

LA COMMANDE PUBLIQUE, UN LEVIER POUR L'ACTION PUBLIQUE ?

Sous la direction de
Étienne Muller

Sous la coordination éditoriale de
Louis de Fournoux et Romain Place

Avec les contributions de

Frédéric Allaire, Serge Doumain, Gabriel Eckert, Guillaume Farde,
Marie-Cécile Folzer, Ophélie Garnier, Gilles Grosclaude, Hélène Hoepffner,
Pascale Idoux, Bruno Koebel, Christoph Krönke, Stéphane de La Rosa,
François Llorens, Elisenda Malaret, Antoine Marcantoni,
Francesco Martucci, Frédéric Marty, Étienne Muller,
Xavier Padrós, Jean-Sébastien Pietri, Gabriella M. Racca

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Collaborative and Strategic Procurement for Supporting Industrial Innovation

GABRIELLA M. RACCA¹

Full Professor of Administrative Law – University of Torino

INTRODUCTION

According to the European Commission reports, public procurement is a substantial part of public investment in the European economy as representing approximately 14% of the European Union's GDP. This means that public authorities spend almost € 2 trillion of the EU taxpayers' money every year.² As a consequence, it is of utmost importance to promote greater efficiency in public spending through a mindset shift among public officials, and also a review in the organizational models of public entities.³ Not by chance, in its public procurement strategy the European Commission has emphasized the need to focus on facilitating demand aggregation, and increasing the professionalism of public buyers.⁴

1. [gabriella.racca@unito.it]

2. EU Commission, *Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects*, COM(2017) 573 final, 3 October 2017, 2. In 2015 alone, public procurement represented 13.7% of the EU GDP, amounting to €1,924.1 billion (excluding utilities). See EU Commission, DG Growth 2016, *Public Procurement Indicators 2015*, 19 December 2016.

3. EU Commission, *Making Public Procurement work in and for Europe*, 3.10.2017, COM(2017) 572 final.

4. R. Cavallo Perin – G. M. Racca, *Administrative Cooperation in the Public Contracts and Service Sectors for the Progress of European Integration*, in F. Merloni, A. Pioggia, *European Democratic Institutions and Administrations Cohesion and Innovation in Times of Economic Crisis*, Springer, 2018. G. M. Racca – G. L. Albano, *Collaborative Public Procurement and Supply Chain in the EU experience*, in C. Harland – G. Nassimbeni – E. Schneller, *Strategic Supply Management Sage Publications*, London, 2013, 179-213; G. M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, in F. Lichère – R. Caranta – S. Treumer (eds.), *Modernising Public Procurement: the New Directive*,

Furthermore, the European Commission has identified six priority actions to undertake with a view to transform public procurement into a powerful instrument in each Member State's economic policy toolbox, and ultimately lead to harvesting substantial positive outcomes in public procurement.⁵

One priority actions recommended by the EU Commission is to ensure a wider uptake in strategic public procurement. Central and local governments should respond to societal, environmental, and economic challenges by using preliminary market consultation and qualitative assessment to a greater extent, and also seeking innovative solutions for public procurement.⁶

Accordingly, public buyers are expected to professionalise through training as appropriate.⁷ That is because public buyers should have and further develop the skills needed to pursue innovation in each and every stage of the procurement process. In that perspective, best practice exchange should be encouraged to foster improvement in the organization and management of procuring entities so as to counteract risk aversion while incentivising strategic planning, flexibility, market knowledge, and the use of innovative tools. Besides, access to procurement markets, especially by small and medium enterprises (SMEs), should be widened. SMEs have an important role in job creation, growth, and innovation, which means in the economy as a whole, and should thus be much more involved in the public procurement process. This could be done by offering SMEs fair treatment, efficient support for problem solving, and independent audit of the procurement strategies adopted by public contracting authorities. For instance, the SMEs participation in cross-border procurement could be encouraged by envisaging the division

Copenhagen, DJØF Publishing, 2014, 225-254. See: [https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1571949].

5. EU Commission, *Making Public Procurement work in and for Europe*, cit., 7 et seq.; See also: G. M., Racca – S. Ponzio, *Nuovi modelli organizzativi per il joint procurement e l'innovazione dei contratti pubblici in Europa*, in R. F. Acevedo – P. Valcarcel Ferrandez (ed. by) *Compra Pública Agregada*, 2016, 373-406.

6. EU Commission, *Guidance on Innovation Procurement*, COM(2018) 3051 final, 15 May 2018; G. M. Racca – C. R. Yukins (eds. by), *Public contracting and innovation: lessons across borders*, in *Droit administratif/Administrative Law Collection* (Directed by J.-B. Aubry), Bruxelles, Bruylant, forthcoming. See also the outputs of the cross-border project on *Public Procurement for Innovation Capacity building to boost usage of Public Procurement of Innovation (PPI) in Central Europe – PPI2INNOVATE* [<http://www.interreg-central.eu/Content.Node/PPI2Innovate.html>] – funded by Interreg Central Europe Programme (European Regional Development Fund) for the period 2016-2019. The project targets directly public procurers on all administrative levels in CE in a way to build regional capacities in PPI, change attitudes towards PPI, strengthen linkages among relevant stakeholders in regional innovation systems and thus boost usage of PPI in CE. As its spearhead, the PPI2Innovate project aims at delivering 3 thematic tools (Smart Health, Smart Energy and Smart ICT) fully customized to 6 national institutional frameworks and translated in each national language. See the publications available at: [<https://www.interreg-central.eu/Content.Node/PPI2Innovate.html#Publications>].

7. EU Commission Recommendation 2017/1805 on the professionalization of public procurement: *Building an architecture for the professionalization of public procurement*, 3.10.2017.

of a project (tender) into lots, thus different contract awards. All this, among other possible measures to adopt, would boost an industrial policy driving the growth of the SMEs.⁸

Strategic procurement development requires relying on technology, increasing transparency and integrity, and gathering data to use appropriately in order to meet needs and enact effective policies.⁹ Digital transformation offers great opportunities to create better analytics for needs-driven policymaking. As more and more data have become available, their collection, storage, and management has become essential to promote integrity in public procurement. Digitisation has been a fundamental step forward in the development of warning systems enabling authorities to tackle corruption, assess the effectiveness of procurement policies, optimize the interaction between public procurement systems, and elaborate strategic planning while mapping risks indicators.¹⁰

Digital technology can be used to streamline and simplify the procurement process through the roll-out of electronic public procurement and, consequently, has the potential to reshape public procurement systems and the organizational models lying behind them.¹¹ The 2014 EU Directive on public procurement prescribes for mandatory electronic submission of tenders by October 2018. Yet, it would be even more beneficial for all phases of the public procurement process (i.e., e-procurement unfolding into planning, notification, submission, invoicing, payment, and archiving) to undergo digital transformation.

