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The Green Paper on the modernization of public procurement policy of the EU: Towards a socially-concerned market or towards a market-oriented society?

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Abstract

The Green Paper on the modernization of public procurement policy of the European Union launched a reflection on how such EU rules can contribute to fulfill the objectives proposed in the Europe 2020 strategy. This paper analyzes its proposals and identifies its inconsistencies. In particular, it is stressed how European integration has subverted the order of priorities in public procurement rules, upgrading the promotion of the free market to the top of the list. An economic approach to the legal issue of public procurement seems to be the reason behind such reorganization of priorities. The conflict between political and economic rationalities, which underlies the Green Paper, gives rise to a number of questions, such as how targets other than free competition –mainly the social and environmental ones– shall be taken into account in public procurement; as well as to some proposals, for instance concerning the joint procurement by different administrations (in both the vertical and horizontal sense, and even encouraging a cross-border component), which seems to point to a reorganization of bureaucracy according to economic rationality. The paper, in a final step, aims at describing the (European) social model that implicitly underlies these proposals.

Key words

Public procurement; Green Paper; free competition; horizontal policies; economic rationale.

Resumen

El Libro Verde sobre la modernización de la política de contratación pública de la Unión Europea propone una reflexión acerca de qué modo las normas comunitarias sobre la materia pueden contribuir a hacer realidad los objetivos propuestos en la estrategia Europa 2020. En este trabajo se analizan las propuestas recogidas en el

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Libro Verde y se identifican sus incoherencias. En particular se hace hincapié en cómo el proceso de integración europea ha alterado el orden de prioridades de las normas de contratación pública, elevando la promoción del libre mercado a la cúspide de las mismas. La razón de esa reorganización de prioridades parece radicar en la aplicación de un enfoque economicista a la cuestión jurídica de la contratación pública. El conflicto entre las racionalidades económica y política, que también subyace en el Libro Verde, da lugar a una serie de preguntas tales como cómo deben ser tenidos en cuenta objetivos distintos a la libre competencia (fundamentalmente los sociales y medioambientales) en los procedimientos de contratación pública, así como a algunas propuestas, por ejemplo referidas a la contratación conjunta por varias administraciones (tanto en sentido horizontal como vertical, e incluso fomentándose el componente transfronterizo), lo que parece apuntar a la reorganización del aparato administrativo conforme a la racionalidad económica. El trabajo, en último término, pretende describir el modelo social (europeo) que tácitamente implican estas propuestas.

Palabras clave

Contratación pública; Libro verde; libre competencia; políticas horizontales; enfoque economicista.

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1. Introduction

At the beginning of 2011, the European Commission published the *Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market* a document opening a public debate on the reform of the public procurement rules in the European Union as part of a broader Commission's strategy leading the EU to become "a smart, sustainable and inclusive economy" (European Commission 2010, p. 5). Such strategy, known as Europe 2020, is the following up of the previous Lisbon Strategy, which failed in the accomplishment of its goal of making the Union "the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion" (European Council 2000). As a consequence of such notorious failure, renewed efforts are now deployed in the current strategy.

The present paper constitutes a critical assessment of the Green Paper. Because the reform of public procurement rules is a work in process, the paper cannot deal with its follow ups and continuous developments and forcedly has to focus exclusively on the proposals contained therein. Moreover, analyzing and discussing in detail the legal and political consequences of each single proposal would require a more systematic effort than this is. Instead, in these pages I will focus in those aspects of the Green Paper which may be more controversial in constitutional terms, from both a political as well as a legal point of view.

The first question worth being posed is whether the Green Paper itself is the proper tool for establishing an adequate communication with society (below in section 2). Although such a query might seem not strictly connected with the revision of public procurement rules, I aspire to demonstrate that this issue is relevant for the thesis I will sustain along the paper, namely that instead of establishing an honest dialogue with society the Green Paper is itself biased. I claim that it supports and consolidates the particular way of understanding society which adapts market concepts and terminology to social practices in principle beyond the scope of the market. To this end, it will be relevant to look for the priorities and main interests of the proposed new public procurement rules, detailing what is the political relevance of public procurement, what are the reasons for reforming the European rules and how the procurement procedures are affected (following in section 3). Afterwards, we will explore the way targets other than free competition –mainly the social and environmental ones, but also those related to small and medium-sized enterprises– will be taken into account (section 4). On another note, the paper also explores the institutional consequences of the proposals included in the Green Paper, particularly of those concerning the joint procurement by different administrations in both the vertical and horizontal sense, and even encouraging a cross-border component, which seems to point to a reorganization of national bureaucracies and by extension of constitutional systems according to an economic rationality (section 5). After these analyses we will be in a position to clarify, in the concluding remarks, some features of the relationship between market and society that implicitly underlie to these proposals (section 6).

2. Some preliminary thoughts about Green Papers as vehicles for addressing society

Before exploring the contents and meaning of the *Green Paper on the modernisation of EU public procurement policy*, it is of the utmost interest to start by analyzing the tool itself, because if the reasons and arguments which follow prove right, in the European context Green Papers are as revealing about public procurement as their content may be. More specifically, my claim is that they are the result of a particular way of conceiving society based on the key concepts of the market, to which they contribute to consolidate. But in order to check the

correctness of such an assessment, a description of the tool and a brief overview of how it was inserted in the European Union are first required.

In the European context, Green Papers aim at establishing a direct relationship between the Commission and private actors, a relationship mainly related to the launch of a program of economic strategic relevance. Thus, they “usually start with an overview of the present situation and regulatory framework in a particular area and then identify the problems and challenges in this respect” (Senden 2004, p. 125). Because of the stage of the policy-making process at which it takes place, it has been considered a preparatory act. Furthermore, Senden claims that it is an example of “pre-law”, in contraposition to “post-law” and “para-law”. My objection to this statement is based on the fact that Green Papers do not (or at least not only) refer to law since they are not part of the legislative process, i.e. of the decision-making process at the European Union level. Instead, they mainly refer to policy: their aim is to contribute to the design of a regulatory policy, and therefore they shall be conceived as part of the policy-making process. Of course, this is not to deny their impact on the concrete solutions described in the particular content of each piece of legislation, but to state that the contribution of the Green Papers shall be considered more referred to the overall design of policies than to the particular drafting of legislation.

