DEVELOPMENTS IN THE EUROPEAN UNION'S EFFORT TO ENACT GOOD GOVERNANCE THROUGH PUBLIC PROCUREMENT LAW

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Abstract
In this study we aim to offer an overview of how public institutions in the European Union and its Member States manage their financial resources, more specific, through public procurement. We approach the evolution of law in the European Union on this topic and the manner it resembles any of the well-established integration theories. A relevant point is how the public procurement adapted through moments of crisis, including the Covid-19 spread.
Addressing issues such as award procedures, qualification criteria, public-private partnerships, concessions and other contracts related to the contracts of public procurement, we set the fundamental points that define the last named. Making good use of doctrine, European Union Court of Justice case law and

legislation, we establish the purpose of public procurement and its vital necessity for a single market.
Moreover, we evaluate which of the EU's institutions weigh more in shaping the image of public contracts, especially regarding the 2014 Directives on public procurement and concessions, and the impact national actors have on applying these rules. Through statistic databases (at international, European and national level) we spot the gaps between the spirit of public procurement law and its efficiency at national level. This way, we approach the problem of systemic corruption through illicit public contracts and its repercussions on public budgets.

Keywords
European Union Law; good governance; public corruption; public procurement; single market; theories of integration.

1. INTRODUCTION

1.1. The purpose of the paper

This paper aims to briefly review some of the key issues in public procurement. It accounts for a trading volume of 16 percent of the EU GDP as of 2017 (Becker, Niemann and Halsbenning 2019, 6), a considerable advance over the last century, as public contracting accounted for 7 to 10 percent in the last decade of the 20th century (Uttley and Hartley 1994, 3). It also represents a central pillar for European integration and enactment of good governance.
In the next subsection, we address some technical issues, outlining the characteristics of public procurement contracts. We intend to define them to prevent the confusion that might occur later by using specific terms.
In the second section, we address the purpose of public procurement law, including the completion of the European single market, as well as the enactment of good governance.
In the third section, we discuss the institutional evolution of public contracts observed through neofunctionalism and historical institutionalism, while the

fourth section is dedicated to the current economic and social role of public procurement.
Last but not least, we present a case study that captures corruption in European public procurement, involving three states with different levels of success in implementing good practices in this area: Sweden (above-average), Germany (average), Romania (below-average).

1.2. What is a public procurement contract?

1.2.1. *Definition*

Public procurement represents 'the purchase of goods and services by public and private enterprises' (Smith and Lilico 2014, 15). This definition is unfit for the purpose of our paper, owing to the fact that, although any public or private procurement raises issues of management in the EU, our interest lies strictly on public procurement that is regulated by EU law. Also, Rhode (2019, 17) differentiates between procurement and purchase, defining procurement as 'acquisitions within the public sector' and purchase as 'acquisitions within the private sector'. The first has been a crucial topic of discussion for EU law makers for over half a century now.
Public procurement is the process (operation or institution) of providing supplies, services and works in the public sector, and public procurement contracts (Directives simply refer to them as public contracts, a terminology which we will use henceforth) represent the instrument through which the aforementioned process is enacted. Not every contract with the object of obtaining supplies, services or works by a public authority is governed by the provisions of EU public procurement law, but only those that fall within certain thresholds.
The Directive 2014/24/EU defines public contracts as 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services' (article 2). From this definition we extract the following characteristics:

1. Public contracts are for pecuniary interest.
2. The parties to a contract shall be economic operators and contracting authorities.
3. The object of a public contract is represented by the execution of works, the supply of products, or the provision of services.
4. Public contracts are concluded in writing (after completing the legal formalities in the form of award procedures that condition the validity of the contract).

1.2.2. *Characteristics of public contracts. The pecuniary element, economic operators, contracting authorities, the object of public contracts, the form of public contracts (thresholds, types of tenders and operational risk)*

The term 'pecuniary' can be described as 'of or relating to money' and, in the 2014 Directive, it is related to the term 'onerous', defined as 'done or given for something of equivalent value' (Garner 1999, 1152, 1117), the latter being the appropriate term. In other words, public contracts are onerous contracts, their pecuniary nature derives from the fact that each party seeks an advantage in accordance with its obligations. The qualification of a contract as onerous (or for pecuniary interest) is done by verifying the intention of each party to gain benefits (Nicolae 2018, 320).

The jurisprudence of the European Court of Justice (Tax-Fin-Lex vs. Ministrstvo za notranje zadeve 2020) indicate a case in which an economic operator submitted a tender of 0 EUR to a public call for competition. The contracting authority rejected the tender because it did not comply with the pecuniary nature of public contracts, and the operator addressed to the ECJ. The operator argued that the pecuniary character does not derive exclusively from a price, his advantage would have been the gain of prestige and reputation. The Court stated, firstly, that the contracting authority must not automatically reject a tender in the event that the price offered is 0 EUR. Secondly, the authority is obliged to make a payment (which, although expressible in money, does not always consist of cash, but could be represented by other services) that is certain, liquid and enforceable. In our case, acquiring a better reputation is not

an obligation that the authority can assume, so the operator's argument was rejected. Even so, the Court stated that the fundamental characteristic of public contracts is not that they are for monetary interest, but they are onerous contracts: each party aims to obtain an economic advantage, expressible in money, either a sum of actual money or other certain, liquid and enforceable payments, such as services provided by the public authority.

Directive 2014/24/EU defines 'economic operator' as 'any natural or legal person or public entity or groups of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services of the market' (article 2), while recital (14) of the same Directive states that 'the notion of economic operator should be interpreted in a broad manner so as to include any persons and/or entities which offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate'.

Therefore, the definition is extensive and includes any entity capable of performing obligations specific to public contracts. In addition to natural persons, profitable legal persons, as well as other entities without legal personality, non-profit organisations can also be economic operators under general conditions, as stated by the ECJ (Consorzio Nazionale Interuniversitario per le Scienze del Mare vs. Regione Marche 2009).

The Directive defines 'contracting authorities' as 'the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law', and includes central government authorities, sub-central government authorities and other bodies governed by public law.

Depending on the obligation assumed by the economic operator, there are public supply contracts, public service contracts, public works contracts, detailed by Directive 2014/24/EU.

