a single state and, so, its regulatory framework. Both preceding characteristics are conducive and fully aligned with the aim that is now the subject of analysis.

- "Dematerialization", as the use of ICT brings about a transformation of the regulatory object, ceasing to be an element composed of atoms - the fundamental elements of matter - and becoming a sequence of bits, constituting goods or channels of interrelation or transmission of information between two or more subjects. A computerized element that allows transmission and exchange, exponentially reducing the burdens, costs, and transmission time of material elements,[30] as well as a preconceived notion of greater reliability and operational accuracy about its behaviour. As a consequence of this transformation that occurs with its digitization, the regulatory object and the administrative procedure become potentially subject to new functionalities unknown in paper-based administration, such as hypertextuality, which involves the possibility of introducing direct and automatic access routes between various documents; hypermediality, which involves the possibility of establishing hypertext systems between various media or communication platforms, for example, between a written document and video and audio reproduction systems; and interactivity, which involves the feasibility of the communication channel to connect multiple parties in order to allow multidirectional dialogue.[31] Functionalities that offer a wide range of possibilities for these innovative technologies to be discovered in the field of public procurement as a true technological innovation, as indeed has been the case. Thanks to the aforementioned associated advantages, a priori, significant effects must be achieved, such as:

- Increasing market knowledge and so the negotiating power of the contracting entity.

- Decreasing the effectiveness of attempts to hide and/or justify a situation of inefficiency in public procurement based on the natural structure of the market when it is ultimately caused with the consent of the contracting authority.

- Promoting the elimination of sectors where an oligopolistic or collusive operating structure occurs, even in those where such operation is traditionally presented as something structural and inevitable, thanks to the powerful effects that ICT can deploy in promoting the competitive participation of economic operators.[32]

The expected benefits, features, and impacts of ICT should theoretically promote the establishment of a borderless European market in public procurement, thus leading to the adoption of more rational, efficient, and transparent procedures.[33]

These purported benefits of competition, to the extent that they address structural deficiencies in competition among bidders, as well as behavioural and informational deficiencies, will ultimately grant electronic procurement its essential importance and constitute a turning point in the development of public procurement, elevating it beyond mere functional novelty. As noted by Pascuzzi, the law will once again draw on the solutions offered by science to find instruments that allow for the correction of certain legal realities that could not be

[29] N. Irti, *Norma e luoghi. Problemi di geo-diritto*, Roma-Bari, Laterza, 2001.

[30] N. Negroponte, *Essere digitali*, Milano, Sperling & Kupfer, 1995.

[31] P. Costanzo, voce *Internet (Diritto Pubblico)*, 349 and 530.

[32] As stated in the Judgement of the Court of Justice of the European Union, cases C-285/99 and C-286/99, 27 November 2001 (Sixth Chamber), pars. 36 and 38: "The coordination at Community level of procedures for the award of public works contracts is thus essentially aimed at protecting the interests of traders established in a Member State who wish to offer goods or services to contracting authorities established in another Member State and, to that end, to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body governed by public law may choose to be guided by considerations other than economic ones (see, to that effect Case C-380/98 University of Cambridge [2000] ECR I-8035, paragraphs 16 and 17; Case C-237/99 Commission v France [2001] ECR I-939, paragraphs 41 and 42)", highlighting how it emanates from European regulations and must respect "the principle of non-discrimination on grounds of nationality implies".

[33] I. Martín Delgado, L*a difusión e intercambio de información contractual a través de medios electrónicos. Publicidad, notificaciones y comunicaciones electrónicas*, in E. Gamero Casado and I. Gallego Córcoles (eds.), T*ratado de contratos del Sector Público. Tomo II*, Valencia, Tirant lo Blanch, 2018, 1900; European Commission, *EU eGovernment Action Plan 2016-2020. Accelerating the digital transformation of government,* COM (2016) 179 final, 19 April 2016.

resolved based on previously existing means.[34]

In this vein, and based on the premises outlined, the Spanish National Commission on Markets and Competition, among others, expressed its support and urged the introduction of new techniques that contribute to the efficiency of public spending channelled through public procurement, through 'computer systems based on open data and big data', as they will facilitate access to information about the public-procurement market for economic operators,[35] enabling their participation on equal terms.

3. *Successful legal instruments based on the use of ICT aimed at promoting the competitive participation of national and European economic operators*

As far as we are concerned, the digitization promoted by Directive 2014/24/EU has led to the establishment of electronic means in European legal frameworks, which objectively represent an improvement over paper-based administration. It lays the groundwork for harnessing the new opportunities offered by ICT, as outlined in the preceding section. Among these, we find the TED (Tenders Electronic Daily) eTendering,[36] which stands as the primary means for electronic access to official announcements about public procurement throughout the European Union. Among such announcements are those for "prior information" and "tendering", enabling indexed and systematized searches through its connection to the digital version of the Official Journal of the European Union (OJEU). Its first implementation traces back to Directive 2004/18/EC, with its maintenance assured in the medium term following its endorsement by the new Directive 2014/24/EU (Annex VIII 3rd). Operating on the TESTA Network, it sets up an interconnection system via an intranet of the local domains of European administrations and those of Member-State administrations, ensuring that this connection stays invisible to third parties as it would if conducted via the Internet. Consequently, it has come to be regarded as a facilitator of technical interoperability at the European level.[37]

Undoubtedly, this platform with a systematic method strongly supported by the CPV and NUTS codes offers extensive possibilities for awareness of the existence of public procurement procedures to any economic operator in the European Union. However, its scope and utility are limited by the fact that its use by national contracting authorities is restricted to SARA contracts. Given the high economic thresholds of these contracts, the contribution of ICT in this regard depends primarily on analogous platforms established by each Member State.

In the case of Spain, the transposition act of this Directive — Act 9/2017, on public sector procurement, hereinafter referred to as LCSP — has established a polycentric system —Article 347 — where all buyer profiles will be hosted, either on the national public-sector platform or on regional platforms, generating a contained dispersion of information, with a maximum of 20 potential hubs and 8 currently in operation.[38] The state platform will also record the procurement procedures initiated in the buyer profiles hosted on the regional platforms through an interconnection announcement, allowing their integration into the search engines of the former, without prejudice to the fact that their electronic bidding and access to complete information must be carried out on the corresponding regional platform.

