Public Procurement by Central Purchasing Bodies, Competition and SMEs: towards a more dynamic model?

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ABSTRACT
The creation of central purchasing bodies (CPBs) sought to generate administrative efficiencies and to aggregate public demand to enable the exercise of buying power capable of delivering better value for money and an opportunity for strategic procurement steering. However, CPB activity can have negative dynamic effects on market structure and the ensuing risk of *bid rigging*, distort competition for future public contracts, and reduce the resilience of the procurement system and the supply chains on which it relies by depleting the supplier pool. It can also generate excessive risks and result in unsustainable procurement systems. The emerging evidence of the failure of the UK's centralised healthcare procurement system to react to the COVID-19 pandemic is the canary in the coalmine.

Against this background, this paper undertakes a comparative survey of the oversight of CPB activity from the perspective of market competition and SME participation in selected EU jurisdictions and the UK. The analysis shows emerging national practices that increasingly subject CPB activities to competition scrutiny, to judicially enforced limits and to increasing requirements of market engagement and consultation. It also shows a clear prominence of SME concerns in the CPB context. However, there is still limited awareness at national level of the medium- to long-term negative effects of (excessive) CPB reliance and most current checks and balances are still rather static. The paper suggests that a more dynamic model could be used as a regulatory benchmark.

Keywords
Public procurement, centralisation, central purchasing body, CPB, competition, SME, monopsony, dynamic effects, resilience, healthcare procurement, COVID-19, oversight.

JEL Codes
H57, I18, K23, K42, L13

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1. Introduction

The creation of central purchasing bodies (CPBs) seeks to generate administrative efficiencies and to aggregate public demand to enable the exercise of buying power capable of delivering *better* value for money and an opportunity for strategic procurement steering.[1] Over the last decade, CPB procurement has been gaining strategic importance.[2] It now constitutes one of the top six priority areas in the European Commission's 2017 procurement strategy,[3] as part of the broader push for (cross-border) collaborative procurement.[4] It also ranks high in the domestic policy agendas of most of the EU jurisdictions, though the maturity of its practice varies.

However, the desirability of unconstrained procurement centralisation is not necessarily a foregone conclusion. CPB activity can have negative dynamic effects on market structure,[5] transparency and the ensuing risk of *bid rigging*,[6] distort competition for future public contracts,[7] and reduce the resilience of the procurement system and the supply chains on which it relies by depleting the supplier pool.[8] This can have particularly serious effects on small- and medium-size enterprises (SMEs)[9]—which, in the absence of adequate tender design, can be excluded from very large contracts.[10] Despite repeated warnings of these anticompetitive risks,[11] procurement centralisation continues to increase in most EU jurisdictions[12]—with the European Commission seeking to boost CPB training on SME issues in some countries.[13]

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[1] For general discussion, see the reflections by M Comba and C Risvig Hamer in chapter 2 of this book.

[2] OECD, *Report on the Implementation of the Recommendation of the Council on Public Procurement*, 16.7.2019, C(2019)94/FINAL, https://one.oecd.org/document/C(2019)94/FINAL/en/pdf (accessed 25 May 2020).

[3] Communication from the Commission to the Institutions, *Making Public Procurement work in and for Europe*, 3.10.2017, COM(2017) 572 final, https://ec.europa.eu/docsroom/documents/25612 (accessed 25 May 2020). See also I Locatelli, 'Process Innovation Under the New Public Procurement Directives' in G M Racca & C R Yukins (eds), *Joint Public Procurement and Innovation: Lessons Across Borders* (Bruylant 2019) 33 ff.

[4] For extended discussion and further references, A Sanchez-Graells, 'The Emergence of Trans-EU Collaborative Procurement: A 'Living Lab' for European Public Law' (2020) 29(1) *Public Procurement Law Review* 16-41.

[5] A Sanchez-Graells, *Public Procurement and the EU Competition Rules* (2nd end, Hart 2015) 110.

[6] For extended discussion, see the comparative chapters by K-M Halonen and A Sanchez-Graells in K-M Halonen, R Caranta & A Sanchez-Graells (eds), *Transparency in EU Procurements: Disclosure within public procurement and during contract execution*, vol 9 European Procurement Law Series (Edward Elgar 2019).