Another priority action recommended by the EU commission is innovation in procurement organizations' models. The high level of complexity of the procurement-related activities requires cooperation through aggregation of public contractors so as to create Central Purchasing Bodies (CPBs) – either at a cross-border, national or sub-national level – having a general or target-specific mandate (e.g. health, IT, energy). CPBs have played an increasingly important role in the promotion of reforms in public procurement, and in the implementation of a strategic approach to public purchases dealing with

8. PwC, A study commissioned by the European commission, DG Internal Market and Services, *SMEs' access to public procurement markets and aggregation of demand in the EU*, February 2014. EU Commission – DG Growth, *New opportunities for SMEs under the reform of public procurement legislation*, 8 March 2016, available at [https://ec.europa.eu/growth/content/8707-new-opportunities-smes-under-reform-public-procurement-legislation_en].

9. G. M. Racca, *The Electronic Award and Execution of Public Procurement*, in *Ius Publicum Network Review*, [<http://www.ius-publicum.com/pagina.php?lang=it&pag=articoli&n=2>], 2012, 1-63.

10. OECD, *MAPS – Methodology for Assessing Procurement Systems*, 2016.

11. EU Commission, *Communication on End-to-End Procurement*, July 2013. See: C. H. Bovis, *The Efficiency Drive to Deliver Savings for the European Public Sector: Full E-Procurement for All Public Purchases by 2016*, in *European Procurement & Public Private Partnership Law Review*, 2012, 85. EU Parliament, *Systems and e-Procurement – Improving Access and Transparency of Public Procurement*, April 2018, available at [[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/618990/IPOL_BRI\(2018\)618990_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/618990/IPOL_BRI(2018)618990_EN.pdf)].

significant volumes.¹² Joint cross-border procurement or collaborative procurement involving a plurality of contracting authorities from different Member States, in fact, can have a huge impact on the supply chain, particularly if there is a strong cooperation among the authorities in question. The outcomes of that kind of strategies, among other, have a deep influence on the industrial policies of the EU and at national level as well. Having said that, it may be worth drawing attention to collaborative procurement as a useful tool to increase public purchasing capability and power.¹³

Owing to their diversity of political mandates, ranging from policy making to operating in various markets at different levels, CPBs are uniquely positioned to implement strategic and innovative procurement. They play a significant role in the process leading to public procurement process standardisation, inextricably linked to professionalization and empowerment of the public administrations, their ability to have a sharp market insight and operate with integrity so as to ensure fair and efficient public spending.

The importance of this kind of organisational model shows through the explicit intention of the EU Commission to support the dissemination of best practices and promote innovative procurement through CPBs and other forms of aggregation of demand.¹⁴ Therefore, the role of collaborative procurement in promoting innovative SMEs and stimulating their growth should be further considered and addressed.¹⁵

1. STRATEGIC PROCUREMENT FOR INTEGRITY AND EFFICIENCY

Procurement costs are financed with the taxpayers' money. Therefore, especially in times of strained national budgets, governments are increasingly required to carry out public procurement in an efficient, sustainable and strategic way. All this to ensure high-quality service provision while

12. EU Commission, *Making Public Procurement work in and for Europe*, cit.

13. G. M. Racca – S. Ponzio, *Nuovi modelli organizzativi per il joint procurement e l'innovazione dei contratti pubblici in Europa*, cit., 373-406; G. M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, cit., 225-254; G. M. Racca – G. L. Albano, *Collaborative Public Procurement and Supply Chain in the EU experience*, cit., 179-213; G. M. Racca, *Collaborative procurement and contract performance in the Italian healthcare sector: illustration of a common problem in European procurement*, in *Public Procurement Law Review*, 2010, 119-133, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1714278].

14. EU Commission, *Public Procurement Strategy*, available at [https://ec.europa.eu/growth/single-market/public-procurement/strategy_en]. See, also, *EU Commission Recommendation (EU) on the professionalization of public procurement*, cit.

15. G. M. Racca, *La contrattazione pubblica come strumento di politica industriale*, in C. Marzuoli, S. Torricelli (eds. by), *Disciplina dei contratti ed esternalizzazioni sostenibili*, Napoli, Editoriale Scientifica, 2017, 171-193.

safeguarding public interests effectively.¹⁶ The primary policy goal in public procurement is to achieve best value for money while avoiding corruption, waste, and abuse.¹⁷ Also, due attention shall be given to industrial policy issues.

Corruption, which means the abuse of entrusted power for private gain, is generally associated with poor integrity.¹⁸ Either is viewed as a shortcoming undermining the main objectives of private and public activities.¹⁹ Corruption, however, becomes more unacceptable and serious when perpetrated by public authorities because it erodes the pillars of democracy and diverts the pursuit of public and civic interests.²⁰ Within the public procurement cycle as a whole, corruption represents an emblematic case of such a diversion: it “distorts competition, hinders economic development, and endangers the stability of democratic institutions as well as the moral foundations of society”.²¹

It is important to warn that the risk of corruption may arise during the whole procurement cycle.²² This also applies to the pre-tender stage (for example in

16. EU Commission, *Making Public Procurement Work in and for Europe*, cit., 2. G. M. Racca – C. R. Yukins, *Introduction. Steps for integrity in public contracts*, G. M. Racca – C. R. Yukins (eds. by), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, in *Droit administratif/Administrative Law Collection* (Directed by J.-B. Auby), Bruxelles, Bruylant, 2014 [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570726].

17. Racca – Yukins, cit. In Italy, for instance, the latter goal is highly emphasized through its “innovative regulatory approach” of delegating extensive regulatory powers in public procurement to a non-legislative body – the National Anticorruption Authority (ANAC), an institution with a primary role of fighting corruption and restoring the integrity within the Italian public procurement market. See: A. La Chimia – S. Valaguzza, *A new approach to implementing the 2014 public procurement Directives in Italy: ANAC's soft law regulatory powers amidst uncertainty and need for clarity*, in *PPLR*, 2017, 165-186.

