5

EU Public Procurement: The SME Perspective

Antonios Maniatis

5.1 Introduction

The fundamental principle of capitalism, consisting of the freedom to create and operate enterprises on the basis of private economic initiative, is conducive to markets with a few mainstreaming providers of goods and services. In this framework, small and medium-sized enterprises (SMEs) are usually limited to a secondary role and are eventually submitted to the influence of a big company. Besides, the European Union (EU) has enacted a role of major importance in various fields of public economic law. It would be interesting to focus on EU law on public procurement in correlation with SMEs. According to the 2003 recommendation of the European Commission, concerning the definition of micro, small and medium-sized enterprises, SMEs 'are enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43

A. Maniatis (✉)
School of Law, University of Nicosia, Kalamata, Greece
e-mail: maniatis.a@unic.ac.cy; maniatis@dikaio.gr

A. Thrassou et al. (eds.), *The Changing Role of SMEs in Global Business*, Palgrave Studies in Cross-disciplinary Business Research, In Association with EuroMed Academy of Business, https://doi.org/10.1007/978-3-030-45831-7_5

million'. Recently, the doctrine concluded that the time for wholesale review of SME policies is ripe (Nicholas and Fruhmann 2014). Anyway, the EU has attempted to bring together state procurement and conventional players of the market, such as private companies of minor impact, by introducing rules on the matter. The perspective of SMEs is related not only to private clients but also to public carriers, on the basis of this normativity. However, criticism has been raised as to the capability of these enterprises to produce innovation within public procurement. The literature provides ambiguous support for the general claim that SMEs should be more innovative than larger firms (Rolfstam 2018).

The current analysis focuses on various aspects of public contracting in Spain, the country being a Protagonist in transgression of EU law. In spite of its pro-European stance, this state ranks first in cases of non-compliance with European law. These cases are related to both the pre-judicial phase and the judicial one, before the European Court of Justice. For instance, from 2007 and on, Spain has constantly been the second country or usually the first one as to cases of infringement of Community normativity on the environment. In a similar way, it is the Protagonist in terms of non-conformity to EU public procurement standards, which are set by the Commission and are based on relevant EU directives. These indicators show how different EU countries are performing on key aspects of public procurement, and, although they provide only a simplified picture, they still highlight basic aspects of countries' procurement markets (European Commission 2019). For instance, among the 12 indicators, indicator [7], entitled 'SME contractors', measures how many contractors are SMEs whilst indicator [8], consisting of 'SME bids', measures the proportion of bids from SMEs. It is notable that low percentages of these bids are interpreted as indicating barriers preventing smaller firms from participating in public procurement procedures (e.g. red tape, etc.) (European Commission 2019).

The current analysis focuses on competition among enterprises, due to the fact that public contracting is intrinsically related to free competition of potential contractors, to promote public interest. The vertical dimension of this complex phenomenon is particularly analysed from a legal point of view. The analysis goes on with a general overview of the normativity coming from EU, on public procurement, given that producing

rules on the matter has been a process related to various stages and specialised legal texts. Furthermore, it highlights the strategic character of the current set of norms, due to which public contracting has been interconnected with wider policies and scopes.

In a parallel way, it presents some aspects of Directive (EU) 2015/2302 on package tourism, in correlation with public procurement normativity, as the EU has a steady focus on socioeconomic and ecological priorities. Besides, it refers to a national case, as far as the relation between Spanish law on public procurement and SMEs is concerned. In addition, it analyses a specific case of new normativity, which consists of the principle of division of the object of contracts into lots. Subsequently, it refers to the content of special conditions on execution of public procurement in Spain, to highlight the strategic character of current rules on the matter. Finally, it ends with some critical remarks on EU public procurement, particularly in correlation with SMEs.

5.2 Competition and Law

As far as the economic analysis of law is concerned, it boosts social relations and corrects a lot of perverse effects of protectionist regulations (Vogel 2004). The case of competition law has demonstrated that efficiency could not be the unique objective of legal rules whilst this remark is valid, a fortiori, for the other fields of law, such as energy law. It is also notable that this branch shares, along with competition law, a particular profile, which has been denominated 'soft law' (Meilhaud 2011). Restraints on competition that are called vertical—between operators at different levels of the economic process—after having been condemned almost as severely as horizontal restraints, have been considered procompetitive since a long time in many various cases (Vogel 2004). The instability of the economic theory of law, exemplified by the approach to the vertical version of competition, has made the law react. Indeed, law has been adapted to these data by adopting, in the field of competition, rules that are very general (more general than elsewhere), by placing a role (broader than elsewhere) to jurisprudence and by making use (more frequent than elsewhere) of 'soft law' (Vogel 2004).

