7 Public Procurement Policy at That Time and Now

Turning Points in Legal Harmonisation I

*Ágota Török**

This study is an edited version of a presentation held at the 2017 Autumn Conference entitled "Where to next, European Union?" organized by the Hungarian Branch Association of FIDE to commemorate the 60th anniversary of the adoption of the Treaty of Rome.

Let us celebrate the Treaty of Rome, the act that launched Europe in the sense of public law. We strived to become members, we wanted to achieve more and become more valuable and live more freely than it was possible under the circumstances that we had been born into. We wanted more, and we worked hard to achieve it. For us, it was in 2004 when the long-awaited magical journey started; and we firmly believed that Hungary was taken to the faraway land of fairy tales on 1st May and our dreams became hopes.

We have crossed a cultural line, and with slight exaggeration we may say that our lives are already driven by renewed customs and traditions: we find ourselves facing a new world at the office, the forms of cooperation changed, and our personal relationships evolved and moulded, too. EU law penetrated our legal system that night in May, and we lawyers had already and for a long time been aware of the framework we needed to adjust to. But did we ever ask ourselves where we wanted to go, why and how?

With 13 years behind us, we have the right to celebrate the EU. It is a common challenge for us to find the right emphasis, to devote ourselves to the mutual goals and to ensure sustainable development. What is the Europe we Hungarians want, what is the Europe each Member State wishes for, what is the Europe the world wants to see and what Europe is really like, what is the path of it and what does future hold for it? On the occasion that the Treaty of Rome on the establishment of the European Economic Community was executed sixty years ago, we should also start a discussion about important issues for us to tackle prior to integration.

As proof of their commitment to the common objectives, the Member States adopted the Rome Declaration which commemorates the anniversary. The Declaration empha-

* Ágota Török: legal counsel, accredited public procurement consultant, National Infocommunications Service Company Ltd.

sizes that the European Union is a community with multilevel governance based on the rule of law and also an economic powerhouse.

The Treaty of Rome ("the Treaty") established a *common market* that created the conditions for stability for European citizens and ensured the free movement of persons, goods and services, and – through this legal community – this integration launched a jointly built and flourishing economy in the history of our continent, of which we European citizens can be rightly proud.

7.1 Preliminary Remarks: The Emergence of Public Procurement in Light of the Treaty of Rome

The provisions aiming at ensuring and protecting competition were laid down in the Treaty establishing the European Economic Community, therefore, we may say that the cradle of a legislation on public procurement with free competition was the Treaty of Rome. The Treaty of Rome does not contain any specific public procurement regulations or contract-awarding criteria but it laid down the four policies that serve as an essential guidance in respect of public procurement legislation and as such can be regarded as the pillars thereof. These policies guarantee:

- the non-discrimination on grounds of nationality (Article 18);
- the free movement of goods and the prohibition of quantitative restrictions or measures having equivalent effect (Article 30);
- the freedom of establishment (Article 50);
- the freedom to provide services (Article 56);

When examining the criteria of trade between Member States and any subsequent effects thereof on public procurement, considering the competitive approach as well, we should quote Article 81 of the Treaty of Rome (ex Article 85):

> "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."

These are agreements directly or indirectly regulating buying and selling prices and other business terms and conditions.

It would not make sense to study any arrangements or regulations affecting competition in the socialist Hungary of the era where economy was governed by command and state ownership, given that the predecessors of any institutions connected to the Treaty

before 1957 were dormant for many decades, avoiding the historical precedents of the traditions of the area of law. Prior to changes implemented in the domestic command economy system in 1968, for instance, general contractual terms and conditions were usually published in Ministerial Decrees in the form of "basic terms and conditions." No transactions other than supply contracts could be established among socialist entities, and this was ensured by administrative means through regulations published in the form of "principles" and "directions" before the creation of the Civil Code. (Therefore, in the Soviet Union and in any country governed by the "people's democracy", legislative measures based on appropriate authorizations regulated the types of services which did not require the conclusion of a supply contract.) Therefore, public procurement, the freedom to enter into public procurement contracts or the implementation of standard contracts published in the course of such procedures cannot be discussed in that regard. Following the consolidation of the Soviet political organisation in Hungary even the distinction between public and private law was denied, just as in several other totalitarian regimes. (The designation of "private law" was no longer in use, on grounds that this branch of law should also serve the "public" interest.) As a result of the elimination of market economy and private ownership, the law of stock exchange, competition law, as well as bankruptcy law ceased to exist and the role of securities law became insignificant. Changes in economy and politics brought about a revival of the economic and institutional background for competition law in the late '80s and the law of public procurement during the mid-1990s.