Awarding public contracts requires the use of specific procedures. In 2004, EU law enacted rules on open procedure, restricted procedure, negotiated procedure, and competitive dialogue, while the latest Directive in public procurement brings the following additions: a new competitive procedure with

negotiation and the innovation partnership (Telles and Butler 2014, 131). Broadly speaking, any award procedure must apply and respect the following EU principles: equal treatment, non-discrimination, transparency (Smith and Lilico 2014, 9). As of today, Maciejewski, Ratcliff and McGourty (2020, 3) mention that EU law covers the following award procedures:

1. Open procedure – 'any interested economic operator may submit a tender in response to a call for competition' (Article 27 of Directive 2014/24/EU). It is the most common award procedure in the EU, as all but one Member State utilise it in more than half of their public contracts, and almost entirely in small countries (Smith and Lilico 2014, 32).
2. Restricted procedure – only invited economic operators can submit a tender (Article 28).
3. Competitive procedure with negation – any economic operator may request to participate in the procedure, but only those selected may submit a tender after the information provided has been evaluated (Article 29).
4. Competitive dialogue – any economic operator may request to participate in the procedure, but only those selected can participate to a dialogue to evaluate what the market can offer to satisfy the public needs (Article 30).
5. Innovation partnership – it is similar to competitive dialogue, but it is applicable only in research and development activities (Article 31).
6. Negotiation procedure without prior publication – in certain cases covered by article 32.

Unless the contract value is below the threshold system (table no. 1), each call for competition must use one of the award procedures. If the value of a contract is below these figures, their award may not use one of the procedures, although it must respect the general principles of the EU law (European Commission 2021a).

Table no. 1. Threshold system for public contracts

	Works	Supplies	Services		
			Social and specific services	Subsidised services	Other services
Central government authorities	5.350.000 €	139.000 €	750.000 €	214.000 €	139.000 €
Sub-central contracting authorities	5.350.000 €	214.000 €	750.000 €	214.000 €	214.000 €

Source: European Commission, 2021a. https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en

2. PUBLIC PROCUREMENT – CATALYST FOR EUROPEAN ECONOMIC INTEGRATION AND THE ENACTMENT OF GOOD GOVERNANCE

2.1. Good governance

The state has the mission to fulfil the general needs of the state and to satisfy the public interest through implementing good governance. Public authorities may obtain supplies, works and services necessary to attain their economic, social and political objectives through several means: production of goods, the execution of works and the provision of services using own resources, expropriation for public utility, and public procurement (Rhode 2019, 17), among others, while obliged to respect human rights and to achieve the best outcome from an economic and social point of view.

The economic performance of a state is reflected in the ability of its institutions to be efficient, insofar as they are able to fulfil the citizens' needs. The concept relating to this aspect is good governance, defined as the process whereby public authorities organise their internal affairs, manage resources and ensure

human rights by fighting abuse and corruption through the rule of law (UN High Commissioner for Human Rights 2020). Good governance refers to examples of predictable and transparent policy-making in which actors involved in the political process (including civil society) act in accordance with law, in order to procure services in a fair manner, while poor governance is portrayed by examples of unorganised and arbitrary policy-making, unaccountable bureaucracies, biased and unfair legislation, corruption, and human rights violation (Phillips, Caldwel and Callender 2007, 139).

Public procurement is a crucial instrument in the race to secure good governance in the European Union. Likewise, there are several other roles played by rules in this area (most obvious being the economic function), which we will address in detail in the fourth section. Even so, in the EU, the role played by procurement is a complex one, which combines aspects of economy, efficiency, effectiveness, a political and social role, as it is aimed to encourage local and central authorities to accomplish wider policy targets regarding issues such as unemployment, lack of innovation, environmental protection and sustainable production (Meulenbelt 2016, 57). All the above are, more or less, circumscribed to the concept of good governance. Additionally, another vital task for procurement is to play its part in establishing a veritable single market in the EU.

2.2. Driving towards a single market

The EU single market is a 'fundamental idea of the design of European construction, [...] the essence of EU and the main economic reason for its existence' (Cimpoeru 2020, 3). The single market is a level of interstate economic integration situated between a 'customs union' and an 'economic union', that is achieved in different stages (Encyclopaedia Britannica 2018):

1. First stage is the free-trade zone. It involves the abolition of customs duties on trade between states participating in an agreement, although these states may impose customs duties on imports from tertiary states.

2. Second stage is the customs union. It implies the abolition of aforementioned customs duties and that Member States (MS) also jointly 'set the level of tariffs to the rest of the world'.
3. Third stage is the common/single market. In addition to the customs union, the single market aims to establish free movement of resources such as labour or capital between MS.
4. The last stage is the economic union. It requires close coordination of national economic policies of different countries. It implies the existence of a common currency, common monetary policy and common taxation policy, inter alia.

The EU focuses on establishing a single market, as article 26 TFEU sets out the fundamental principles of its completion, outlining the four 'freedoms', free movement of goods, persons, services and capital. There are different methods of completion of the single market: the negative method, EU law prohibits national legal systems from impeding trade between MS, and the positive method, EU law plays an active role in harmonizing rules in MS, especially through Directives (Cimpoeru 2020, 4).

The negative approach has been visible since the Treaty of Rome when tariff barriers were removed between states (the abolition of customs duties). Although they were removed, there were still issues affecting trade between MS known as non-tariff barriers. They are hidden forms of discriminatory protection exercised through administrative means, legislation, by establishing public monopolies, indirect taxation, state aid, and, finally, public procurement, and they are depicted as trade-defence measures that represent 'any government policy that potentially leads to a discriminatory treatment of foreign competitors relative to domestic agents' (Yalcin, Felbermayr and Kinzius 2017, 5).

Recently, there has been an increase in the impact of non-tariff barriers in international trade. Yalcin, Felbermayr and Kinzius (2017, 4) consider that, since the 2008 financial crisis, customs duties have become less frequent, while 61 percent of all protectionist measures worldwide, in 2016, were non-tariff barriers, usually set up by high-income countries. The same authors note that developed countries in Western Europe utilise non-tariff barriers rarely

compared to countries such as the United States of America, Russian Federation or India. These instruments generally have a negative impact, being estimated that in 2000-2015 non-tariff barriers reduced the imports targeted by those measures by around 4 to 12 percent (Kinzius, Sandkamp and Yalcin 2019, 603).