18. See *UN Convention against Corruption* – UNCAC, the *Convention on Combating Bribery of Foreign Public Officials* – OECD Antibribery Convention, Council of Europe Conventions and EU Instruments. G. M. Racca – R. Cavallo Perin – G. L. Albano, *Public Contracts and International Public Policy Against Corruption*, in M. Audit – S. W. Schill (eds. by), *Transnational Law of Public Contracts*, Bruxelles, Bruylant, 2016, 845 et seq.

19. S. Rose-Ackerman, *Corruption and conflicts of interest*, in J.-B. Auby – E. Breen – T. Perroud (eds. by), *Corruption and Conflicts of Interest. A Comparative Law Approach*, Edward Elgar Publishing, 2014, 5-15; G. M. Racca – R. Cavallo Perin, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent to the Lack of Loyalty*, in G. M. Racca, C. R. Yukins (eds. by), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit.

20. EU Commission, *Report from the Commission to the Council and the European Parliament, EU Anti-Corruption Report*, COM(2014) 38 final, 6.

21. Council of Europe, *Criminal Law Convention on Corruption*, signed on 27 January 1999, entered into force on 1st July 2002, Preamble, § 5.

22. OECD, *Recommendation of the Council on Enhancing Integrity in Public Procurement*, C(2008)105, 2008, available at [http://acts.oecd.org/]; United Nations Office on Drugs and Crime – UNODC, *Guidebook on anti-corruption in Public Procurement and the management of public finances. Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption*, September 2013, available at [https://www.unodc.org/]. G. M. Racca – R. Cavallo Perin, *Material changes in contract management as symptoms of corruption: a comparison between EU and U.S. procurement systems*, in

the need assessment and planning phases), the tendering phase, the award phase, and the post-tender stage (namely, the execution of the contract). The risk of corruption during the tendering stage is foreseen and addressed not only at an international level (for instance, through the UNCITRAL Model Law or WTO Government Procurement Agreement), but also at EU level (through Public Procurement Directives, amongst other) and national level as well. Although it is equally likely to occur, the risk of corruption is nevertheless not sufficiently addressed in the pre-tender phase (before the tender process begins) and in the post-tender phase (after the contract has been awarded).

Lack of integrity affects fundamental rights.²³ Integrity in the public procurement process is universally recognized as an essential condition to achieve public objectives, thus to ensure a proper use of precious resources coming from taxpayers. Unfortunately, the lack of integrity in public procurement at any governance level is a well-documented phenomenon, which can take different forms, at times unexpected.²⁴ It should be added that the lack of transparency and integrity has a staggering economic cost and a profound impact not only on the economy of a state, but also on the rights of its citizens.²⁵ The new demand-side collaborative strategies among contracting authorities (also from different Member States) can be used to ensure efficiency, sustainability, and integrity on account of an "inclusive transnational anti-corruption co-operation".²⁶

Bearing these considerations in mind, national and international policy-makers – principally in the EU and working at either global or regional levels – have developed formal rules to apply to public procurement in furtherance of three main aims. Firstly, (a) bringing anti-corruption measures into sharp focus, which culminated with the adoption of the United Nations Convention Against Corruption in 2003. Secondly, (b) making widespread efforts to reduce the costs of public procurement in national systems, mainly in the aftermath of the economic and financial crisis that had started in 2008.

G. M. Racca – C. R. Yukins (eds. by), *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in Public Procurement Internationally*, cit.; G. M. Racca – R. Cavallo Perin – G. L. Albano, *Competition in the execution phase of public procurement in Public Contract Law Journal*, 2011, Vol. 41, n. 1, 89-108, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011114].

23. Council of Europe, Civil Law Convention on Corruption, Art. 13, signed on 4 November 1999, entered into force on 1st November 2003, Preamble, § 4, "corruption represents a major threat to the rule of law, democracy and human rights, fairness and social justice, hinders economic development and endangers the proper and fair functioning of market economies".

24. EU Commission, *Report from the Commission to the Council and the European Parliament. EU Anti-Corruption Report*, COM(2014) 38 final, 3 February 2014, 8 et seq.

25. EU Commission, *Report from the Commission to the Council and the European Parliament. EU Anti-Corruption Report*, cit.; Racca – Yukins, cit.

26. European Economic and Social Committee (2016), *Opinion of the European Economic and Social Committee on 'fighting corruption in the EU: meeting business and civil society concerns'*, 2016/CO13/11

Finally, (c) emphasizing the concept of sustainability of public expenditure in environmental and social terms, and, more recently, also in terms of innovation.²⁷ Public procurement has consequently been the focus of a series of reforms, coming in waves and aimed at improving the performance and cost-effectiveness of public services. They were also meant to highlight the importance of fundamental principles to be adopted for public governance, first and foremost transparency and accountability.²⁸

The debate around the reform of public procurement has given rise to a sort of dualism between centralized and decentralized models. The centralized model approach postulates the aggregation of public demand for goods and services so that a limited number of organizations should manage "purchasing activities" and ensure that collective needs are met. Ideally, fostering public purchasing power should run parallel with favoring the strategic use of procurement and industrial policy goals.

Conversely, the decentralized model approach for public procurement actually favors fragmentation of the demand among 250,000 contracting authorities, which may result in drawbacks such as higher transaction costs and lower capability.

It is however possible to combine – to some extent – both the aforementioned organizational models on account of the fact that different aggregation forms require specific procurement strategies. These should be carefully defined to operate effectively on the relevant market

II. THE INCREASING ROLE OF COLLABORATIVE PROCUREMENT

Contracting authorities are rarely buying together. Only 11% of the award procedures are carried out by means of co-operative procurement. Recently, the EU Commission has highlighted that "buying in bulk often leads to better prices and also offers an opportunity to exchange know-how and obtain better quality". Yet, "not all types of purchases are suitable for aggregation, overall low aggregation rates suggest lost opportunities".²⁹

The EU Commission considers co-operating to procure together as one of the six priority areas for changing procurement.³⁰ In particular, the EU Commission proposed a broad collaborative partnership to move to an effective, transparent, digital, smart public procurement system. That should be fully responsive to the challenges of today's changing environment, and

27. G. L. Albano – C. Nicholas, *The Law and Economics of Framework Agreements*, cit.

28. P. R. Schapper – J. N. Veiga Malta – D. L. Gilbert, *An analytical framework for the management and reform of public procurement*, in *Journal of Public Procurement*, 2006, 1-26.

