

**JOINT PROCUREMENT AND INNOVATION IN THE NEW EU DIRECTIVE  
AND IN SOME EU-FUNDED PROJECTS**

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**1. INTRODUCTION**

The new European Directive on public procurement<sup>1</sup> provides new rules and instruments for fostering the aggregation of public procurement of goods, services and works<sup>2</sup> as well as the innovation in public procurement even through IT tools<sup>3</sup>.

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<sup>1</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 *on public procurement and repealing Directive 2004/18/EC*; See also: Directive 2014/25/EU of the European Parliament

New chances for cooperation - also cross-border or transnational - among contracting authorities are introduced, particularly for Central Purchasing Bodies (CPBs) in order to pursue the best value for money as well as innovation and sustainability, overcoming the existing barriers in the EU Single Market and offering new chances to economic operators, especially to innovative SMEs.

Considering the difficulties in the implementation of such forms of cooperation the new Directive aims to facilitate such experiences on the basis of some EU projects that first tested new solutions. Such projects have permitted to establish some networks among European public purchasers and to develop experiences of joint procurement to test the most relevant critical points as subsequently highlighted in the Directive <sup>4</sup>.

Among the most advanced and innovative joint procurement experiences, the HAPPI project *Healthy Ageing - Public Procurement of Innovations*<sup>5</sup> stands out for having combined product innovation (“what to buy”) with a significant innovation of the procurement procedure jointly designed and conducted by CPBs of different Member

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

<sup>2</sup> Directive 2014/24/EU, cit., Art. 59. See the Title II, Chapter II (Artt. 33-39), on *Techniques and instruments for electronic and aggregated procurement*.

<sup>3</sup> EU Commission, *Golden Book of e-Procurement Good Practices*, available at: [http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/golden-book/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/golden-book/index_en.htm). See also: EU Commission, *A Strategy for e-Procurement*, 20<sup>th</sup> April 2012.

<sup>4</sup> Directive 2014/24/EU, cit., Whereas no. 71.

<sup>5</sup> The HAPPI project (*Healthy Ageing Public Procurement of Innovations*, <http://www.happi-project.eu/>), is funded by the EU Commission (DG Enterprise) within the Call “*Supporting Public Procurement of Innovative Solutions: Networking And Financing Procurement*” (ENT/CIP/11/C/N02C011). See infra § 4.

States. The experience of the HAPPI project in the wider perspective of the next challenges of the implementation of the new Directive has been recently discussed and this article aims to highlight the more innovative perspectives emerged<sup>6</sup>. The new challenges require to overcome legal and language barriers and need an intense capacity development. The benefit of such changes should assure a significant improvement of the quality of public spending for the benefit of innovative and sound suppliers and of citizens<sup>7</sup>.

## **2. INNOVATION IN PUBLIC PROCUREMENT IN THE EU SINGLE MARKET**

The new European Directive on public procurement<sup>8</sup> provides new organizational and contractual instruments to pursue simplification and innovation in public procurement in order to enhance the EU Single Market. In such a perspective joint procurement

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<sup>6</sup> Conference on *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, Rome, Italian Council of State, 14th May 2014 (<http://www.giustizia-amministrativa.it/documentazione/ATT00053.pdf>).

<sup>7</sup> EU Commission, *Public consultation on the modernisation of EU public procurement policy – Towards a more efficient European procurement market*, available at [http://ec.europa.eu/internal\\_market/consultations/2011/public\\_procurement\\_en.htm](http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm).

<sup>8</sup> Directive 2014/24/EU cit.

strategies can become an innovative way of buying <sup>9</sup> with a more extended use of e-procurement<sup>10</sup>.

The EU legal framework on public procurement provides transparent procedures<sup>11</sup>, implementing the principles of fair competition, participation and non-discrimination through an objective selection of the tenderers coherent and proportional to the features of goods and services purchased, in order to ensure openness of the Single Market. However, the still existing linguistic and legal barriers among Member States have undermined the realisation of such goals. Simultaneously, the fragmentation of public demand has often caused public procurement inefficiency<sup>12</sup>.

The estimate of total government expenditure for public procurement of works, goods and services (excluding utilities) in the EU is significant and almost reached the 14% GDP in 2012<sup>13</sup>. Data observed in Italy are similar, considering that, in 2012, the public

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<sup>9</sup> Directive 2014/24/EU, cit., Art. 59. See the Title II, Chapter II (Artt. 33-39), on *Techniques and instruments for electronic and aggregated procurement*.

<sup>10</sup> EU Commission, *Golden Book of e-Procurement Good Practices*, available at: [http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/golden-book/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/e-procurement/golden-book/index_en.htm). See also: EU Commission, *A Strategy for e-Procurement*, 20<sup>th</sup> April 2012.

<sup>11</sup> Directive 2004/18/EC, 31 March 2004, Art. 7 and Directive 2004/17/EC, 31 March 2004, Art. 16.

<sup>12</sup> O. Bandiera, A. Prat, T. Valletti, *Active and passive waste in government spending: Evidence from a policy experiment*, 2009, *American Economic Review*, the report points out the differences in the prices of equivalent goods and the higher costs are related to insufficient professional skills (83%) more than the existence of corruption.

<sup>13</sup> EU Commission. *Public Procurement Indicators 2012*, 12<sup>th</sup> November 2014, where it is reported for the 2012 that the total expenditure on works, goods and services (excluding utilities) is the 13,74 % of GDP (the EU Public Procurement market amount – excluding utilities in 2012 reaches 1769,58 billion of Euro, in the same year the value of contracts published in TED are 401,68 billion of Euro)". M. Poulain, *Opening public procurement markets: Contribution of trade policies to the recovery in the field of public procurement*, Procurement unit DG

spending in public procurement of works, services and supplies has reached an amount equal to 95 billion €<sup>4</sup>.

Notwithstanding the relevant purchasing power of public administrations and the significant resources involved in the area of public contracts, until today such power has been deeply limited by the widespread fragmentation of public demand. Indeed, the existence of over 250 000 contracting authorities in Europe has been detected, where these authorities manage procurement budgets of different sizes and possess very different purchasing capacities<sup>15</sup>. Within this context, public procurement can represent the basis for important policies aiming to ensure public demand quality and integrity for the benefit of citizens as well as to favour a smart, sustainable and inclusive growth<sup>16</sup>, while pursuing the

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Trade, Rome, 15th October 2009. M. Burgi, *Annual Report 2012 – Germany*, in *Ius Publicum Network Review*, Issue no. 2/2012, 1 and ff.

<sup>14</sup> G. Giovannini, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 4 et seq.

<sup>15</sup> EU Directive, Whereas No. 78 et seq. EU Commission, Commission staff working paper, *Evaluation Report - Impact and Effectiveness of EU Public Procurement Legislation*, 27<sup>th</sup> June 2011, SEC(2011) 853 final, Part 1, VI. See: G. M. Racca, *The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers*, in D. Dragos – R. Caranta (Eds.) *Outside the EU Procurement Directives - Inside the Treaty?*, European Procurement Law Series, Vol. 4, Djøf Publishing, Copenhagen, 2012, 382-383.

<sup>16</sup> EU Commission, 3rd march 2010, *Europe 2020 — A strategy for smart, sustainable and inclusive growth*. See: G. M. RACCA, *Professional Buying Organisations, Sustainability and Competition in Public Procurement Performance, 4th International Public Procurement Conference (IPPC 2010) – Seoul (Korea)*, August 26-28, 2010, available at <http://www.ippa.org/IPPC4/Proceedings/18TransparencyAccountabilityinProcurement/Paper18-13.pdf>; G. M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, cit., 226 e 227.

most efficient use of public resources<sup>17</sup>. Such objectives represent particularly pressing needs due to the economic crisis.