7.2 Contribution to Growth by the Single Market

Currently the EU has the largest single integral market in the world, accounting for 22% of global GDP and 15% of world trade. The EU-28 accounts for approximately 15% in world merchandise trade. The value of international merchandise trade is significantly (approximately three times) higher than that of the services. Within the Union, the value trade between Member States was EUR 3,110 billion in 2016, 78% higher than extra-Union trade.

Through the single internal market the Member States enjoy the same rights and obligations, a unified legal framework and equal protection within the Union, and consequently, it smoothes out trade barriers. The ability to overcome occasional internal and external conflicts, implement specific reforms and the achievements are indicators of the power lying within the community.

7.3 Where Will the White Paper Take Us?

On 1 March 2017, the European Commission published a discussion paper entitled "White paper on the future of Europe and the way forward. Reflections and scenarios for the EU27" (the so-called "Juncker White Paper"). The White Paper envisaged five scenarios, each describing a possible way the EU may take by 2025, depending on the decisions Europe makes and the path the Member States choose during this period.

Scenario 1: "Carrying on" – The European Union focuses on delivering its positive reform agenda. The positive agenda of action continues to deliver concrete results. The unity of the EU27 is preserved but may still be tested in the event of major disputes. Only a collective resolve to deliver jointly on the things that matter will help close the gap between promises on paper and implementation.

Scenario 2: "Nothing but the single market" – The EU27 cannot agree to do more in many policy areas other than increasingly focusing on deepening certain key aspects of the single market. Decision-making may be easier to understand. It will become more and more difficult to tackle issues involving more than one Member States, consequently, the gulf between expectations about common challenges and implementation is increasing. The rights of citizens guaranteed at EU level may be curtailed in the future.

Scenario 3: "Those who want more do more" – The EU27 proceeds as today but where certain Member States want to do more in common, they will have the opportunity to emerge to work together in specific policy areas and achieve more results. These may cover policies such as defence, internal security or taxation (harmonisation of tax rates). The unity of the EU at 27 is preserved while further cooperation in the field of law, budget and common procurement is made possible for those who want it. The gap between expectations and delivery starts to close in the countries that want and choose to do more. Questions arise about the transparency and accountability of the different layers of decision-making. Citizens' rights derived from EU law start to vary depending on where they live. Disparities emerge. The legal status of Member States is preserved, and they retain the possibility to "join"/connect those doing more in certain areas over time.

Scenario 4: "Doing less more efficiently" – The EU27 decides to focus on delivering more and faster in selected policy areas, while doing less elsewhere, where in its opinion it is unable to create added value. European citizens feel that the EU restricts its actions to areas where it can actually create added value.

Focusing resources and emphasis on selected areas enables the EU to react more quickly. Initially, the EU will face difficulties in agreeing which areas it should prioritise.

Scenario 5: "Doing much more together" – Member States of the European Union decide to do much more together across all policy areas. There will be a far greater and quicker decision-making at EU level. Citizens have more rights derived from EU law. There is the risk that certain parts of society which feel that the EU lacks legitimacy or has taken too much power away from national authorities want out.

7.4 Public Procurement Policy at That Time and Now

Let's discuss the topic of public procurement by going through those major legislative phases taking us to today's legislation. What stages can we distinguish, how was the system of principles elaborated, how does the EU trade policy affect bidders? Let us explore if public procurements can be more efficient, and if so, how?

– There is an economic policy goal underlying the Treaties establishing the Communities, an essential component and the major phase of economic integration: the internal market, which is similar to the domestic one in terms of the way it operates. *Internal market* is a single economic area without internal borders where goods, persons, services and capital move freely. The foregoing are the four fundamental freedoms within the EU. There are three types of obstacles hindering the free movement of goods and services: physical and technical obstacles and those caused by the differences between customs systems and tax schemes.