This understanding of the role of Green Papers is consistent with its origin in several constitutional systems, mainly common-law based (Senden 2004, p. 124), where they constituted a link between the executive and the legislative when designing certain policies. It seems plausible that this tool was adapted to the European Union context from the United Kingdom practice –indeed European institutions did not present Green Papers until the 1980’s, when the United Kingdom was fully aware of the policy-making process in the EU level. However, there is a radical difference between the Green Papers delivered in the national context, where they fulfil the abovementioned task of linking the executive and the legislative powers on occasion of some policy program,¹ and the Green Papers in the European context. Firstly, because the Commission cannot be properly considered an executive power –or, at least, it cannot be identified with an executive power with the ability of designing policies, as is the case in nation-state democracies. Its aim is limited to granting the implementation of the provisions of the Treaties and to fostering further integration. And secondly, and this is important, because such Green Papers are not addressed to a parliament or to a representative body, but to society in general and to institutionalized interests in particular. In this respect it should not be neglected that the tool was used by the European institutions precisely when the neoliberal thinking fostered by Margaret Thatcher, particularly concerned about diminishing the role the state has to play in society, was assumed by many of the European leaders, importantly Mitterrand among them.²

Combining and further developing both explanations, we could very well say that since the European integration process is not based on the political concept of separation of powers, but instead strikes a delicate balance between the different interests involved in the process (national, supranational, and democratic),³ the European Commission’s political program is not directly legitimated by the

¹ “In the UK, Green Papers are government policy documents for discussion *in parliament*” (Senden 2004, p. 124, emphasis added).

² Indeed, the key fact which allowed the hegemony of neoliberal policies in Europe was the U-turn of French socialists, recently in government, in the issue of capital controls (Abdelal 2007, pp. 58-65; Schmidt 1996, 94-105; Loriaux 1991, 214-240).

³ Each of these interests constitutes the rationale lying behind one the three institutions participating in the European Union’s decision-making process: the Council, the Commission and the European Parliament, respectively. The role they play in the legislative process, the majorities required, the veto points and possible blockages, they all conform an equilibrium which has been reflected in the principle of institutional balance. Majone (2005, p. 46) has pointed out that this concept finds its very foundation –or at least a precedent– in the medieval idea of “mixed government”.

European Parliament. Instead, it is mainly assessed depending on its performance, what has been labelled as “output legitimacy” (Scharpf 1999, pp. 10-23).⁴ Therefore, the only way of improving the legitimacy of its actions (what has been even more strongly required since the 80’s) is to consult civil society in order to know what results are expected from its activity. It is at this point when the tool of the Green Paper is replicated from the nation-state level and adapted to the European Union system.⁵

As a matter of fact, the results of such adaptation to the supranational level are far from perfect and reveal some of the main deficits of the European Union’s institutional and political system already mentioned. Nonetheless Green Papers present their own specific problematic issues. Firstly, instead of focusing on particular details of the norms in force which should be improved, they deal with all aspects of a particular policy field. Therefore, all previous achievements can be reassessed, and all kinds of changes can be proposed. As said above, the Green Paper refers to the whole policy-making process and not to the reform of single legal documents, which means that the content of the latter is subordinated to the decisions adopted in the former. Of course, this also happens in the national political and legal systems, but the peculiarity of the European Union to this respect is that because of its particular need of output legitimacy, private actors participate in the design of these general policies. This constitutes the second problematic issue of the Green Papers, since they open the door for taking into account the interests of private actors from the initiation of the political process. It goes without saying that gathering all the available information when planning policy developments seems the right way of proceeding, but this is far from accepting all information coming from private actors as reliable. Economic interests are the main reason for these actors to participate. Therefore, the pursuit of public/general interests cannot be equated with the defence of the results of this type of consultation. Furthermore, the initial stage of the policy process is highly important, not because final decisions can be adopted then, but because some different approaches and options can be excluded from that very moment. This is particularly true in the European Union, where legislative proposals are competence of the Commission, allowed to alter and even withdraw its proposal as long as the Council has not acted (article 293.2 TFEU). This provision ensures that the supranational interest, represented by the Commission, will always be part of European decisions. However, this basic premise can be easily distorted in case the Commission is captured (or at least influenced) by private interests. This seems to be what has happened so far. As a result, and this shall be considered the third problematic issue, Green Papers consolidate the bias towards market approach policies to the detriment of policies more sensitive to the general, public interests, a bias with which the European Union has been charged (Scharpf 1999, p. 83).

To exemplify what has been said so far, just consider the *Green Paper on the modernization of EU public procurement policy*. What private actors have to say about some very detailed, if not technical, matters is rather debatable. This is so, for instance, when the question is posed whether well-established legal categories such as works, supplies and services contracts should be reconsidered (European Commission 2011, p. 7). Resorting to the three problematic issues already identified, should such a legal figure, peacefully existent in many if not all of the national legal orders, be changed as a result of a new policy strategy coming from the supranational level? Should private economic actors have anything to say about

⁴ According to Max Weber’s categories originally published in 1922 (Weber 1978, pp. 212-301), output legitimacy, or in another word, effectiveness, would never be considered a way of legitimacy. Instead, Weber conceives it as a reason for obedience, since acceptance of the system depends on the results of governmental action, but he explicitly rejects the idea of it constituting a basis for legitimacy. Despite this, the concept of output legitimacy has been successfully adopted by, and is currently well settled in political science’s jargon.

⁵ On the (synthetic) constitutional concepts of ‘replication’, ‘adaptation’ and ‘experimentation’ see Fossum and Menéndez (2011, pp. 65-69).

such a change? Or, posing the question differently, why regular citizens without a direct economic interest in public procurement are not questioned about such an issue? And finally, if such change is operated in national legal orders, to what extent would it result from the interests of private actors?

Another example of the bias towards market-approach policies can be easily found in the same document when it deals with the scope of the Directives on public works, supplies and services contracts (in what follows Public Sector Directive).⁶ The Green Paper aims “to apply the standard regime to all service contracts” (European Commission 2011, p. 8), and therefore “[t]he introduction of any new exclusion [reducing the scope of the Directive] would certainly be a matter of concern” (European Commission 2011, p. 9). Consequently the question addressed to the private actors is drafted in such a way that exceptions to the general scope shall be reasoned, instead of justifying why a new approach shall be adopted:

“Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why”. (European Commission 2011, p. 9)

This bias towards the market approach in policy-making reinforces what is a structural problem in the European Union. Going back to the practice of private actors giving their opinion and therefore conditioning the political strategy to be adopted in public procurement rules, the underlying problem here is related to the prevalence of some rationality, in this case the economic one, over the others. According to an economic approach, the abolishment of the legal categories of public works, supplies and services contracts would be the solution to some efficiency problems, while according to the legal rationality such figures are part of any coherent and consistent legal order. The same differences between rationalities appear when the scope of the directives is reconsidered taking exclusively into account reasons of economic efficiency. Both examples refer to two basic tensions, namely a vertical one between the EU and its Member states (a competence dispute) alongside a horizontal one touching substantive issues (their different response to the conflict, according to the said different rationalities). The combination of these two dimensions results in the translation to the legal arena of what in critical comments of the Court of Justice of the European Union’s (CJEU) case law has been accurately defined as tri-dimensional “diagonal conflicts” (Joerges 2010, pp. 34-35 and 59-61).⁷