Of all non-tariff barriers, public procurement acts as a significant obstacle that can intervene in the completion of the EU single market (Bovis 2012, 482). Competition between domestic and foreign actors can also be influenced by 'natural' barriers, such as language, culture, geography, lack of experience in cross-border business (Becker, Niemann and Halsbenning 2019, 13). Apart from these, there are other types of barriers, such as home bias, poor implementation of directives, infringements of single market rules (Pataki 2014, 15). In order to achieve certain objectives (e.g., single market, good governance), these obstacles must be prevented from causing harm. Thus, it was mandatory to take a positive approach, i.e., the regulation of public procurement by directives in order to harmonize national laws.

In the initial phase of the EEC, there were no special rules regarding public procurement, although it was governed by the principles in the Treaty of Rome. It was standard practice for the first MS to impose non-tariff barriers to limit the participation of foreign economic operators in domestic markets: quotas were implemented to protect national industries and they were abolished only 22 years after the Treaty of Rome by Directive 70/32/EEC and Directive 70/50/EEC, followed by others (Meulenbelt 2016, 58). Until recently, 'buy-national' practices in MS were usual (Uttley and Hartley 1994, 3), practices that are detrimental to several actors: the EU as a political construct because it undermines the desideratum of a single market; the contracting authorities because they are deprived of more competitive tenders, that could have a dichotomous impact, increasing product quality and lowering prices; and the citizens of MS because the poor public expenditure represents a burden on their shoulders.

The 'cost of non-Europe' concept was firstly used in a 1987 EC's study that has been revised since then, most recently in 2014. At that time, Uttley and Hartley (1994, 3-4) made the following conclusions based on the aforementioned study: public authorities in MS have adopted protectionist policies on public

procurement in order to achieve various objectives, such as strategic ones, e.g., preserving independence in the defence industry, reducing unemployment, endorsing high technology sectors; misconduct in public procurement creates pecuniary damages and the reduction of Value for Money (VfM). Preventing participation of foreign economic operators in award procedures removes incentives for local operators to invest in efficient management in order to face increased competition. Operators thus become self-sufficient, indulge in providing supplies, works or services of less-satisfactory quality to win a contract against other domestic firms. As a result, in national markets with few competitors or low competitiveness, there is an artificial increase of prices, and a decrease of VfM.

In the 1990s, of the total imports of each MS, those from another Member represented 22 percent. The share of public contracts awarded to economic operators from another MS (or 'cross-border contracts') was at that time approximately 2 percent, a huge gap compared to the first figure (Uttley and Hartley 1994, 3). As of more recent times, the share of cross-border contracts was still around 2 percent in 2017, while in terms of contract value, cross-border contracts' share amounted for 5,95 percent in 2013, decreasing to 3,4 percent in 2017 (Becker, Niemann and Halsbenning 2019, 14).

Why are cross-border contracts so important? If we look at the previous data, their share remains extremely low, although in the meantime the Directives on public procurement aimed for greater openness towards foreign economic operators. It seems to be a natural problem, as we detailed before, not only non-tariff barriers diminish trade, but also 'natural' ones. E.g., it is more costly for a domestic Swedish company to provide a service in Bulgaria than it is for a domestic Bulgarian company. That is because language, geography, different national laws, local corruption and others raise the costs of a foreign operator. Furthermore, if the value of a contract is high, the natural costs may be offset by the prospect of a higher gain by executing that contract, so the Swedish company would be more likely to propose a tender (only if it met the requirements of the contract in question). We believe this is an argument for the reason why foreign operators are more prone to win award procedures for high-priced contracts.

We reiterate that openness to foreign tenderers is crucial, as it creates a psychological impact on domestic operators that know there is bigger competition. It is all the more important as a recurring problem in this area is that many calls for competition have no tenders, or there is only one submitted tender (Flynn 2018, 4-5), determining the decrease of VfM.

3. HISTORY OF REGULATIONS OF PUBLIC PROCUREMENT

3.1. General issues regarding the evolution of EU law on public procurement

The EU law makers can adopt three types of acts: Regulations, directly applicable in all MS, Directives, setting objectives to be implemented in one form or another in the legislation of each MS, Decisions, regarding one or more MS without general character or direct effects (European Union 2020). To create a legal framework for public procurement in EU states, the directives were chosen as a legal instrument, because they offer the possibility for Member States to adopt European legislation in line with their own domestic realities, although this operation has shortcomings. One is that it could take years for directives to be implemented. Consequently, when a deficiency is discovered in a directive, its amendment might take a very long time (Verdeaux 2003, 722-23), especially since the European institutions may have diverging positions. However, each directive comes with a deadline for implementation, otherwise there will be sanctions (European Commision 2021b).

The directives enforce the mission to transpose them into domestic legislations, and national authorities can choose the instrument to do so (article 288 TFUE). The ECJ states that directives do not have a horizontal effect, but a vertical one, and private persons cannot be charged with infringing the directive if it has not been correctly transposed by a state (Dougan 2000, 586-88). E.g., in the case of Seda Kücükdeveci vs. Swedex (2010), an employee was fired with only one month's notice due to the fact that Directive 2000/78/EC, stipulating a minimum of 4 months' notice, was incompletely transposed by the German state. Given its vertical effect, the Directive did not apply directly to the employee's situation, meaning that the applicable law was the German one.

However, the Court remarked that German law was in conflict with the EU law, and it was mandatory for Germany to amend those conflictual norms.
In the event of non-compliance, Member States are the ones sanctioned, as was the case of France in 2001 for delaying the implementation of Directive 97/52/EC (Verdeaux 2003, 724).