The Member States consolidate their measures which were previously different to create a single internal market and have less room to manoeuvre in legislation and standardization. Following only one (the Community) rule instead of various Member State regulations is a good direction. The external boundaries of the EU are reinforced by requirements and procedural rules. The so-created and highly protected borders of the EU are hard to penetrate and can be easily managed by arrangements between the EU and third countries at Community level. In case of weaker trade partners, there is a significant pressure to adapt if the latter wish to remain on the EU market.

The prerequisite and a crucial element of the survival of the single internal market is to prevent Member States from reserving public procurements to their own businesses.

– The most important goal of regulating public procurements is to develop the single internal market and operate it in a manner that the entrepreneurs established in different Member States are able to compete on the EU market of public procurement under the same conditions.

The Legislator's Way to Regulate Public Procurement was in the Form of Directives

According to Recital (2) of the Directive 2004/18/EC of the European Parliament and of the Council: "The award of contracts concluded in the Member States on behalf of the

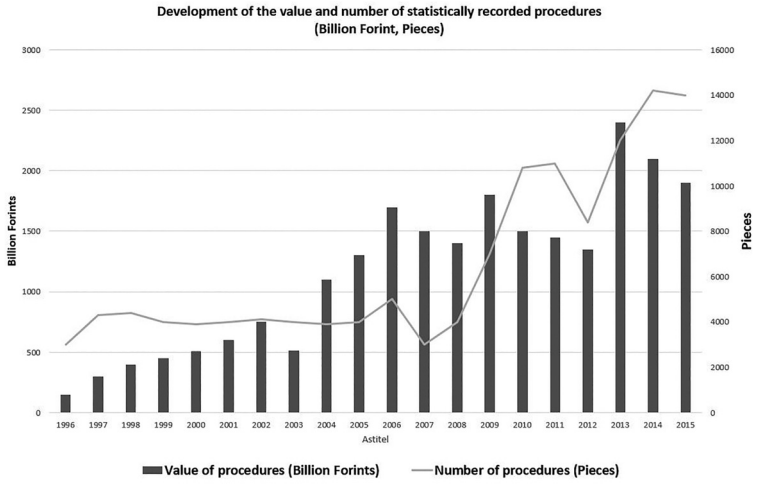
State, regional or local authorities and other bodies governed by public law is subject to compliance with the principles of the [EC] Treaty and in particular with the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and with the principles deriving therefrom, such as the principle of *equal treatment*, the principle of *non-discrimination*, the principle of *mutual recognition*, the principle of *proportionality* and the principle of *transparency*.

However, for public contracts above a certain value, it is advisable to draw up provisions of Community coordination of national procedures for the award of such contracts which are based on these principles so as to ensure the effects of them and to guarantee the opening-up of public procurement to competition. These coordinating provisions should therefore be interpreted in accordance with both the aforementioned rules and principles and other rules of the [EC] Treaty."

The principle of *equal treatment* is a significant principle of public procurement law which continues to exist in this specific field as a variant of non-discrimination on grounds of nationality, namely, non-discriminatory treatment. This principle means that a contracting authority shall not treat tenderers who are in the same situation differently and those with various backgrounds equally.

The following table demonstrates the size of the market involved in public procurement and the dynamics of growth (in HUF, according to changes in the value and volume per piece of each procedure) from 1996 in Hungary, showing the amounts at the disposal of the contracting authorities.

Figure 7.1 Development of the value and number of statistically recorded procedures (Billion Hungarian Forints (HUF), Pieces)



Source: The Statistical Department of the Public Procurement Authority

By the 1990s, a system of Community Directives was created, regulating the public procurements of traditional contracting authorities according to the subject of procurement, with a specific Directive governing the public procurements initiated by utility providers and another laying down the rules of legal remedies and sample announcements. It was the period of including these into *national law* when the administrative institutional and redress system of Hungarian public procurement was developed which has remained substantially unchanged ever since, where the Public Procurement Authority supervises the lawfulness of the procedures as an independent entity subordinated to the Parliament, whose legal status has been left almost intact since the first Public Procurement Act.