Thus, the root of the problem comes from the disembedding of the supranational economic system from the political system, a development of which the risks were already discussed in the 1940s by Polanyi (2001, pp. 74-80). As a result of such disembedding, the rules by which diagonal conflicts are actually solved in the European Union are of a legal nature –in particular checking if according to the distribution of competences the supranational level can act and, if so, guaranteeing the application of such measures via the principle of primacy. But, because of a long term development which at the end of the day has constitutionalized the free competition principle as well as the four economic freedoms, European Union law reflects an economic rationality. The prevalence of this rationality reduces the conflict to a two-dimension conflict which has led to the “horizontal application of the free movement provisions” (Schepel 2012, pp. 178-179). This is also true if we think about the World Trade Organization agreements, which constitute a constant

⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

⁷ When referring to public procurement and diagonal conflicts in the judicial realm, one is forced to mention the *Rüffert* case, where a provision of a tender proffered by a national authority requiring the tendering firms to respect the relevant (national) collective-bargaining agreements was deemed by the ECJ as contrary to the free provision of services (article 56 TFEU, ex-article 49 EC). See Case C-346/06, *Rüffert v Land Niedersachsen*, of 3 April 2008, [2008] ECR I-01989.

pressure in order to restrict all controls over the markets because of its reciprocity clause (Nicol 2010, pp. 75-77). Going on with the example of the scope of the Directives, the Commission expresses its concerns about the economic consequences in the context of the WTO of not changing such scope:

“In addition, such a distinction does not exist in most trading partners' systems. The current legal situation therefore makes it more difficult to obtain further market access commitments from trading partners since the EU is not in a position to reciprocate, especially on services that have become relevant for the internal market and cross-border trade”. (European Commission 2011, p. 8)

The addition of all these different features leads to a scheme in which one has to choose between applying either the supranational highly economic-influenced legal system or the national traditional politically embedded legal system, with the conflict usually solved via the principle of primacy of the former. This innovation has subverted a basic feature of the old-fashioned nation-states, where political, economic and social systems overlapped and these conflicts have to be solved by a political decision taking into account all the different rationalities. A balancing of all those reasons took place, whereby results could be different depending on the political program and ideological convictions of each party. As soon as the political decision was adopted, citizens could express their level of agreement or discontent and, if they considered so, they could even take the measures required to change it.

Finally, some questions arise as to which interest is the Commission protecting in the Green Paper, a public or a private one? According to some paragraphs one could think that private economic interests are, at least, equated to public interests:

“However, increasing the thresholds would exempt more contracts from the requirement of an EU-wide publication of a contract notice, reducing business opportunities for undertakings throughout Europe”.⁸ (European Commission 2011, p. 9)

Consulting private parties about this sort of issues will most likely provide as answers all kinds of statements for the increasing of the opportunities of private actors (broadening the limits of the market), while the public institutions would rather be concerned about limiting the markets whenever a public interest should prevail over them. Thus the way the Green Paper is drafted seems to reflect the idea that the more opportunities for companies to make business, the more the growth of the economy, which at the end of the day will be translated into more wealth and social wellbeing.⁹ This way of reasoning means that the pursuit of public interests actually depends on, or even is subordinated to, the achievement of private goals. The next section aims at shedding light on this.

3. Priorities and main interests behind the reform of public procurement rules

As explained in the introduction, the revision of public procurement rules is part of the *Europe 2020* strategy. A first intuition is, thus, that the reform is not strictly related with the strengths and weaknesses of the current legal regime itself, but more inclined to adapt public contracts to the needs of the said strategy, namely creating the adequate environment for fostering economic growth in Europe. The

⁸ This idea is further developed in the Green Paper, “In any case, it must be noted that all international commitments taken by the EU include thresholds which are set at exactly the same value as in the current directives, except for the so-called B-services (and social services in particular). These thresholds determine market access opportunities and are one of the most important elements in all of these agreements. Any increase in the applicable thresholds in the EU would automatically involve a corresponding increase in all the agreements concluded by the EU (meaning not only in the GPA, but also in all other international agreements). This situation could in turn trigger requests for compensation from our partners. These requests could be quite significant.” (European Commission 2011, p. 9)

⁹ These aprioristic assumptions can be easily demystified (Chang 2010, pp. 190-198).

following pages will be devoted to find out which are the priorities and interests behind the review of this legal regime.

3.1. *The political relevance of public procurement*

Public procurement rules establish the procedures according to which public authorities can buy products, hire services, or contract supplies from the private sector. Because of the identity between the interests of the Government and the public interest, it is easy to understand why in the nation-state context these contracts have traditionally been split up from ordinary civil law and considered part of administrative law.¹⁰ Furthermore, as a result of the special nature of the object of the contract, the rights granted to the administration as well as the duties of the contractors differ from those granted to the parties according to civil law. Indeed, in procurement contracts the administration is entitled to supervise and monitor the way the contracted activities are carried out, and even has the ability to revise or change *a posteriori* some of the conditions of the tender contract, whereas contractors can of course look for profit but always without disregarding that they are executing a public task. As a matter of fact, investing contractors with public authority is a key element of public procurement. Therefore, in structural terms public procurement law has been historically conceived as a “demand-based law” (Lichère 2007, p. 947).

Nevertheless, if we are able to transcend the strict legal approach based on the detailed description of the rights of each party of the contract, and we examine the relationship between the administration and the contractors through a more pragmatic lens, we soon realize that public procurement constitutes a powerful political tool. As a matter of fact, it is of key strategic importance for the development of the technologies and abilities of the industrial sector in question because of the huge investment of money involved. By way of an adequate use of public procurement states can give incentives to their industrial sector. These incentives may be of such degree as to create some dependence between both parties, one requiring the economic investment by the state, since the amounts expended cannot be supplied by average companies; the other seeking potential political, economic, and social returns coming from the development of the industry. This may give rise to more competitive companies, to more employment, and at the end of the day to more wellbeing for citizens. In the long term, such dependence may foster the consolidation of the relationship between the parties of procurement (public authorities and contractors) in the form of “joint ventures” which contribute to melt the borders between public and private law (Sammelmann 2012), a figure that in political science terminology broadly corresponds to “public-private partnerships.”

The political, economic and even social relevance of public procurement implies that a delicate equilibrium has to be achieved between the set of very different and conflicting interests it involves. There is a first basic balance between the interest of Government in obtaining the product, service or supply at a fair price, and the essential interest of providers, who mainly care about obtaining benefit from the transaction. The balance between the conflicting interests is thus achieved in economic terms, i.e. via price. However, such a balance has to be recalculated when other elements enter the scene:

“The Government’s object in contracting is to procure its requirements as cheaply as possible, consistently with *securing the desired quality of goods or service*. The Government’s interest in cheap procurement has to be reconciled with the contractor’s interest in profit, and also with the *need to keep in existence a*

¹⁰ However, there are some exceptions. For instance, in Netherlands public procurement is considered part of civil law, “the idea being that a public body is supposed to be on the same footing as service providers when the two sides enter into an agreement” (Drijber and Stergiou 2009, p. 814).

sufficient number of firms with the willingness and capacity to do the Government's work" (Turpin 1968, p. 242; emphasis added).