[7] A Sanchez-Graells & I Herrera Anchustegui, 'Impact of Public Procurement Aggregation on Competition: Risks, Rationale and Justification for the Rules in Directive 2014/24' in R Fernández Acevedo y P Valcárcel Fernández (eds), *Centralización de compras públicas* (Civitas 2016) 129-163. For further discussion, see I Herrera Anchustegui, 'Collaborative Centralized Cross-Border Public Procurement: Where Are We and Where Are We Going To?' in M Assis Raimundo (ed), *Centralização e Agregação de Compras Públicas – Reflexões Sobre uma Tendência Actual da Contratação Pública* (Almedina 2019) 337 ff; idem, 'Centralizing Public Procurement and Competitiveness in Directive 2014/24' (2015) 4(III) *European Law Reporter* 119.

[8] As mentioned by J Meehan, M N Ludbrook & C J Mason, 'Collaborative public procurement: Institutional explanations of legitimised resistance' (2016) 22 J*ournal of Purchasing & Supply Management* 160, 161.

[9] *Cfr* PWC/ICF GHK/Ecorys, *SMEs' Access to Public Procurement Markets and Aggregation of Demand in the EU* (2014) http://ec.europa.eu/DocsRoom/documents/15459 (accessed 25 May 2020).

[10] See eg OECD Sigma, *Small and Medium-sized Enterprises (SMEs) in Public Procurement* (2016) Public Procurement Brief 33, http://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-33-200117.pdf (accessed 25 May 2020). For discussion, See I Herrera Anchustegui, 'Division into Lots and Demand Aggregation—extreme looking for the correct balance?' in G S Ølykke & A Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar 2016) 125-145.

[11] With more references, see eg A Sanchez-Graells, 'Public Procurement and Competition: Some Challenges Arising from Recent Developments in EU Public Procurement Law' in C Bovis (ed), *Research Handbook on European Public Procurement* (Edward Elgar 2016) 423-451.

[12] However, there was a noticeable contraction in relative terms in several jurisdictions in 2018; see European Commission, Single Market Scoreboard for Public Procurement (2019) https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm (accessed 25 May 2020).

[13] See eg COS-TSMFRIEND-FPA-2019-2-02: Training for SME-friendly policies in Central Purchasing Bodies (CPBs), https://ec.europa.eu/easme/en/section/cosme/cos-tsmfriend-fpa-2019-2-02-training-sme-friendly-policies-central-purchasing-bodies (accessed 25 May 2020).

Meanwhile, despite the relatively uncontroversial fact that the buying power CPBs accumulate can generate the same type of competition distortions that competition law is aimed to prevent, the subjection of CPBs to competition law is contested and increasingly unclear,[14] as the general exclusion of public procurement from the concept of 'economic activity' for the purposes of EU competition law is indiscriminately extended to CPB activities in a less than convincing manner.[15] Moreover, an emerging possibility of classifying procurement activities carried out in compliance with EU public procurement law as a service of general interest (SGI)[16] casts further doubts on the extent to which competition law can effectively close the stable door *before* the horse has bolted and prolonged (excessive) CPB activity has made a permanent dent on the competitive structures of the markets for supplies and services to the public sector, specially concerning SMEs.

Beyond competition concerns, or rather related to them, it is worth stressing that procurement centralisation can generate excessive risks and result in unsustainable procurement systems, in particular where CPBs seeking to eg maximise economies of scale or minimise administration costs rely on severely reduced numbers of suppliers and contractors. Those then become 'strategic' or 'critical' to the functioning of the public sector,[17] despite oftentimes acting as mere 'contractual fronts' that in turn depend on strained supply chains through subcontracting arrangements. All of which creates a system that can be particularly vulnerable to external shocks and, ultimately, fail to satisfy the public needs dependent on the supplies and services CPBs procure.

The emerging evidence of the failure of the UK's centralised healthcare procurement system to react to the COVID-19 pandemic is the canary in the coalmine.[18] It is starting to be clear that excessive concentration on single suppliers and service providers justified on the grounds of 'listed price' savings and streamlined contractual administration, at the expense of a wider choice of (more expensive) suppliers, creates very significant operational and governance issues—including exploitative capture (through excessive pricing), insufficient supply and inflexibility to scale up operations when required, as well as too many 'single points of failure' along supply chains that can be put under extreme pressure—in particular, but not only, concerning medical equipment and consumables. It is too early to extract clear lessons from pandemic-related procurement fiascos (in the UK and elsewhere), but the evidence that excessive centralisation was a contributing factor (in the UK) seems difficult to rebut.