The economic significance assumed by public contracts (public procurements and concession contracts) has determined the EU intervention in this sector for defining common principles for Member States in order to advance in developing the Single Market, still so limited. Despite the provision of EU public procurement principles and rules<sup>18</sup>, the goal of the Single Market is still not accomplished. Indeed 80% of public procurement in Europe is below the European thresholds or is outside the scope of the EU Directives. The application of different national principles and rules has limited the participation - especially the cross-border one - in award procedures. Indeed, the amount of direct cross-border procurement is equal to 1,6%<sup>19</sup> which raises up to 11% taking into account the

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<sup>17</sup> Directive 2014/24/EU, Whereas No. 2.

<sup>18</sup> Since the early 70's, the European public procurement rules on public procurement have primarily aimed to achieve economic integration among the Member States implementing the EU principles and the "economic freedoms" as defined by the Treaties: cfr. Directive 71 /305/EEC of 26 July 1971 *concerning the coordination of procedures for the award of public works contracts*; Directive 77/62/EEC of 21 December 1976 *coordinating procedures for the award of public supply contracts*; Directive 92/50/EEC of 18 June 1992 *relating to the coordination of procedures for the award of public service contracts*. On the development of the EU public procurement legal framework see: C. H. Bovis, *EU Public Procurement Law*, Edward Elgar, Cheltenham, 2007, 17 et seq. See now the Treaty on the Functioning of the European Union on: the free movements of goods (artt. 28 - 37); the free movement of persons, services and capital (artt. 45 - 48); right of establishment (artt. 49- 55); the freedom to provide services (artt. 56-62); the movement of capitals and payments (artt. 63-66). See: S. Arrowsmith, *The Law of Public and utilities Procurement. Regulation in the EU and UK*, Sweet & Maxwell, London, I, 2014, 237 et seq.; A. Sánchez Graells, *Public Procurement and the EU competition rules*, Hart Publishing, Oxford, 2011.

<sup>19</sup> EU Commission, Commission staff working paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, cit., I, 134. See: Rambøll Management, Rambøll study for the EU Commission, *Cross-border procurement above EU thresholds*, May 2011, 38. This study also found that 50% of public procurement shall be awarded to economic operators established in less than 100 km by the contracting authority. See also: EU

indirect cross-border procurement (where firms bid for contracts through their foreign affiliates or subsidiaries)<sup>20</sup>.

An effective Single Market and a fair competition could permit to develop more efficient businesses as well as to guarantee a proper use of public resources for improving European citizens' life quality.

The economic relevance of the public contract sector led the EU institutions to develop such principles also to boost the European economic growth<sup>21</sup>. Indeed public procurement plays an important role for the Europe 2020 strategy's success since it represents, within the EU legal system, a market-based instrument to achieve a smart, sustainable and inclusive growth<sup>22</sup> while ensuring the most efficient use of public resources<sup>23</sup> as well as the openness of the European public procurement market.

The lack of an adequate public procurement orientation towards innovation has been acknowledged not only in Europe<sup>24</sup> and has hindered the spread of innovation and a

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Commission, *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, COM(2011) 15 final, 27th January 2011, 4.

<sup>20</sup> EU Commission, Commission staff working paper, *Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation*, cit., I, XIII. See: EU Commission, *Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market*, cit., 4.

<sup>21</sup> G. Giovannini, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 4.

<sup>22</sup> EU Commission, 3rd March 2010, *Europe 2020 — A strategy for smart, sustainable and inclusive growth*.

<sup>23</sup> Directive 2014/24/EU, cit., Whereas No. 2.

<sup>24</sup> The Japanese government discussed the significance of an innovation orientated toward a new approach for public procurement. And through comparison with procurement strategies employed by the US, the UK and the Netherlands it proposes: (1) intermediary professional actors to appraise prototype technologies; (2) interactive

better definition of public demand as well as the definition of innovative technical specifications for products and services<sup>25</sup>.

The public procurement of innovative goods and services has become an essential tool in order to ensure quality and efficiency of the services delivered to citizens, especially in economic crisis times<sup>26</sup>, since economic operators' investments for complying with the public procurement of innovations may foster the creation of new products or the improvement of already existing products<sup>27</sup>. The public demand, if correctly driven towards the achievement of environmental, social or health protection goals, could successfully stimulate innovation and investments by the economic operators from reference markets favouring competition among themselves and the creation of new job opportunities.

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dialogues between suppliers and users before tendering; (3) fair and transparent competition focusing on new social and economic values of emerging technologies are the absolute essence of public procurement for innovation. Y. Myoken, *Demand-orientated policy on leading-edge industry and technology: public procurement for innovation*, in *International Journal of Technology Management*, 2010, 49 (1-3), 196 – 219.

<sup>25</sup> J. Edler – L. Georghiou, *Public procurement and innovation – Resurrecting the demand side*, in *Research policy*, 2007, 949-963.

<sup>26</sup> EU Commission, *Scoreboard shows EU more innovative, but gap between countries widening*, 26 March 2013, that provides a ranking of EU Member States. While the most innovative countries have further improved their performance, others have shown a lack of progress. The overall ranking within the EU remains relatively stable, with Sweden at the top, followed by Germany, Denmark and Finland. Estonia, Lithuania and Latvia are the countries that have most improved since last year. Drivers of innovation growth in the EU include SMEs and the commercialisation of innovations, together with excellent research systems. However the fall in business and venture capital investment over the years 2008-2012 has negatively influenced innovation performance.

<sup>27</sup> EU Commission, *Europe 2020 Flagship Initiative Innovation Union – 2011*. Public procurement of innovative products and services is vital for improving the quality and efficiency of public services at a time of budget constraints. Yet little public procurement in Europe is aimed at innovation, despite the opportunities under the EU procurement directives. This is due to a range of factors, such as: incentives that favour low-risk solutions; a lack of knowledge and capabilities regarding successful procurement of new technologies and innovations; and a disconnection between public procurement and policy objectives.



The role of public demand for innovation is particularly relevant when the risk for companies to innovate is high. The high risk occurs when a supplier needs to commercialise because demand is uncertain. As a result, many products and companies fail at the demonstration and scale-up stage. Consciousness of an existing market for an innovative product reduces the risk and enables a supplier to invest in anticipation of future revenues. Innovation through public procurement has great potential to trigger innovation in industry and to create markets for innovative products which meet specific needs<sup>28</sup>. Through the public procurement of innovation, public authorities may buy goods and services even already existing but needing to be improved, obtaining these in a reasonable time.

The new Directive highlights that "public procurement is crucial to driving innovation, which is of great importance for future growth in Europe" and promotes "the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth"<sup>29</sup>.

To achieve the mentioned goals and in order to increase the efficiency of the public procurement sector with an innovation of the award procedures the new EU rules aim to facilitate cooperation among contracting authorities both cross-border and transnational, while facilitating participation of innovative Small and Medium Enterprises (SMEs) in public procurement.

In such a perspective the cross-border joint procurement is promoted aiming to enhance the benefits of the Single Market by creating cross-border business opportunities for the economic operators. Indeed, innovative projects involve a great amount of risk than

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<sup>28</sup> EU Commission, *Innovation Union Competitiveness Report*, 2011, available at <http://ec.europa.eu/research/innovation-union/pdf/competitiveness-report/2011/iuc2011-full-report.pdf>.

<sup>29</sup> Directive 2014/24/EU, cit., Whereas No. 95.

reasonably bearable by a single contracting authority. The new strategies of cooperation in public procurement may allow contracting authorities "to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing"<sup>30</sup>.