In other words, two additional interests are to be taken into account in public procurement. First of all, the activities, services, or supplies contracted must be consistent with the quality standards set by the public authorities in the tender. The determination of such standard is a political matter, and thus competence of the legitimated political authority calling for tender. This quality requirement may have an impact on the final price, since the higher the required quality, the higher the final price will be. And in the second place, free competition must be guaranteed among potential contractors in order to avoid an unjustified rise in the price: the higher the number of companies that are interested in the tender, the lower the final price will likely be. Free competition is, thus, a subordinated aim in public procurement, since it somehow counterbalances the trend towards high prices which any quality requirement means.

As a result, we can depict the traditional way of understanding public procurement as striking the balance between two main interests (those of public authorities for achieving the cheapest price and those of private actors for obtaining the maximum profit), which are subsequently modulated by two additional elements, i.e. the quality of the contracted services and free competition.

3.2. The underlying main interest for reforming public procurement: promoting free competition

The European integration process has changed the traditional conception of public procurement described in the previous pages. According to the rationality of integration, national rules on public procurement can breach the free provision of services, since they are able to compartmentalize the internal market. Consequently, equal treatment of all tendering companies, regardless of the member state they come from, was required in order to guarantee undistorted competition. This was guaranteed by the CJEU by monitoring the transparency of national tendering procedures as well as by the non-discrimination test. Such jurisprudence, aiming at the liberalization of public procurement, has been successively codified by EU directives partially harmonizing national procurement procedures (Bovis 2002; 2006; Drijber and Stergiou 2009, p. 805). Therefore, the structural conception of public procurement according to European Union law corresponds to a "supply-based law" (Lichère 2007, p. 947).

As a result of its subordination to economic freedoms, public procurement is now examined through the lens of the principles of non-discrimination, competition and transparency (Bovis 2006, p. 461). In other words, an approach which corresponds more to the free market paradigm (competition law) than to the state and bureaucratic paradigm (administrative law). This is arguably not a completely unexpected development, since the first European treaties were already in tune with the antitrust school of thought rampant in the post Second World War era (Wells 2002, pp. 201-205; Leucht 2009, pp. 62-68), and particularly in the United States. The decisive influence the latter exerted not only in terms of international relations, but also in the field of the personal relationships, may explain the easy acceptance of the antitrust paradigm by European leaders.¹¹

Nevertheless, even if the antitrust principles and their specific translation into articles have barely changed since the signature of the treaties,¹² their relationship with the other rules therein and their prevalence over what up to that point were considered principles standing on an equal-footing, has done so (McGowan 2010, p. 136-146; Buch-Hansen and Wigger 2011, p. 81). The result of such a change is

¹¹ On this see how much Jean Monnet was fond of the contribution of American civil servants to the design of the ECSC (Monnet 1997, for instance at p. 391).

¹² What in origin were articles 85 to 94 of the Treaty of Rome are today articles 101 to 109 TFEU, their content being substantially the same except for some minor amendments.

now evident in the reforms proposed by the Green Paper. The main problems emerging when considering public procurement in the European Union may stem precisely from not recognizing in explicit grounds this alteration of priorities. For instance, when justifying the need for reviewing the rules, the Commission states on the Green Paper that:

“... public procurement rules provide for specific contract award procedures to enable public purchases to be made in the most rational, transparent and fair manner. Safeguards are put in place to compensate for the potential lack of commercial discipline in public purchasing, as well as to guard against costly preferential treatment in favour of national or local economic operators.

Therefore, European public procurement rules apply to all public contracts that are of potential interest to operators within the Internal Market, ensuring equal access to and fair competition for public contracts within the European Procurement Market.” (European Commission 2011, p. 6).

In the two paragraphs quoted above the drafting is deceiving. The argument seems to be that because of the reasons expressed in the first paragraph the measures of the second one follow, while in practice it is precisely the other way around. At this point the concern of the Commission about the “potential lack of commercial discipline” becomes extremely revealing. It goes without saying that this concern is not typical only of the European Union, but of any political system that allows the hiring of private services by public authorities. However, this “potential lack of commercial discipline” has traditionally been solved differently in other political systems, where such decisions are monitored by citizens and civil society in general. Thus, unjustified losses may have as a consequence the removal of those who made inefficient decisions –if the irony of applying such economic terms to politics is allowed here- and, in case of serious misbehaviour resorting to courts via a criminal procedure. Justifying the reform of the rules on these grounds seems quite naïve by the part of the Commission.

A different (and in my opinion more adequate) reading of these paragraphs reveals that the Commission is trying to obviate the true reason for establishing common public procurement rules at the European level. They are not aimed at granting sound economic rationality on the behaviour of public authorities, but mainly to avoid borders that fragment the market of public procurement in the European Union and hence the competition in such field.¹³ In other words, the Commission is interested in opening new markets across the EU territory applying the paradigm of competition to fields which have been traditionally controlled by the state. This culminates the process of transfer of public procurement from the domain of administrative law, to which it has been attached in the context of the nation-state, to the field of competition law, a process already with supporters in the legal doctrine (Sánchez Graells 2011, p. 221-223). The risk behind this new approach to public procurement is that just as the legal reasoning of the CJEU in cases opposing economic freedoms to social issues is biased towards the former (Menéndez 2012, pp. 103-104), in public procurement the free competition principle will structurally prevail over other conflicting principles. This may constitute another example of how the vertical conflicts in the European Union result in the increased influence (if not the plain imposition) of an economic rationality over the various combined rationalities traditionally coexisting in national structures.

All in all, the main and underlying goal of the reform is to promote free competition in a field previously fragmented by national borders as a way to promote economic growth. The existence of borders, and thus the allowance of some kind of discrimination because of nationality, as expressed in the legal orders via the

¹³ As a matter of fact, this is explicitly recognized by the Commission later in the document, when it states that “...the aim of public procurement rules – namely open and effective competition...” (p. 30) or when it is said that “[o]ne of the foremost objectives of EU public procurement legislation is to enable economic operators to compete effectively for public contracts in other Member States” (p. 27).

respective national administrative laws, reflects the fact that interests other than free competition and more attached to national sovereignty still prevail. The new public procurement rules included in the Green Paper propose to limit the will of one of the parties of the contract, the contracting public authority, in such a way that fully guarantees the non-discrimination principle.¹⁴ This is not something new, since both article 2 of the Public Sector Directive and article 10 of the Directive 2004/17/EC (in what follows Utilities Directive)¹⁵ provide that “contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way”. As a matter of fact, the prohibition of all kinds of discrimination in public procurement, regardless of reasons, has been endorsed by the CJEU.¹⁶ Therefore, according to this reasoning, the arguments behind the existence of borders will be overruled by non-discrimination on grounds of nationality, which will lay the foundations leading in the short term to free competition. As a result, free competition becomes the main public interest, or at least is equated to the main goal of public decisions in the field of public procurement, although it has to be reconciled with other, subsequent aims in which the so-called horizontal policies are based. But before opening such analysis, to which section 4 is devoted, a reflection on how public interests are taken into account in the proposals of the Green Paper is required.