At first, Hungarian legislation was positive: the first Public Procurement Act (in accordance with Article 66 of the Europe Agreement) *made it possible for a transitional period of ten years* (*i.e.* until our accession to the EU) *for Hungary to promote its own economic interests,* thus allowing to protect its public procurement market. This way the fact that certain goods were of domestic origin or the grant of preferential treatment based on value created by domestic employees did not infringe our harmonisation obligations laid down in the Europe Agreement, and it resulted in the exclusion of businesses established in other Member States of the EU from Hungarian public procurement procedures. The sum in Figure 7.1 covered by public procurement procedures increased from HUF 230 billion to HUF 1,730 billion during the first ten years.

The Decision No. 30/1998. (VI. 25.) AB of the Hungarian Constitutional Court is worth mentioning as an example of the difficulties in implementing these rules, given that the Court clearly considered Community law as *foreign law* and (due to its rigid sovereignist approach) did not take into account the fact that there had been already existing relationships between the EC and the Republic of Hungary based on the Europe Agreement. This passive approach was later disregarded by ordinary courts, by establishing that Community law shall be applied in accordance with the case law of the European Court of Justice in cases where Hungarian law is in conflict with Community law. The penetration of EU law into national law is made possible by the so-called "accession clause."

The harmonization of the EU and national regulatory system of public procurement was completed by 2004, and as a result Hungary's legislation was – in our opinion – overly regulated and complicated by complex derogations that we have not been able to overcome yet, however, the so-harmonized legislation was still a huge step forward compared to the former one regulating previous public procurements.

7.5 Can the System of Principles Be Regarded as a Norm?

The development and changes of domestic *principles of public procurement* are closely linked to how the EU law evolved and what legislative solutions the Member States ap-

plied. The Public Procurement Act of 1995 describes this under the Title of "*Principles of Procedure*." Such principles are as follows: the purity and public nature of competition; equal opportunities for bidders; the obligation of national treatment (the latter has the nature of substantive law). The (second) Public Procurement Act of 2003 maintained the existing principles unchanged. The principles of the Public Procurement Act of 2011:

- The contracting authority shall ensure and the economic operators shall respect the fairness, the transparency and the public nature of competition;
- The contracting authority shall ensure equal opportunities and equal treatment for economic operators;
- In the course of the contract award procedure, contracting authorities and economic operators shall act in good faith and in compliance with the requirements of honesty and proper practice of rights;
- When the contracting authority uses public funds, it shall act respecting the principle of effective and responsible management;
- In the course of the contract award procedure, national treatment shall be applied to economic operators established in the European Union as well as to Community goods; As regards economic operators established outside the European Union and as regards non-Community goods, national treatment is to be applied in accordance with the international obligations assumed by Hungary and the European Union in the field of public procurement;

The following system of principles laid down in Article 18 of the Directive 2014/24/EU was the next stage in the series of EU principles:

> "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.
>
> Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X."

In addition to the requirements laid down by the EU, the rules of Hungarian Civil Law also influenced the development of the scheme of principles in the new Public Procurement Act, but are they really identical, given that the scope of the legal institutions in the

two Codes (*i.e.* the Civil Code and the Public Procurement Act) is different (such as: subcontractors, securities, option, reimbursement of damages, contract modification, invalidity).

The new Public Procurement Act of 2015 introduces the prohibition of the abuse of rights, while omitting the requirement proper practice of rights, in light of the provisions governing the principles of the Civil Code. This can be explained by the fact that the current Civil Code no longer mentions the requirement proper practice of rights among the principles of the former Civil Code. According to the explanatory memorandum, the legislator's assumption is that the Code should first of all grant the free exercise of subjective rights, and any significant misuse of rights is usually in breach of the prohibition of abuse of rights. Furthermore, the implementation of the requirements governing good faith and fair dealings also creates an appropriate opportunity for the proper practice of rights. Similarly to its predecessor the current Public Procurement Act also declares at a prescriptive level that the provisions of the Civil Code (as *lex generalis*) shall apply as a background for the general provisions of the Public Procurement Act (as *lex specialis*). In addition to the explanatory memorandum, rulings of decision-makers (such as judges, public procurement commissioners) elaborated in cases initiated on grounds of such principles would bring an additional perspective and flesh out the provisions governing these principles, however, no such rulings (involving the principles) were published by the Public Procurement Authority between December 2015 and November 2017.