As mentioned, in private law there have been important developments, particularly on the basis of EU law whilst the Commission plays a mainstreaming role in the field of competition. The doctrine has characterised the mission of the Commission in certain domains as a 'super-regulator's role' (Colson and Idoux 2016). This mission of informal superiority is exemplified by the field of competition law or by rules on the opening of competition in some sectors, such as the domain of electronic communications. Thus, the French independent administrative authority 'Authority of regulation of electronic communications, posts and distribution of press (Arcep)' has to notify to the Commission its draft decisions on the analysis of suitable markets for the telecommunications sector. The executive institution of Brussels is endowed with a veto right over the definition of these markets and the designation of powerful operators.

5.3 The Fourth Generation of EU Public Procurement Law

The EU has shaped a new branch of law on the pre-contractual phase of public contracts of works, supplies and services. No later than April 2016, its Member States should have achieved the full transposition of the following legislative acts:

a. *Directive 23/2014/EU on concessions*

This text, officially entitled 'Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts', constitutes an authentic novelty, as for the first time there is a separate set of rules on concessions, at least for services concessions. As specified by Whereas (4) of the Preamble, the award of public works concessions was till the adoption of this directive subject to the basic rules of Directive 2004/18/EC of the European Parliament and of the Council, belonging to the third generation of EU rules on public contracting. In a parallel way, the award of services concessions with a cross-border interest was merely subject to the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the

principles of free movement of goods, freedom of establishment and freedom to provide services, as well as to the principles deriving therefrom such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

b. *General Directive 24/2014/EU*

It is about 'Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC'. In other words, this text involves a mainstreaming set of rules, applicable in contracts of conventional type, being different from the abovementioned specific case of concessions.

c. *Sectorial Directive 25/2014/EU*

The general directive coexists with a specialised one, officially entitled 'Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC'. According to Whereas (1), in light of the results of the Commission staff working paper of 27 June 2011 entitled 'Evaluation Report—Impact and Effectiveness of EU Public Procurement Legislation', it appears appropriate to maintain rules on procurement by entities operating in the water, energy, transport and postal services sectors, since national authorities continue to be able to influence the behaviour of those entities, including participation in their capital and representation in the entities' administrative, managerial or supervisory bodies. Another reason to continue to regulate procurement in those sectors is the closed nature of the markets in which the entities in those sectors operate, due to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned. In other words, according to the EU there is an important tradition of public monopolies, exemplified by the world tendency to award the water supply to municipalities and, as a general rule, to municipal enterprises operating without any competition. It is also implied that public opinion is particularly sensitive in these

sectors whereas the most sensitive domain has proven to be the hydraulic one. So, the EU in the framework of the fourth generation continues to have two different directives on public contracting, as occurred with the general Directive 2004/18/EC and Directive 2004/17/EC, known as the 'utilities' directive or the directive on excluded sectors.

The chain of directives on utilities constitutes a rather legal curiosum, as the EU tends to create specific norms on various aspects of public contracting, like in the aforementioned case of concessions. It results, in a way, in an 'aristocratic' legislative technique (utilities, concessions) instead of a coherent, unique set of rules, far beyond the ideal standard of codification. Besides, the tripartite form of the fourth generation is conducive to unexpected side effects, such as the lack in transcription of at least one of the directives on the matter, per national legal order. This has happened in Spain, which has been deprived of transcription of the sectorial directive.

5.4 The Strategic Character of EU Public Procurement Law

The fourth generation has converted public contracting into a tool to exercise political strategy (Adjuntament de Barcelona 2017), related to the neologism 'strategic contracting'. In the Commission's guide on social aspects of public contracting, of October 2010, new guidelines are introduced for the incorporation into public procurement, of social aspects. This form of contracting is called 'responsible public procurement' and includes 'social public purchase' and 'green and ethical purchase'. In a similar way, the document 'Europe 2020: A strategy for smart, sustainable and inclusive growth', of 3.3.2010, has previewed for Europe in 2020 the following three mutually reinforcing priorities:

Smart growth—developing an economy based on knowledge and innovation.
Sustainable growth—promoting a more resource-efficient, greener and more competitive economy.
Inclusive growth—fostering a high-employment economy delivering economic, social and territorial cohesion.