3.3. How the bias towards free competition in the Green Paper reverberates in the proposed tendering procedures

If it is true that the main aim of the revision of public procurement rules is to grant an open and free competition, important consequences are supposed to take place when discussing the procedures for awarding these contracts. According to the Green Paper, the modernization of such procedures is considered “particularly with a view to reducing complexity and administrative burdens, while at the same time ensuring fair competition for public contracts and optimal procurement outcomes” (European Commission 2011, p. 13). This is not in accordance with the conception of public procurement traditionally applied in the national context, namely the one which gives a public role to contractors and according to which public interest prevails over their particular interests, mainly that of profit. Instead, or maybe in addition to that, the current approach’s main interest is that public actors contribute to facilitate competition. This did not happen before, when “[t]he contractors to the Government [sought] profit, but they [were] also carrying out a public function in supplying the requirements of the state” (Turpin 1968, p. 241). Hence, it was out of question that companies had to play a decisive role in supporting governmental activities and interests, a formulation which implicitly assumes that the economy and its actors are embedded in society and are part of the political project leading the common destiny of the polity of which they are a part.

According to this traditional logic, the existence of several procedures among which contracting authorities can choose when allocating a public contract serves to protect the public interest.¹⁷ In the current European public procurement rules, procurers can decide between using different procedures. On the one hand, they can resort to the open procedure, in which the contracting authority chooses amongst those bidders who fulfil the criteria for qualitative selection -whichever

¹⁴ A different and controversial debate is the appropriateness of this principle to lead to social justice. A critical view on this can be found in Somek (2011, pp. 180-183).

¹⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).

¹⁶ See Case C-458/03, *Parking Brixen v. Gemeinde Brixen* [2005] ECR I-8612; and Case C-410/04, *ANAV v. Comune di Bari* [2006] ECR I-3303.

¹⁷ “The delicate balance that must be struck between the provision of reasonable profits to contractors and the limitation of cost to the Government calls for the use of different forms of contract that are appropriate to different contracting situations” (Turpin, 1968, p. 242).

offer better fulfils the award criterion indicated in the contract notice- usually because of its lowest price, or because it is the most economically advantageous tender. They can also resort to the restricted procedure, in which only certain candidates, chosen on the basis of criteria indicated in the contract notice, are invited to submit offers. It is also possible for them to open a negotiated procedure with prior publication, in which contracting authorities and entities consult the economic operators of their choice and negotiate with one or more of them the terms of the contract to be concluded. This procedure is freely available in the Utilities Directive and only foreseen in limited cases in the Public Sector Directive (European Commission 2011, p. 14).

However, introducing its new, more private interest-oriented logic, the Green Paper establishes that all these procedures are to be revised in order to place at the contracting authorities' disposal the best possible set of tools for an "efficient procurement" (European Commission 2011, p. 14). The key question is precisely what is the Commission referring to when using such expression; in other words, when shall procurement be considered efficient? For that purpose, it can be useful to pay attention to the link established by the Green Paper between efficiency and public-private partnerships,¹⁸ since the different procedures as well as their requirements must encourage this type of association. This is the reason why for some clearly defined cases it is possible to resort to the negotiated procedure without publication of a contract notice. A set of other procedures is at the disposal of procurers, bringing additional flexibility to the policy coming from the competitive dialogue, from dynamic purchasing systems, electronic auctions, centralized procurement or framework agreements (Bovis 2005, pp. 58-61; 2007, pp. 228-272).

Resulting from all these overlapping developments one cannot say anymore that the main interest protected in public procurement rules is a public one. A more combined public-private approach currently dominates. This change is operated in a twofold way: on the one hand, by considering the public interest only in economic terms, i.e. "guaranteeing that contracting authorities obtain best value for money" (European Commission 2011, p. 14), while on the other hand, by taking into account the interests of companies. An example of this is the proposal for increasing the use of procedures in which negotiation has a key role. However, the public justification for such a proposal is once again supposedly based on the interest of public authorities ("[t]his could indeed give contracting authorities more flexibility to obtain procurement outcomes that really fit their needs"; European Commission 2011, p. 15), while it seems obvious that it could be even more convenient for private actors: direct negotiation with public authorities will give them some influence which at a certain point may be relevant. The result is that the negotiation procedure could be understood exactly as the opposite of what the Commission intends, i.e. as making more flexible some of the requirements which could be part of the specifications of the contract. The range of procedures at disposal of public authorities seems to respond, thus, not only to their interests when contracting, but also to those of the companies participating in the process.

4. Integrating horizontal interests in the new public procurement rules

We have verified that promoting free competition is the main interest behind the reform of European public procurement rules. Nevertheless, it is certainly not the

¹⁸ The exact wording of this reference varies from the English and French versions ("in view of the increasing importance of public-private partnerships"; "eu égard notamment à l'importance croissante des partenariats public-privé") to the Spanish one ("con vistas a fomentar las asociaciones entre los sectores público y privado"). The nuance distinguishing between them is that the former recognize an already existing reality as the reason for the changes, while the latter aims at fostering such reality with the proposed changes. One may ask if this has any relationship with the fact that such partnerships are much more common in the English model of society (not so much in the French) than in the Spanish one, or if this interpretation derives from a dubious translation.

only one. This section deals with the proposals of the Green Paper that referred to other interests to be taken into account in procurement. Traditionally, they are cross-cutting, "horizontal" policies (Arrowsmith and Kunzlik 2009, pp. 14-15) that are included in the procedure either at the moment when the tender is called, or when deciding between the different candidates. We will pay attention to the way they shall be taken into account according to the proposed new procurement rules. A related issue, referring to a different set of horizontal interests resulting from the necessity of correcting potentially negative consequences of the prevalence of free competition for some economic actors (mainly small and medium-sized firms), will also be explored in the following pages. The procedural moment in which these horizontal interests are to be taken into account is key for understanding how the different rationalities (economic and political) are conciliated public procurement.

4.1. How traditional horizontal policies –mainly the social and environmental ones– are considered in the proposed new European Union's public procurement rules

As has been argued in the previous section, in the Green Paper the Commission mainly conceives public interests in just one of their multiple dimensions: measuring them in economic terms. As a result, the decision between the different proposals submitted by the bidders shall be based in the profitability for the public authorities. This, of course, has a narrow link with the prevailing of the competition approach to public procurement, which requires the decision of the authorities to be technical and not political. The price for this is that other political objectives shall either be excluded from the decision or translated into technical terms in order to give them a say in the process. Political discretion cannot be part of public procurement, since it risks distorting free competition or leading to non-equitable practices or even corruption:

"Of course, addressing societal challenges should not decrease the efficiency of public procurement. Taking into account policy related considerations in public procurement should be done in a way so as to avoid creating disproportionate additional administrative burdens for contracting authorities or distorting competition in procurement markets" (European Commission 2011, p. 34).