What is the outcome for the principles? Is it possible for it to be recognised as grounds of redress? The purity and public nature of competition, as well as equal opportunities are all clear requisites but changes in the nature of legislation and vague wording holds us back from initiating appeal procedures due to *e.g.* the breach of the principle of effective and responsible management, and when applying the law, we do not refer to the other principles as a general clause. Instead of being an argument for thinking in terms of principles, efforts to regulate every detail bring about the fragmentation of such principles within the legislation and adds weight to detailed rules to the detriment of general clauses.

7.6 Removal of Obstacles – External Dimensions of the Single Market

The rules governing the obligation of national treatment under public procurement law have not changed substantially. The *international obligations* of Hungary and the EU *in the field of public procurement* (as per Article 2(5) of the Public Procurement Act) towards countries outside the EU are governed by *international treaties*, and the obligations shall be fulfilled in accordance with such treaties in the course of public procurement procedures *involving tenderers established in and goods originating from third countries.*

According to Article 3(1)(e) of the TFEU, the EU has exclusive competence for the *common commercial policy*. In respect of substantive law, the common commercial policy

is described under Title IX of the TFEU. The major objectives of the common commercial policy – such as the harmonious development of world trade and the abolition of trade restrictions – are set forth in Article 131. The common commercial policy *creates the external conditions for* the Customs Union – more precisely today's *internal market.*

According to Article 2(5) of the Public Procurement Act, *national treatment* shall be applied to *economic operators established in the European Union* as well as to *Community goods* in the course of the contract award procedure. As regards economic operators established outside the European Union and as regards non-Community goods, *national treatment* is to be applied in accordance with the international obligations assumed by Hungary and the European Union in the field of public procurement;

We are not obliged to apply national treatment for tenderers and goods outside the EU, provided that these are not covered by any international treaties, either. The principle of national treatment has remained unchanged since the first Public Procurement Act. The legislative options of nation states in the field of commercial policy ceased to exist.

The term "commercial policy" is not defined by the Treaty of Rome, thus, the practices developed on the legal basis thereof are of great importance. The primary law only specifies an open provision in respect of the commercial policy which will be given substance in practice in particular by the European Court of Justice when applying the law. In commercial policy the *Community interest is expressed,* and the interests of Member States should be channelled into the foregoing.

7.7 European Union as a Global Power in Defining the Scope of Tenderers

In the development process of international trade, the relationship between the EU and third countries are governed by multilateral treaties. If such treaties prescribe the obligation of granting national treatment to tenderers established in third countries, this shall be carried out in a *non-discriminatory* manner according to the rules of public procurement. The public procurement legislation permits the contracting authority to specify at its sole discretion which "grounds for exclusion" it will use to achieve appropriate tenders in the course of the public procurement procedure. Exclusion of certain tenderers established third countries may lead to complications in commercial policy.

Due to stalled multilateral trade negotiations within the WTO, the EU had to explore new ways to better access the markets of third countries. These free trade agreements are the so-called "new generation" agreements, reaching far beyond the reduction of customs tariffs and the trade in goods. Such agreements are those concluded with South Korea, Peru and Colombia, Canada and Singapore. A rather recent and relevant decision of the Court of Justice makes a clear distinction between the competences of the EU and the

Member States in respect of negotiations concerning international trade agreements and the ratification thereof.

Let us take a look at the "new generation" free trade agreement concluded between the EU and the Republic of Singapore. The European Union and Singapore initialled the text of the free trade agreement (EUSFTA) on 20 September 2013. According to the EUSFTA, it shall be concluded as a separate agreement between the EU and the Republic of Singapore, without the participation of the Member States. The European Commission contends that the European Union has exclusive competence to enter into the agreement; the European Parliament generally agrees with the Commission, but the European Council and the governments of every Member State that submitted written observations argues that the EU does not have the right to conclude its agreements alone, given that certain parts of the EUSFTA fall under the scope of competences shared between the EU and the Member States or belong to the exclusive competence of the latter. According to the motion, the EU should have *exclusive external competence* in certain areas involving the EUSFTA.