It should be noted that on both types of platforms — the national and the European — tender announcements must allow full electronic and free access to the specifications. However, it is true that the process of digitizing information and the possibility of accessing it via the Internet will not, by itself, increase its real usefulness or establish it as a source of knowledge for economic operators and contracting authorities.[39] Indeed, as De Nictolis suggests,

[34] G. Pascuzzi, *Il diritto dell'era digitale. Tecnologie informatiche e regole privatistiche*, Bologna, Il Mulino, 2002, 9.

[35] Comisión Nacional de los Mercados y la Competencia, *Análisis de la contratación pública en España: oportunidades de mejora desde el punto de vista de la competencia. Informe de 5 de febrero*, 2015.

[36] SIMAP, whose acronym corresponds to the French expression "Système d'Information pour les Marchés Publics".

[37] E. Gamero Casado, *Interoperabilidad y Administración electrónica: conéctense, por favor*, in *Revista de Administración Pública*, vol. 179, 2009.

[38] https://contrataciondelestado.es/wps/portal/plataforma.

[39] F.J. Escrihuela Morales, *La contratación del sector público y la corrupción*, in *Contratación Administrativa Práctica: revista de la contratación administrativa y de los contratistas*, vol. 135, 2015, 2. Similarly, see the critique of understanding transparency as mere data openness in J. Valero Torrijos, *Innovación tecnológica e in-*

in pursuit of transparency, online accessibility is a necessary but not sufficient condition. This is evident because a vast amount of information, without the necessary organization, schematization, and systematization, can result in "*rumore informatico*" with an informational capacity akin to silence,[40] given that strict publicity of information will not be accompanied by its adequate availability.[41]

In light of this, although it is true that ICT and the information provided by contracting authorities through them constitute a novel and important source of information from which economic operators, other contracting authorities, and oversight bodies can benefit,[42] to realize their potential and achieve the expected outcomes of these new publications, it will not suffice to merely demand the ability to access information on public-procurement processes or to configure telematic communications that maintain the same regulations and structure as those existing in paper-based administration,[43] but it will be necessary for the information—dematerialized and easily accessible through these means—and electronically enabled procedures to be appropriately designed in the regulations, conducted through relevant channels that guarantee accessible, secure, and reliable access, supported by appropriate oversight mechanisms, and above all, accompanied by the adaptation of traditional legal frameworks to the new reality of ICT. Ultimately, a holistic adaptation of the organizational structure of the Administration, as well as its substantive areas of operation, must be undertaken.[44]

Otherwise, the implementation of electronic means will not entail the introduction of any administrative innovation, as it will not represent an improvement in functionality compared to the traditional system it aims to replace,[45] a fundamental aspect considered by the European Commission when defining e-government is not only the implementation of new technologies but also the combined procedure of such usage alongside the introduction of organizational changes and new skills within the administration to align it with those technologies.[46]

However, it is also true that the European legislator has laid a fundamental foundation to systematize information in public procurement and prevent it from becoming a mere electronic noise without informative capacity: the Common Procurement Vocabulary (CPV), as showed in Article 23 of Directive 2014/24/EU. This has been complemented by national initiatives such as the Spanish one, which requires that all information published in buyer profiles and their corresponding hosting platforms be provided in open and reusable formats (Articles 63 and 347 of the LCSP). This has helped the emergence of information-reuse systems for public-procurement procedures at the national level,

novación administrativa, in *Seminario Teoría y Método-STEM*, Universidad Castilla La Mancha, 2016, 21 and 22; R. Martínez Gutiérrez, *La contratación pública electrónica. Análisis y propuesta de transposición de las Directivas comunitarias de 2014*, Valencia, Tirant lo Blanch, 2015, 33 and 34.

[40] R. de Nictolis, *Il codice dei contratti pubblici: la semplificazione che verrà*, in *L'Italia che cambia: dalla riforma dei contratti pubblici alla riforma della pubblica amministrazione*, Milano, Giuffrè Editore, 2017, 84.

[41] T. Tessaro and S. Piovesan, *La riforma Madia del procedimento amministrativo. La legge 241/90 dopo la legge 124/2015*, Santarcangelo di Romagna, Maggioli Editore, 2015, 127.

[42] A. Cancelo, *Diez años de Contratación Pública Electrónica. Reflexiones y perspectivas de la puesta en práctica de la contratación electrónica desde Euskadi*, in *Contratación Administrativa Práctica: revista de la contratación administrativa y de los contratistas*, vol. 137, 2015, 8 and 9.

[43] J.M. Martínez Fernández, *«Transparencia» vs «Transparencia» en la contratación pública*, in *Diario la Ley*, vol. 8607, 2015, 3.

[44] I. Martín Delgado, *La difusión e intercambio de información contractual a través de medios electrónicos. Publicidad, notificaciones y comunicaciones electrónicas*, 1896. In the same sense, J.Y. Choi and H. Kim, *Electronic Government Procurement Reform*, in *Public Procurement Law Review*, vol. 3, 2013, 116.

[45] See I. Gallego Córcoles, *Contratación pública e innovación tecnológica*, in *Revista española de Derecho Administrativo*, vol. 184, 2017, 195; E. Gamero Casado and R. Martínez Gutiérrez, *El Derecho Administrativo ante la «Era de la Información»*, in E. Gamero Casado and J. Valero Torrijos (eds.), *La Ley de Administración Electrónica. Comentario sistemático a la Ley 11/2007, de 22 de junio, de Acceso Electrónico de los Ciudadanos a los servicios Públicos*, Cizur Menor, Thomson Aranzadi, 2008, 35; J. Valero Torrijos, *La transposición en España de la normativa europea sobre contratación pública electrónica: Una oportunidad para la innovación tecnológica*, in *I Congreso de la Red Internacional de Derecho Europeo: La nueva contratación pública*, Toledo, 2014, 38; or J. Valero Torrijos, *Innovación tecnológica e innovación administrativa*, 5.

