PUBLIC PROCUREMENT
IN THE EUROPEAN UNION
AND ITS MEMBER STATES
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The creation of a common European Law on public procurement is one of the most ambitious objectives for the transformation of public Law that the European Union has undertaken. The motive is easy to explain, as, given the economic importance that public procurement of works, supplies and services has in the countries of which the European Union is comprised, it would not be acceptable for this sector to remain in the sidelines of the construction of this great internal market that makes up its original reason for being. However, the harmonisation of the legal system for public contracts has always faced and faces great difficulties that have been looked at in the official reports studies carried out by the European Commission. These difficulties in essence stem from the tendency of Member States to award public contracts to companies established in their own country, moreover, in the their own region or territorially reduced area that the respective public contracting body administers.

In a certain way, these problems are inevitable, because public procurement is not just another form of economic activity subjected to the still imperfect rules of free and equal competition, but it is also an important instrument of economic social and even (although in lesser measure) environmental policies. Any public administrator cannot fail to take into consideration and to implicitly balance the direct and indirect effects that their decision may have on the economy of the country or of the region when contracting, on the creation of employment and other aspects of public policies. This fact suggests a lesser or greater obstacle, depending on the cases for the unification and for the correct application of public procurement Law based on the principles of the single market.

In spite of this, forty years has already passed since the existence of legislation on the subject, if we take as a point of reference, the adoption of Directive 71/305/CEE of 26 July 1971, regarding the coordination of the awarding procedures for works contracts (without prejudice to previous activities of a lesser scope). During this long period, this legislation not only has been consolidated but has also been extended to other types of contracts and has been perfected in successive stages. On the other hand, the Directives on the awarding of public contracts have given rise to the development of extensive and rigorous Court of Justice case-law. This case-law doctrine along with the European Commission’s informative and vigilance functions has contributed in a crucial way to the work of revising the internal legislation on public contracts that each of the Member States has had to adopt normally also successively and in stages.
What has happened is that all national legislators have been forced to modify internal regulations in order to adapt them to the Directives that have been given, to the interpretative guidelines deduced from European case-law and in several cases to modify internal regulations to the European Commission’s requirements and decisions. In and of itself, this process of legislative change is a formidable achievement.

It must be taken into account the fact that the harmonisation of European Law on public procurement, although relative and partial, is based on very different legal and administrative realities and traditions. It equally affects those countries that have received the régime administratif model and those countries that use common law to systems in which the rule of law is understood in a different way, to centralised or decentralised States and those with very different bureaucratic models, without prejudice to the lack of homogeneity of the institutions and the different framework of relations between the constitutional powers. In spite of this, with the necessary flexibility in order adapt themselves to the changing circumstances, the basic rules on the awarding of the most important public contracts and the essential guarantees for their execution are the same in the twenty-six States of which the Union is currently comprised. Now, under this uniformity there essentially lies an evident diversity. The public bodies called to award public contracts regulated by the European Directives neither have neither the same legal character nor the same characteristics in all Member States. The regulation of the administrative procedures, even those influenced by common legislation maintains a great variety of nuances. The relevant bodies for the control by Law for the correct enforcement of said legislation are not the same in each and every case, because the functions that pertain to the court of justice and to other non-judicial bodies regarding the supervision of administrative activities. As the European Directives no longer refer to the awarding of the contracts, the legal system applicable to contracts already awarded by public bodies greatly varied, especially amongst the legal systems, the majority of which to which civil or common Law applies, with or with without any peculiarities and that have their own public legal or administrative system that applies to the execution or resolution of contracts.

More so, the partial harmonisation has started to create a common language and to unify some laws and practices. However, the application of European Law on public procurement fails to be homogenous in all Member States. Partly because local political and economic interests are and will continue to be present that have an influence on their execution. Partly because going further than this suggests permeating national political, administrative and legal policies and that, without a doubt has taken a long time. The harmonisation process of European Law on public procurement can also be seen as a significant example of the actual European unification process: Slow, irregular, imperfect, complex... but unstoppable, at least up until now (and one wishes it to be so in future).

In the collective work that we are now publishing, we have sought to analyse and to recognise this controversial legal situation, that is to say, the state of unification relative to European Law on public procurement in the midst of the European Union. In order to do so and in a pragmatic way, more than carrying out a dogmatic study or an interpretation of the Directives, we have sought to study who they are applied, either by the Court of Justice or by the legislator (and in its turn by the courts) of the Member
States. Obviously we were not able to look at the problems related to the administrative application of this legislation in a study of a legal nature, although some of these problems were warned about on reading court decisions or certain official reports.

The alert reader will be able to immediately understand the differences between the regulations in various countries and includes the resistances, certainly not unanimous, that several of them surmise or can be gathered more strictly than necessary from the legal texts for harmonisation in order to “comply” with Community Law. It does not fail to draw attention to, for example, the fact that in many States, legislation on public contracts has different content and a different level of guarantee according to how it is applied to contracts that are above the economic thresholds established by the Directives, or to contracts that do not exceed the thresholds and that in principle, would not be regulated by European Law. This, in spite of the fact that the Court of Justice has reminded that at least the general principles on public procurement on which the Directives are based are applicable to all types of public contracts, since they stem from the actual founding Treaties.

We believe that a study of this type not only has academic nor does it have a merely comparative aim. As well as the interest that it may have for lawyers, other professionals and economic agents who wish to begin to study the legislation of other States in the Union on this matter, to highlight the this question may also modestly contribute to evaluate, and its turn, to perfect national legislation and its common framework.

This last aim, whose pro-European stance that we have not hidden, is shared by the author's of this study, all of them Lecturers of Administrative Law at Spanish Universities, the majority of which are young, but with a high level of training and research experience. Each one of them, on the basis of some formal criteria, has had complete freedom to carry out and expound their work. Hence its diversity, which we find to be preferable to imposing a strict content outline from the start. In fact, because of the same diversity of the legislation that is studied, flexibility is consequently essential.

However, it is with some sorrow that we have not been able to extend the study to all of the European Union States, as in some cases access to documentary sources caused linguistic problems and others caused problems of a practical nature that would have been difficult to resolve without delaying the publication of the other studies. However we trust that these waters can be chartered in future if we are fortunate to be given the opportunity to work on a revision of this work.

To conclude and in order to acknowledge and give thanks, we would like to recognise that this study and its publication in two European languages have been possible due to the Research project financed by the Spanish Government’s Ministry of Science and Innovation. We also must thank the Universidad de Alcalá for the support given in the organisation of tutorials and workshops and also for the final edition. As regards the final edition, we must emphasise the availability and the interest with which the Publisher Lex Nova has shown initiative, all the more praiseworthy in times of financial crisis.

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**ALEJANDRO HUERGO LORA**

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