29. EU Commission, *Making Public Procurement Work in and for Europe*, 6.

30. *Ibid.*, 5.

suitable to encourage a demand-side approach aimed at benefiting from the competition among economic operators of different Member States. The integration between national contracting authorities contributes to the “integration of the relevant markets.” Cooperation, particularly when realized in a system of competences organized as a network, allows for the development of legal systems capable of overcoming administrative nationalism, and foster cross-border administrative cooperation.³¹ It is worth noting that demand aggregation does not only promote economies of scale, with lower prices and transaction costs, but also opens way to developing adequate professionalism and strategies for defining specific objectives to be pursued through public tenders (i.e., social and environmental projects, innovation, greater participation of SMEs by envisaging different lots).³² The EU public procurement rules take all this into account.³³ In fact, they contain specific provisions on the aggregation of public demand.³⁴ By means of provisions on “Techniques and instruments for electronic and aggregated procurement.” they also address key issues.³⁵ In particular, the conditions for operating purchases are specified envisaging either permanent CPBs or temporary joint procurement agreements.³⁶

With regard to aggregate purchasing, there are two organizational models that differ from each other on account of their pervasiveness as far as a structural reform is concerned. One model is based on the “contractual” association between contracting authorities (a form of co-operation not requiring any structural change) for the occasional joint procurement of goods and/or services of common interest – even delegating one of the contractual authorities to delegation to execute specific purchasing activities. The second model requires the creation of a dedicated entity that shall procure goods and/or services for other entities or contracting authorities, as happens for example with “centralized purchasing activities through CPBs”.

The first model described above is characterized by a significant degree of flexibility in respect to the nature of cooperation, which may either result in

a one-off single contract notice to be published on behalf of all participating authorities, or give shape to more stable collaborative agreements.³⁷ Whenever this model is adopted, contracting authorities follow a common protocol as agreed, even in absence of a legal status uniting them or shared assets. Depending on the nature of the demand, a particular contracting authority is entrusted with the responsibility for each tender.³⁸

If the contracting authorities jointly manage a procurement procedure, they shall be jointly responsible for fulfilling their obligations complying with the applicable EU Directive. Conversely, if only part of the procurement procedure is managed jointly by the contracting authorities, joint responsibility should apply only with regard to that part.³⁹ Nonetheless, each contracting authority will be responsible for the procedures or part of any procedure undertaken independently. Of note, contracting authorities that purchase works, supplies or services from or through a CPB shall be deemed to have complied with the EU Directive insofar as the CPB has complied with it.⁴⁰

A “corporate-style” organizational model for centralized purchasing activities envisages the establishment of a Central Purchasing Body.⁴¹ That is meant to be a professional structure with a separate juridical status acting as a contracting authority on behalf of other public entities.⁴² The EU Member States may prescribe that contracting authorities might purchase works, goods or services from or through CPBs. It is not, however, mandatory to establish CPBs as that is only an option for Member States.⁴³

A. THE ROLE OF CENTRAL PURCHASING BODIES, AND THE INDUSTRIAL POLICY STRATEGIES: THE ITALIAN EXPERIENCE

CPBs may operate a deep structural modification of the way in which public entities carry out their contractual activities. The individual contracting authorities can use external structures such as CPBs for the procurement phase, and therefore take care of the contract management phase only.

31. R. Cavallo Perin, *L'organizzazione delle pubbliche amministrazioni e l'integrazione europea, in A 150 anni dall'unificazione amministrativa europea*, L. Ferrara, D. Sorace (a cura di), vol. 1, Firenze University Press, 2016, 3-36 e *L'Organizzazione delle pubbliche amministrazioni nel processo d'integrazione dello Stato nazionale italiano e dell'Unione Europea*, in *Istituzioni del Federalismo*, Rimini, Maggioli Editore, 44/2016, 997-1033.

32. Strategies already described in G. M. Racca, *Relazione al Convegno Appalti pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove direttive*, Consiglio di Stato, Roma, 14 May 2014, cit., especially p. 14 et seq.

33. Particularly EU Directive 24/2014.

34. Differently from previous EU Directive 18/2004.

35. I Herrera Anchustegui, *Centralising public procurement and competitiveness in Directive 2014/24, 2015*, available online at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633445]; Articles 33–39 EU Directive 24/2014.

36. Articles 37 and 38 of EU Directive 24/2014; also, article 39 of EU Directive 2014/24, “Procurement involving contracting authorities from different Member States”, deals with cross-border models of centralized purchasing.

37. “Occasional joint procurement” Article 38 EU Directive 24/2014.

38. EU Commission, *Joint Procurement – Fact sheet in European Commission Green Public Procurement (GPP) Toolkit*, 2008.

39. Recital 71, EU Directive 24/2014.

40. A similar rule is included in EU Directive 2014/25, Article 55(2); article 37(2) of EU Directive 2014/24.

41. EU Directive 2014/24, Art. 37. CPBs are known as Professional Buying Organization, PBO in the American experience in the Healthcare sector; Albano – Racca, *Collaborative Public Procurement and Supply Chain in the EU Experience*, cit.

42. S. Arrowsmith, *The Law of Public and Utilities Procurement. Regulation in the EU and UK*, London, Sweet & Maxwell, 2014, 1304; Crown Commercial Service, *A brief guide to the 2014 EU public procurement directives*, October 2016, available at [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560261/Brief_Guide_to_the_2014_Directives_Oct_16.pdf].

43. EU Directive 2014/24, Art. 37 (1).

Central purchasing bodies play a crucial role because they have been managing an increasingly higher share of the public procurement markets. As such, they are seeking reforms in public procurement and a more strategic approach to public purchases by means of greater leverage power. That is essential in certain markets, particularly those dominated by a small number of operators.

The main *rationale* for establishing centralized purchasing activities is that large scale procurement volumes may generate better prices for purchasers (in fact, this has become an axiomatic fact). An individual procuring entity seldom has a procurement volume large enough to generate prices comparable to those that could be obtained if an aggregation of needs among procuring entities were made.