[46] European Commission, *The Role of eGovernment for Europe's Future,* COM(2003) 567 final, 26 September 2003, 7; see the concept of digital transformation contained in European Commission, *Making Public Procurement work in and for Europe*, COM (2017) 572 final, 30 October 2017.

such as OPENPLACSP,[47] as well as at the European Union level, such as OPENTENDER.[48]

Thus, within the European Union, we find the existence of advertising models that undoubtedly, from an objective standpoint, clearly surpass paper-based advertising models, favouring the reduction of bidding costs faced by economic operators potentially interested in taking part in a public-procurement procedure, at least from a strictly national perspective.

In parallel, another element born from the electronic transformation of public-procurement procedures has also been consolidated, namely the European Single Procurement Document (ESPD), or self-certification[49] devised by European institutions based on previous experience derived from prequalification documents used within certain Member States, this instrument was conceived with a functional dynamic like its predecessors. However, what made it innovative was its distinctly electronic and multilingual nature, as it was available in all official languages of the Member States.

Its electronic nature has allowed its implementation to be accompanied by electronic platforms at the European level, where the online service is offered, allowing for its generation, import, and export.[50] These last two utilities ease their use and reuse by allowing for export and later import using an open-document format, specifically, in XML format. Eventually, when the same requirements are requested from bidders in various procurement procedures, only the data of the specific procedure needs to be replaced, along with the procedure type field, which is never imported. The service for the use of these utilities is provided by the European Commission, which, in the case of Spain, is channelled through the Ministry of Finance.[51] In addition to the above, there is the possibility that certain data can be automatically filled in with information already held by public authorities, as allowed by ROLECSP, whose electronic portal generates an ESPD holding all the information of a specific economic operator automatically. Once again, we meet an advancement that, from our perspective, objectively surpasses the functioning of paper-based procedures, reducing bidding costs, at least from the viewpoint of economic operators within the same Member State as the contracting authority.

Finally, and without aiming for exhaustive coverage, it is worth noting how the immediacy of electronic-communication means has enabled the Independent Office for Regulation and Supervision of Spanish Procurement to establish, through its Instruction 1/2019 of February 28, the obligation of contracting authorities of the General Administration of the State to attempt to obtain, at least, three estimates for minor contracts—up to 15,000 euros for goods and services contracts, and up to 40,000 euros for works contracts, as indicated in Article 118 of the LCSP. It has also offered as an alternative, giving way to a simplified open procedure and an even more simplified open procedure, which allow the participation of any interested economic operator, as stipulated in Article 159 of the LCSP.

As a predictable result, procedures open to the free competition of economic operators have increased. As an example, data from the transparency portal of the Region of Murcia (Spain) shows that in 2016, 45% of procedures above the threshold of the minor contract were processed through the negotiated procedure without prior publication, whereas this figure reduced to 27% in 2022, and to 25% in 2023.[52]

If we use national-level data, we can verify that in 2012, there were 4,743 procedures out of a total of 11,262, processed through the negotiated procedure without prior publication, being 42.12% of the total contracts—excluding the number of minor

[47] https://contrataciondelsectorpublico.gob.es/wps/portal/DatosAbiertos.

[48] https://opentender.eu/start.

[49] R. Martínez Gutiérrez, *El uso de medios electrónicos en la contratación pública. La relación entre las Leyes 39 y 40 de 2015 y las Directivas 24 y 55 de 2014 de contratación pública y facturación electrónica. Propuestas para su transposición*, in I. Martín Delgado (ed.), *La reforma de la Administración electrónica: Una oportunidad para la innovación desde el Derecho*, Madrid, INAP, 2017, 292; T. Medina Arnáiz, *Avanzando en la reducción de las cargas administrativas vinculadas a la selección del contratista*, in M. Fernández Salmerón and R. Martínez Gutiérrez (eds.), *Administración Electrónica, Transparencia y contratación pública*, Valencia, Tirant lo Blanch, 2019, 124.

[50] Tool available in Spain in https://visor.registrodelicitadores.gob.es/espd-web/filter?lang=es.

[51] The web address of this service is https://visor.registrodelicitadores.gob.es/espd-web/filter?lang=es.

[52] Data extracted from https://transparencia.carm.es/web/transparencia/contratos-de-obras-suministros-y-servicios#gsc.tab=0.

contracts. This contrasts with a 7.8% of procedures processed through the negotiated procedure without prior publication in 2023, based on the data of the 181,011 procedures offered by the OPENPLASCP tool[53] that year.[54] These figures mentioned in the report of the year 2023 by the European Court of Auditors, regarding the number of direct awards do not correspond to those expressed in the previous analysis. The report highlights a widespread increase in procedures without publication across the European Union from 2011 to 2021, with Spain being one of the countries in such circumstances. This disparity should be explained by the fact that the report uses the TED system as its database, where the included information primarily refers to procedures above European-Union threshold.[55]

In this regard, as it has already been hinted at, limiting the study of data to procedures above the European threshold established by Directive 2014/24/EU does not provide definitive conclusions. As it was the case in Spain, instances of procurement significantly influenced by ICT to the extent of becoming procedures with advertising, despite originating from a previous situation of non-advertised procurement, fall within the scope of contracts not subject to harmonized regulation. In cases where they do exceed the previous threshold, it is logical that the procurement procedure pre-existing the entry into force of Directive 2014/24/EU, even in a paper-based administration context, would have predetermined the use of advertised procurement. This explains why the values of these types of procedures are similar in 2011 and 2021, as they involve cases where the qualitative cause enabling this type of exceptional procurement remains unchanged, except for exceptions where a significant reduction has occurred, such as in Slovakia, Hungary, Croatia, Germany, Latvia, and Estonia, as well as in those other countries where a notable regression has occurred, such as Portugal, Luxembourg, Denmark, Romania, and Cyprus. In these cases, a specific analysis of the analysed data and their national regulations would be necessary.

It is for all the above reasons that, in our opinion, the assertion of the Court of Auditors appears bold when characterizing the number of direct awards in several Member States as "high," at least in relative terms, as it did not consider procedures below the community threshold.