Meanwhile "public procurement should be adapted to the needs of SMEs" particularly of the innovative ones. To preserve competition and transparency as well as market access opportunities – even at cross-border and transnational level – for SMEs, contracting authorities are encouraged to "divide large contracts into lots"<sup>31</sup>, possibly accompanied by a maximum number of lots that can be awarded to one bidder<sup>32</sup>. Lots' strategies can develop on a quantitative basis, arranging the size of the individual contracts so as to adapt them to capacity of SMEs, or on a qualitative basis, taking into account the SMEs' specialised sectors and consequently adapting the content of the individual contracts<sup>33</sup>.

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<sup>30</sup> Directive 2014/24/EU, cit., Whereas No. 73.

<sup>31</sup> Directive 2014/24/EU, cit., Whereas No. 59 and 78.

<sup>32</sup> EU Commission, *Green Paper on the modernisation of EU public procurement policy*, cit., 30.

<sup>33</sup> EU Commission, *Green Paper on the modernisation of EU public procurement policy*, cit., 4. G. M. Racca, *Le prospettive dell'aggregazione nell'amministrazione dei contratti pubblici*, in *ApertaContrada*, 2014, available at <http://www.apertacontrada.it/2014/01/15/le-prospettive-dellaggregazione-nellamministrazione-dei-contratti-pubblici>, where are highlighted the benefits to provide separate lots (territorial or by type of service) in relation to the presence of economic operators in the sector. In this framework this strategies enhance competition and encourage the participation of small and medium enterprises more innovative.

### 3. NEW ORGANIZATIONAL MODELS FOR JOINT PROCUREMENT

In order to ensure the innovation and rationalization of the organizational models of public procurement procedures, the new EU Directive provides new principles and rules in the field of aggregation of public procurement promoting cooperation among contracting authorities from different Member States. In such a perspective significant innovations in national legal systems are required. Within this new context the overall public procurement moves from being a model based on award procedures carried out by individual contracting authorities towards a totally different model, grounded on the aggregation of such award procedures<sup>34</sup>.

The cooperative models can be developed among CPBs as contracting authorities that may drive public choices towards the best use of public resources for the benefit of innovation, sustainability and competition, favouring participation of innovative SMEs in public procurement. CPB is a complex organization that has different professional skills (legal, economic, technical, methodological, engineering etc.)<sup>35</sup>. Those skills are often out

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<sup>34</sup> G. M. Racca, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 11. See also: G. M. Racca and 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*, cit., 7 et seq.

<sup>35</sup> G. M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, in F. Lichère – R. Caranta – S. Treumer (ed. by) *Modernising Public Procurement: the New Directive*, DJØF Publishing, Copenhagen, 2104, 225-254; G. M. Racca, *Nuove prospettive per l'aggregazione dei contratti pubblici nel contesto europeo*, in R. F. Acevedo – P. Valcarcel Fernandez (ed. by) *La contratación pública a debate: presente y futuro*, Thomson Reuters – Editorial Civitas, Cizur Menor, Navarra, 2014, 455-492; G. M. Racca, *Le prospettive dell'aggregazione nell'amministrazione dei contratti pubblici*, in *Aperta Contrada*, in <http://www.apertacontrada.it/2014/01/15/le-prospettive-dellaggregazione-nellamministrazione-dei-contratti-pubblici/>, 2014; G. M. Racca, G. L. Albano, *Collaborative Public Procurement and Supply Chain in the EU experience*, in C. Harland – G. Nissimbeni - E. Schneller (ed. by), *Strategic Supply Management Sage*

of reach for most individual contracting authorities and they are necessarily required for the implementation of joint procurement. CPBs can ensure the necessary professionalization for a smarter use of the innovative contractual tools such as framework agreements and dynamic purchasing systems or procedures (e.g. innovation partnership<sup>36</sup>).

New chances for cross-border cooperation are explicitly provided by the Directive: first, contracting authorities can use public contracts awarded by contracting authorities of different Member States; second, a contracting authority may delegate another one to carry out its own procurement procedure; third, contracting authorities from different Member States can set up joint entities established under national or EU law<sup>37</sup> such as the European grouping of territorial cooperation (EGTC)<sup>38</sup>. The last instrument allow to overcome the barriers hindering territorial cooperation, favoring the establishment of cooperative groups at European level and invested with legal personality, also in the public procurement sector.

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*Publications*, London, 2013, 179-213; 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*, no. 7-8/2011, 7-12.

<sup>36</sup> S. Arrowsmith, *The Law of Public and utilities Procurement. Regulation in the EU and UK*, Sweet & Maxwell, cit., 1044 et seq.

<sup>37</sup> Directive 2014/24/EU, Whereas No. 73. See EU Commission, *Commission Staff Working Paper concerning the application of EU public procurement law to relations between contracting authorities ('public-public cooperation')* - SEC(2011)1169), 4th October 2011, where there is a distinction between cooperation to carry out tasks of public interest in the proper sense and activities that would require the competition in the market. See: R. Cavallo Perin – D. Casalini, *Control over In-house Providing Organisations*, in *Public Procurement Law Review*, Issue 5, 2009, 227-241.

<sup>38</sup> Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC); Regulation (EU) No 1302/2013 amending Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC).

One of the most innovative legal provisions of the EU Directive enables contracting authorities to use centralised purchasing activities offered by CPBs located in another Member State and that prevent Member States from prohibiting such a possibility<sup>39</sup>. This provision pursues the goals both of strengthening the EU Single Market and of safeguarding competition, which assume specific relevance exactly with regard to public procurement of a high cross-border interest<sup>40</sup>. The provision derives from previous EU principles and does not introduce a new rule. This implies the possibility to apply it according to the whereas that recognized that it was possible before the new Directive even considering the legal and practical difficulties for contracting authorities in purchasing from CPBs in other Member States or jointly awarding public contract<sup>41</sup>. Considering such principles, Member States, while implementing the European Directive, are allowed exclusively to specify which centralised purchasing activities may be used by their contracting authorities<sup>42</sup>. CPB has in fact the possibility to act either as a wholesaler or as an intermediary and, while acting as intermediary, without mandatory instructions that is without an obligation to buy<sup>43</sup>.

In such a perspective the use of centralised purchasing activities offered by a CPB (even if located in another Member States) allows contracting authorities not to apply the

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<sup>39</sup> Directive 2014/24/EU, cit., Art. 39, par. 2.

<sup>40</sup> G. M. Racca, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, Rome, 14th May 2014, cit., 14.

<sup>41</sup> Directive 2014/24/UE, cit., wh. No. 73.

<sup>42</sup> Directive 2014/24/UE, cit., Art. 39, par. 2; see also the art. 2, par. 1, 14, (a) and (b), about the activities intermediary and wholesaler carried out by central purchasing bodies (centralised purchasing activities).

<sup>43</sup> G. M. Racca, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 14.

procedures provided for public procurement<sup>44</sup> and even the European principles and rules in the public procurement field<sup>45</sup>, since they are already guaranteed by making use of this organizational model.

Such rules allow national contracting authorities to reach significant savings, at the same time requiring to define a clear regulatory framework. Within the Italian legal system, it is of utmost importance to coordinate the implementation of the new Directive with the national rules currently compelling contracting authorities to adhere to contractual tools adopted by the national CPB Consip S.p.A. or to respect the price-quality parameters as inserted within the relative “conventions”<sup>46</sup>.

The evolution of the related legal framework is fragmented and not always coherent, especially regarding the obligation of adhesion to the contractual activity carried out by Consip S.p.A.<sup>47</sup>. Initially, the obligation to purchase through this legal entity was provided for State administrations<sup>48</sup>, while the other public administrations were obliged to

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<sup>44</sup> Directive 2014/24/EU, cit., Art. 37, par. 4.

<sup>45</sup> Directive 2014/24/EU, cit., Art. 37, par. 2.