By offering larger volumes, the demand side can trigger competition and obtain better prices. This ultimately means ensuring better outcomes in terms of efficiency and improvement in the procurement system on one hand. On the other hand, suppliers may benefit from demand aggregation as leaving room for product standardization and the opportunity to access large-scale economies, which means operating at a lower unit cost.⁴⁴ It should also be noted that the aggregation of knowledge and expertise creates a spill-over effect as CPBs often provide support and consulting services to other contracting authorities.⁴⁵

Nonetheless, centralized purchasing activities are controversial. Objections to them have arisen because aggregation may favour market concentration in relevant sectors. Another issue is less opportunities being offered to SMEs as it is likely that they will not be able to participate individually in large public procurement award procedures.⁴⁶

Centralized purchasing activities have to be designed correctly, keeping up to date with the ongoing changes in the relevant markets thus taking

44. G. L. Albano – M. Sparro, *Flexible Strategies for Centralised Public Procurement*, in *Review of Economics and Institutions*, 2010, 1(2).

45. EU Commission, *Making Public Procurement Work in and for Europe*, 12. See also: EU Commission Recommendation on the professionalization of public procurement, cit., in which it is highlighted "The need to ensure the efficient application of public procurement rules at all levels is necessary to make the best out of this essential lever for European investment, as spelled out in the Investment Plan for Europe, and to achieve a stronger single market called for in the 2017 State of the Union address of President Juncker. Efficiency is also among the areas of improvement in public procurement signaled through the European semester process".

46. The Italian Antitrust Authority (Autorità Garante per la Concorrenza ed il Mercato, AGCM – Italy) recently identified a restriction of the competition realised by Deloitte, KPMG, Ernst & Young e PWC. See AGCM, Resolution 18 October 2017. See the Italian case law: Cons St, sez V, 6 March 2017, n 1038, where Consip SpA split the framework agreement for security services into 13 lots and they were considered to limit too much participation of SMEs and the award procedure was annulled by the Italian State Council. See also TAR Lazio, Rome, II, 26 January 2017, n 1345; Cons St, III, 23 January 2017, n 272; TAR Toscana, III, 12 December 2016, n 1755; in turn, recitals 59 to 69 of EU Directive 2014/24 provide a lengthy and not always coherent statement of justifications for adopting centralized or aggregated procurement techniques.

into account any important development in market prices and technology. Determining the benefits of centralized procurement is not, therefore, a straightforward matter.

Market analysis is necessary for the strategic design of the public procurement process.⁴⁷ The same applies to the terms and conditions of the contract/framework agreement (e.g., duration, to be established ensuring that competition will be maintained; limits to the number of lots for which an economic operator may tender or the number of lots that may be awarded to a tender).⁴⁸

The SMEs may act as subcontractors or participate in consortia (groups of economic operators) whenever the purchaser has envisaged lots which, owing to their nature and size, allow SMEs to participate as tenderers in their own capacity. The possible structures and outcomes of procurement procedures are, however, too complex to be regulated by a universal rule stating which is the better approach to take.

By aggregating purchasing activities, contracting authorities and suppliers can expect a significant reduction of transaction costs. Almost likely, resources (e.g. staff and time) can be made available for other functions (e.g. contract management). However, the effect of centralized purchasing activities on transaction costs cannot be generalized. Rather, they should be calculated taking the type of award procedure adopted into account.

It should also be noted that centralized purchasing activities may offer advantages that cannot be directly expressed in economic terms. Efficiency, for instance, may result from coordinated solutions offered by CPBs. Another possible benefit is standardization, especially as far as IT systems and software as concerned, can increase legal, technical, economic, and professional skills required for carrying out complex award procedures in relevant markets. CPBs also have the potential to ensure a reduction in the risks of complaints, overcome poor or insufficient quality of the products in question, supplier failure, and/or inadequate contract terms. Additionally, the combined use of an e-platform may foster the efficient use and re-use of data.

Governments may use aggregated purchasing activities as instruments to pursue policy goals such as SME participation by strategically splitting contracts into lots, and also limiting the number of lots that can be awarded to one operator. If correctly addressed, aggregated purchasing activities can also be an economic and industrial tool for pursuing social, environmental, and innovation goals.

Contracting authorities should be allowed to award a public service contract for the provision of centralized purchasing activities to a CPB without applying

47. EU Directive 2014/24, Art. 40 and EU Directive 2014/25, Art. 58. on preliminary market consultations.

48. EU Directive 2014/24, Recital No. 78-79 and Art. 46.

the procedures set forth in the EU Directive insofar as that option it is commonly considered as a public-public co-operation. Public service contracts of that kind should also include the provision of ancillary purchasing activities.⁴⁹

The 2014 EU Directives, in fact, introduced “ancillary purchasing activities” providing support to purchasing activities, in particular in the following forms: technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services; advice on the conduct or design of public procurement procedures; and preparation and management of procurement procedures on behalf and for the account of the contracting authority concerned.⁵⁰

One example of CPB operating at national level with a general mandate is CONSIP in Italy. According to the last report of the President of the Italian Anti-Corruption Agency (ANAC), the aggregation of purchases has increased the quality and competency of the contracting authorities. Yet, it has raised some important issues on overcoming the excessive market fragmentation. At national level, an important initiative, pivotal in the rationalization of the procurement system, has been the drafting of a list of “aggregator entities”.⁵¹ Indeed, public purchases have been concentrated in the hands of a limited number of subjects having adequate organizational qualifications and representing a significant purchasing volume for the aggregate procurement of certain categories of goods and services which were previously purchased by a wealth of different contracting authorities.⁵² The new Code of Public Contracts has confirmed the competence of ANAC for the management of the aforementioned list.⁵³ That has also established specific provisions regarding the aggregation and centralization of procurement activities and the qualification of contracting entities and CPBs.⁵⁴

According to the Italian legal framework, the list of aggregate subjects includes CONSIP, a central purchasing body for each region, and 35 entities

49. EU Directive 2014/24, Recital No. 70.

50. EU Directive 2014/24, Art. 2 (15); EU Directive 2014/25, Art. 2(11). Public service contracts for the provision of ancillary purchasing activities should, “when performed otherwise than by a CPB in connection with its provision of central purchasing activities to the contracting authority concerned” be awarded in accordance with EU Directive 2014/24 (Recital No. 70). This is the case of the purchasing activity made by a “procurement service provider” that is “a public or private body which offers ancillary purchasing activities on the market” EU Directive 2014/24, Art. 2 (17); EU Directive 2014/25, Art. 2(13). The 2014 EU Directive on public procurement “should not apply where centralized or ancillary purchasing activities are provided other than through a contract for pecuniary interest which constitutes procurement within the meaning” of EU Directives.