The Green Paper creates a link between some of the social objectives of the Europe 2020 strategy and public procurement in such a way that their promotion comes from using the purchasing power of Member States "to procure goods and services with higher 'societal' value in terms of fostering innovation, respecting the environment and fighting climate change, reducing energy consumption, improving employment, public health and social conditions, and promoting equality while improving inclusion of disadvantaged groups" (European Commission 2011, p. 33-34). How are these political objectives translated into the technical terminology required to de-politicize them and thus avoid the risks inherent to politics? The Green Paper proposes two different strategies, basically related to "how to buy" and "what to buy". The former establishes some procedural requirements guaranteeing a certain degree of social or environmental protection, while the latter grants such protection via substantive requirements, i.e. through the way the works, services or supplies to be hired protect such issues. In any case, both procedural and substantive requirements imposed by public authorities in order to foster some environmental or social protection cannot mean that the state aid rules (articles 107 to 109 TFEU) are somehow not observed (European Commission 2011, p. 39).

The problem with the substantive requirements is that they may significantly distort competition. Therefore, when translating them to some technical terms, the Commission describes the methods which least harm free competition. It suggests that "performance requirements are likely to have a less limiting effect on competition than detailed specifications on the technical characteristics of the goods to be procured", or that "mandatory provisions concerning the decision as to which of the various award criteria should be taken into account (...) would probably have

less limiting effects on competition in procurement markets” than “[m]andatory prescriptions on the technical characteristics of the goods to be procured” will (European Commission 2011, p. 43).

The aim is “to ensure that public procurement strategies are consistent with overall policy objectives” (European Commission 2011, p. 34), but the difficulty in this regard is that the policy objectives at the EU level are not equivalent to those at the national level: they are supposed to be ideologically neutral statements which can be assumed by all the different political sensibilities.¹⁹ This approach towards substantive requirements has some relevant consequences. For instance, it is precisely that neutrality what endangers in several ways the consistency of the general policy objectives. Maybe the most important way of doing so results from the freedom granted to contracting authorities when deciding the most economically advantageous tender, which “allows them to reflect in the evaluation the importance they wish to attach to environmental or social criteria compared to the other criteria, including price” (European Commission 2011, p. 36-37). This means that the general objectives and political strategies are substantially decided in the level of the contracting authority, a practice which can only undermine their consistency across Europe. Indeed, if such objectives are not fulfilled and the final decision is just based in the lowest price criteria, no sanction follows. At the end of the day, this way of doing things means that public authorities will need to pay an extra amount of money for the achievement of some political objectives (once again, the ‘marketization’ of society) instead of exerting their regulatory powers and transferring the economic cost to the private actors by forcing them to always observe the red lines imposed by public authorities (in this case in environmental and social issues, but not only) when looking for some profit. It goes without saying that, as the Green Paper correctly identifies, the consequence of the introduction of such obligations will be that they “may lead to discrimination or restrict competition in procurement markets, possibly resulting in fewer bidders and higher prices” (European Commission 2011, p. 42). For the Commission, thus, this constitutes a “risk” (European Commission 2011, p. 42) which should be avoided in order to guarantee that public procurement is in alignment with the general policy objectives of the European Union.

Instead, the strategy the Commission is more inclined to when conciliating the prevailing competition approach with other political aims is the procedural one. As has been said, far from allowing any kind of political discretion, its suggestion is to translate into technical terms the other, subsequent objectives. Accordingly, several procedural-based proposals have come to the fore. For instance, it has been suggested that candidates might be requested to prove that they are able to meet certain environmental or social requirements by means of obtaining some certification. This strategy is not without a cost. On the one hand, because it leads to an increasing administrative burden on the part of the candidates –a cost that can be of particular significance in the case of small and medium-size firms-; and on the other hand, because the acceptance of foreign national certificates requires either some verification procedures by national administrations, particularly when “part of the supply chain is located in a third country” (European Commission 2011, p. 38), or the application of the principle of mutual recognition. Resorting to the latter avoids both the full harmonization of national public procurement rules, which is a counterintuitive solution to the problem, as well as the potential distortions to the free market that would result from the verification by national administrations

¹⁹ For instance, one may think about the objectives of the Lisbon Strategy, aimed at making of the European Union “the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion” by 2010 (European Council 2000). It is hard to think about somebody who could reject such objectives: if existing, disagreement could not be about the aims, but about the means to achieve them. However, the apparently neutral formulation of the aims came together with the ‘marketization’ of many fields of law, as is the case of public procurement (on the idea of the ‘marketization’ of European integration, see van Apeldoorn 2009, pp. 27 and 29).

of the fulfilment of the requirements by each candidate. Nevertheless, mutual recognition also has disadvantages, since it not only implies that a risk assessment is carried out by the authorities of one member state, but mainly that such an assessment is accepted by all other member states (Weiler 2005, p. 49). This feature of mutual recognition has often been neglected, but it is the reason lying behind the need of mutual trust when applying mutual recognition. On the other hand, it is true that it would be possible to establish a set of common legal requirements reducing such risk, but then harmonization and not mutual recognition would be the strategy adopted.

Both procedural and substantive requirements for protecting social and environmental objectives as foreseen in the Green Paper have an additional problem. Companies looking for profit may not consider developments in the social or environmental fields as interesting for them as purely economic efficiency. Because the investments required for improvements in these fields, and mainly in the environmental one, can only effectively result in some kind of profits in the long term, making such companies sensitive to these non-economic arguments and interests can only be achieved through the imposition of such procedural and substantive requirements. Once again, public interests are subordinated to the rationality of economics: in this case, certain patterns of behaviour not strictly guided by the interest of short term profit are imposed on the companies, but only when contracting with the state. Avoiding damaging practices to the environment, or at least promoting some of the best ones for all economic activities in general terms still has to be done via public regulation (interventionism). The Commission seems to be aware of this when it poses the question of whether "further obligations on *what to buy* at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead" (European Commission 2011, p. 44), an option that so far does not count with the necessary political support.

4.2. Market correcting measures through public procurement? Some inconsistencies of the Green Paper

The picture resulting from the current approach shows a market where only the companies with resources enough for carrying out the required investments will be awarded the contracts with public administrations. Although this seems to be the aim of the rules, the Commission is aware of the dramatic impact that such a strategy may have on small and medium-sized firms. They represented "[t]he overwhelming majority (99.8 %) of enterprises active within the EU-27's non-financial business economy in 2008", accounting for "two out of every three jobs (66.7 %) and for 58.6 % of value added within the non-financial business economy" (Eurostat 2011, p. 11). In a nutshell, if the process of detachment of the market from society is to be curbed, the strict application of free competition and non-discrimination as general principles of EU procurement rules has to be corrected by means of alleviating the requirements imposed on small and medium-sized firms participating in public procurement.