3.2. Before Directives

Since the Treaty of Rome, there have been ongoing discriminatory practices between MS in award procedures (Uttley and Hartley 1994, 3-4). Hence, European institutions developed programmatic documents to approach this issue.
The first two acts on public procurement were the General Programmes for the abolition of restrictions on freedom of establishment and freedom to provide services adopted in 1962 (Cimpoeru 2020, 6). The first Programme stated that European economic operators, other than those from the state where an award procedure takes place, may also participate (The Council of the European Economic Community 1962, Article 56). However, these acts did not provide binding rules to reduce discriminatory practices in public procurement.
Nevertheless, legislation in this area was inefficient from several points of view: domestic tenderers, due to low competition, could artificially increase prices; there was an increase in cost of production for suppliers due to the monopoly imposed by domestic firms on specific industries, affecting developing firms (Mclachlan 1985, 359-60).

3.3. The Directives

Regarding public works contracts, the first legislative acts were Directive 66/683/EEC, Directive 70/32/EEC, Directive 71/304/EEC and Directive 71/305/EEC. The last one was amended by Directive 89/440/EEC, establishing a more precise definition of public works contracts (Sohrab 1990, 527).
Regarding public supply contracts, the first legislative act was Directive 77/62/EEC, which established the main award procedures, such as the open

procedure and restricted procedure, and public procurement principles, such as transparency, non-discrimination, impartial award criteria, inter alia (Cimpoeru 2020, 7). It was amended twice by Directive 80/767/EEC, and later by Directive 88/295/EEC (Allain 2014, 519), setting a new threshold for public supply contracts in accordance with the GATT Code and adding a new award procedure (Sohrab 1990, 525-26).

The Directives did not accomplish any great achievements, as the first EC's reports illustrated that a free public procurement market did not flourish, contract advertising was symbolic, and attempts to amend the directives in 1980 were at a minimum level in order to comply with World Trade Organisation (WTO) conditions and excluded rules regarding public procurement contracts in the field of transport, telecommunications, water, electricity, and gas (Mclachlan 1985, 366-67), considered public monopolies, that we will refer to as utilities. The postponement was due to the diversity and complexity of the sector (Verdeaux 2003, 721), and to the resistance of MS to privatise them, coming from a fear of economic uncertainty (Bovis 1998, 230).

Finally, regarding public utilities contracts, they were regulated by Directive 90/531/EEC, subsequently replaced by Directive 93/38/EEC, that was later amended by Directive 98/4/EC and Directive 2001/78/EC (Allain 2014, 520). Another replacement was enacted by Directive 2004/17/EC (amended in 2009), replaced again by Directive 2014/25/EU.

Regarding public service contracts, Directive 92/50/EEC was the first one.

In order to create a more comprehensive framework, new directives on public supply and works contracts were adopted (Directive 93/36/EEC, respectively Directive 93/37/EEC), on the basis of recommendations set out in the 'White Paper from the European Commission' (Commision of the European Communities 1985, 1-55). Afterwards, the Commission (1996, 1-49) presented a Green Paper on public procurement, showing the effects of the former directives, how they should be implemented, and advanced new recommendations for their amendment.

The Directives regarding public supply, works, respectively service contracts were amended by Directive 97/52/EC in order to be consistent with the new changes in the Agreement on Government Procurement (GPA) and the

Agreement of Marrakesh established by WTO, consequently amended by Directive 2001/78/EC (Allain 2014, 519-20). They were eventually repealed by Directive 2004/18/EC that regulated the coordination of procedures for the award of public works, supply and service contracts, so that the three types of public contracts have been comprehensively regulated for the first time in a unique document. It focused on award procedures being consistent with impartial competition, imposing contracting authorities to refrain from developing a conduct contrary to the principles and provisions specific to the EU single market (Graells 2015, 197). E.g., an addition brought about by the directives was electronic tenders. In the meantime, Directive 2009/81/EC amended Directive 2004/18/EC, providing an addition for award procedures in the field of defence and security (Cimpoeru 2020, 12).

Although the new directives created a broader legal framework governing public procurement, data from 2009 (Woolcock 2012, 12) revealed that 'cross-border provision of public contracts within the EU remains very low at only 1.5% of total contracts or below 4% by value'.

In 2010 the European Commission presented the 'Europe 2020. A European strategy for smart, sustainable and inclusive growth', making a number of proposals in order to overcome the economic crisis that had affected the whole world. This document aimed to draw a plan to create a more efficient, digitalised, environmentally-friendly economic space, especially by reforming public procurement (European Commission 2010, 9-13). Therefore, new directives were enacted: Directive 2014/23/EU regarding works and service concession contracts, applying the same principles as public procurement norms; Directive 2014/24/EU replacing the one in 2004 on public works, supply and service contracts

Both were innovative in that they changed the award criteria. If initially the price was mainly considered, 2014 Directives introduced 'a new hierarchy of goals', including 'environmental, social, and innovation aspects' (Pircher 2019, 10). Thus, tenderers can include the impact of their resources in the aforementioned sectors, and it should be considered. Also, a new emerging concept is 'life cycle-cost' that states all costs of a resource (e.g., use,

maintenance, or end-of-life costs), facilitating award procedures (Dragoş and Neamţu 2014, 318).

Ultimately, what will the single market look like after Brexit? More specific, how will the UK act regarding to EU rules on public procurement, especially since it is predicted that much of the investments from the EU companies will fall by 63 percent (Egan 2019, 22) in this former MS. It is believed that the United Kingdom would return to its habit of regulating the field of public procurement by soft law, i.e., to provide guidelines, not strict rules (Arrowsmith 2020, 10).