All of this will likely (or at least it *ought to*) trigger a reconsideration of the centralisation strategy and the impacts on markets and supply chains it carries with it, as well as the need for more detailed regulation of CPB activity.[19] So, it would seem that, in the

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[14] See eg S Keating, 'What role do competition law principles play in public procurement?' (Practical Law Public Sector, 6 Jul 2015) http://publicsectorblog.practicallaw.com/what-role-do-competition-law-principles-play-in-public-procurement/ (accessed 25 May 2020).

[15] For discussion and further references, see A Sanchez-Graells & I Herrera Anchustegui, 'Revisiting the concept of undertaking from a public procurement law perspective – A discussion on *EasyPay and Finance Engineering*' (2016) 37(3) *European Competition Law Review* 93-98.

[16] Although in the area of State aid and concerning e-procurement, see Judgment of 7 November 2019 in *Aanbestedingskalender and Others v Commission*, C-687/17 P, EU:C:2019:932. For discussion, A Sanchez-Graells, '10 Years On, the CJEU Creates More Uncertainty About the (In)Divisibility of Public Powers and Economic Activities in Public Procurement (C-687/17 P)' (How to Crack a Nut, 18 Nov 2019) https://www.howtocrackanut.com/blog/2019/11/18/cjeu-creates-uncertainty-about-public-powers-and-economic-activities-in-procurement (accessed 25 May 2020).

[17] For discussion in the context of UK centralised healthcare procurement, see A Sanchez-Graells, 'Centralisation of Procurement and Supply Chain Management in the English NHS: Some Governance and Compliance Challenges' (2019) 70(1) *Northern Ireland Legal Quarterly* 53, 66 ff.

[18] See D Hall et al, *Privatised and Unprepared: The NHS Supply Chain* (20 May 2020) University of Greenwich / We Own It, https://weownit.org.uk/privatised-and-unprepared-nhs-supply-chain (accessed 25 May 2020).

[19] For interesting discussion, see G M Racca & C R Yukins, 'Introduction: The Promise and Perils of Innovation in Cross-Border Procurement' in idem (n 3) 1, 21 and ff.

permanent swing of the procurement regulation pendulum, we are now approaching a (renewed) realisation that diversity of supply is a strategic need of resilient systems and we will possibly start discussing again dual (or rather, multiple) sourcing requirements reminiscent of those traditionally used in defence procurement.[20]

Against this background, this chapter undertakes a comparative survey of the oversight of CPB activity from the perspective of market competition and SME participation in selected EU jurisdictions and the UK.[21] The questionnaire for the earlier fieldwork included three questions: one on competition law and CPBs,[22] another one on CPB activity beyond public markets,[23] and a final one on SME issues.[24] This chapter aggregates the relevant insights in a different way. Section 2 traces the awareness of anticompetitive and anti-SME risks in CPB activities. The analysis shows emerging national practices that increasingly subject CPB activities to competition scrutiny, to judicially enforced limits and to increasing requirements of market engagement and consultation. It also shows a clear prominence of SME concerns in the CPB context. Section 3 then critically reflects on the emerging approach to monitoring competition and SME impacts of CPB activities and their regulation. The analysis shows that there is still limited awareness at national level of the medium- to long-term negative effects of (excessive) CPB reliance and most current checks and balances are still rather static. Section 4 concludes by suggesting that a more dynamic model could be used as a regulatory benchmark.

2. Awareness of anticompetitive and anti-SME risks in CPB activities

An initial clarification that may be necessary is that the interaction of competition rules and CPB activities gives rise to two distinct concerns, depending on whether one focuses on the demand or the supply side. First, on the supply side and in relation to the behaviour of the tenderers for CPB contracts, there is a concern that centralisation can require (or be deemed to justify) higher levels of collaboration between tenderers and, thus, potentially lead to anticompetitive joint tendering. Second, on the demand side and in relation with CPB behaviour, there is a concern that the way in which CPBs tender contracts (most usually, framework agreements, and increasingly dynamic purchasing systems)[25] can *in itself* be restrictive of competition and, thus, not only potentially breach the principle of competition in Article 18(1) of Directive 2014/24/EU,[26] but also the EU competition rules in Articles 101 and/or 102 TFEU. For the purposes of this chapter, the second concern is of particular interest, as the first one is largely indistinguishable from the treatment of joint tendering and *bid rigging* more generally—which discussion exceeds the space available here.