51. Art. 9(1), d.l. No. 66 of 2014 converted in law 23 June 2014, No. 89.

52. Annual report from the president of the Italian Anti-Corruption Authority to the Parliament, 2018. Available at [https://www.anticorruzione.it/portal/rest/fcr/repository/collaboration/Digital%20Assets/anacdocs/Comunicazione/News/2018/ANAC.Relazione.2018.pdf].

53. Legislative decree No. 50 of 2016, as amended by legislative decree 56/2017.

54. Respectively, Art. 37 and 38, legislative decree No. 50 of 2016, as amended by legislative decree, No. 56 of 2017.

carrying out centralized purchasing activities (such as those subjects with significant purchasing power operating in the procurement market for goods and services in a stable manner and through a dedicated organization, i.e. metropolitan cities, provinces, associations, unions and consortia among local authorities).⁵⁵ Only those CPBs can award procurement in a number of sector of goods and services defined by a decree.⁵⁶

To conclude, the Italian strategies of joint procurement should still be improved to overcome territorial limits and provide an effective policy for the growth of innovative SMEs.

B. JOINT CROSS-BORDER PROCUREMENT IN THE EU

The EU Directives on Public Procurement pave way for the implementation of joint cross-border procurement at EU level, which offers new opportunities, especially to CPBs. Some of the pilot projects funded by EU, in fact, show that cooperation with CPBs is feasible.

A noteworthy example is the HAPPI project – one of the most remarkable cases of joint cross-border procurement bringing innovative solutions into the healthcare sector, according to a recent study that the EU Commission entrusted to BBG and SKI.⁵⁷ The project has significantly contributed to overcoming the “lack of knowledge and expertise amongst contracting authorities” as well as the “lack of innovative capability in public organizations, with little or no dedicated resources (human or financial)”, all of which prevented from identifying, developing and experimenting innovative solutions, while not granting access to the most innovative SMEs in the reference market of healthy ageing.

The HAPPI project⁵⁸ was one of the first experiences of cross-border joint public procurement. It was developed and implemented through a consortium of European partners. These were procurement organizations (central purchasing bodies) in the health sector, by experts of PPI (public procurement of innovation) agencies and academic institutions.⁵⁹ The need to purchase

55. Overall, in the 2018 updated list, there are 32 aggregator entities: CONSIP, a central purchasing body for each of the 20 Italian region and for the autonomous provinces of Trento and Bolzano, and the metropolitan cities of Bologna, Catania, Florence, Genoa, Milan, Naples, Rome and Turin as well as the provinces of Brescia and Vicenza.

56. Decree, 11 July 2018, *Individuazione delle categorie merceologiche, ai sensi dell'articolo 9, comma 3, del decreto-legge 24 aprile 2014, n. 66, convertito, con modificazioni, dalla legge 23 luglio 2014, n. 89* (18A05421).

57. BBG – Ski, *Feasibility study concerning the actual implementation of a joint cross-border procurement procedure by public buyers from different Member States*, 2017, available at [http://ec.europa.eu/DocsRoom/documents/221021].

58. Healthy Ageing – Public Procurement of Innovations (HAPPI) [http://www.happi-project.eu/] funded by the EU Commission – DG Enterprise and Industry within the Competitiveness and Innovation Framework Programme (CIP) – ref. Call ENT/CIP/11/C/N02C011.

59. HAPPI has 12 European partners from France (Réseau des acheteurs hospitaliers d'Ile-de-France, École des Hautes études en santé publique [EHESP], BPIFRANCE), the United

innovative solutions for healthy and active ageing, to be chosen based on the results of a thorough market analysis, led to studying several national and European legal models of aggregation to identify the most suitable form of consortium. The selected legal model led to the establishment of a European collaborative procurement organisation composed of the central purchasing bodies that were partners in the project. That same organisation, a consortium now open to other Member States, relies on the French institution of the *Groupement de commandes* according to Article 8 of the French *Code des marchés publics*.⁶⁰ The consortium included an agreement to delegate to the French central purchasing body the competence to carry out the selection procedure for the award of a closed Framework Agreement, with several lots and without a commitment to buy from a single economic operator, in compliance with European Union law and French national law. The agreement further considers harmonization of the award requirements and tender documents to overcome the legal and linguistic barriers while ensuring the publication of the tender notice in three different languages. The tender documents provide for the application of the national law of each country of destination of the goods or service to be provided in compliance with the relevant contract awarded.⁶¹ Joint procurement often takes the juridical form of a mandate, as one or more contracting authorities act as mandators and delegates. Once their needs are defined and a convention *ad hoc* is established by undersigning a legally binding contract – a single contracting authority acts as mandatory (agent) in order to purchase goods and services on their behalf and in their interest.

Another relevant case study on National Joint procurement models is the UK Future Operating Model (FOM). The FOM established a new NHS Supply Chain service providing improved procurement and logistics support to the NHS through the aggregate purchase of clinically safe, high quality products (within 11 standardized Category Tower Service Providers) for the NHS at the best possible value for money (the expected result is a £2.4 billion saving in its first five years). This model is also aimed at offering larger supply volume

Kingdom (NHS Commercial Solutions, BITECIC Ltd), Germany (ICLEI – Local Governments for Sustainability), Italy (University of Turin and the Piedmont Region Client Company, SCR), Belgium (MercurHosp – mutualisation hospitalière), Luxembourg (Fédération des hôpitaux luxembourgeois – FHL), Austria (the Federal Procurement Agency [FPA] – Associate partner) and Spain (FIBICO – Associate partner). For a description of the project activities, see S. Ponzio, *Joint Procurement and Innovation in the new EU Directive and in some EU founded projects*, in *Ius Publicum Network Review*, 2/2014, available at [http://www.ius-publicum.com/repository/uploads/20_03_2015_13_12-Ponzio_IusPub_JointProc_def.pdf], p. 1 et seq.