This market-correcting spirit is what lies behind a different set of interests that, according to the Green Paper, are to be taken into account in the revision of the public procurement rules, interests which include, among others, those of small and medium-sized businesses. However, this new approach will reveal how inconsistent the Commission's proposals are, for instance when suggesting to "require the successful tenderer to subcontract a given share of the contract value to third parties" (European Commission 2011, p. 29).²⁰ Such a measure will adapt public

²⁰ Such an obligation already exists under the Public Sector Directive and Directive 2009/81/EC of the European Parliament and of the Council, of 13 July 2009, on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or

procurement to the necessities of small and medium-sized businesses,²¹ but at the same time compulsory subcontracting could be contrary to free competition as understood in the Treaties: “The underlying idea is that in a well-functioning, competitive procurement market it is for the undertakings themselves, and not to the contracting authority, to decide whether subcontracting is economically sensible” (Hatzis 2009, p. 363). Moreover, compulsory subcontracting openly contradicts the aim, presented as well in the same Green Paper, of imposing stronger restrictions to it, in this case “in order to allow contracting authorities to exert more influence on the performance of the contract” (European Commission 2011, p. 27). Indeed, this idea is further developed, also suggesting to “exclude subcontracting completely or at least for essential parts of the contract”, or to “restrict it to a certain share percentage of the contract or provide for a general right for the contracting authority to reject proposed subcontractors” (European Commission 2011, p. 27). As a matter of fact, the Green Paper also considers that banning some subcontracting practices will avoid some instances of collusion, since “subcontracting certain parts of the contract is a popular way for the winning bidder to reward cartel members for abiding by the cartel agreement” (European Commission 2011, p. 32). How to reconcile compulsory subcontracting with all these contradictory measures, if possible, is not evident at all, but it should be noted that resulting from the analysis of the case-law “[t]he pernicious effect of [both!] prohibited or compulsory subcontracting is that it affects how the contract is to be performed in a way that is relevant to the tenderer’s capability and seriously undermines competition in the public procurement market” (Hatzis 2009, p. 363).

The interests of small and medium-sized enterprises are in open contradiction not only with some of the proposals of the Commission, but also with the ultimate aims of the Green Paper. If the main interest is to “create a truly European procurement market” which “would multiply business opportunities for European undertakings” (European Commission 2011, p. 31), it seems that the role they could play in such European procurement market would be rather limited, the goal being to create a set of strong multinational-sized companies competing for the contracts instead of protecting the interests of the small and medium-sized ones.

Another set of interests the Green Paper considers worth of protection are those of local and regional authorities when the value of the contract is below the thresholds established by the Directives. In particular, these authorities claim that more legal certainty is required when determining if a cross-border interest exists, since that implies that, according to the CJEU case-law (Bovis 2012, pp. 264-265), the general principles of transparency and non-discrimination apply to their procedures (European Commission 2011, p. 20). If the aim of the Green Paper is to create a “truly European procurement market”, as has been mentioned, it follows that distinguishing between situations where a cross-border interest does or does not exist is nonsensical. Thus, any consistent policy to be applied in this respect can only depart from the premise that such cross-border interest always exists.

In this respect it is relatively easy to detect again some inconsistencies, since simultaneously the Green Paper offers several proposals in order to ease the cross-border participation of companies from one Member state in tendering procedures taking place beyond its borders. Namely, imposing some mutual recognition of the quality certifications for such companies, or even publishing the tender specifications in a second language (European Commission 2011, p. 31). Both proposals have some problematic issues attached. The ones related to mutual

entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJEU L 216, of 20 August 2009, p. 76).

²¹ As a matter of fact, the only option for the CJEU to accept it is in case it is explicitly authorised. See Case C-389/92, *Ballast Nedam Groep NV v. Belgian State* [1994] ECR I-1289; Case C-176/98, *Holst Italia SpA v. Comune di Cagliari* [1999] ECR I-8607; Case C-314/01, *Siemens v. Hauptverband der österreichischen Sozialversicherungsträger* [2004] ECR I-2549; and a combined interpretation of the three (Hatzis 2009, pp. 359-364).

recognition have been already expressed above. As to the acceptance of a second language in the procedure, it seems that a breach in the key principle of institutional and procedural autonomy in which European integration is based will follow –even though in the field of public procurement it has been extensively reduced (Galetta 2010, p. 102). Because the observance of such a proposal requires from national civil servants a high command of that second language (which, importantly in practical terms, must be for all of them the same), a mutation on the constitutional structure of the whole European Union will take place. If we accept that Member States apply EU law as if it was national law, why would national authorities need to command a second language? Once again it seems that the rationale behind this proposal is closer to the interests of private actors involved in procurement procedures than to the public interest. If we assume that its aim is creating a common market of public procurement, then how to reconcile it with the interests of small and medium-size firms? Will they have the resources for translating their proposals to a second language? Will they accept competition with other companies from other countries which submit their proposals in a different language? Would not that mean that creation of bigger companies is fostered and, therefore, the small and medium-sized ones are not taken into account as the Commission seems to do?

5. Proposals concerning the joint procurement by different administrations: tacitly conditioning and redesigning national constitutional orders?

A different and radically new issue proposed in the Green Paper is the suggestion of what is defined, resorting to economic terms, as “aggregation of demand”. Cooperation between different administrations, both in the vertical and horizontal sense, is an already well-established practice, despite the fact that its degree is different depending on the Member State. Moreover, cooperation between administrations from different Member States is not completely new in the European Union, as the recent codification of such practices in the treaties under the heading “Administrative cooperation” (Title XXIV, article 197 TFEU) certifies. This is also true even in public procurement procedures: as a matter of fact, the Public Sector Directive allowed the existence of “central purchasing bodies”. Furthermore, currently it is already possible for contracting authorities to sign framework contracts on this purpose, to coordinate some phases of the procurement procedure or to plainly share their experiences in previous procedures. What the Green Paper proposes, notwithstanding, goes beyond mere coordination by creating some tools at the European level which allow a real “cross-border joint procurement” (European Commission 2011, p. 23).

The reasons adduced for this innovation are all economic: “economies of scale, lower production costs at the benefit of undertakings and European taxpayers, increased buying power on the part of public authorities and a possibility for them to pool skills and expertise and to share the procurement related costs and risks” (European Commission 2011, p. 23). Once more, a pro-market approach, based on an economic rationale, is gaining ground. But this time the consequences of the proposed change are of a particularly acute constitutional nature. “The sharing of costs and risks” (European Commission 2011, p. 23) between the different administrations involved in procurement in the European Union means that the economic paradigm is applied to political structures organized according to a completely different set of criteria, the political rationale. Institutions and procedures in nation-state polities are established observing a constitutional design according to which powers are distributed between the different levels of government and accountability is guaranteed. Moreover, this reform apparently ignores something that is undoubtedly more important, namely that democratic legitimacy is at the very core of national constitutional systems. Hence, when a cross-border joint procurement is proposed, not only intricate legal problems arise,

such as “identifying which national legislation is applicable to the public procurement procedure and to the contract, the ability of contracting authorities to use national legislation other than their own, deciding on the competent body and the applicable rules for reviewing procurement decisions, etc” (European Commission 2011, p. 24), problems which somehow threaten the essential core of the constitutional systems of the Member States by allowing sources of law external to them to rule their own public powers, but an additional and often neglected phenomena also occurs in broader constitutional terms. Applying that supranational economic rationale when (re)organizing bureaucracy and its procedures leads to ignoring the true reasons for their existence, which can only be explained according to the national political rationale. In other words, national administrations are reconceived according not to their original and main purposes, but to the prevailing economic way of thinking. The aim of this paper is not to explain the risks entailed in disembedding the economy from the political system, something many others have done so far in a very clear way (Polanyi 2001, pp. 45-46; Lindblom 1982, p. 332). However, it is absolutely compelling to point out that the new public procurement procedures proposed in the Green Paper lead precisely to such development. One cannot but stress that there is a need not only to debate its substantive proposals, but also to rethink and criticize the whole paradigm they lead to.