Focusing thus on demand-side potentially anticompetitive CPB activity, perhaps unsurprisingly, there are notable differences in the levels of awareness of the impact of aggregation on SME access to CPB procurement and on competition in the market across

[20] For a 'classic' discussion, to which we may well return, see W B Burnett & W E Kovacic, 'Reform of United States Weapons Acquisition Policy: Competition, Teaming Agreements, and Dual-Sourcing' (1989) 6(2) *Yale Journal on Regulation* 249-318.
[21] I am grateful to the colleagues that have compiled the national reports included in this book. The comparative considerations solely rely on their contributions, which are taken to correctly represent the current state of the law and administrative practice in the respective jurisdictions.
[22] Q9: 'Have any concerns been raised regarding competition law aspects in your Member State regarding the agreements by CPBs – if so which and how are they tackled?'
[23] Q10: 'Are CPBs solely for the use of public sector entities, or can they also sell to private users? If the latter, how are prices determined (is there a single price for public and private buyers)? Does the type of buyer have an impact on the way the CPB is remunerated (eg are there commissions, or different fees, for private sector sales)?'
[24] Q11: 'Are SMEs being taking into account by CPBs? Do SMEs bid for contracts at CPBs? Are there any requirements for lots?'
[25] See the contribution by R Vornicu and M Andhov in this book.
[26] Directive 2014/24/EU on public sector procurement [2014] OJ L 94/65. This claim is frequent in Swedish procurement litigation vis-à-vis CPBs; see the Swedish national report by Å Edman in this book.

jurisdictions. What is perhaps more surprising is that, although these two issues are closely connected—for, functionally, less SME access means less competitive pressure and a likely depletion of the pool of potential providers for the future—the narrative concerning each of them is also rather different in some jurisdictions.

At the lower level of awareness, in some jurisdictions, there are no reported concerns with the impact of procurement centralisation on competition in the relevant markets, at least from the perspective of subjecting CPB activities to competition monitoring and/or enforcement. This is the case is *Italy*,[27] or *Poland*.[28] In these jurisdictions, there is concern about SME access to public tenders, but it is largely framed not in competition terms, but rather on some other understandings of equity or equality of opportunity in accessing opportunities financed by public funds, or to simply result from political pressure.

In some jurisdictions, the issues of competitive impact and SME access in the context of centralised procurement are still at a nascent stage, but that largely derives from the limited experience with centralisation in itself. That is for example the case of *Romania*, although there are early signs of awareness of competition impacts and trade-offs.[29] Conversely, in jurisdictions with a mature and relatively complex CPB landscape, like the *United Kingdom*, competition concerns may only play a marginal role in terms of CPB regulation, largely on the assumption that market incentives suffice to discipline their behaviour.[30] Indeed, the preservation of those market incentives was one of the main reasons to discard making the use of CPB services mandatory in the UK, where SME policies are also left to each of the CPBs in a largely deregulated approach, with some pursuing more active approaches than others.[31]

In Scandinavian jurisdictions, however, the potential impact of procurement aggregation through CPB activity on market competition, including SME access, has been subjected to some more detailed scrutiny. For example, in *Denmark*, while a 2015 report by the competition authority found no relevant issues and even reported significant (price) advantages in single-supplier framework agreements, there are continued discussions on SME access on the political arena, including the possibility of mandating the division of contracts into lots to increase SME accessibility.[32] Similarly, in *Sweden*, although there has been debate on the potential anticompetitive effects of CPB activity in terms of long-term monopolisation (rectius, foreclosure) of certain markets, including a report commissioned by the competition authority in 2010, there is an increasingly positive view of CPB activity and uptake in use of their services—which is partly explained as 'the result of CPBs taking into consideration the above mentioned critique in their strategies and daily businesses'.[33] Perhaps more starkly, in *Finland*, a recent merger of the two largest CPBs—which was cleared by the competition authority, despite effectively being a *merger to monopoly*—has raised significant concerns on SME accessibility.[34] However, despite this 'structural tolerance' to centralisation and its political support, there are clear signs of a growing attention to competition concerns in the way CPBs *behave* or, in other words, in the way in which they design and implement their procurement. For example, in a landmark case, the Finnish Supreme Administrative Court found that 'the decision to award "too-large" a framework agreement for health care and