<sup>46</sup> G. Giovannini, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 7. See G. M. Racca, *Public Contract – Annual Report 2012*, in *Ius Publicum Network Review*, Issue no. 3/2012, 11 and ff.

<sup>47</sup> Organisation for Economic Co-operation and Development, *Centralised Purchasing Systems in the EU*, 11 gennaio 2011, in [http://www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union\\_5kgkgqv703.xw-en](http://www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkgqv703.xw-en); S. Zuccolotto – L. Minganti, *Evoluzione storica del processo di acquisto della pubblica amministrazione*, in L. Fiorentino (ed. by), *Lo stato compratore. L'acquisto di beni e servizi nelle pubbliche amministrazioni*, Bologna, 2007, 60 e ss.; E. D'Alterio, *Luci e ombre del sistema degli acquisti delle pubbliche amministrazioni*, L. Fiorentino (ed. by), *Gli acquisti delle amministrazioni pubbliche nella Repubblica federale*, Bologna, 2011, 31 e ss.

<sup>48</sup> D.m. 24 February 2000, *Conferimento alla Consip S.p.A. dell'incarico di stipulare convenzioni e contratti quadro per l'acquisto di beni e servizi per conto delle amministrazioni dello Stato*.

ensure congruence with the quality/price parameters (*parametri prezzo e qualità*) set in the “conventions” concluded by the national CPB<sup>49</sup>.

At first, these commitments were strengthened<sup>50</sup> and extended also to entirely State-owned public and private entities, which therefore had to adhere to the conventions system<sup>51</sup>. At a later stage, these commitments were limited (by providing the obligation to use Consip S.p.A.’s conventions only for “purchase of goods and procurement of high-quality and low-labour-intensity services”<sup>52</sup> and then of “goods and services with national relevance”<sup>53</sup>) and then again extended<sup>54</sup> by including also National Healthcare Agencies<sup>55</sup>,

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<sup>49</sup> S. Ponzio, *La verifica di congruità delle offerte rispetto alle convenzioni Consip s.p.a. negli appalti pubblici di forniture e servizi*, in *Foro amm. CDS*, 2009, 2356. See also C. conti, sez. giur. reg. Valle d’Aosta, 23 November 2005, n. 14, in *Foro amm. CDS*, 2005, 3473, with an article of G. Astegiano, *Acquisto di beni e servizi da parte degli enti territoriali e responsabilità del funzionario incaricato*. See also: G. M. Racca, *Aggregate models of public procurements and secondary considerations*, in R. Caranta - M. Trybus (ed. by), *The Law of Green and Social Procurement in Europe*, Djøf Publishing, Copenhagen, 2010, 165-178.

<sup>50</sup> L. 23 December 2000, No. 388, Art. 58; l. 28 December 2001, No. 448, Art. 24, par. 6-8.

<sup>51</sup> L. 28 December 2001, No. 448, Art. 32; l. 27 December 2002, No. 289, Art. 24.

<sup>52</sup> D.l. 24 June 2003, No. 143, Art. 5, par. I, (a), converted in l. 1° August 2003, No. 212

<sup>53</sup> L. n. 24 December 2003, No. 350, Art. 3, par. 166.

<sup>54</sup> D.l. 12 July 2004, No. 168, *Interventi urgenti per il contenimento della spesa pubblica*, Art. 1, converted in l. 30 July 2004, No. 191. See also: l. 23 December 2005, No. 266, art. 1, c. 22, and l. 27 December 2006, No. 296, Art. 1, par. 449.

<sup>55</sup> D.l. 6 July 2012, No. 95, *Disposizioni urgenti per la revisione della spesa pubblica con invarianza dei servizi ai cittadini*, Art. 13, par. 15, (d), converted in l. 7 August 2012, No. 135. See also: P. Amovilli, *Obbligatorietà delle convenzioni Consip e nullità del contratto*, in *Urb. e app.*, 2014, 269.

institutes and schools of all levels, education and university institutions<sup>56</sup> and, for what concerns below-European-threshold contracts, local entities<sup>57</sup>, within the entities obliged to make recourse to the national central purchasing body, the violation of such obligation entailing the invalidity of the contracts possibly concluded in violation of the obligation, a disciplinary offense and the administrative liability of the civil servant<sup>58</sup>.

The new Directive confers more legal certainty to cooperation among contracting authorities (included CPBs) from different Member States for the joint award of public procurement contracts, framework agreements and contracts under a dynamic purchasing systems<sup>59</sup>.

The Directive establishes that – unless the necessary elements have been regulated by an international agreement concluded between the Member States concerned – the participating contracting authorities shall conclude an agreement<sup>60</sup>, that determines the responsibilities of the parties and the relevant applicable national provisions, as well as the internal organization of the procurement procedure which includes the management of the

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<sup>56</sup> L. 24 December 2012, No. 228, *Legge di stabilità per il 2013*, Art. 1, par. 149. Italian Ministero dell’Istruzione dell’Università e della Ricerca, 5th March 2013, circolare n. 2674 e 20th March 2013, circolare n. 3354.

<sup>57</sup> L. 7 August 2012, No. 135. T.A.R. Sardegna, Cagliari, I, 8th May 2013, No. 361.

<sup>58</sup> See also: Cons. St., III, 27th March 2014, No. 1486.

<sup>59</sup> S. Arrowsmith, *The Law of Public and utilities Procurement. Regulation in the EU and UK*, cit., 1101 et seq.; C. Risvig Hamer, *Regular purchases and aggregated procurement: the changes in the new Public Procurement Directive regarding framework agreements, dynamic purchasing systems and central purchasing bodies*, in *Public Procurement Law Review*, 2014, 201 et seq. See also: UK Government, *A brief guide to the EU public contracts Directive (2014)*, February 2015, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/407236/A\\_Brief\\_Guide\\_to\\_the\\_EU\\_Public\\_Contract\\_Directive\\_2014\\_-\\_Feb\\_2015\\_update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407236/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Feb_2015_update.pdf).

<sup>60</sup> Directive 24/2014/UE, cit., Art. 39, par. 4.



procedure, the distribution of the works, supplies or services to be procured and the conclusion of contracts<sup>61</sup>. An implementation of the EU principle of administrative cooperation is provided, as required by the Treaty on the Functioning of European Union, which enables the EU to “support the efforts of Member States to improve their administrative capacity to implement Union law”<sup>62</sup>.

Lastly, “joint entities” may be established by contracting authorities from different Member States in order to attribute to such joint entities the task of carrying out the award procedure. The European grouping of territorial cooperation (EGTC)<sup>63</sup> is expressly mentioned as a legal instrument that may be used to implement such model of aggregation. The provision considers also “other entities established according to the Union law”, thus allowing the establishment of legal entities which could act as CPBs at the European level. In this case, the determination of responsibilities of the parties and the relevant applicable national provisions as established within the parties’ agreement will be integrated by the European regulations on the conflict-of-law rules<sup>64</sup> thus allowing to choose to apply a different law to the execution of the contract.

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<sup>61</sup> Directive 24/2014/UE, cit., Art. 39, par. 4.

<sup>62</sup> Treaty on the Functioning of the European Union – TFEU, Artt. 6 and 197 TFEU. See also F. Cortese, *Il coordinamento amministrativo. Dinamiche e interpretazioni*, Milan, 2011, 140 – 141. See: H. Caroli Casavola, *Public Procurement and globalisation*, in *Ius Publicum Network Review*, Issue no. 3-4/2012, 13 and ff.

<sup>63</sup> Directive 24/2014/UE, cit., Art. 39, par. 5.