4. *Evolution in the attainment of the single market in the field of public procurement*

4.1. *Current state*

The aim of the single market for public procurement entails the urgent need to abandon positions by which it is conceived as a tool through which the activity of economic operators located in the same locality—or geographically nearby — of the contracting authorities is driven.[56] Beyond the fact that such proximity is or has been essential for sampling the offer to which smaller contracting authorities have more direct access — a situation that ICT can help overcome through the way market consultations are designed in Directive 2014/24/EU in its Articles 40 and following —, for reasons of efficiency and in accordance with the principles of our legal system and basic EU rules, measures to promote competition must be completely neutral, at least with respect to any economic operator in the EU. Additionally, as pointed out by DRUCKER,[57] "in the mental geography of electronic commerce, distances have been eliminated. There is only one economy and only one market".

However, despite its early verbalization, it stays an unrealized objective in practice to this day. Already in the research promoted in the mid-1980s by the European Commission "The cost of non-Europe. Vol. 5", it was clear that while private trade had increased substantially

[53] https://contrataciondelsectorpublico.gob.es/wps/portal/DatosAbiertos.

[54] The quantitative difference in the accessible samples also shows the positive effect that ICT has had in relation to the aspects evaluated in the previous section of this work.

[55] European Court of Auditors, *Public procurement in the EU. Less competition for contracts awarded for works, goods and services in the 10 years up to 2021*, Annex II, 65 ff.

[56] As reported in J. Peña Alonso, *La Central de Contratación de la Diputación de Burgos. Experiencia práctica en la gestión de acuerdos marco y la licitación electrónica de contratos menores*, in *Transparencia, Innovación y Buen Gobierno en la Contratación Pública*; M. Fernández Salmerón and R. Martínez Gutiérrez (eds.), Valencia, Tirant lo Blanch, 2019, 180.

[57] Cited in J. Domínguez-Macaya Laurnaga, *La contratación pública electrónica como instrumento para la transparencia: ¿Estamos a setas o estamos a Rolex?*, in *Transparencia, Innovación y Buen Gobierno en la Contratación Pública,* 196.

since the creation of the EU, public entities contracted almost exclusively with national companies. This situation resulted in sectors where public procurement was predominant not experiencing the increased competitive pressure or the positive effects derived from the creation of the single market and in contrast to a scenario where cross-border participation of companies from other Member States had indeed expanded, similar to private trade, this situation resulted in an additional cost for all contracting authorities, ranging between nine and nineteen billion ECU (European Currency Units).[58]

Given the failure to achieve this goal, hope was placed on ICT to reverse the situation, as outlined in the previous section.

However, the study on competitive bidding conducted by the European Court of Auditors in 2023 highlights a continued low level of cross-border participation among EU Member States. Specifically, 24 out of 27 Member States would fall below the threshold of 10% of contracts awarded to companies domiciled abroad, including those from other EU Member States.[59] Although these figures should be nuanced with an understanding of the bidding data of such companies, regardless of their award, the inherent bias in the data used by the Court of Auditors is less pronounced on this occasion. This is because, logically, larger economic operators capable of meeting the solvency requirements for contracts above Union thresholds, as well as proving higher levels of ability as bidders, will have a greater inclination for mobility and establishment in other Member States. Additionally, it should be noted that TED only mandates to advertises this type of contract, without necessarily having to provide common-information systems across all Member States for contracts below EU threshold.

4.2. *European Systems Favouring the Single Market in Public Procurement Pending Development or Expansion*

4.2.1. *E-certis*

In the current state of evolution of European regulations, the limited mandatory inclusion of information about contracts on the SIMAP Platform is not the only significant deficiency for the formation of the single market. The fact that the regulatory instrument used is a directive and not a regulation implies the need for means of legal interoperability. This circumstance is fully acknowledged by the European institutions and has led to the proposal of the E-Certis tool as an information system set up by the European Commission, managed by its Directorate-General for Internal Market, Industry, Entrepreneurship, and SMEs, fed with information provided by the Member States.[60] Its establishment responds to an explicit provision in Directive 2014/24/EU following its prior proposal in earlier documents by the European Commission.[61] Such information is aimed at establishing an electronic database, made available to economic operators free of charge, which informs — Article 61 of Directive 2014/24/EU — on the nature and content of certificates and declarations, self-declarations, and evidence required in public-procurement procedures in different Member States, as well as the entities potentially linked to their issuance.[62] Additionally, a system of equivalences between the different information needed in the field of public procurement by the contracting authorities of the various Member States is included. Furthermore, it is envisaged that such equivalence of information will be accompanied by the provision of models of certificates or documentation related to that information.

This information can be systematized by country, material scope, or aspect of the tender to which the documentation refers, and

[58] M.E. Comba, *Variations in the scope of the new EU public procurement Directives of 2014: Efficiency in public spending and major role of the approximation of laws*, 34.

[59] European Court of Auditors, *Public procurement in the EU. Less competition for contracts awarded for works, goods and services in the 10 years up to 2021*, 27 and 28.

[60] Web address of this service is *https://ec.europa.eu/tools/ecertis/#/search.*

[61] European Commission, *Green Paper on expanding the use of e-Procurement in the EU,* COM(2010) 571 final, 18 October 2010.

[62] Among such documents, the inclusion of the ESPD in all the languages of the EU Member States is anticipated. In the case of Spain, these issuing bodies included in e-Certis are the Central Commercial Register, the Official Register of Bidders of the Public Sector, the Tax Administration Agency, and the General Treasury of Social Security.

whether e-Certis provides an exemplifying model or not. However, as of today, it can be established as a point of improvement in the information filtering system that the description of each element is available exclusively in English, despite this description being the only one that allows identifying, if coinciding, two analogous elements from different countries. Likewise, there is a lack of absolute coincidence of these descriptions that would allow their easy location through the column sorting system, as demonstrated, for example, by the initial description codes established by Italy, which prevent maintaining a correlative order with their equivalents from other countries, leading to the need for a unique coding system, following the example of CPV or NUTS codes.

With this information, e-Certis aims to establish an important system of organizational and legal interoperability, allowing to understand and analyse, in one's own language, a glossary of elements used in the tender procedures of each Member State, and thus, to ease the understanding of the information being provided or requested in the specifications. It also allows access, if applicable, to related documents that enable the preparation of one's own documentation for bidding in another Member State or to "find reciprocally acceptable equivalent information".[63] On the other hand, there is a lack of the ability to access or download the corresponding proof document for each element when comparing two elements in this database. All of this could be considered as a means of linguistic interoperability, with SMEs being among its main beneficiaries, as told in recital 87 Directive 2014/24/EU.