[27] See the Italian national report by G Racca in this book.
[28] See the Polish national report by P Nowicki in this book. This is perhaps particularly surprising in view of the possibility for Polish CPBs to offer their services to public and private entities alike.
[29] See the Romanian national report by R Vornicu and D Dragos in this book.
[30] This is, in itself, notable, as market mechanisms can only function efficiently under adequate competition law enforcement.
[31] See the UK national report by L Butler, A Manzini and M Trybus in this book.
[32] See the Danish national report by C Risvig Hamer in this book.
[33] See the Swedish national report by Å Edman in this book.
[34] See the Finnish national report by K-M Halonen in this book.

hospital supplies created barriers to bidding for most undertakings and was unduly restricting competition'.[35]

Much along the same lines, in *Germany*, there is consolidated case law subjecting collaborative procurement to antitrust law and, in principle, there are quantitative limits in place to restrict the accumulation of excessive buying power. However, most recent enforcement action has mostly consisted on checking that the relevant contracts were divided into lots as a compensatory measure in terms of competition, as imposed by the applicable legislation, which includes a number of measures to promote SME participation.[36] Not too differently, in *Spain*, the competition authority can oversee and recommend modifications to the tender design, in particular for contracts to be awarded by the State-level CPB, and there is an emerging body of administrative practice in that regard, in particular concerning framework agreements. Similar to the Finnish case mentioned above, there is also precedent in Spain of review bodies (administrative tribunals) quashing tender procedures on the basis that the advertised framework agreement would have been 'too large'. Also similarly, the main tool to facilitate SME participation is the legal requirement to divide contracts into lots.[37] In *The Netherlands*, there is also explicit consideration of the competition impacts of collaborative procurement—though it seems to be primarily of a sectorial nature and focused on healthcare and pharmaceuticals, which display peculiar market structures, including on the demand side due to the Dutch insurance healthcare system—and explicit guidance has been formulated by the competition authority to that effect. Under Dutch law, there are also quite developed SME-orientated requirements, including a cluster ban and a splitting obligation go beyond what is required by Directive 2014/24/EU (see further details below, section 3.3)—although their effectiveness has been doubted in the context of increased use of market consultations to scope the relevant contracts.[38]

There are some additional moderating factors that may be important parts of the broader model that seems to be emerging in jurisdictions where there is *some degree* of consideration of competition impacts twinned with clearer concerns for SME access to public contracts. First, it is important to stress that Danish, Finnish, Dutch and Spanish CPBs only offer their services to public sector buyers (largely understood, to cover eg sheltered workshops in The Netherlands), which may be seen to exclude issues of (unfair) competition between CPBs and other intermediaries in private markets (eg supply-chain management consultancy). In Germany and in Sweden, some CPBs offer services to private buyers as well, but the general trend seems to still be largely constrained to CPBs serving the public sector, largely construed (eg to include housing companies in Sweden).

Second, there are clearly distinct approaches to the inclusion of SME considerations, which may largely be determined by issues of legal culture that can also play a role in terms of the general approach—which, however, exceed the possibilities of this chapter. In that regard, it is worth stressing that it seems that Danish, Finnish and Swedish CPBs have explicit SME policies in place, in a sort of *self-regulatory approach* that may appease policy-makers facing calls to ensure SME access (as well as competition concerns, at least in the case of Sweden). Differently, a much clearer *command-and-control* approach can be observed in other jurisdictions. In Germany and Spain, the main elements of a pro-SME procurement design—notably, an obligation to divide contracts into lots—are enshrined in the law and, thus, of

[35] Ibid. For extended discussion, see K-M Halonen, 'Framework Agreements Should Not Be Used Improperly or In Such A Way As To Prevent, Restrict or Distort Competition' (How to Crack a Nut, 9 Dec 2016) https://www.howtocrackanut.com/blog/2016/12/8/framework-agreements-should-not-be-used-improperly-or-in-such-a-way-as-to-prevent-restrict-or-distort-competition-guest-post (accessed 25 May 2020).
[36] See the German national report by M Burgi and C Krönke in this book.
[37] See the Spanish national report by P Valcarcel in this book.
[38] See the Dutch national report by W A Janssen and M A J Stuijts in this book.

general application. Similarly, there is a rather developed system of requirements under Dutch law. I elaborate on these insights in the next section, where I critically reflect on the emerging approaches to monitoring competition and SME impacts of CPB activities and their regulation.