Table no. 2. EU Public Procurement Directives

<table>
<tr><th></th><th>Public works contracts</th><th>Public supply contracts</th><th>Public services contracts</th><th>Public utilities contracts</th><th>Concession contracts</th></tr>
<tr><td>1966</td><td>66/683/EEC</td><td rowspan="3">None</td><td rowspan="8">None</td><td rowspan="5">None</td><td rowspan="13">None</td></tr>
<tr><td>1970</td><td>70/32/EEC</td></tr>
<tr><td>1971</td><td>71/304/EEC
71/305/EEC</td></tr>
<tr><td>1977</td><td rowspan="5"></td><td>77/62/EEC</td></tr>
<tr><td>1980</td><td>80/767/EEC</td></tr>
<tr><td>1988</td><td rowspan="4">88/295/EEC</td></tr>
<tr><td>1989</td><td>89/440/EEC</td></tr>
<tr><td>1990</td><td></td><td rowspan="2">90/531/EEC</td></tr>
<tr><td>1992</td><td></td><td>92/50/EEC</td></tr>
<tr><td>1993</td><td>93/37/EEC</td><td>93/36/EEC</td><td rowspan="2">93/38/EEC</td></tr>
<tr><td>1997</td><td colspan="3" rowspan="2">Directive 97/52/EC (amending)</td></tr>
<tr><td>1998</td><td>98/4/EC</td></tr>
<tr><td>2001</td><td colspan="3">Directive 2001/78/EC (amending)</td><td>2001/78/EC</td></tr>
<tr><td>2004</td><td colspan="3">Directive 2004/18/EC</td><td rowspan="2">2004/17/EC</td></tr>
<tr><td>2009</td><td colspan="3">Directive 2009/81/EC (amending) – including defence and security contracts</td></tr>
<tr><td>2014</td><td colspan="3">Directive 2014/24/EU</td><td>2014/25/EU</td><td>2014/23/EU</td></tr>
</table>

Source: Authors' own contribution based on our previous research.

3.4. Theories of integration (neofunctionalism and historical institutionalism)

As we discussed in the previous section, initially the European Communities encountered issues in the completion of a single market. Rampant discriminatory practices proved that the Treaty of Rome was not sufficient to diminish the phenomenon.

Considering the information presented so far, the evolution of public procurement in the EU is part of the neofunctionalist logic, defined by the following characteristics: i. the notion of spillover represents its core concept; ii. aims at the role played by social groups in the integration process (Cini and Borragan 2010, 72-73).

European integration is stimulated by 'spillover', a process whereby the integration in one sector will later gradually determine integration in another, 'an automatism of the integration process' (Bărbulescu 2015, 97). In other words, spillover is 'the process whereby members of an integration scheme agreed on some collective goals for a variety of motives but unequally satisfied with their attainment of these goals attempt to resolve their dissatisfaction by resorting to collaboration in another related sector (expanding the scope of mutual commitment) or by intensifying their commitment to the original sector (increasing the level of mutual commitment), or both' (Cini and Borragan 2010, 76).

Bovis (1998, 220) considers that the European Communities started from the stage of a customs union and pursued a political union (as an ultimate goal), which requires the achievement of complex intermediate objectives, and this evolution follows the spillover logic. Public procurement is a sector 'affected' by spillover, which in turn affected others (such as concessions). Within the evolution of public procurement law, we perceive the following spillover changes:

- Initially, public procurement was regulated by primary legislation (rules included in the Treaty of Rome). Given the fact it had no pragmatic effect, General Programmes were created, and then eventually directives were passed on.

- The first directives concerned only public works contracts, while public supply contracts were regulated later, and public utilities contracts and public service contracts decades later.
- Last but not least, Directive 2014/23/EU included works and service concessions, an effect of the public procurement's spillover.

Regarding the involvement of other societal groups, given the nature of public procurement, the interest of enacting rules is held by various economic interest groups, among which is BUSINESSEUROPE. It states (2020) that its main purpose is to influence EU policies by interacting with the European Parliament, the European Commission and the Council for the benefit of the business world, being 'the leading advocate for growth and competitiveness at European level'. Hence, a supranational interest group has been formed, influencing decisions taken at the EU level.

Although MS have often opposed innovations in public procurement, implicitly the transfer of prerogatives to the EU, the European Commission stated that public procurement directives are of high-priority, because they exceed the regulatory role of the economic market, having a complex supranational role (Pircher 2019, 519), that is supported by supranational actors such as interest groups.

Concluding, the creation of the EEC called for the emergence of rules that would directly and efficiently prevent obstacles to free trade between Member States. In this manner, to complete the single market, public procurement has been gradually regulated and evolved in line with the policy of small steps advocated by one of the most prominent founding fathers of the European Union, Jean Monnet.

Pircher (2019, 509-25) wrote an article on the evolution of EU policy on public procurement, arguing that it fits into the logic of historical institutionalism, because it complies, among others, with the three orders of change introduced by Hall: i. changes in basic policy instruments; ii. changes in settings or techniques; iii. changes in the hierarchy of goals or the nature of the policy. The author goes on to introduce three concepts (path-dependency, bounded rationality, layering) that explain the evolution of EU public procurement, as it corresponded to its initial nature and remained closely linked to the goal of

completion of single market, developments occurring step by step by laying a norm on top of another. Same author further notes that several changes in public procurement are in accordance with the three orders of change: first and second order changes are not substantial, such as increasing the number of award procedures and simplifying them, encouraging small and medium-sized enterprises (SME), while the substantial changes took place under the third order, referring to the ones brought about by the 2014 Directives, in that the award criteria changed, and so did the goals of the policy: the contracting authorities no longer have an exclusive interest in receiving cheaper and superior resources, but they must take an important social and environmental role, by encouraging companies that protect the environment, develop inclusive policies towards minorities, and generate innovative projects.

4. THE ECONOMIC, SOCIAL AND POLITICAL ROLE OF PUBLIC PROCUREMENT

From an economic point of view, the regulation of public procurement has as its ultimate goal the increase of Value for Money (VfM). The value for public money has a complex structure, including the costs-benefits ratio of an activity. VfM is expressed through the classic price-quality ratio, but the 2014 Directives operationalize the benefits and costs according to all economic, social, ecological and technological impacts (Pircher 2019, 519). The main agent who must ensure the increase of VfM is the contracting authority, applying appropriate practices before, during and after an award procedure (Dimitri 2013, 151). Efficiency in public procurement is of crucial interest for the contracting authority as it secures the following advantages: selection of the most appropriate resources, at lower prices, at a higher quality, at the right place and time; preventing corruption; saving funds for other activities; fulfilling the objectives of the various policies implemented by the authority; ensuring transparency aimed at increasing prestige, image and trust in the public sector (Rhode 2019, 47).

Regardless of the intentions of a contracting authority, it needs certain 'tools' to engage into performant procurement, namely a legal framework friendly towards tenderers, foreign or domestic, SME or big companies. The path from the economic operator to the contracting authority must be paved by transparent procedures and clear rules that allow and promote participation. There are two significant entrepreneurial EU institutions that have supported such instruments: the European Commission and the European Court of Justice (Pircher 2019, 512).