<sup>64</sup> Directive 24/2014/UE, cit., Whereas No. 73, where is mentioned the Regulation 593/2008/EC, on the law applicable to contractual obligations cd. Rome I. G. M. Racca, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 15. See also: Id. G. M. Racca, *Le centrali di committenza nelle nuove strategie di aggregazione dei contratti pubblici*, in *Rapporto Italiadecide 2015, Bologna, Il Mulino, 2015*. G. M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, cit. 243 et seq.

The objective of an EGTC is to promote and facilitate a territorial cooperation (cross - border, transnational or interregional) among its member which may be Member State, Regional or Local authorities or bodies governed by public law. This instrument - initially limited to the implementation of territorial cooperation programs or projects co-financed by the Community through the European Regional Development Fund, the European Social Fund and/or the Cohesion Fund<sup>65</sup> - could become in the new perspective one of the most innovative instrument for fostering cooperation among Member States also in order to set a joint public procurement at a European level. Indeed an EGTC is a legal instrument capable of providing a strong legal basis for cross-border cooperation.

In order to improve efficiency and effectiveness in collaborative procurements, the use of innovative contractual tools, such as framework agreements or dynamic purchasing systems could innovate the procurement system.<sup>66</sup> The EU Directive provides that the framework agreements may be concluded with one or more economic operators by defining all the provisions in the agreements to be signed (“closed” framework agreement or framework contract) or *viceversa* the definition of some conditions may be left up to a reopening of competition (mini-competition) so that contracting authorities may later adjust them to their needs (“open” framework agreement or framework agreements *stricto sensu*)<sup>67</sup>. A further possibility provides additional flexibility allowing to conclude a

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<sup>65</sup> Regulation 1082/2006, cit., Article 7(3). Nevertheless, an EGTC may carry out other specific actions of territorial cooperation also without a financial contribution from the Community, with the possibility however for Member States to limit the tasks that an EGTC may carry out without the EU financing. INTERACT, ‘European Territorial Cooperation post 2013 – Position Paper’, available at [http://www.interact-eu.net/downloads/2152/INTERACT\\_Position\\_Paper\\_ETC\\_beyond\\_2013\\_07\\_2010.pdf](http://www.interact-eu.net/downloads/2152/INTERACT_Position_Paper_ETC_beyond_2013_07_2010.pdf).

<sup>66</sup> OECD (Organisation for Economic Co-operation and Development) (2011) *Centralised Purchasing Systems in the EU*, January 11 2011, at [www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union\\_5kgkgv703xw-en](http://www.oecd-ilibrary.org/governance/centralised-purchasing-systems-in-the-european-union_5kgkgv703xw-en).

<sup>67</sup> Directives 2004/18/EC and 2004/17/EC, cit. ; G. M. Racca, G. L. Albano, *Collaborative Public Procurement and Supply Chain in the EU experience*, cit., 179-213.

framework agreement that sets out all the terms, with a partial subsequent reopening of competition among the economic operators parties to the framework agreement<sup>68</sup>.

Framework agreements could favor the development of SMEs promoting their entrance in the relevant market and preventing an excessive concentration of contracts awarded to the larger undertakings. In this perspective, competition could be achieved by splitting contracts into territorial or product-based lots, possibly integrated by the determination of a maximum number of lots that can be awarded to one bidder. If there are not enough competitors among the smaller firms, an alternative way to ensure efficient competition might be to group several purchases into one contract, in order to attract potential competitors from other Member States<sup>69</sup>.

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<sup>68</sup> Directive 24/2014/UE, cit., Whereas No. 61 and Art. 33. Where this possibility has been stipulated by the contracting authorities in the procurement documents for the framework agreement. The choice of whether specific works, supplies or services shall be acquired following a reopening of competition or directly on the terms set out in the framework agreement shall be made pursuant to objective criteria, which shall be set out in the procurement documents for the framework agreement. These procurement documents shall also specify which terms may be subject to reopening of competition.

<sup>69</sup> EU Commission, *Green Paper on the modernisation of public procurement policy*, cit., 30. G. Albano, Demand aggregation and collusion prevention in public procurement, in G. M. Racca – C. R. Yukins, *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in public Procurement Internationally*, Bruxelles, Bruylant, 2014, 161. A. Sánchez Graells, *Prevention and deterrence of bid rigging: a look from from the new EU Directive on public procurement*, ivi, 186-191. Id, *Public Procurement and the EU competition rule*, Hart Publishing, Portland, 2011, 54 et 55.

#### **4. THE NEW CHALLENGES OF EU-FUNDED PROJECTS TO PURCHASE INNOVATIVE SOLUTIONS AT EUROPEAN LEVEL**

The cooperation among public administrations from different Member States (European territorial cooperation) stands out as one of the objectives of the 2007-2013 EU cohesion policy<sup>70</sup>. With regards to public procurement – although the legal provisions of the previous directive<sup>71</sup> implicitly allowed for cross-border joint public procurement<sup>72</sup> - both legal and practical difficulties have been highlighted by the EU institutions within the new rules on public procurement<sup>73</sup>. Such difficulties are mostly due to conflicts between national public procurement rules and to barriers (e.g. linguistic ones) preventing the recourse to other Member States' CPBs<sup>74</sup> or the joint cross-border award of public contracts.

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<sup>70</sup> The reference is to the INTERREG initiative with the forecast of forms of cross-border, transnational and interregional cooperation. This initiative is funded by the European Regional Development, as an implementation of the principle of administrative cooperation established by the Treaty on the Functioning of the European Union.

<sup>71</sup> Directive 2004/18/EC, cit.

<sup>72</sup> Directive 2014/24/EU, cit., Title II, Chapter II (Artt. 33-39), on *Techniques and instruments for electronic and aggregated procurement*. See also the Whereas No. 97.

<sup>73</sup> Directive 2014/24/EU, cit., Whereas No. 73

<sup>74</sup> G. M. Racca, *Le modalità organizzative e le strutture contrattuali delle aziende sanitarie*, in A. Pioggia – M. Dugato – G. M. Racca – S. Civitarese Matteucci (ed. by), *Oltre l'aziendalizzazione del servizio sanitario. Un primo bilancio*, FrancoAngeli, Milan, 2008, 280 et seq.; G. M. Racca, *Joint Procurement Challenges in the Future Implementation of the New Directives*, in F. Lichère – R. Caranta – S. Treumer (ed. by) *Modernising Public Procurement: the New Directive*, DJØF Publishing, Copenhagen, 2104, 225-254; R. Caranta, *Le centrali di committenza*, in M. A. Sandulli - R. De Nictolis - R. Garofoli (eds.), *Trattato sui contratti pubblici*, Milan, 2008, II, 607-622.

In order to overcome these obstacles, the European Union<sup>75</sup> promoted innovation in public procurement both through public procurement of innovation (PPI) – in order to buy existing innovations that don't need new research and development – and pre-commercial procurement (PPC) that “can be used when there are no near-to-the-market solutions yet and new R&D is needed”<sup>76</sup>.

In such a perspective the European Union supported the establishment of European public purchasers' networks<sup>77</sup>, at first within some programs such as the *Competitiveness and Innovation Framework Programme* (CIP)<sup>78</sup> and the *Framework Programme for Research and Technological Development* (FP7)<sup>79</sup> and subsequently under the *Horizon 2020 Strategy* with the goal to identify, develop and test innovative solutions. Within such initiatives, the EU supports both the most innovative SMEs in the reference markets and the Member States for purchasing these solutions, by providing specific budgetary funds, by favoring cooperation between procurers from across Europe, and by supporting the networking activities of procurers in public procurement of innovations also by co-funding the initial call for tenders.

Several EU-funded projects have concerned procurement involving contracting authorities from different Member States. These include projects in which one of the

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<sup>75</sup> EU Commission, DG Enterprise and Industry, *The lead market initiative*, 2009.