3. Thoughts on CPB oversight and regulation from a competition and SME perspective

The emerging regulatory model, as far as one can be identified in the limited experiences cursorily surveyed in the previous section, seems to be one where there are a few relevant elements: (i) concerns 'public-only' or 'mostly public' CPB markets; (ii) strongly relies on discrete controls on the division of contractual opportunities into (SME-friendly) lots; and (iii) focuses on the short-term and is largely oriented towards 'large number' controls based on proxies for the competitiveness of procurement markets. The model allows for some variation on (ii), as controls on contractual allotment can either be legally mandated or left to self-regulation. This section concentrates on each of these issues in turn. It concludes that there is still limited awareness at national level of the medium- to long-term negative effects of (excessive) CPB reliance and most current checks and balances are still rather static, which leads to suggesting a more dynamic approach in the following section.

3.1. No private competition, no problem?

One of the main implicit elements of the emerging competition oversight model seems to be that: *given that there is no competition* between CPBs and (private) undertakings *because CPB activities are limited to serving the public sector* (loosely defined), there is no need to subject CPBs to direct competition law oversight and enforcement. While this could theoretically make some sense because CPBs that do not offer their services in private markets cannot eg cross-subsidise their services or engage in predatory practices, it obviates both the possibility of competition *among* CPBs (where they have overlapping remits), as well as the fact that CPBs are put in a practically unassailable position—which is *legally* unassailable where CPB use is mandatory.

This, in itself, is a weakness of the emerging model, not only because the remit of CPBs is not necessarily fixed and because there could be potential alternative providers of centralised purchasing services likely foreclosed (in the long-run), but also because CPBs could engage in exclusionary or exploitative practices vis-à-vis potential or current contractors. For example, pricing strategies are highly unlikely to be scrutinised despite the potential for CPBs to extract excessive rents from its contractors, especially in very large contracts based on average unit prices, which may then be implemented to much lower levels that would have required higher unit prices for suppliers to turn a reasonable profit and/or not sell at a loss. While this is an issue that can (sometimes) be addressed through procurement rules,[39] the natural remit for such type of analysis is competition law (on unilateral conduct by a dominant undertaking).

The second weakness is perhaps less visible and concerns the 'transmission' of the unassailable position from the CPB to the contractor/s engaged in their contractual arrangements—mostly, framework agreements. The relevant issue here is that, where a CPB tenders a large framework contract or a number, or a sequence of them, it can act as a funnel for market power and end up creating a system that puts 'key' or 'strategic' suppliers in a dominant position. The emerging model limits the oversight to whether a given specific tender was divided into lots (whether as a legal requirement, or a pragmatic expectation), which raises the question whether contractual allotment suffices to avoid the issue of eg cumulative awards (which it does not).

[39] See eg the case on fuel procurement discussed in the Finnish national report by K-M Halonen in this book.

3.2. In lots we trust?

Almost with no exception, the jurisdictions covered in the survey place the brunt of SME and competition concerns on the effectiveness of the rules on the division of contracts into lots. The rather clear intuition behind this approach is that, *where the different lots are adequately designed*, SMEs will not face a disadvantage and, where SME participation is possible (or, better, maximised), the competitive mechanism for the award of the public contract will prevent market distortions *and* ensure value for money. Now, of course, the catch is in the difficulty of ascertaining whether or not the different lots are adequately designed.

The difficulties in establishing the adequate scope of a contract and, where appropriate, its allotment make these decisions notoriously difficult to challenge—particularly on the basis of distortions that can be countered by the contracting authority as only having emerged with hindsight. There is also no guarantee that a 'well-designed' division of a contract into lots will result in multiple awards (to SMEs), as there is a number of factors at play, such as the evaluation rules and, in particular, the rules on bundle/total tenders and overall discounts, the actual size of the lots (where designed eg geographically or around different specialisms), or the timing of the tender of different contracts for all of which a single contractor would have an interest, but with insufficient capacity to fulfil them all—to mention but a few.