The EU institutions understood that the liberalization of public procurement would create monetary benefits: the first Cecchini Report estimated that the elimination of discriminatory practices between MS will bring savings from 8 to 19 billion EUR in five of the MS (Pataki 2014, 20). From a quantitative perspective, the implementation of rules in this area is all the more important as, in the OECD countries, public procurement accounted for 12,8 percent of GDP and 29 percent of total public expenditure in 2013 (Flynn 2018, 2).

The Commission's assessments were close to reality, as evidenced by more recent studies, which illustrate that public procurement legislation in the period preceding 2014 produced savings of around 22,7 billion EUR (Pataki 2014, 30). The same author, analysing statistical data, estimated that the 'gap' represented by the non-completion of the single market has narrowed since the First Cecchini Report, but still accumulates around 50 billion EUR. To reduce the gap, reforms were to be enacted by the 2014 Directives, and it is estimated that they brought savings of 2,88 billion EUR, including the following: reduction of administrative burden (288 million EUR), enhanced cross-border contracting (432 million EUR), raise of SME participation (144 million EUR), dynamic and other economic benefits (2 billion EUR) (Becker, Niemann and Halsbenning 2019, 30), securing also the political role of developing the EU edifice.

As of today, performance in public procurement in the EU is measured by the EC (2021c) according to VfM, using twelve indicators: 1. single bidder; 2. no calls for bids; 3. publication rate; 4. cooperative procurement (share of award procedures that include more than one authority); 5. award criteria; 6. decision speed; 7. SME contractors (share of award procedures won by SME); 8. SME

bids; 9. procedures divided into lots; 10. missing calls for bids; 11. missing seller registration numbers; 12. missing buyer registration numbers.

For a better understanding of public procurement performance, we will discuss indicators no. 1, 2, 7 and 9. The single bidder indicator reveals the share of award procedures with just one tender. In the absence of real competition between several economic operators, VfM decreases, a decrease that could be due to bureaucracy, impeding cross-border contracts or awarding contracts with too high a value to prevent SME participation. The single bidder issue exists even in high-performing states, and it may be due to the strict requirements of public contracts (Flynn 2018, 6). The situation is even worse in the case of no call for bid. In the absence of any tender, contracting authorities may award contracts following a negotiated procedure. To reflect these indicators, we present the following figures that capture their evolution between 2016 and 2019 in three Member States (Sweden, Germany and Romania), and the EU average.

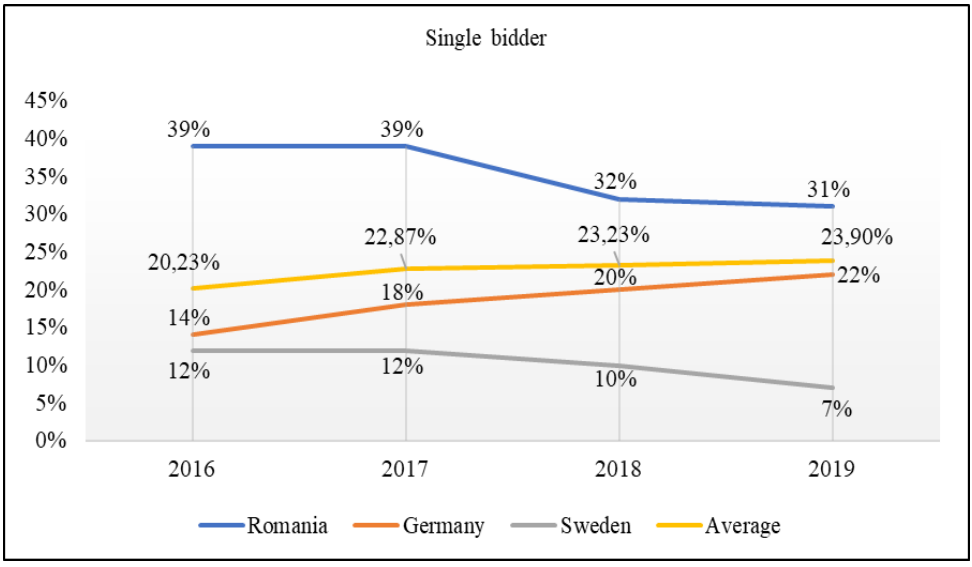

Figure 1. Single bidder

Source: European Commission 2021c. ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm

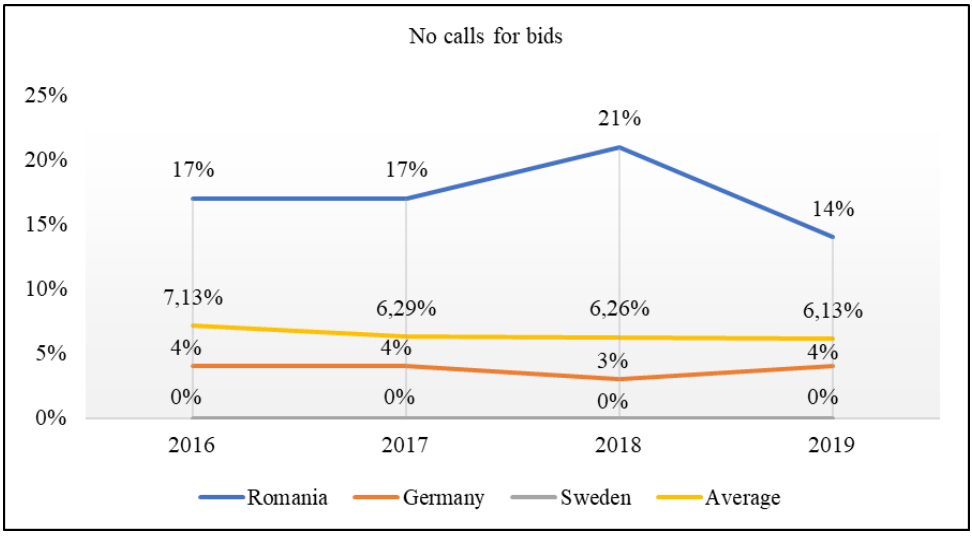

Figure 2. No calls for bids

Source: European Commission 2021c. ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm

Regarding indicators no. 7 and 9, they express the social impact of procurement, because they concern primarily SME, that include around 66 percent of all employees in the EU (Becker, Niemann and Halsbenning 2019, 6). That is why their participation in award procedures may especially increase the living standards and determine economic gains for those operators in need. The purpose of dividing contracts into lots is to allow the participation of companies with lower economic capacities, but the purpose is misunderstood by some authorities that split the contracts below the threshold system, an issue discussed in the section on corruption.