<sup>76</sup> For more details see: <http://ec.europa.eu/digital-agenda/en/innovation-procurement>.

<sup>77</sup> Among the trans-national networks established see for example: “Enprotex”, (<http://www.firebuy.gov.uk/home.aspx>); “Sci-Network” (<http://www.iclei.org/index.php?id=796>). And “Lcb-Healthcare” (<http://www.bis.gov.uk/>).

<sup>78</sup> <http://ec.europa.eu/cip/>. See also: Programme for the Competitiveness of enterprises and SMEs (COSME) 2014-2020.

<sup>79</sup> [http://ec.europa.eu/research/fp7/index\\_en.cfm](http://ec.europa.eu/research/fp7/index_en.cfm)

partners had the role to procure supplies, services and works relevant to the objectives of the specific project, acting as a central purchasing body<sup>80</sup>. Moreover, many projects were related to public procurement of innovation (PPI) as well as to pre-commercial procurement (PCP)<sup>81</sup>, therefore promoting innovation in the market. As to PPI, several public procurement experiences involved collaborative cross-border procurement, as well as the delivery of common specifications across Member States<sup>82</sup>.

The aforementioned HAPPI Project was founded under the *Competitiveness and Innovation Framework Programme (CIP)*. The related call aimed to overcome the “lack of knowledge and expertise in contracting authorities” as well as the “lack of innovative (financial or personnel) capability in public organizations” due to the scarcity of resources dedicated<sup>83</sup>.

This perspective allows to achieve both the product-related innovation - defined as “the implementation of a new or significantly improved product, service or process” (what to buy) - and the innovation in the organizational and contractual models for procurement.

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<sup>80</sup> Alpine Space Programme, website <http://www.alpine-space.eu/>.

<sup>81</sup> SILVER (Supporting Independent LiVing for the Elderly through Robotics) Project (website: <http://www.silverpcp.eu/>).

<sup>82</sup> FIRED-uP (FIRE services Develop innovative Procurement) Project, (website: <http://www.fired-up.eu/> ); PRO-LITE (Procurement of Lighting Innovation and Technology in Europe) Project (website <http://www.prolitepartnership.eu/> ); EcoQUIP Project (website <http://www.ecoquip.eu/> ); InnoBuild Project, (website <http://www.innobuild.eu/> ); Innobooster inLIFe Project (website <http://www.innobooster.eu/about-innobooster/> ); SPEA (Smart Procurement European Alliance) Project (website <http://www.speaproject.eu/> ); SYNCRO Project (website <http://www.syncromobility.eu/> ).

<sup>83</sup> See the Call ENT/CIP/11/C/N02C011 – EU Commission, DG Enterprise & Industry available at [http://www.vpt.lt/vpt/uploaded/2012/metodologija/Inovatyviu%20viesuju%20pirkimu%20pletra\\_angl.pdf](http://www.vpt.lt/vpt/uploaded/2012/metodologija/Inovatyviu%20viesuju%20pirkimu%20pletra_angl.pdf).

This latter plays a fundamental role as it involves a change in the procedures for selection of the awardees while calling for a re-organization of contracting authorities.

The promotion of innovative public procurement takes place both during the “preparatory” phase and during the “implementation” phase. In the former case, by stimulating the cooperation among European contracting authorities, by building networks for favouring joint procurement and thus leading to a full accomplishment of the Single Market goals. In the latter case, through the achievement of a co-funding by the European Union for supporting the realization of the innovative public procurement.

The HAPPI project realizes an important cross-border public procurement whose elaboration has been developed by a consortium of European partners that includes healthcare CPBs, innovation and procurement experts and academic institutions among which the University of Turin<sup>84</sup>. The project is based on the experiences and practices of the CPBs equipped with the largest goods and services buying capacity which has been endorsed by establishing a network among the public purchasers in Europe.

The HAPPI project aims to establish a strategic cooperation among healthcare CPBs from several EU Member States that is also open to others Member State. The cooperation among HAPPI partners pursues the objective to overcome legal and linguistic barriers among EU Member States by stimulating innovation in "how to buy". The related network aims to favour the European joint procurement and overcome the public demand fragmentation according to the spending-review and innovation-boosting priorities established within the *Strategy Europe 2020*. The project is directed to perform an

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<sup>84</sup> HAPPI has 12 European partners from France (Réseau des Acheteurs Hospitaliers d’Ile-de-France, Ecole des Hautes Etudes en Santé Publique (EHESP), BPIFRANCE), the United Kingdom (NHS Commercial Solutions, BITECIC Ltd), Germany (ICLEI - Local Governments for Sustainability), Italy (University of Turin and Società di Committenza Regione Piemonte), Belgium (MercurHosp – Mutualisation Hospitalière), Luxembourg (Fédération des Hôpitaux Luxembourgeois (FHL), Austria (The Federal Procurement Agency (FPA) – Associate partner) and Spain (FIBICO – Associate partner).

aggregated purchase at the European level of innovative solutions for active and healthy ageing, also through market-analysis.

The joint procurement within this project has been preceded by an in-depth Legal Study<sup>85</sup> that pointed out the different techniques and instruments for aggregated procurement at National and European level in order to develop the most suitable model for the HAPPI consortium, to check the feasibility of joint cross-border procurement and to identify the optimal organizational and contractual model.

The chosen model was to delegate the French CPB<sup>86</sup> (acting as partner and coordinator of the whole project) to conclude a Framework Agreement (without commitment to buy) with different lots establishing all the terms and identifying a single economic operator for each lot, on behalf of the other procurers of the consortium, within the French legal institute of «*groupement de commande*». The HAPPI project might anticipate the solution considered by the new Directive opening for all the partners the possibility of using the activity offered by the French CPB, through a proxy or the adhesion to an award procedure of such CPB<sup>87</sup>.

In order to apply this model the public procurers of the HAPPI consortium signed an «Agreement establishing the European purchasing group “Innovative Solutions for Healthy Ageing- HAPPI» (an European *groupement de commande*), according to Art. 8 of

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<sup>85</sup> The legal study within this project has been conducted by the University of Turin, Management Department (Scientific Responsible: Prof. Gabriella M. Racca, Professor of Administrative Law).

<sup>86</sup> *Groupement d'Intérêt Public (GIP) -Réseau des acheteurs hospitaliers d'Ile-de-France (RESAH IDF)*.

<sup>87</sup> Directive 24/2014/UE, cit., Art. 2, par. 14-15-16 and Artt. 37-39, see also: Directive 2014/25/EU, Artt. 2, par. 10-11-12 and Artt. 55-57. See: G. M. Racca, *Le prospettive dell'aggregazione nell'amministrazione dei contratti pubblici*, in *ApertaContrada*, 2014, available at <http://www.apertacontrada.it/2014/01/15/le-prospettive-dellaggregazione-nellamministrazione-dei-contratti-pubblici>, cit.



the French *Code des Marchés Publics*<sup>88</sup> as a legal entity for conducting the award procedure. A great effort to harmonize the rules according to the different legal system has been done. The agreement permits to delegate the French CPB for the conduction of the award procedure, in accordance with European Union law and French national law, and to regulate all the elements connected with the allocation of roles and responsibilities to the partners.