There is also a further issue of potential deviations between the advertised (and awarded) needs and those that arise during the execution of the contract, which could create uncertainty as to whether being awarded a lot will mean *any business at all* where CPBs do not commit to placing any call-offs (or where there is 'cascade system' based on excessive capacity and/or with a first-ranked contractor with sufficient capacity) or, at the other end of the spectrum, whether contractual requirements will end up *exceeding the material capability of the contractor*. Once again, this is partially linked to some procurement rules—eg on the level of precision that must be met by value estimates (for framework agreements) and the 'capping' of the contractual validity at that level, as per the recent *AGCM Antitrust and Coopservice* case.[40] But, once again, it seems that these operate as a rather poor substitute for proper (dynamic) competition analysis conducted in a more holistic manner.

3.3. The (large) irrelevance of mandating lot division as an output, but not as a process

Given the significant practical constraints on relying on lot division to control for *effective* competition for public contracts (from SMEs, but also more generally), it seems largely irrelevant whether countries decide to impose a positive obligation to divide contracts into lots or not. What is more interesting is the use of such *conditional obligation* to create a procedural requirement for contracting authorities to undertake market analysis (and engagement), as seems to be the case in The Netherlands, where the relevant law

> … obliges contracting authorities to prevent *onnodig clusteren* (unnecessary clustering) by taking into account the following three criteria, namely 1) the composition of the relevant market and the influence of clustering on the access for SMEs, 2) the organizational consequences and risks due to the clustering of contracts for the contracting authority and the economic operator, and 3) the level of cohesion between the respective contracts … clustering cannot lead to an appreciable limitation of competition on the market and … a balance must be made between the advantages and disadvantages of clustering, including total cost of ownership appreciations and the complexity of a procurement. If clustering of contracts is preferred [… there is] a subsequent *splitsingsgebod* (splitting obligation) that obliges contracting authorities to divide the clustered contracts into lots. Both decisions to either cluster a contract or to not split a clustered contract into lots must be duly motivated and published …[41]

[40] Judgment of 19 December 2018 in *Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice*, C-216/17, EU:C:2018:1034. For discussion of additional distortions at domestic level of such an approach, see the Danish national report by C Risvig Hamer in this book.

[41] See the Dutch national report by W A Janssen and M A J Stuijts in this book.

Of course, this is not to mean that this is a perfect solution. However, the imposition of two consecutive duties on contracting authorities, together with motivation and publication requirements can allow for a timely challenge of decisions to cluster and/or not split contracts.

In systems with a self-regulatory approach to this issue, the premise is likely to be that, given a specific corporate policy in the CPB, as a matter of diligence and professionalism, the CPB workforce will engage in the same analysis. Moreover, at least in the case of some Swedish CPBs, there are informal and formal communications and complaints mechanisms that can generate the same type of timely (and effective?) challenge of equivalent decisions.[42] Whether the same is achieved in jurisdictions with a legal obligation to split contracts into lots can be doubted, even where there are high levels of transparency of the justification of those decisions, as this approach does not truly encourage involvement of the contracting authority/CPB with the market—except where, separately, market consultations are promoted as a matter of general procurement design.

3.4. How many SMEs mean effective competition for public contracts?

As mentioned above, another of the weaknesses in the emerging model is that it focuses on the short-term and is, at the same time, largely oriented towards 'large number' controls based on proxies for the competitiveness of procurement markets (eg such % of CPB contracts/lots were awarded to SMEs during this financial year). Most reports included in this book stress that a large percentage of the contracts (or lots) tendered by CPBs were awarded to SMEs as a recognised sign that CPB activity does not necessarily negatively impact on them.

However, even if this information can give some indication of the extent to which SMEs are (or not) negatively affected by centralised procurement at the time of reporting, this is information is insufficient. First, it is insufficient because it is not benchmarked against the 'SME population' in the relevant markets. Even if, say, 80% of CPB contracts/lots are awarded to SMEs, that is a major (negative) deviation compared to the general economy where SMEs are eg 94% of the business fabric of a given economy. Conversely, it is also a major (unclear) deviation if, in a specific sector, only 60% of active undertakings are SMEs. Therefore, aggregate and decontextualized figures are insufficient to assess whether there is an SME accessibility issue. Abstract figures by number of contracts are also not very useful and disaggregation eg by value, innovative character, sustainability aspects, etc could be much more useful.