60. G. M. Racca – S. Ponzio, *La mutualisation des achats dans le secteur de la santé publique : les centrales d'achat et les accords-cadres dans une perspective comparative*, in *Droit administratif*, 2011, p. 7-12.

61. See the award of the framework agreement HAPPI: [<http://www.happi-project.eu/news-events/news/139-the-happicontracts-are-awarded>].

opportunities, lower sales-and-marketing costs, and a more streamlined procurement landscape to the benefit of small and medium enterprises too.⁶²

The case studies above show that aggregation does not always mean stipulating high-volume contracts with one only supplier. It should also be noted that centralized procurement and its effects are under scrutiny.⁶³ Contracting authorities are therefore required to provide an indication of the main reasons why they may decide not to split a particular project into different lots.⁶⁴

A correct procurement strategy, especially for CPBs, requires a complete market analysis. Moreover, the division of a project into different lots should take into account the number and size of economic operators in order to favor participation and avoid collusion.⁶⁵ Sometimes “macro-lots” might be considered too big to engage small and medium-size enterprises, thus foreclose the participation of possible competitors operating in the market of interest.⁶⁶

In summary, recitals 59 to 69 of the EU Directive 2014/24 (although lengthy and not always coherent in justifying the adoption of centralized or aggregated procurement techniques) may be interpreted to suggest that decentralized models do not permit strategic procurement. They could also favor the fragmentation of public demand and purchasing power in at least 200,000 to 250,000 different contracting authorities, operating at different governmental levels and with various budget sizes.⁶⁷ By contrast, aggregated models enable some procuring bodies to carry out procuring activities (also or only) for third parties, subsequently opening way to principal – agent model issues. Joint Procurement (JP), as such, plays a pivotal role in “combining the procurement actions of two or more contracting authorities. Its main feature is that there should be only one tender, to be published on behalf of all participating authorities”. Indeed, the JP activities are not new:

62. For more information, please consult the website of the NHS Supply Chain: [<https://www.supplychain.nhs.uk/Home/News/~ /media/Files/News/DH%20FOM%20%20Supplier%20QA%20%20FINAL.ashx>].

63. G. L. Albano – C. Nicholas, *The Law and Economics of Framework Agreements*, Cambridge University Press, 2016, Chapters 8 and 9; A. Sanchez Graells – I. Herrera Anchustegui, *Impact of Public Procurement Aggregation on Competition: Risks, Rational and Justification of the Rules in Directive 2014/24*, 2016, available at [https://research-information.bristol.ac.uk/files/47837809/Aggregated_purchasing_ASG_IHA_merged_version_final_.pdf]; EU Directive 2014/24, Art. 46; EU Directive 2014/25, Art. 65; as an example, recitals 78 and 79 of EU Directive 2014/24/EU contend for a disaggregation of purchases by encouraging procurement divided into smaller lots: such a perspective is foreseen in the 2014 EU Directives.

64. EU Directive 2014/24, Art. 46, par. 1(2).

65. See AGCM, Resolution 18 October 2017, cit.

66. See the Italian case law: Cons St, sez V, 6 March 2017, n 1038, cit. See also TAR Lazio, Rome, II, 26 January 2017, n 1345; Cons St, III, 23 January 2017, n 272; TAR Toscana, III, 12 December 2016, n 1755; in turn, recitals 59 to 69 of EU Directive 2014/24 provide a lengthy and not always coherent statement of justifications for adopting centralized or aggregated procurement techniques.

67. Locatelli, 2016.

in countries such as the UK and Sweden, for example, public authorities have been buying together for a number of years.⁶⁸

Two different general models for the implementation of JP are usually adopted. One is the “full JP”, with the close involvement of all participating authorities. The other is the so called “piggy-backing”, whereby a contracting authority carries out procurement on its own, but leaves to other contracting authorities the option of utilizing the same contract.⁶⁹ According to this model, the contracting authorities that take part in the joint procurement can specialize their purchasing activity in one relevant market, respectively, yet make the contract they perfected available to other contracting bodies.⁷⁰

CONCLUSIONS

The institutional and legal framework on joint or collaborative procurement in the EU can be regarded as a resource for the long awaited reform in the procurement market and the unavoidable adoption of a strategic approach by contracting authorities. In that perspective, “joint procurement and central purchasing bodies are key players in the public procurement landscape and often play an important role with respect to a strategic approach to purchases by public administrations”.⁷¹ By timely and effectively organizing “what to buy” and “how to buy”, contracting entities may address contemporary societal challenges in a number of vital sectors (i.e., healthcare, energy, climate change, transport, security, environmental protection), which are important to policy-makers because of their national and international commitments to deliver more effective public services.

In addition, aggregation may help procurers to become more powerful in eliciting innovation from the demand side. All this by encouraging economic operators to develop new solutions and make them available to the market in shorter time, which would ultimately mean prompting industry to invest in new skills, equipment and R&D.

Public contracting authorities should plan their procurement procedures strategically and timely, based on their needs yet considering benefits in the short and long term as well. In other words, governmental authorities should provide an efficient alignment between long-term visions and

68. EU Commission, *Green Public Procurement (GPP) Training Toolkit, Joint procurement Fact sheet*, available at [http://ec.europa.eu/environment/gpp/pdf/toolkit/module1_factsheet_joint_procurement.pdf].

69. *Ibid.*, cit.

70. G. M. Racca – S. Ponzio, *La mutualisation des achats dans le secteur de la santé publique : les centrales d'achat et les accords-cadres dans une perspective comparative*, in *Droit administratif*, 2011, 7-12; e.g. see the model of “UniHA” a co-operative network undertaking grouped purchasing on behalf of 67 public hospitals in France at [<https://www.uniha.org>].

71. EU Commission – DG Growth, *Study on strategic use of public procurement*, 2016, 59.

short-term actions. Procuring innovative solutions, in fact, can promote better access to, and understanding of the market. This entails a more effective and evidence-based decision-making. Also, it may allow public authorities to meet their policy goals and achieve better value for money through the optimum combination of higher quality, faster delivery and/or reduced whole-life costs.

Innovative strategies such as those mentioned earlier can also stimulate innovative suppliers' access to the procurement market, and, consequently, foster their growth.