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<sup>88</sup> The legal institute of the “Groupement de commandes”, stipulated by the French, is an organizational model for public procurement that allows coordination among different entities, allowing to award a contract to an economic operator as a result of a single tender procedure. The “groupement” is established through an agreement, which may also be amended or extended, if necessary. See : Mission interministérielle pour la qualité des constructions publiques,, *Recommandations pour la mise en œuvre d’un transfert de maîtrise d’ouvrage ou d’un groupement de commandes*, September 2006, available at [http://www.archi.fr/MIQCP/IMG/pdf/mediations\\_no\\_15.pdf](http://www.archi.fr/MIQCP/IMG/pdf/mediations_no_15.pdf). The “groupement de commandes” is well established for several years in the region of Paris and Ile de France. Resah-idf was involved in other “groupement de commande” before this project. See: M. Hehn - L. Bertrand - M.-P. Gagaille - A. Ancedy - M. Talbert, *Groupement de commandes de pansements: quel bénéfice pour la qualité des soins?*, in *JPC - Journal des plaies et cicatrisations*, 2011, no. 77, 6-12, available also at [http://www.resah-idf.com/fichiers/Groupement\\_de\\_commandes\\_de\\_pansements\\_quel\\_b\\_n\\_fice\\_pour\\_la\\_qualit\\_des\\_soins\(17\).pdf](http://www.resah-idf.com/fichiers/Groupement_de_commandes_de_pansements_quel_b_n_fice_pour_la_qualit_des_soins(17).pdf). For further examples of the use of the “Groupement de commandes”, even in different contexts, see : Hydratec, *Schema directeur d’alimentation en eau potable du bassin versant de la romanche – Rapport final*, February 2013, available at <http://polytechnique.oieau.fr/AERMC/sdaep-romanche-rapport-final-la-morte-v3.pdf>; and its contract notice available at <http://ted.europa.eu/udl?uri=TED:NOTICE:211522-2009:TEXT:FR:HTML>. In the mentioned case, the award procedure was related to the acquisition of a study for a master plan on drinking water (“Intitulé attribué au marché par le pouvoir adjudicateur: Elaboration du schéma directeur eau potable du bassin versant de la Romanche”). The “Groupement de commandes” finds no consideration into Italian legal system. In the French Code des Marchés Publics, the “groupement de commande” is regulated by Art. 8. See: A Taillefait, « Coordination, groupement de commandes et centrale d’achats », *Juris Classeur Contrats et Marchés Publics*, f. 50. D. Peljak, « La réforme du code des marchés publics et le groupements d’achats locaux », *AJDA*, 2001, p. 927. B. Roman Sequense, *Où en est-on de la rationalisation de l’achats hospitalier ?* », *Contrats et Marchés Publics*, n. 3 / 2008, comm. 64. Y.-R. Guillou, « Le différentes formes d’achats groupés », *Actualité de la commande et des contrats publics*, 2001, p. 4. A. Mourier, “Compétence managériales et modernisation de la fonction achat dans les hôpitaux public français”, *techniques hospitalières*, 2010, p. 29.

On the basis of the aforementioned framework agreement each procurer will, in turn, award contracts based on the framework agreement and execute them according to the respective national legal system and through "purchasing orders". Also in such a perspective an effort to harmonize terms and conditions for the subsequent contracts has been done<sup>89</sup> for the final goal of a common legal framework during the execution phase of the contract complying with the national mandatory legal provisions.

The framework agreement could be used by the partners of the project as well as by other interested contracting authorities, thus realizing the sharing of advantages and risks related to the purchase of innovative products still not widespread within the market.

The added value of the HAPPI project seems to be the achievement of the real cross border joint procurement overcoming the legal and linguistic barriers, with the publication of the contract notice and of the tender documents, based on French law, in three different languages<sup>90</sup>.

## **5. THE NEED OF PROFESSIONALIZATION FOR INTEGRITY AND EFFICIENCY IN PUBLIC PROCUREMENT**

The implementation of the new Directive within the several national legal systems could be the chance for a simplification of rules and award procedures in order to truly endorse the tools provided by the European Directive thus overcoming formalisms and

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<sup>89</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, *amending council directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.*

<sup>90</sup> English, French, Italian.

other legal barriers<sup>91</sup> that have often represented obstacles to fair competition and therefore to the quality of life of citizens<sup>92</sup>. The legislative complexity<sup>93</sup> as well as the high formalism of the procurement procedures are particularly evident in Italy and they can determine a violation of the EU principles of equal treatment and non-discrimination, hindering participation of business, especially of the foreign ones<sup>94</sup>.

The simplification of the organizational models for aggregating public procurement in the EU legal framework gives the chance for rationalising the general regulatory system on public procurement for a proper implementation of the new principles.

First of all, a structural re-organization of public administration entrusted of purchasing power is needed. In the Italian legal system, this implies re-defining the public procuring function, which until today has been delegated to more than 37.000 contracting authorities<sup>95</sup>. Within the new legal framework some important changes are expected toward

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<sup>91</sup> As it has been highlighted, it is hard to uphold the implementation of the 90 articles of the previous directive on public procurement through the 616 articles of the Code of Public Contracts and the implementation regulation, above all if compared with other Member States' implementations (in France and in Spain the same Directive was implemented with almost 300 articles, in Great Britain with 49 articles). This circumstance highlight a significant legal barrier to the completion in the EU internal market: Cfr. G. M. Racca, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 13.

<sup>92</sup> G. M. Racca, *Le centrali di committenza nelle nuove strategie di aggregazione dei contratti pubblici*, in *Rapporto Italiadecide 2015*, cit.; G. M. Racca, *The Risks of Emergencies in Public Procurement*, in *Journal of Public Finance and Public Choice*, 2013, 105 et seq.

<sup>93</sup> G. Giovannini, Hearing to the Italian Senate, VIII Commissione, 14 January 2015.

<sup>94</sup> OECD, *Draft Recommendation of the Council on Public Procurement*, cit., recommendations No. III.

<sup>95</sup> Italian Authority for the Supervision of. Public Contracts for works, services and supplies, *Segnalazione ai sensi dell'art. 6, comma 7, lettera f), del decreto legislativo 12 aprile 2006, n. 163*, 12 January 2012, No. 1. Cfr. C.

a reduction of the total amount of these authorities, then entitling to public purchases only 35 CPBs (*soggetti aggregatori*)<sup>96</sup> and some smaller centres at provincial or sub-provincial level<sup>97</sup>. Limitations of the contracting powers are also extended to any municipality.

The opening of the EU Single Market to competition as well as the professionalization of public procurement workforce are functional steps to reach the needed capacity of procurement officials<sup>98</sup>.

The implementation of the new organizational models for aggregating public procurement requires professionalism in order to ensure the correct exercise of the renewed procuring function. The lack of this professionalism makes the organization inadequate to

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Cottarelli, *Proposte per una revisione della spesa pubblica (2014-16)*, available at <http://download.repubblica.it/pdf/2014/economia/cottarelli.pdf>.

<sup>96</sup> D.L. 24 April 2014, N. 66, *Misure urgenti per la competitività e la giustizia sociale*, Art. 9, converted with amendments in Law 23 June 2014, No. 89. Cfr.: D.L. 24 June 2014, No. 90, *Misure urgenti per la semplificazione e la trasparenza amministrativa e per l'efficienza degli uffici giudiziari*, Art. 22, c. 7, converted with amendments in Law 11 August 2014, No. 114.

<sup>97</sup> See the Italian Public Contracts Code, d.lgs. 12 April 2006, No. 16, Art. 33, c. 3*bis*, where it refer to "unions of municipalities" (unioni di comuni – d.lgs. 18 August 2000, No. 267, Art. 32), consortium agreements among municipalities or provinces which alternatives to the use of "soggetti aggregatori".

<sup>98</sup> S. Arrowsmith - P. Kunzlik, *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, Cambridge, 2009. For an analysis of public expenditure see: EC Commission, *A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future*, 3rd February 2004; EU Commission, *Commission staff working paper – implementation report SEC(2003)33*, 14<sup>th</sup> January 2003. See F. Merloni, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 33, who underlines that In the Italian legal system, in order to promote the new organizational models as defined by the European Directive on public procurement it is therefore needed, on one hand, to build up "public administrations of excellence".