In this context, modern technologies (innovative priority) are combined with sustainable development (environmental priority) and inclusive growth (priority consisting of inclusiveness or social priority). So, the new model of strategic public contracting was born. It is notable that the Commission adopted a staff working document, of 25.6.2008, entitled 'European Code on Best Practices Facilitating Access by SMEs to Public Procurement Contracts'. It is about an indicative text of Commission services and cannot be considered binding to this institution. According to it, e-procurement promotes competition, as it allows easier access to the relevant information on business opportunities (Commission of the European Communities 2008). It adds that it may be particularly helpful to SMEs by enabling cheap and quick communication, for example, downloading the contract documents and any supplementary documents without incurring copying or mailing costs whilst SMEs usually do not have large or specialised administrative capacities that are well-acquainted with public procurement language and procedures. It also indicates that while it is possible in all EU countries to search for contract notices via web portals, in many of them the number of such web portals being used by the government and by regional and local authorities makes it difficult for tenderers to maintain an overview.

On account of this remark, it is notable that the relevant third generation of directives was marked by a problem of major importance, consisting of the provision of a wide discretional power of Public Administration on the use of electronic media in the pre-contractual phase. The institutionalisation of this form of competence allowed very limited use of new technologies in the countries involved. As a result, the generalised modernisation that occurred through the introduction of Community normativity should be completed by a new set of rules.

The objective to encourage SMEs as potential contractors is very clear in the fourth generation. For instance, according to Whereas (124) of the general directive, 'Given the potential of SMEs for job creation, growth and innovation it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level'. SMEs constitute the widest sector and are considered by all EU organs as the backbone of

European economy (Fernández Ecker 2018). They constitute the overwhelming majority of enterprises in the EU but they do not manage to be awarded even one-third of public contracting.

Last but not the least, the strategic character of public procurement is promoted by reserved contracts. According to Article 77 of the general directive, Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74. For instance, in Spain reserved contracts sometimes correspond to only one bidder, which is likely to be an organisation employing disabled persons by at least 33%.

This new form of contracts has raised criticism, arguing that it is about an anti-competitive legally tolerated way of advantaging certain service providers in the award of public contracts.

5.5 Aspects of Directive (EU) 2015/2302 on Package Tourism

In many aspects there is an interconnection between the priorities previewed by the document on Europe 2020. Indeed, the adoption of electronic media in the pre-contractual phase promotes the protection of environmental goods, through the dematerialisation of the requested documents. An approach to economic affairs exempted from papers constitutes a wider concern of the EU, as is the case of Directive (EU) 2015/2302 on package travel and linked travel arrangements, which replaced the first directive on the matter, 90/314/EEC.

First of all, it is notable that what is particular to the tourism market is that it is the only economic sector in which concentration is made by third parties, namely, the tour operators (Maniatis 2019). Tourism has undergone a huge evolution, from 'mass tourism' from 1950 and on in Europe to 'personalised tourism', in the sense that each individual wants his or her trip. The traditional 'value chain' consisting of 'tour operators–travel agencies – carriers and hoteliers' has become outdated recently.

What goes up is the trip booked with the provider; the package travel is down (Maniatis 2019).

Article 2 of the aforementioned directive previews that this 'Directive applies to packages offered for sale or sold by traders to travellers and to linked travel arrangements facilitated by traders for travellers'. It is about a text that is clearly protectionist of the contracting party which is considered as weak. In this sense, juridical protection is granted not only to the 'traveller' (conceived of as a 'consumer' upon other EU legal texts) but also to the persons representing the community of small enterprises and professionals that make a reservation of travels related to their commerce or profession as long as they do not organise their travels on the basis of a general convention. However, the directive is not targeted uniquely towards tourists, the subjective scope is extended by including active travellers, that is, including at the request of or in accordance with the selection of travellers involved. Besides, the notion of 'trader' is the following: 'any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive, whether acting in the capacity of organiser, retailer, trader facilitating a linked travel arrangement or as a travel service provider'.