To this regard it may be worth remarking that any aggregation strategy requires a well settled industrial policy as it affects the private supply chain of the relevant market.

As shown in the HAPPI project, framework agreements can be a particularly useful tool to promote the innovation and growth of the SMEs – a relevant goal to achieve within the framework of joint procurement.

Joint procurement gives an irreplaceable contribution to ensuring greater quality in public spending while fostering professionalism among procurement officials and integrity in the public procurement process. The aggregation of public purchases and the establishment of networks between procurement agencies, when correctly addressed, ensure the combination of professional skills required for procurement to be used as a strategic tool for safeguarding public interest and ensuring economic development.⁷² Clearly, professionalism is one of the key factors for success in any procurement process: successful public procurement of innovation such as that achieved by the municipalities of Amsterdam, Barcelona, and Turin, for example, resulted from a combination of strongly innovation-oriented economic policies and high motivation and professionalism of the public administration officers.⁷³ Not by chance the Public Procurement package published by the European Commission in October 2017 which emphasised the importance of professionalizing public procurement⁷⁴. The package also highlighted the peaking trend of demand represented aggregations of public purchasers in the EU public procurement

72. EU Commission, *Making Public Procurement work in and for Europe*, cit.

73. EU Commission (2017), *Consultation document on Guidance on Public Procurement of Innovation – Draft version to be submitted to the targeted consultation*. G. M. Racca – C. R. Yukins (eds. by), *Public contracting and innovation: lessons across borders*, in *Droit administratif/Administrative Law Collection* (Directed by J.-B. Auby), Bruxelles, Bruylant, forthcoming.

74. European Commission (2017), *Staff Working Document – Toolbox of good practices accompanying the document Commission Recommendation on the professionalization of public procurement. Building an architecture for the professionalization of public procurement*, SWD(2017)327, 3 October 2017, p. 18. In this sense, see also European Commission (2017), *Commission recommendation of 3.10.2017 on the professionalization of public procurement – Building an architecture for the professionalization of public procurement*, Brussels, 3 October 2017, C(2017)6654.

markets as having a twofold aim. On one hand, obtaining economies of scale, lower prices and inferior transaction costs. On the other hand, improving and professionalizing procurement management.⁷⁵

The joint procurement procedures undertaken in recent years have led to spreading best practices and a knowledge of how procurement processes are managed in different Member States. As a result, a remarkable step forward toward professionalization has been taken by the public procurers involved in those kinds of project, particularly in as far as language and project management skills are concerned. Public procurement workforce professionalization is crucial to achieve to main objectives. Firstly, to successfully develop administrative cooperation.⁷⁶ Secondly, to meet public needs by executing the duties that public employees are entrusted with by governmental authorities, including providing efficient and high-quality services to citizens.⁷⁷

In conclusion, promoting professionalism and highlighting the importance of ethic behaviour as binding for procurement officers working in complex organizations such as the Central Purchasing Bodies is crucial to achieve positive economic results through transparent, efficient and competitive public procurement. Furthermore, efficient public procurement may become a key lever to promote collaborative and innovative industrial policies to the benefit of EU citizens.

75. G. M. Racca (2010), *Professional buying organisations, sustainability and competition in public procurement performance*, proceeding for 4th International Public Procurement Conference (IPPC 2010), Seoul (Korea); E. S. Schneller, *Role of Group Purchasing in the US*, proceeding at 2^e symposium international, Paris 8 and 9 September 2010; C. Rooney, *Pooling Hospital Procurement through Group Purchasing Organizations (GPOs): The U.S. Experience*, proceeding at 2^e symposium international, Paris 8 and 9 September 2010. See also: E. S. Schneller – L. R. Smeltzer (2006), *Strategic Management of the Health Care Supply Chain*, San Francisco, Jossey-Bass; E. Schneller (2009), *The value of Group Purchasing – 2009: Meeting the Needs for Strategic Savings*, in *Healthcare Sector Advances*.

76. Pursuant to Article 197 TFEU

77. R. Cavallo Perin – G. M. Racca, *Administrative Cooperation in the Public Contracts and Service Sectors for the Progress of European Integration*, in F. Merloni, A. Pioggia, *European Democratic Institutions and Administrations Cohesion and Innovation in Times of Economic Crisis*, Springer, 2018.

L'accès des petites et moyennes entreprises à la commande publique

FRÉDÉRIC ALLAIRE

Maitre de conférences HDR, Université de Nantes

L'accès des petites et moyennes entreprises (PME) à la commande publique est une question dont la récurrence procède de l'ambivalence des auteurs du droit de la commande publique à passer du registre de la suggestion à celui de la sujétion.

Partant du postulat que la taille de l'entreprise est une donnée significative, l'aspiration à privilégier les PME dans l'attribution des commandes publiques ne laisse pas de se manifester sous couvert, généralement, de l'invocation du modèle américain de *Small Business Act*¹ aux États-Unis et de son prolongement dans la loi relative au *Federal Acquisition regulation*². Suivant sa codification dans le code juridique fédéral au chapitre 1^{er} du titre 48, une discrimination positive est instituée par le système de parts réservées aux PME dans les marchés publics passés par le gouvernement fédéral en disposant que chaque agence devra se fixer un objectif annuel précisant la part de ses marchés publics allouée aux PME. Ce régime dont la portée n'est pas toujours appréhendée à sa juste mesure³ a suscité plusieurs rapports s'en inspirant que ce soit à l'échelon européen avec la communication « "Think Small First" : Priorité aux PME; Un "Small Business Act" pour l'Europe » du 19 juin 2008⁴ ou national, soit pour appeler à sa transposition en droit français⁵, soit pour

1. *Small Business Act*, Public Law 85-536.

2. Titre 48, *Code of Federal Regulation*.

3. L. Richer, « Ce qu'est vraiment le *Small Business Act* aux États-Unis », *Mon. TP*, 22 févr. 2008.

4. Communication de la Commission au Parlement européen, au Conseil, au Comité économique et social européen et au Comité des régions : « "Think Small First" : Priorité aux PME; Un "Small Business Act" pour l'Europe », 19 juin 2008. COM(2008), p. 394.

5. F. Grignon, « Rapport d'information n° 374 : Aider les PME : L'exemple américain », 1997.