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carry out the given competences<sup>99</sup>. In fact public administrations have not only to ensure efficiency by duly spending public funds, but they also have to safeguard effectiveness in using public powers and - even before - the capacity of achieving results and thus the suitability of the organization to satisfy the interests delegated<sup>100</sup>.

In this perspective the CPB stands out as an answer to the needs of effectiveness and efficiency of the administrative action; it also represents the structural model for public administrations to keep on delivering services to the users - controls on procurement performances included - by delegating or aggregating the procuring of goods, services and works to entities with the needed and adequate professionalisms they lack<sup>101</sup>.

It the EU Single Market the need for extending the scope of benchmarking and the implementation of CPBs models are more and more pressing. Indeed, the provision of centralised purchasing activities by a CPB located in a different Member State offers to the national contracting authorities concrete alternatives with regard to the national CPBs. The latter, in turn, shall compete with European similar entities within a range which shall take form of a direct competition among public procurements conducted on the same products

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<sup>99</sup> G. M. Racca, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 12 Id., *Le centrali di committenza nelle nuove strategie di aggregazione dei contratti pubblici*, in *Rapporto Italiadecide 2015*, cit., where it is reported that the lack professionalism cause not only the lack of competence or attribution, but represents a parameter of the constitutionality of different state and regional laws (Art. 118, c. I, Italian Constitution).

<sup>100</sup> S. Ponzio, *La valutazione della qualità delle amministrazioni pubbliche*, Roma, 2012, 16. See also: D. McBride, *Strategic Management Model for Public Organisations: Looking for Effective, Efficient, Transparent, Ethical and Accountable Organisations*, June, 2008, Maxwell School of of Citizenship and Public Affairs, in <http://danielmcbride.net>.

<sup>101</sup> G. M. Racca, *Le prospettive dell'aggregazione nell'amministrazione dei contratti pubblici*, in *ApertaContrada*, 15 January 2014, available at <http://www.apertacontrada.it/2014/01/15/le-prospettive-dellaggregazione-nellamministrazione-dei-contratti-pubblici/>.

and leads to buying from different framework agreements<sup>102</sup>. This perspective could at last results in a competition among legal framework models whose outcome will consist in identifying the CPB as well as the national law to be applied to the joint procurement<sup>103</sup>.

The new professional organizations are required to perform their functions within the European Single Market by realising public-public partnerships with similar entities for a true requalification of public spending. The aggregation of public procurement should not consist in a sum of public tenders or in adding together human resources lacking of adequate professionalisms both considering the need of inter-disciplinary education and the need of a periodic updating due to the continuous changes in the legal framework<sup>104</sup>.

CPBs' capacities should not be evaluated just by taking into account the needed and proper professionalism for adequately conducting the award procedures, the drafting of contract terms and the related market-analysis and benchmarking activities but also by considering the adequacy of goods and services purchased. The latters are necessary for properly accomplishing the tasks delegated even for favouring the use, on large scale, of the new contractual tools such as framework agreements and for taking advantages of e-procurement devices and data-bases which ensure transparency and procuring officials' accountability.

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<sup>102</sup> R. Cavallo Perin, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 42.

<sup>103</sup> G. M. Racca, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 13.

<sup>104</sup> G. M. Racca, *Le centrali di committenza nelle nuove strategie di aggregazione dei contratti pubblici*, in *Rapporto Italiadecide 2015*, cit., where are highlighted the problems connected to the use of joint procurement as a means to collect awarding procedure without a previous strategy and a market analysis; A. Zito, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 25.

The “procurement workforce” has been identified as “a *pillar* of a public procurement system” because of the impact of the related functions “on the effectiveness and integrity of a public procurement system”. Considering that “procurement workforce” is susceptible to corruption, a strategy to fight corruption e to promote integrity in public procurement is needed and it can be pursued through “laws, regulations and oversight but also by enhancing the capabilities and qualifications of the public procurement officials”<sup>105</sup>.

In a different perspective it is also needed to reduce the excessive formalism that is still a feature of public award procedures, particularly in the Italian legal system: formalism causes inefficiency without helping compliance with the principles of equal treatment and non discrimination, having rather been, indeed, a tool through which economic operators could drive public award procedures’ outputs to their own benefit<sup>106</sup>.

In order to ensure integrity in public procurement, new technologies and interoperability of databases will favour the exchange of information and the comparison of data among contracting authorities thus ensuring a coordination of the measures needed for realizing publicity, simplifying contracting authorities’ activities and reducing the administrative burdens on economic operators. By doing so it will be possible to monitor time and quality of public award procedures and, under a different perspective, the

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<sup>105</sup> See P. T. McKeen, *Conference: Presentation of the book Integrity and efficiency in sustainable public contract. Balancing corruption concerns in public procurement internationally*, eds. By G. M. Racca and C. R. Yukins, Rome, *Scuola Nazionale dell’amministrazione*, December 17th, 2014, section V: The need for professionalization in the procurement market. See also: A. Zito, *Conference: Presentation of the book Integrity and efficiency in sustainable public contract. Balancing corruption concerns in public procurement internationally*, cit. section II: Corruption at the award phase.

<sup>106</sup> G. M. Racca – C. R. Yukins, *Integrity and Efficiency in Sustainable Public Contracts. Balancing Corruption Concerns in public Procurement Internationally*, Bruxelles, Bruylant, 2014. See also S. Rose-Ackerman, *Corruption and Government. Causes, consequences and reform*, Cambridge University Press, Cambridge, 1999, 59 et seq.

performance rating and economic operators' reputation addressing the needed participation criteria<sup>107</sup>.

In this context the innovation and the use of new technologies may favour transparency and ensure controls on the PP procedures by specific authorities as well as economic operators, stakeholders and citizens<sup>108</sup>. In this regard it is also needed to enhance the ex-post controls for discovering public officials' unlawful behaviours, e.g. through the improvement of the financial and human resources of the Anticorruption National Authority in order to make it able to accomplish its supervising and inspection tasks<sup>109</sup>.

Following this path it will be possible to promote an external control on public administration's contractual activity, thus enhancing public officials' accountability and safeguarding ethical principles and constitutional duties, and obliging those public officials to perform their function with discipline and honour<sup>110</sup>, thus contributing to the fight against corruption.

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<sup>107</sup> G. M. Racca, *Le centrali di committenza nelle nuove strategie di aggregazione dei contratti pubblici*, in *Rapporto Italiadecide 2015*, cit.

<sup>108</sup> OECD, *Draft Recommendation of the Council on Public Procurement*, cit., recommendations No. V.

<sup>109</sup> F. Merloni, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 33.

<sup>110</sup> G. M. Racca, *Le centrali di committenza nelle nuove strategie di aggregazione dei contratti pubblici*, in *Rapporto Italiadecide 2015*, cit.; R. Cavallo Perin, *Appalti Pubblici: innovazione e razionalizzazione. Le strategie di aggregazione e cooperazione europea nelle nuove Direttive*, cit., 42. G. M. Racca – R. Cavallo Perin, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent Against the Lack of Loyalty*, in *Ius Publicum Network Review*, n. 1/2014, www.ius-publicum.com and in G.M. Racca - C.R. Yukins (eds. by), *Integrity and Efficiency in Sustainable Public Contracts*, Bruxelles, Bruylant, 2014, 23-48. R. Cavallo Perin, *L'etica pubblica come contenuto di un diritto degli amministratori alla correttezza dei funzionari*, in F. Merloni – R. Cavallo Perin (eds. by), *Al servizio della nazione, Etica e statuto dei funzionari pubblici*, Milano, Franco Angeli, 2009, 147-161.