The concept is that vertical relations constitute a very common phenomenon, particularly in relation to airline companies. If previously those alliances between enterprises coming from different markets were held as very dangerous for the freedom of competition, the modern approach proves to be friendly, as already indicated. The subsequent removing of legal barriers is plausible, but it should be combined by the introduction of new rules in favour of the private individual who is the consumer of an informal block of companies offering complementary services. It follows that the EU has contributed to the modernisation not only of competition law but also of a newer branch, the consumer protection law, which partly coincides with tourism law, namely, as long as travellers undertake journeys for tourism purposes.

Another aspect of the directive on the matter focuses on professionals, who are facilitated in their activity. For instance, it offers modern instruments for information obligations, which are no longer based exclusively

on travel brochures. Traders, exemplified by SMEs, are exempt from the duty of reprinting brochures, and that is why they could save 390 million euros a year. The abolition of this obligation is beneficial for traders whilst travellers experience no deterioration of their legal status, as they can make use of the Internet to find out about marketed benefits. Additionally, avoiding the use of paper indicates respect for the environment whilst the use of paper constitutes one of the subjects of major interest in the matter of public contracting, with recycled paper being a priority.

The directives of the fourth generation aim at enabling buyers to make better use of public procurement, in support of common social objectives, such as environmental protection, greater energy efficiency and resource use, the fight against climate change, the promotion of innovation, employment and social integration and the provision of high-quality social services in the best possible conditions (Moreno Molina 2016). In this sense, they are similar to the new EU policy in the matter of tourism on the basis of the Treaty of Lisbon (Villanueva Cuevas 2012). It is obvious that tourism is one of the sectors that have undergone major transformations in the digital era and, as a result, the second generation of normativity on package tourism, namely, Directive (EU) 2015/2302, has many features in common with the fourth generation of directives on public procurement, in both social and environmental terms.

5.6 The Spanish Law on Public Procurement and SMEs

Although with an important delay, the Spanish legal order is endowed with a single law for the transcription of directives of the fourth generation, with the exception of special directive, as already mentioned. It is about Law 9/2017 on Contracts of Public Sector, which was adopted on 8 November and entered into force on 9 March 2018. The strategic vision, which appeared somewhat diluted within the text initially sent to the Congress of Deputies, has been converted into the principal axe of contracting (Gimeno Feliú 2018). The strategic identity of public contracting moves towards a vision closer to the consideration of the public

contract as an investment and not as an expense. This development overcomes the traditional application of public tender procedures in Spain, which is marked not only by bureaucracy but also by an approach being too attached to economic standards (Gimeno Feliú 2018).

According to Article 1.3.1, 'In any public procurement, social and environmental criteria will be incorporated transversally and prescriptively as long as it is related to the object of the contract, in the conviction that its inclusion provides a better value for money in the contractual provision, as well as greater and better efficiency in the use of public funds'.

Furthermore, Article 1.3.2 is an opening to the entrepreneurial world having essentially a relatively small size. It previews that '*equally, access of small and medium-sized enterprises, as well as of social economy enterprises, to public procurement will be facilitated*'. All these dispositions indicate a clear 'innovation' with regard to the practical understanding of public contracting, renouncing a formal and excessively economic bureaucratic philosophy to incorporate, in a mandatory way, the strategic vision (Gimeno Feliú 2018). In this way, a budgetary vision is abandoned for public contracting, which is reoriented to a perspective relevant to the implementation of public policies, such as the labour one (Gimeno Feliú 2018).

Besides, according to the statements of reasons of the law, one of the legislative objectives consists of the simplification of procedures. The bidding process should be simpler, with the idea of reducing the administrative burdens of all the economic operators involved in this area, thus benefitting both bidders and contracting bodies. If this declaration of intentions is plausible, criticism has been raised, given that the law is far from having achieved a genuine simplification of the requested procedures. The normativity has been characterised inter alia as incomprehensible for any SME (Martínez Fernández 2018). The fourth generation of directives previews the use of the European Single Procurement Document (ESPD), whose completion is not considered to be simple for a SME (Martínez Fernández 2018), although this document seems substitutable for a 'responsible declaration' in the model that is included in the specifications. Indeed, the incorporation of the general rule consisting of the

'responsible declaration' as a simplification measure favours the participation of SMEs (Gimeno Feliú 2018).