This is the perspective from which the cross-border cooperation has to be scrutinized. The conclusion is that some risks (not in economic but in political terms) arise from this proposal, since involving different administrative bodies coming from different Member States and sustained by different democratic legitimacy logics in a common procedure constitutes a real challenge to each national constitutional system. It is not only a matter of reconciling the dissonance between different legal orders, or of solving the problem of different language regimes being applied to the same procedure (or a language foreign to a country being applied in one of the procedures according to which it buys products, services or works). It is a real and radical transformation of the national constitutional systems leading towards a common, integrated administrative procedure resulting from harmonization and from informal practices, but in any case developed without having as an explicit aim such restructuring of the constitutional framework of the European polity. Integrating the public procurement markets, “encouraging the defragmentation of European markets across national borders” (European Commission 2011, p. 23), means that such an economic aim prevails over the political organization of the Member States. This is identified particularly by the existence of borders, for the recognition of their sovereignty within them, and ultimately recognized in the EU context by the principle of institutional and procedural autonomy. Eroding such principle, erasing borders and mixing sovereignties could be a crucial step towards the consecution of a European polity, but such a step cannot be taken in a tacit way and merely because of economic reasons. The risk that entails the subordination of all other values or principles to the praiseworthy goal of European integration has been pointed out by Giandomenico Majone (2009): the price to be paid is democracy.²²

Finally, as another example of the biased approach of the Commission towards public procurement, the Green Paper explicitly mentions that cross-border joint procurement shall not erode the principle of free and undistorted competition (“[s]uch instruments and mechanisms would have to strike the right balance between allowing a stronger aggregation of demand in strategic sectors, and not restricting competition in procurement markets”; European Commission 2011, p.

²² “The imposing structure of European laws, institutions, and policies has been erected on the basis of a few operational principles that have remained mostly implicit, but nevertheless have shaped the political culture of the European Union. (...) Arguably the most important of these implicit operational principles says that *integration has priority over all other competing values, including democracy.*” (Majone 2009, p. 1; emphasis added).

23), but it does not say anything about other non-economic principles, like the very important ones mentioned here. Moreover, protecting the interests of small and medium-sized businesses by dividing contracts into lots if necessary is also foreseen, meanwhile no measure for protecting competences of national, regional or local authorities is mentioned.

6. Conclusion: the European social model that implicitly underlies these proposals

Our survey departed from considering to what extent a Green Paper is the appropriate vehicle for establishing a dialogue between public powers and civil society. I am fully convinced that the more adequate response is “no” for a series of reasons. First, because the kind of communication it fosters is more a query than a dialogue. Second, because the addressees are mainly private economic actors rather than the civil society. And third, because it is limited to the topic and approach suggested by the consulting authority.

The description and analysis of the proposals included in the Green Paper corroborated such preliminary assessment. On the one hand, throughout the whole document references are made to the stances of private actors towards some of the proposals. This reflects the fact that the dialogue with them is fluent, but at the same time it also implies that only some of them are privileged enough as to be allowed to participate in it. On the other hand, the subordination of public issues to private interests throughout the document is rather striking. It is hard to accept why what private actors, mainly guided by economic interests, have to say about how the public sector is so relevant.²³

The influence of an economic rationale on the Green Paper goes well beyond these examples. Indeed, the Green Paper cannot but be considered a symptom of the already critical status such thinking has reached nowadays. This explains why restricting free competition is described as a “risk” (European Commission 2011, p. 24), while this revealing term is never applied to other developments challenging other public goals. As a result, undistorted competition is equated to the essential and prevailing public interest. This is particularly true when even the main aim of public procurement, that is, regulating the hiring of some services, works or goods by the administration, is subordinated to free competition. “Contracting authorities should avoid tendering contracts which can only be executed by one or a small number of market player(s), as this would solidify oligopolistic structures and make new market entries almost impossible” (European Commission 2011, p. 30). Therefore, the Commission is proposing that the interest which gives rise to the procurement procedure has to be adapted to an even superior aim: that of free competition. Consequently it is possible to understand why the trend towards the reduction and even suppression of the key public role private actors had to play when contracting with the administration is so solid nowadays.

The reasoning of the Commission goes even beyond the simple application of the pure economic thinking to public procurement, since one of its ultimate goals is to make the demand side sensitive to the needs of the supply side: “[i]ntelligent procurement aimed at maximizing competition in such markets would require in the first place that procurers are aware of the structure of the markets in question” (European Commission 2011, p. 30). It follows that achieving a competitive set of companies bidding for procurement contracts is the real aim. Lying behind such an argument is the idea that creating this well-structured European market of public procurement will in the long term allow public authorities to have better offers in terms of cost. However, it seems quite odd that in order to achieve that aim first they have to behave not guided by that very interest, but taking into account, for instance, “[i]f smaller competitors on the market are able to deliver the service or

²³ See, for example, the questions in European Commission 2011, p. 23.

products in question on a smaller scale, efficient ways to maximise competition may include reducing the volume / duration of contracts" (European Commission 2011, p. 30).

Deeply-rooted economistic thinking about politics actualizes Polanyi's warnings about the disembedding of the economic system from the political one. It is particularly manifest when new procedures for public procurement are proposed attending only to economic needs, instead of paying attention to the needs of public authorities –behind which the very essence of public procurement contracts lie– and the coherence of the legal system (European Commission 2011, p. 16). The same can be said about the new legal categorization proposed for the distinction between different examples of public-public cooperation, some of which should be exempted from the regime of public procurement: "Such a concept should be designed so as to clearly distinguish between modern forms of organisation of the (joint) performance of public tasks by contracting authorities, that are guided solely by considerations of public interest on the one hand (i.e. not covered by public procurement rules), and the pure (commercial) sale and purchase of goods and services on the market on the other hand (covered by the rules)" (European Commission 2011, p. 22). All these proposals foster legal changes mainly responding to the economic rationale developed by the CJEU in its case law protecting fundamental economic freedoms. The complexity of the economic analysis carried out by the Court, for instance referred to the 'in-house' doctrine (Bovis 2012, p. 257; Frenz and Schleissing 2009, pp. 173-174), steals the debate from its legal and political dimension. This is but another example of how promoting integration only in the economic dimension has a serious impact on the political domain. As long as politics is bounded hand and foot to the national level and a true political dimension for the European Union avoided, this unbalance will persist.

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