Second, and more important, it is worth stressing that most concerns with the impact of CPB activity on market competition are not focused on the short-term, but rather on the medium- and long-run. From this perspective, what is relevant is to be able to identify trends to see if *over time* centralisation does (or not) have the effect of driving (unsuccessful) undertakings out of business. It is also important to see if the trends vary in different markets as, it is possible that eg CPBs generate more concentration in some sectors than others.

3.5. Preliminary conclusion

On the whole, it is submitted here that, even if the emerging model evidences engagement with issues of SME access and *some* competition concerns as far as they are related to SME participation (or its possibility); there is still limited awareness at national level of the medium- to long-term potential negative effects of (excessive) CPB reliance—and of the potential ensuing distortions of market structures. Moreover, most current checks and balances are static and offer partial snapshots that make it difficult to assess the real impact of CPB activity.

[42] See the Swedish national report by Å Edman in this book.

4. Conclusion—a call for a more dynamic model

Given the analysis above, I would extract two related conclusions.

The first one is that there are elements of the potential impact of CPBs on market competition and some aspects of CPB market behaviour that cannot be satisfactorily tackled by procurement rules *alone*, even in the (current) absence of competition between CPBs and (private) undertakings for the provision of centralised procurement services. In that regard, I renew the call for the inclusion of (centralised) procurement as an 'economic activity' for the purposes of the application of EU competition law. CPBs need to be treated like undertakings and, as such, be potentially subjected to investigations for exclusionary and abusive practices, as well as anticompetitive practices under Articles 101 and 102 TFEU.

The second conclusion, which is closer to the core of the discussion in this chapter, is that—once the above is in place—there is promise in the emerging model of CPB regulation in so far as it can be improved through incorporating more dynamic analysis. A combination of the requirements that emerge from the Scandinavian and Dutch experiences with a longer-term analysis of market trends could generate a good regulatory benchmark. As stressed above, the Dutch approach resulting in a proceduralisation of the obligation to consider market (and SME) impacts of procurement decisions at design stage is appealing. From the Scandinavian, and in particular the Swedish experience, it would be interesting to follow the approach to CPB-run supplier/SME engagement mechanisms, including the existence of an Ombudsperson for pre-contentious engagement. More generally, and in common with Finnish, German and Spanish approaches, it would also be necessary to have access to judicial remedies based on competition considerations where those other dispute resolution mechanisms failed—and, in particular, to have effective enforcement of the principle of competition in Article 18(1) of Directive 2014/24/EU.[43] In addition, there would be a necessary additional layer of regulation to cover longer-term effects. This would require CPBs to generate, and to share with the relevant competition authority, more detailed and specific reports on the evolution of market structures and dynamics in the areas where they are active. This could then lead to the publication of more limited versions for public analysis.

Of course, with the advent of more advanced and open procurement data architectures—such as those that *should* result from the transposition of the new rules on *eForms*,[44] and perhaps also from the further development of the Open Data Directive[45]—it should be progressively easier for CPBs to discharge this burden. Such developments could also allow third parties—including competition authorities themselves, or procurement oversight or audit bodies—to develop the relevant indicators. However, this will all be dependent on complex decisions at national level about the transparency of procurement information and the availability of (big) data on the relevant economic sectors against which to cross it. Therefore, for now, it would seem best to impose the obligation to document and to take those dynamic medium- and long-term trends into account on CPBs themselves. It may well be that some of them already do, in which case the proposal is largely one of mandating limited disclosure to the relevant competition authority or oversight body. Where CPBs do not do this, adding this regulatory burden is unlikely to generate a disproportionate impact, as long as CPBs have adequate record-keeping mechanisms, which they must have.

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[43] A Sanchez-Graells, 'Some Reflections on the "Artificial Narrowing of Competition" as a Check on Discretion in Public Procurement' in X Groussot, J Hettne & S Bogojevic (eds), *Law and Discretion in EU Public Procurement* (Hart 2019) 79 ff.
[44] Commission Implementing Regulation (EU) 2019/1780 of 23 September 2019 establishing standard forms for the publication of notices in the field of public procurement and repealing Implementing Regulation (EU) 2015/1986 (eForms) [2019] OJ L 272/7.
[45] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L 172/56.