5.7 The Principle of Division into Lots

Spanish normativity includes measures in favour of SMEs, comprising solutions suggested in the European Code on Best Practices Facilitating Access by SMEs to Public Procurement Contracts. According to this Code, the sub-division of public purchases into lots clearly facilitates access by SMEs, both quantitatively (the size of the lots may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more closely to the specialised sector of the SME). Further opening the way for SMEs to participate broadens competition, which is beneficial for the contracting authorities, provided that this is appropriate and feasible in light of the respective works, supplies and services concerned (Commission of the European Communities 2008). Directive 2014/24 establishes the principle of the division of the object of contracts into lots and Whereas (78) cites that contracting authorities should be encouraged to make use of the aforementioned Code, providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation. It is also added that 'the contracting authority should have a duty to consider the appropriateness of dividing contracts into lots while remaining free to decide autonomously on the basis of any reason it deems relevant, without being subject to administrative or judicial supervision'. This mention blocking eventual administrative or legal (jurisdictional) control is very important, but it has not been incorporated either in Article 46 of the main text of this directive or obviously in Spanish law and therefore it has raised criticism (Santiago Fernández 2018).

Nowadays, what was once an exception has become a general rule, involving the division of the object of the contract into lots. The fundamental rule that was used before the adoption of the current law has been reversed, so that, only if a contract is not divided, a motivation is required (Gimeno Feliú 2018). This measure has been characterised as the most effective one for the real possibility of SMEs to take part in public

contracting tenders, thanks to the adequacy of solvency requirements (or classification) to the amount and characteristic of each lot (Martínez Fernández 2018). The problem of the very big size of the object of public contracts had been aggravated in Spain, before the transcription of the new general directive, as the competent authorities had usually tended to bring contracts to the maximum legally stipulated term, against the established rule of the national legislation that these terms can only be reached when it is essential to amortise the necessary investments (Martínez Fernández 2016).

Criticism has been raised on the fact that the general rule consisting of the division into lots has been adopted in combination with various exceptions, which are held as too generic (Martínez Fernández 2018). It will therefore remain in the hands of each contracting authority to adopt a more or less active position to achieve the desirable objective of SMEs receiving a greater number of public contracts (Martínez Fernández 2018). Furthermore, the law regulates the possibility of submitting an inclusive offer for different lots whilst the number of lots may be limited.

5.8 Special Conditions on Execution of Public Procurement in Spanish Law

Article 201 of Law 9/2017, entitled 'Obligations in environmental, social or labour matters', previews that contracting organs must take the appropriate measures to guarantee that in the execution of contracts contractors fulfil the applicable obligations in environmental, social or labour matters established in the EU law, national law, collective agreements or by the provisions of international environmental, social and labour law that link to the state and in particular those established in Annex V, entitled 'List of international agreements in the social and environmental field referred to in article 201'. This list has to do mainly with some agreements of the International Labour Organization on labour matters and also with other international agreements in environmental matters.

Furthermore, Article 202 previews in line with Article 1.3 the obligation to establish in the specifications of administrative clauses at least one

special condition on execution among the conditions which may refer to economic considerations, relating to innovation, of the environmental type or of the social type (employment-related). The doctrine has characterised this obligatory character as a very noteworthy issue (Pintos Santiago 2018). Nevertheless, it is about a problematic formulation, which is not clear enough, at least as for the question whether the legislator has previewed four groups of conditions (economy, innovation, environment and employment) or only three (innovation, environment and employment). Although neither the doctrine nor Public Administration seems to have shed light on this issue, we consider that it is about four separate groups, in spite of the fact that the aforementioned document on Europe 2020 focuses on three priorities which coincide with the triptych on the matter.

As far as the environmental alternative is concerned, the following considerations of ecological type are mentioned:

a. *Reduction in greenhouse emissions*

The inclusion of this condition has been dictated by the current status of affairs, given that climate change constitutes a threat to the planet. It results that it is about an authentic 'priority' of major importance, against the rest environmental conditions, which contributes to the accomplishment of the central objective of Law 2/2011, of 4th March, on Sustainable Economy. It is notable that the preamble of this national law makes reference to the 'priority' granted to the promotion of activities related to clean forms of energy and to energy saving.

b. *Maintenance or improvement of environmental values that may be affected by the performance of the contract*