In parallel, this Directive, in Article 59.6, establishes that this database should be supplemented with a complete list of all databases that may contain information related to economic operators, to serve as a means of information exchange between the contracting authorities of the various Member States, indicating, if available, the electronic address that allows free consultation. The aforementioned information, about the verification of the absence of prohibitions to contract, will be complemented by the Early Detection and Exclusion System[64] (EDES) initially provided for by Financial Regulation 2002/1605/EC, set up by Regulation 2008/1302/EC, and definitively promoted by the reform of the latter through Regulation 2015/1929/EU. Currently, this service includes those economic operators who are subject to any of the grounds for exclusion from contracting listed in Article 136 of the current Regulation 2018/1046/EU. Among these databases, the national registers having lists of accredited operators and pre-classification systems will be included in e-Certis. This is intended to give effect to the mandate of Article 64.4 of Directive 2014/24/EU, which requires the existence of a rebuttable presumption about the capacity of economic operators that are listed in "official lists of approved contractors, suppliers, or service providers or possess the corresponding certificate of registration". Concerning this orientation of the e-Certis database, as Martínez Gutiérrez indicates, its ultimate desirable stage of evolution would involve transitioning from being considered a point of access to the different national registration services to the creation of a single registration service for economic operators at the European level, even if it were established based on an integration process and autonomous operation of national registers.[65]

The factual relevance of e-Certis is enhanced by Article 61 of Directive 2014/24/EU, which obliges public administrations and other contracting authorities of each Member State to keep the information updated for both the contracting authorities of other Member States and economic operators. This obligation is announced and explained in recital 87 of the current directive. As Medina Arnaiz writes down, this update will be an indispensable element for the operability of e-Certis, which will require the commitment and active participation of all Member States.[66]

However, as derived from Article 61.2 of Directive 2014/24/EU, the necessary step has

[63] R. Martínez Gutiérrez, *La contratación pública electrónica: análisis y propuesta de transposición de las Directivas comunitarias de 2014*, 192.

[64] Available at https://ec.europa.eu/info/strategy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes/database_en.

[65] R. Martínez Gutiérrez, *La contratación pública electrónica: análisis y propuesta de transposición de las Directivas comunitarias de 2014*, 191.

[66] T. Medina Arnáiz, *Avanzando en la reducción de las cargas administrativas vinculadas a la selección del contratista*, 109.

not yet been taken for the procurement procedures of each Member State to only use supporting documents accessible through e-Certis. Such an extreme only exists as a mere preference. Thus, we consider that we will have to wait until this database is perfected and its establishment made mandatory— in the aforementioned sense — in the European regulation succeeding Directive 2014/24/EU, so that the contracting authorities of the various Member States are definitively motivated to use it and to ensure its updating. This future mandatory nature is announced in Recital 87 of Directive 2014/24/EU. The same considerations can be made on the possibility provided for in Article 59.6 of Directive 2014/24/EU. The mere provision of its possibility, and not its obligatoriness, may not be sufficient to ensure its use, among other reasons, due to the lack of knowledge of the language in which the register belonging to other Member States is written or simply due to unfamiliarity with its interface. We agree with Martínez Gutiérrez that the mandatory nature of e-Certis would show or confirm it as the "cornerstone of the electronic system for the exchange of information and contractual documentation of the European Union, formed by the archive of single European-procurement documents and the databases of contractual documentation of the Member States.[67] Until then, it is logical that the establishment of a single European public-procurement market is still incomplete.

In any case, this system of legal interoperability complements the needs for linguistic interoperability, for which the European Commission has developed the eTranslation tool, an online service for automatic translation of text and documents between the various languages of the Union. Additionally, it allows for the selection of different text registers depending on the context in which they are framed. This service, started in November 2017, has been made available to public administrations, SMEs, and universities of any Member State, Iceland, or Norway, free of charge, at least to date.[68] Moreover, the CPV can function as a means of linguistic interoperability, as each of its codes is indexed in a list with its description in natural language, available in all the languages of the European Union. Indeed, this interoperability translates into a system or core of information structuring, in formats particularly suitable for processing by big data systems.

4.2.2. *Pan European Public Procurement Online*

Beyond the mere provision of a common information system that helps the knowledge of all public contracts concluded in the Union, and not only those subject to harmonized regulation, the establishment of this single market also requires advances in technical interoperability solutions. This aim has been outlined in the Pan European Public Procurement Online (PEPPOL) initiative. Its goal from the beginning has been to set up systems that facilitate cross-border electronic public procurement by developing and/or adopting common technical standards, to be followed by contracting entities and economic operators throughout the EU. Specifically, within this general objective, the aim was to enable economic operators to communicate electronically with any European body during the procurement process.

Given the success in the development and implementation of the interoperability solutions created during the early years of PEPPOL,[69] the consortium transitioned to OpenPEPPOL on 1 September 2012. In this dynamic, Regulation 238/2014/EU referred to initiatives such as PEPPOL, describing them as "key cross-border digital services in the internal market, based on common building blocks," which must be given "priority over other digital service infrastructures, as the former are a prerequisite for the latter".

Currently, this initiative has maintained its relevance, consolidating a system designed to enable the exchange of standardized electronic documents through its own network system or intranet, with the ultimate goal of allowing economic operators to carry out the entire public-procurement process electronically using the same software, with full interoperability across the European Union and even with non-EU countries like Norway or Singapore. The focus of PEPPOL's interoperable protocols and services is on

[67] R. Martínez Gutiérrez, *La contratación pública electrónica: análisis y propuesta de transposición de las Directivas comunitarias de 2014*, 193.

[68] The description, manual, and access to the tool — upon registration — are available at *https://ec.europa.eu/info/resources-partners/machine-translationpublic-administrations-etranslation*.

[69] PEPPOL, *Final report*, 2012.

communications and information exchange between economic operators and contracting authorities, where the former are the senders and the latter the receivers.