In regard of the social role, more recently, the COVID-19 pandemic has led to the publication of the 'Communication from the Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis' (EUR-Lex 2020), aimed at 'cases of extreme urgency', in which authorities may derogate from the 2014 Directives, resorting to direct awards,

negotiated procedures without prior publication, or reducing the time required for other procedures (e.g., open procedure's duration is reduced from 35 days to 15 days). From this point of view, although the current situation is of major urgency, it is still necessary for rules to be followed, transparency to be maintained, single market not to be questioned, VfM to be conserved, and last but not least, to protect EU citizens from COVID-19.

Another major aspect through which we will conclude this section is the distinction between public-private partnerships (PPP), concessions and public contracts. Darrin Grimsey and Mervyn Lewis (2007, 171) indicate that PPP 'need to be viewed as one form of public procurement, supported by many hybrid approaches that blur the lines between them and conventional procurement methods', and OECD (2012, 18) defines them as 'long-term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks. Hitherto, there are no specific EU rules on PPP. If a part of a PPP qualifies for a public contract, it shall comply with the EU Directives. However, they rarely occur and have strong geographical bias. The European Court of Auditors (2018, 16) note that in 1990-2016, of all MS, only five accumulated 90 percent of the total value of awarded PPP, with the UK amounting for more than half of that figure.

As for concessions, their object is either the execution of a work and then the exploitation of the result, or providing a service. The major difference is that the earnings of the operator are made of payments from the users of the service, while in the case of public contracts, earnings come preponderantly from public funds in the form of payments (Gherghina 2019, 176). Both PPP and concession contracts require the distribution of operational risk between the parties, in order to obtain a balanced risk between partners, while in public contracts the authority retains the majority of the risk (European Court of Auditors 2018, 14, Gherghina 2019, 176-77).

5. CASE STUDY: PUBLIC CORRUPTION IN PROCUREMENT PRACTICES

5.1. General aspects

Corruption is one of the main phenomena that affects good governance in a state and involves grave economic, social and political downturns. It is difficult to identify those acts that fall into the category of corruption practices. Regarding public procurement, corruption has the effect of squandering public money through higher prices, lack of efficiency and effectiveness, decreased trust in public institutions, delayed projects, creation of monopolies and oligopolies, diminishing investments, among others (Wensink and de Vet 2013, 63). The EC (2014a, 2) defines corruption as 'any abuse of power for private gain', although we will only refer to practices occurring in the public sector.

Meanwhile, we need to address corruption as a structural issue, rather than an individual one. In this regard, Kauppi and van Raaij (2015, 957-58) argue that corruption in public procurement may occur due to 'information asymmetry' and 'goal incongruence', whereby public officials are the ones that maximize their private interests to the detriment of the economic operators. Also, the same authors (2015, 960-63) find it difficult to distinguish between acts of corruption and 'honest incompetence', the latter referring to the lack of training and professionalism of the public official, while these two issues are distinct negative factors regarding good governance. If acts of corruption arise from the rational desire of a public official to obtain larger advantages, whether they act legally or not, this conduct is not circumscribed to the notion of 'honest incompetence', because this one occurs when the official commits mistakes due to his literal incompetence, acts that should not be classified as corruption. Although both practices should be prevented, the difference between fault and intentional harm should always be acknowledged.

Examples of acts of corruption are bid rigging (arranging the tender in such a way that the public contract is awarded to a certain operator), kickbacks (contracting authorities solicit or are open to bribes that may influence the result of an award procedure), conflict of interests (the public official has good

relations with an operator, influencing the award procedure), deliberate mismanagement (European Commission 2014a, 27), even splitting award procedures into several lots. In the latter example, splitting procedures into lots is a goal and an indicator for performant procurement (European Commission 2021c), as it promotes the participation of SME. On the other hand, if contracts are divided in such a manner that each value of a contract is below the threshold system, they no longer fall within the scope of EU Directives, and public officials may award contracts arbitrarily, through discriminatory and negative practices, such as artificial increases in project duration, so that an operator that has ties with a public official may receive more public funds for less resources provided (Wensink and de Vet 2013, 169).

According to the EC (2014a, 3), corruption generates additional yearly spending of 120 billion EUR. Another report (Van Ballegooij and Zandstra 2016, 11) estimates annual loses from corruption in public procurement at 5,33 billion EUR, and also points out that, by introducing an EU-wide e-procurement system, damages from corruption in this sector would be reduced by 920 million EUR.

Consequently, attempts have been made to combat and prevent corruption: depoliticising public procurement, monitoring political party funds to identify conflicts of interest, creating a rotative system for public officials to work in different sectors, enforcing the release of declarations of assets by public officials, inter alia (Diaz 2017, 389-90). Another effective way of prevention is to systematically collect in databases public procurement information from each MS, so that detection of corruption is enhanced through e-procurement (Wensink and de Vet 2013, 17-18). Furthermore, whistle-blowers should be encouraged if they notice any acts that seem illegal by establishing a suitable legal framework to protect them (Van Ballegooij and Zandstra 2016, 8). All measures specified before operate, more or less, in at least one of the three states targeted in our study.

5.2. The cases of Sweden, Germany and Romania

People's perceptions of corruption do not provide an exact scientific argument for the presence of this social phenomenon, but it gives us a clue of how corruption is portrayed in a society and how felt is its existence. In recent years, according to Eurobarometer reports in 2014, 2017 and 2019 (European Commission 2014b, 20, European Commission 2017a, 5, European Commission 2020, 9), residents in Sweden, Germany and Romania have seen an average decrease of 9 percentage points in spread of local corruption between 2014 and 2017, and an insignificant average increase of 3 percentage points between 2017 and 2019. Perception of corruption in Germany and Sweden is below the European average (72 percent), while in Romania it is above average.