The contractor could be obliged, in a contractual way, to compensate for damage to environmental goods. It is remarkable that a maximalist potential approach is adopted, since it is not about merely an application of the principle of environmental sustainability (in the sense of 'maintenance') but a dynamic version of the same principle (in the form of an 'improvement'), which could be applied eventually by providing

incentives to the contractor. Anyway, it is to highlight that environmental law is a priority over public procurement law, given that both the execution of technical works and, in some cases, the delivery of services are subject to a previous administrative act consisting of the approval of environmental conditions. Consequently, public procurement law must not only abide by environmental normativity, including this act, but it must also be endowed with its own normativity, aiming at the promotion of environmental objectives that are existent in the framework of environmental law.

c. *A more sustainable management of water*

It is about one of the most inspired dispositions of this law, belonging to a national legal order, whose icon involves the branch of water law. This water-based condition implies the existence of the universal human right to water (Maniatis 2018b). People's water supply constitutes a priority use whilst a lot of water is consumed in the framework of other uses, such as industrial use and irrigation.

d. *Promotion of renewable energy*

The most important form of renewable energy is solar energy, whose priority is previewed in the field of buildings energy efficiency law, without disregarding other forms, such as the water-based ones (Maniatis 2018a).

e. *Promotion of product recycling and use of reusable packaging*

The EU emphasises measures based on circular economy whilst Spain promotes the same model.

f. *Impulse to deliver bulk products and ecologic production*

Bulk delivery has a favourable impact on the environment, since it allows many containers and packaging to be reduced. A large percentage of the plastic that is generated worldwide is for packaging. In addition,

buying in bulk, in neighbourhood markets and stores, favours small businesses. The SME is of major importance and, due to its small size, it has to face restrictions and conditions in different areas of activity. So, administrative action in order to alleviate these disadvantages is justified (Fernández Ecker 2018).

Besides, the same article includes an extended indicative list of potential special conditions of the social type (or employment-related). Among all these conditions, the last one uniquely seems to have a relation with SMEs. It aims at guaranteeing respect for basic labour rights throughout the production chain, by demanding compliance with the fundamental Conventions of the International Labour Organization, including those considerations that seek to favour small productors of developing countries, with whom favourable commercial relations are maintained. The considerations on the matter are exemplified by payment of a minimum price and a premium to producers or by greater transparency and traceability of the entire commercial chain.

5.9 Conclusion

The current analysis ends with the following final remarks:

a. *Promotion and digitalisation of the competition*

The fourth generation of directives emerged to enhance competition, particularly through electronic media. The discretional power granted to the competent authorities was replaced by their obligation to make use of digital mechanisms. Therefore, SMEs have no choice but to become accustomed to this new form of procedures, which anyway is intrinsic to the current era.

b. *Alteration of the competition for certain services*

However, competition has been partly altered, as is the case with the novelty of 'reserved contracts' for certain services, such as health. Indeed, the potential introduction of this form of contracts limits in a

considerable way the eventuality of competition. This novelty, which is already in extended use, could be characterised as emblematic of the strategic character of public procurement. Criticism has been raised that strategic contracting to a great extent alters the principle of freedom of competition.

c. *Adaptability of SMEs to environmental objectives*

Anyway, it is notable that the priorities of Europe 2020 are interconnected; for instance, this is the case of environmental sustainability and social cohesion. Some ecological objectives may be partly connected with the promotion of SMEs, which are said to be particularly friendly to the environment. SMEs do not contribute merely to ecological targets but also to economic democracy although it is doubtful whether they can offer innovation to public contractors more than larger firms can.

d. *Extrajudicial dispute resolution mechanisms particularly promoting SMEs*

The new wave of normativity on public procurement needs not only simplification and comprehensibility but also flexible and fast mechanisms on the basis of the principle of rule of law. This modern approach to the pre-contractual stage is not imposed by EU law but by public interest itself. This is the case with Greece, which from 2017 and on has been endowed with an independent administrative authority on the matter, the 'Authority for the Examination of Prejudicial Recourses'. Obviously, this extrajudicial dispute resolution mechanism is useful mainly for SMEs, for which it would be difficult to make use of human and financial resources for protracted judicial litigation in the matter of their participation in public procurement tenders. Obviously, this Greek novelty could be adopted in other legal orders, if not imposed by further EU normativity.