It should be noted that the PEPPOL system does not constitute a public-procurement platform within the nomenclature of European public-procurement regulations. The set of protocols and services derived from PEPPOL are set up as support elements, interoperability solutions, or public-procurement services, which can be integrated into the public-procurement platforms or instruments developed and existing in each Member State. In other words, PEPPOL provides access to an electronic connection infrastructure based on homogeneous technical standards for all its users, capable of connecting with existing electronic public-procurement solutions and supplying them with electronic procurement services, using standardized electronic-document formats.

All participating organizations and end-users of PEPPOL, both economic operators and contracting authorities, must have an access point (AP) to the PEPPOL intranet, through which the users will connect to the PEPPOL intranet and exchange electronic documents with other access points. Both contracting authorities and technology-solution providers can choose their access point provider, and regardless of the chosen solution, the rest of the access points in the network will be visible to them. This system is described by PEPPOL as "connect once, connect to all".

Once they have an access point, PEPPOL members will make their business data and the implemented PEPPOL solutions public. This data will include delivery addresses, procurement processes, and compatible document types. The medium through which this information will be made public is an external service used by PEPPOL called the "Service Metadata Publisher" (SMP). PEPPOL defines the SMP service operation as analogous to an address book or a business register having the necessary data of the participants in a specific electronic-procurement community. Each entry in this register constitutes an SMP service, like a website published on the internet, with its own domain name, but within the intranet provided to PEPPOL members.

To issue electronic documents from a sender to a specific recipient, the access point to the IT system of each member must be able to identify the other access points and determine the identity of the other participant to whom the document should be sent. To achieve this, a centralized service called the Service Metadata Locator (SML) has been established. This service decides which SMP should be consulted to obtain the data and document-delivery methods. Analogously, the SML service can be viewed as the navigator that provides access to each SMP location within the intranet used by PEPPOL.

Among these initiatives to promote interoperability, including PEPPOL, the ISA^2 initiative — established by Decision 2015/2240/EU of 25 November 2015, establishing a program on interoperability solutions and common frameworks for European public administrations, businesses, and citizens (ISA^2 program) as a means of modernizing the public sector — implemented the Open e-Prior tool as a possible means of connection to the PEPPOL network. Through this instrument, it would be possible to channel the use of PEPPOL services from European instances without prejudice to the users' freedom to select PEPPOL access-point providers.

To this end, Open e-Prior is proved as an e-administration portal through which access to a plurality of telematic tools, including — the most important — the PEPPOL network, is provided. Access to these services would be eased, with the corresponding security and identification measures, to both contracting authorities and economic operators,[70] allowing the use of a free open-source version. The services connected through Open e-Prior, in its latest version 2.2.0, are post-award services. The first materialization, as a fully operational service open to use by third parties conducted under the ISA^2 initiative, in the same line of work as Open e-Prior, is the eTrustExchange platform managed by the Directorate-General for Competition of the European Commission.[71]

If an Administration decides to use this service, it must register on the European Commission's website, where the tool manager will grant it the status of

[70] EPRIOR, *Facilitating interoperable electronic procurement across Europe. Technical Overview*.
[71] European Commission. Directorate-General for Competition, *eTrustExchange. User Guide,* 2020.

administrator for one or more sections of the service. The economic operators contracting with it can request their registration in the eTrustExchange service, which must be confirmed by the corresponding Administration before confirmation. Once registration is complete, the administering body can register the economic operator as a user of this service. From that moment on, users will be able to send invoices to the corresponding Administration through the interface detailed in point 3 of the "User Guide" of the eTrustEx Menu.[72]

Open e-Prior has been launched by the Belgian Administration, coinciding with its third position in the ranking conducted by the European Court of Auditors of countries with the highest awards to foreign economic operators. However, from our point of view, it will not set the final standard that allows for the necessary integration of platforms not only as information systems but as support for the public electronic-procurement service: conducting inquiries and submitting bids. This standard will involve the use of the PEPPOL network or another with the same purpose, allowing national platforms to integrate with a European access point and through this, with each other, so that the submission of bids and the receipt of notifications do not require an interface change — and its requirements and language — depending on the State or region to which the contracting authority belongs.

Nevertheless, this stage is still distant, so we must be patient for the full establishment of a fully functional single European public procurement market. In any case, we must highly value the steps taken by the European Union and recognize the difficulty of the path travelled in this regard in just the 10 years since the adoption of Directive 2014/24/EU and, with it, the obligation for contracting authorities to use electronic means in the selection and award phases.

4.3. *The Need to Eliminate Barriers to Market Unity, also at the National Level*

However, although it may provide scant consolation from a European perspective, the legal consolidation of the principle of freedom of establishment at the national level should be highlighted. This principle is not only upheld at the highest levels of court actions but also in the daily activities of administrative oversight bodies, which constitutes an essential premise for its future realization. This crystallization can be exemplified by Resolution no. 328/2018 of 6 April 2018, from the Spanish Central Administrative Tribunal for Contractual Appeals, which reminds that:

"[…] This Tribunal has expressed a view against considering territorial establishment conditions as criteria for awarding public contracts (Resolution no. 29/2011 of 9 February 2011). Ultimately, and as concluded in the JCCA report no. 9/09, mentioned earlier: 'the origin, registered office, or any other indication of territorial establishment of a company cannot be considered as a condition of eligibility to contract with the public sector,' circumstances that 'likewise cannot be used as evaluation criteria'.

In any case, the limit to the requirement of a commitment to allocate resources to the execution of the contract is determined by the principle of proportionality, that is, its relation to the object and value of the contract, as well as the principles of competition, equality, and non-discrimination that govern public procurement. Furthermore, it is an obligation whose accreditation, according to Article 151.2 of the TRLCSP, corresponds only to the bidder who has sent the most advantageous offer".

This is further supported by the aforementioned Administrative Tribunal in its Resolution no. 390/2020 of 12 March 2020, which states that:

"Well, the caselaw of this Tribunal and the Court of Justice of the European Union prohibits territorial establishment clauses applied as criteria for solvency or for evaluating offers. Ultimately, it is sanctioned that territorial establishment places some bidders at an advantage over others, whether as a solvency criterion to take part in the tender, or by placing them in an advantageous position by initially scoring higher than bidders not located in the territory specified by the tender documents. However, such clauses, in the opinion of this Tribunal and also admitted by the Court of Justice of the European Union, should not be considered automatically discriminatory but should be evaluated in relation to the object of the contract.