Economic operators' perceptions of corruption (quantified by responding to the question: 'in the last three years, do you think that corruption has prevented you or your company from winning a public tender or a public procurement contract?') fluctuated in Romania from 44 percent in 2014 to 62 percent in 2017 (highest in the EU), and then to 23 percent in 2019, while in Germany and Sweden they were constant, with an average of 20 percent, respectively 28 percent (European Commission 2014c, 129, European Commission 2017b, 72, European Commission 2019, 232).

Although one can guess the level of corruption in each state based on these opinions, there are more specific indicators to recognise it, provided by the World Bank (2019), such as Government Effectiveness, Rule of Law, Control of Corruption. The same organisation (2007, 2-3) defines these concepts:

1. Government Effectiveness represents the quality of public or private services, their autonomy and independence from political control, the credibility of public authorities in implementing policies, and the quality of the legal order.
2. Rule of Law refers to the trust that citizens have in enforcement agencies and the judicial system, and also the crime rate, that includes acts of corruption.
3. Control of Corruption concerns the way public officials make use of their prerogatives for private gain, regardless if those practices are petty or grand

forms of corruption, and also the degree to which a state is 'captured' by the private interests of elites.

Table no. 3. World Bank Indicators

	Government Effectiveness			Rule of Law			Control of Corruption		
	SE	DE	RO	SE	DE	RO	SE	DE	RO
2015	96,63	93,75	51,44	99,04	93,27	61,54	98,56	93,27	57,21
2016	94,71	94,23	47,12	99,52	91,83	63,94	98,08	93,75	57,21
2017	96,15	94,23	47,12	99,04	91,35	63,94	98,08	94,23	55,29
2018	96,15	93,27	43,27	98,56	91,35	63,46	98,08	95,18	52,40
2019	97,12	93,27	40,38	98,56	92,31	64,42	98,56	95,19	51,44
Average	96,15	93,75	45,86	98,94	92,11	63,46	98,27	94,32	54,71

Source: Authors' own contribution based on World Bank, 2019. SE-Sweden, DE-Germany, Ro-Romania. https://info.worldbank.org/governance/wgi/Home/Reports

According to Corruption Perceptions Index or CPI (Transparency International 2021), Sweden ranks 3rd (85 points) among the least corrupt countries worldwide. Even so, corruption still exists especially in urban areas, mostly Stockholm, and it occurs in public contracts more often at the level of local authorities (Salén and Korsell 2013, 22-23). Thus, Swedish Competition Authority (2018, 21-28) states that, out of the average of 100 corruption cases investigated annually, most of them concern conflicts of interest or award procedures, the requests for legal re-examination of award procedures being made almost exclusively for shortcomings in tender documents, incorrect handling of qualification criteria or of technical requirements.

According to CPI, Germany ranks 9th (80 points). Kukutschka (2015, 12) notes that public procurement in Germany is very decentralised, a situation considered discouraging towards corruption, so that almost 75 percent of procurement is done by local authorities. Same author (Kukutschka 2015, 14-21) states that public procurement covered by EU Directives (above the thresholds) is generally conducted properly, legally, yet the problem lies in procurement below the threshold system. He argues that, although the EU promotes

transparency in contracts below the threshold system, there are no mandatory rules in this regard, Germany having the fewest tenders published on public platforms in all MS, and also that domestic legislation on procurement below thresholds is more likely to leave room for corruption. Nevertheless, there are still examples of high-profile corruption cases such as the one concerning the former technical lead for Berlin Airport, Jochen Grossmann, who accepted a bribe of 500.000 EUR in the award procedure of a public works contract (Ondruskova 2014). Even so, Germany's efforts to prevent such illegal acts are considerable, including the ban from award procedures of persons convicted for corruption offenses and the increase of penalties (GAN Integrity 2020a). As proof, Germany did not report any acts of corruption related to public procurement in 2013 (PricewaterhouseCoopers 2016, 86).

According to CPI, Romania ranks 69th (44 points), having serious issues on corruption. The main illegal acts identified in public procurement presented by the National Anti-Corruption Directorate (2017, 1-20) were the waste of public funds by procuring useless resources, fragmentation of contracts into lots below the threshold system so that they do not have to comply with EU law in this area, direct awards, mimicking transparency, imposing in bad faith too particular technical specifications to eliminate certain economic operators from competition, conflicts of interest, incorrect evaluation of tenders, inter alia. Corruption in public procurement generates a low rate of absorption of European funds and a low participation of SME in award procedures, among others (Dimulescu, Pop and Doroftei 2013, 111-115). As an example of high-profile corruption, there is the infamous 'Teamnet' case, a company that, among other crimes investigated, has been accused in 2017 of illegal practices to 'secure public sector IT contracts' by receiving support from notorious businessman Sebastian Ghiță (GAN Integrity 2020b).

To conclude, corruption is present to a greater or lesser extent in Sweden, Germany and Romania, each with its own particularities in how such illegal acts are perceived, how they operate in the public procurement sector, and how they are to be eradicated.

7. CONCLUSIONS

EU institutions have developed a huge interest in enacting rules on public procurement, due to its special role in ensuring two key elements: good governance and completion of the single market. The purposes of rules in this sector are diverse and cannot be accurately included in the broad sphere of good governance or the one of single market completion, because both aim for similar economic, social and political objectives. The evolution of EU law has followed an increasing trend, including more areas, creating new award procedures and criteria, filling the 'gap', increasing the share of cross-border contracts and SME participation, boosting VfM, ensuring its social role to raise benefits for EU citizens. As of today, procurement is challenged by tenacious foes, such as corruption, economic, social and, more recently, public health crises, but there are examples of good practices to be taken as a benchmark by less performant Member States. Damages created by illicit or incompetent practices are capable of weakening the legitimacy of national authorities, and even the EU as a whole. Dealing with these will require the strengthening of a more coherent and innovative legal framework for public procurement, including the development of e-procurement, and the adequate training of public officials.

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