To conclude, we note that special attention to SMEs in the context of public contracting was inexistent before the fourth generation of directives. However, their participation was rather limited whilst new trends were related mainly to big companies, as was the case with Public-Private Partnership (PPP). Actually, SMEs are drastically encouraged to participate

in public procurement tenders, through various modern principles and mechanisms that favour them, either directly or indirectly (e.g. the principle of division into lots, the use of the 'responsible declaration' as a simplification measure, etc.). The public sector, including specialised independent administrative authorities, has been orientated to promote the interests of SMEs, whose role could be conducive to the success of the model of sustainable development. This model constitutes a world trend, particularly in reference to the 2030 Agenda for Sustainable Development, which was adopted by the United Nations General Assembly in 2015. Thus, the active involvement of SMEs is an important challenge for the future.

References

Adjuntament de Barcelona. (2017). *Guía de contratación pública ambiental.* https://ajuntament.barcelona.cat/contractaciopublica/sites/default/files/guia_contratacion_publica_ambiental_es_3_0.pdf

Colson, J.-P., & Idoux, P. (2016). *Droit public économique*. Paris: LGDJ.

Commission of the European Communities. (2008, June 25). *Commission staff working document, European code on best practices facilitating access by SMEs to public procurement contracts*. Brussels: SEC, 2193.

European Commission. (2019, September 2). *Single market scoreboard public procurement reporting period: 01/2018–12/2018*. https://ec.europa.eu/internal_market/scoreboard/_docs/2019/performance_per_policy_area/public_procurement_en.pdf

Fernández Ecker, A. (2018). La Ley de Contratos del Sector Público: una oportunidad para la PYME. *Contratación Administrativa Práctica, 153*(Enero-Febrero), 82–85.

Gimeno Feliú, J. M. (2018). La nueva ley de Contratos del Sector Público: hacia un modelo de contratación pública transparente y estratégica. *Contratación Administrativa Práctica, 153*(Enero-Febrero), 34–39.

Maniatis, A. (2018a). *El Derecho al Agua y la Contratación Pública. Estudio de Derecho Público.* Editorial Académica Española.

Maniatis, A. (2018b). La concesión y la contratación pública en Grecia tras las directivas de 2014. *Contratación Administrativa Práctica, 155*(Mayo-Junio), 124–128.

Maniatis, A. (2019). Les voyages à forfait dans le cadre de la directive 2302/2015/UE. *Revue du Droit de l'Union Européenne (RDUE), 3*, 87–100.

Martínez Fernández, J. M. (2016). Fomento del acceso de PYMES a la contratación pública. *Contratación Administrativa Práctica, 153*(Enero-Febrero), 92–103.

Martínez Fernández, J. M. (2018). Medidas para facilitar a las PYMES la participación en la contratación pública. *Contratación Administrativa Práctica, 153*(Enero-Febrero), 94–103.

Meilhaud, J. (2011). *Guide juridique des énergies*. Paris: Éditions TECHNIP.

Moreno Molina, J. A. (2016). *La inclusión de las personas con discapacidad en un nuevo marco jurídico-administrativo internacional, europeo, estatal y autonómico*. Thomson Reuters Aranzadi.

Nicholas, C., & Fruhmann, M. (2014). Small and medium-sized enterprises policies in public procurement: time for a rethink? *Journal of Public Procurement, 14*(3), 328–360.

Pintos Santiago, J. (2018). Capítulo I Novedades de impacto en la nueva ley de contratos del sector público. In J. En Pintos Santiago (Dir.), *Las consecuencias electrónicas de la nueva ley de contratos del sector público. Código electrónico práctico de la ley 9/2017, de 8 de noviembre* (pp. 35–51). Punto rojo libros.

Rolfstam, M. (2018). *Promoting SMEs as suppliers in public procurement: Would it lead to innovation ?* (pp. 1–23). Available at SSRN: https://ssrn.com/abstract=3147388 or https://doi.org/10.2139/ssrn.3147388

Santiago Fernández, M. J. (2018). División en lotes: nueva configuración del objeto del contrato en la Ley de Contratos del Sector Público. *Contratación Administrativa Práctica, 153*(Enero-Febrero), 86–92.

Villanueva Cuevas, A. (2012). *La política de la Unión Europea en materia de turismo y sus repercusiones en la Legislación Turística Española*. Madrid: Reus.

Vogel, L. (2004). *L'économie, serviteur ou maître du droit, Une certaine idée du droit. Mélanges offerts à André Decocq*. Paris: Litec LexisNexis.