This connection has been explained by the contracting authority as the need for the

[72] European Commission, *eTrustExchange. User Guide,* 7-18.

awarded firm to be present in the daily operations of the municipality. However, this need could be perfectly met by including a contractual obligation that ensures the effective provision of the required legal aid under the desired immediacy conditions. Assigning more or fewer points to bidders based on the geographical location of their professional office at the time of sending offers indeed places them in a situation of inequality, contrary to the principle of proportionality, which could easily have been avoided by including the aforementioned contractual obligation for the awardee. Therefore, the objection must be upheld".

And the fact is, even though the unity of the national market generally starts from a situation of uncontested respect by public authorities,[73] in the field of public procurement, the conceptualization of purchasing processes as a system for channelling expansionary policies favourable to the business fabric has traditionally exhibited a tendency towards local procurement, within the jurisdiction and competence of the awarding entity in question. In this regard, the European Union's insistence on eliminating barriers embedded in the drafting of tender documents that imply any discrimination against economic operators based on their registered office has also had a significant national impact, providing tools to control bodies and the judiciary to address these practices when brought to their attention.

In fact, the effectiveness of these prohibitions at the national level will shape the drafting of tender documents governing procedures with public advertisement, to prevent any type of discrimination against economic operators on this basis — without prejudice to the availability and responsiveness required by the contract's object — and create a conducive environment for, in the future, after the completion and development of the necessary tools for establishing a functional single market, that market not to be constrained by the terms in which public tenders are established.

[73] Aside from extraordinary circumstances such as the establishment of gaming halls in Spain, which is experiencing a trend of municipal limitation and regulation, as can be extensively studied in A. Palomar Olmeda and R. Andrés Álvez, *La libertad de empresa y la actividad económica del juego*, Cizur Menor, Thomson Aranzadi, 2021.

5. *Lack of Realization of an Increase in Competitive Bidding Resulting from the Use of ICT in Public-Procurement Procedures*

Beyond the extent of participation by economic operators from other Member States in public-procurement procedures, an alarming fact that would undermine the theoretical potential of e-administration in public-sector procurement, as outlined in the second section of this article, and the legal figures that objectively represent an improvement over the previous model, discussed in the subsequent third section, is the one provided by the European Court of Auditors regarding the number of bidders participating in each public-procurement procedure.

Thus, this body asserts that "the proportion of procedures with a single bid has almost doubled in the last ten years",[74] since "during the period 2011-2021, the proportion of public-procurement procedures with a single bid in the EU single market increased significantly, rising from 23.5% (2011) to 41.8% (2021) of the total procedures. At the same time, the number of bidders per procedure almost halved, dropping from an average of 5.7 bidders to 3.2 bidders per procedure". Spain was one of these countries, with approximately 35% in 2023, an increase of about 17 percentage points.

If we look at the figures for this Member State, we find the following data when procedures below the EU threshold are also considered:

2023				
Procedures with Information on the Number of Bidders		Procedures with Information on the Number of Bidders and a Single Bidder		% Procedures with a Single Bidder
Open	105,546	Open	30,040	28.46%
Simplified open	63,079	Simplified open	20,402	32.34%
Restricted	5,078	Restricted	1,609	31.69%
Total	173,703	Total	52,051	29.97%
2016				
Procedures with Information on the Number of Bidders		Procedures with Information on the Number of Bidders and a Single Bidder		% Procedures with a Single Bidder

[74] European Court of Auditors, *Public procurement in the EU. Less competition for contracts awarded for works, goods and services in the 10 years up to 2021*, 19.

Open	15,803	Open	3,224	20.40%
Restricted	130	Restricted	34	26.15%
Total	15,933	Total	3,258	20.45%
2012				
Procedures with Information on the Number of Bidders		Procedures with Information on the Number of Bidders and a Single Bidder		% Procedures with a Single Bidder
Open	2,194	Open	418	19.05%
Restricted	31	Restricted	1	3.23%
Total	2,225	Total	419	18.83%

Therefore, it can be seen from this data source an increase of about 11 percentage points in single-bidder procedures, although the quantitative differences in the sample composition for each year are relevant.

If we try to complement this information with other characteristics of competitive bidding in public-procurement procedures, we find the following data about the average number of bidders:

Average Number of Bidders in 2012 per Procedure	
Open	7,10
Restricted	12,68
Simplified Open	-
Average Number of Bidders in 2016 per Procedure	
Open	21,43
Restricted	8,65
Simplified Open	-
Average Number of Bidders in 2023 per Procedure	
Open	8,85
Restricted	3,29
Simplified Open	3,62

Year	Procedures with Information on Whether the Awardee is an SME or Not	Procedures Awarded to SMEs	Procedures Not Awarded to SMEs	% Percentage of Contracts Awarded to SMEs
2012	No information	No information	No information	No information
2016	No information	No information	No information	No information
2023	216,494 (out of 269,308 cases analysed)	129,835	86,659	59.97 %

With these other data, caution is needed when interpreting results from year-over-year comparisons, as in years prior to the widespread use of electronic means, such as 2016 or 2012, the samples were limited. On the other hand, it is true that the 2023 samples do not include contracts from negotiated procedures on regional platforms, and that there have been no systems in place to verify the quality of data entered into the national platform by the contracting authorities that have used it as an information and/or electronic procurement system[75]. However, it was already a much more significant sample in terms of qualitative reach, which, regardless of historical comparison, allows us to draw conclusions such as that almost a third of open procedures receive only one bid, and that simplified open procedures, despite lower solvency requirements, receive less than half the bids of open procedures.

In this regard, it should be remembered that for the functional innovation represented by ICT to result in administrative innovation in the terms detailed in the second section of this paper, the skill and diligence of the legislator in planning its introduction, as well as the executive in implementing its use, are essential.

At the same time, new and inherent challenges in introducing ICT into public-procurement procedures must be addressed and overcome, such as ensuring security in the interactions between market operators, at levels similar to or higher than those of paper-based administration, and configuring the introduction of such tools in a way that does not create entry barriers and obstacles to free competition arising from the need for new equipment and technological training of its operators. It must be kept in mind that, otherwise, this new tool could not only fail to produce its expected positive effects but could also become a negative factor that might prevent access to public procurement,[76] so leading to a regression compared to paper-based procurement. In countries like Spain, it would be unusual for this difficulty to stem

[75] Area in which, as highlighted in the OIRESCON annual report for the year 2023, module V, improvements must be made to improve the quality of the data provided by the OPENPLASP tool. www.hacienda.gob.es/es-ES/Oirescon/Paginas/ias2023.aspx.

[76] See I. D'Elia Ciampi, *L'informatica e le banche dati*, in S. Cassese (ed.), *Trattato di diritto amministrativo. Diritto amministrativo speciale*, vol. III, Milano, Giuffrè, 2003, 1627.

from the need to use advanced electronic certificates based on a qualified certificate, as this is a mandatory requirement for legal entities in their dealings with public administrations in any area. However, there could be a widespread lack of familiarity with the new electronic means for obtaining information and submitting bids electronically, a situation that contracting authorities must carefully analyse and address by offering training courses to companies or distributing detailed tutorials. In short, it is crucial to address any potential resistance or lack of skill in using electronic means to access the public-procurement market, particularly among economic operators in some sectors. This situation should be mitigated by providing prior aid to economic operators to help them overcome such obstacles. If these problems exist, they could lead to economic operators who previously took part in paper-based procurement procedures no longer taking part in electronic procedures.

Similar effects could occur if procedures with low estimated value, due to the new possibilities offered by ICT, are integrated into framework agreements or dynamic purchasing systems that are not adequately divided into lots or categories, and thus are subject to solvency conditions that now prevent them from participating in procedures for the same contractual objects they previously provided. This example would highlight a regression caused by the implementation of ICT, despite its theoretically positive effects discussed in the second section of this paper.

However, these figures, even from a temporally comparative perspective, should not necessarily be explained only by the exclusion of active bidders who refuse to use electronic means. In the case of Spain, based on the national figures presented in the second section of this paper, we see that procedures previously awarded without public advertisement have transitioned to procedures with public advertisement. It is possible that these newly advertised procedures have evolved and been configured in a way that does not ensure adequate competitive bidding.

This phenomenon may not only be due to the ulterior motives of contracting-authority officials, who may design tender documents with solvency requirements, technical specifications, award criteria, execution conditions, or accumulation of contractual objects that favour earlier contract awardees or specific economic operators,[77] and discourage the participation of other economic operators.

In addition, competitive bidding will subject the procurement documents to greater stress tests and scrutiny from a legal perspective, requiring their design to be informed by a high level of knowledge of the legal framework and its scholarship or application criteria. Otherwise, it could result in the annulment of the procurement procedure and the necessity of repeating it.[78]

Indeed, this approach to preparing and designing public contracts may be a response to the proven fact that, in some cases, competitive bidding has resulted in a "novice awardee" who has performed the contract defectively, where the traditional awardee, given their extensive experience, perfectly fulfilled their role — beyond considerations about their price-quality ratio compared to the general market conditions. Coupled with the significant difficulties contracting authorities face in rectifying a procurement procedure in which the economic operator fails to meet their obligations, or the lack of time to do so within the execution period, this would rationally lead the contracting authority, based on their prior experience and in the public interest, to somewhat prevent the encouragement of competitive bidding when preparing the contract. This could partly explain why simplified open procedures, despite their lower solvency requirements, have lower competitive bidding, as within their thresholds are those that previously corresponded to negotiated procedures without advertisement due to their value.

Indeed, in Spain, if a tender does not have proper execution and this cannot be corrected through the penalties provided in the tender documents, the contracting authority must end

[77] The existence of trends within the contracting authorities that can lead to such decisions is clearly outlined in J.M. Gimeno Feliú, *El necesario big bang en la contratación pública: hacia una visión disruptiva regulatoria y en la gestión pública y privada, que ponga el acento en la calidad*, in *Revista General de Derecho Administrativo,* vol. 59, 2022, 2 and 9.

[78] Complexity which, as highlighted in A. Sánchez Graells, *Digital Technologies and Public Procurement. Gatekeeping and experimentation in digital public governance*, 130, is inherent and inevitable in the pursuit of any objective in public procurement.

the contract and conduct a new procurement procedure. However, it is common that between this termination and the completion of the new procurement procedure, the contracting authority cannot afford the absence of a contract for that object, whether due to the uninterrupted and crucial nature of the public service in which the contract is embedded —e.g., civil liability insurance for a public nursery school — or the seasonal and specific nature of the contract's execution — e.g., provision of a service during a week of local festivities.

As mentioned, this risk of incurring an "unacceptable" breach, due to the lack of alternatives may lead the contracting authority, considering the introduction of ICT and the increase in publicly advertised procedures, to look to undermine the possibility of effective competition as a means of ensuring the successful completion of the contract. Therefore, they should be provided with means to address this increased risk inherent in the expanded scope of publicly advertised procedures. Specifically, in cases like those mentioned, after ending the contract, contracting authorities should at once or simultaneously formalize another contract valid until the completion of the new procurement procedure — which could be suspended if an appeal is filed by any interested party. This transition contract should mandate the initiation and proper processing of the new procurement procedure and, due to its characteristics, its award method should be like a negotiated procedure without advertisement. However, if available, it could be arranged with the second or subsequent highest-ranked bidder in the same terms they expressed in their offer. In this case, it would be necessary to determine, either in the regulation or the tender documents, how long after the first award this second-call obligation would be mandatory for the affected operators — considering the changes that may occur in the market over time — or whether it should acquire a discretionary nature.

Of course, like any other administrative activity, the decision to end and the execution of the transition contract would be subject to oversight by the relevant administrative bodies and the courts. Additionally, to eliminate systemic problems in the supply faced by public demand, contracting authorities should be required to initiate the appropriate proceedings to prohibit contracting due to false statements made by the economic operator in the procurement procedure — Article 71.1.e) of the LCSP — or for poor performance —Article 71.2 of the LCSP.