According to the ruling passed by the European Court of Justice, the free trade agreement between the EU and Singapore requires *Member State ratification* to become effective, given that certain anticipated provisions of the treaty fall within the shared competence of the EU and the Member States instead of the exclusive competence of the EU, with the exception of foreign direct investment and relevant dispute resolution fall directly under the competence of the EU.

The decision could slow down the ratification of the other free trade agreements contemplated by the EU and Japan or Mexico, and it will also affect the treaty to be concluded with the United Kingdom after Brexit. Given that the ratification of Member States is a relatively unpredictable process, it is likely that years will pass until the last Member State ratifies such agreements and it also entails a risk that the Parliament of a country or even a region will block the agreement to become effective.

Is It Possible for the Contracting Authority to Specify the Origin of the Tenderer or the Goods?

In the field of public procurement, the contracting authority might *want to differentiate based on the origin, registered seat* of the tenderer, and – in respect of goods – *the origin of certain components thereof* or the establishment of its suppliers. Due to differences under the Directive, traditional contracting authorities and those operating in the utilities sector may act in different ways.

According to the rules applicable to *public procurements of utility providers,* the contracting authority may exclude from the procedure any tenderer in the event that more than 50% of the goods offered by such tenderer are exempt from the obligation of national treatment; if more than one identical tenders are identified during the assessment, the contracting authority shall grant preferential treatment to the tender where more

than 50% of the offered goods are subject to the obligation of national treatment. The contracting authority is not obliged to grant preferential treatment if this entailed that the contracting authority would have to procure items that are different and incompatible in technical point of view or if such procurement brought about disproportionate technical difficulties of operation or maintenance or caused unreasonable additional costs.

The public procurement law enables the contracting authorities to decide in each individual case whether or not and how to permit the submission of tenders. To that end, the Public Procurement Act defines optional grounds for exclusion. Exclusion as a legal instrument operates as an obstacle to the participation and competition of certain economic operators in the procedure. The definition of mandatory and optional grounds for exclusion by the laws is not the competence of Member State legislation: the Member States shall not deviate from the system of the Directives and the case law of the ECJ.

By using the optional grounds for exclusion, the contracting authority may disqualify tenderers from the procedure who are not subject to national treatment, *i.e.* a tenderer may be excluded if it is established in a country which is not a member of the EU or does not have a free trade agreement in place with the EU. The contracting authority may exclude tenderers from the procedure offering goods the origin of which does not require the application of national treatment, *i.e.* any tenderer – whether established in the EU or in a country which is not a party to a free trade agreement – offering goods of non-third country origin. Exlusions impose legal and commercial policy risks alike.

7.8 Compulsorily Announced Public Procurements

The topic discussed under the modern history of European law, the law of public procurements delegates the management of certain economic transactions to public law and public administration (by considering other significant criteria and exploring other important areas as well). The logical structure of public procurement is permanent, but challenges and events influencing legislation and law application (the creators of critical points) might have a different emphasis, varying from time to time.

How and to what extent can administrative decision-making on a public procurement market accounting for 15 to 20% of EU GDP contribute to a sustainable economic growth? In the course of implementing the legal background of the EU governing public procurements into national law, the access of businesses established within the EU to the public procurements of other Member States is secured, however, using public procurements to different strategic purposes by certain Member States is also not unknown. Finding the tender offering best value for money makes it possible for the operators of the public procurement market to achieve the most appropriate overall solution by observing the mandatory environmental, social and labour requirements in addition to using economic benefits (*i.e.* favourable prices) as a selection criterion. This is anticipated

to contribute to the sustainability of economic operators respecting European values, given that such requirements facilitate the growth of *demand* for competitive and green technologies.

Creating faster, more flexible procedures with simpler procedural rules have been permanent goals of legislation for a long time, but national systems of checks in regulation and supervision do not necessarily make it possible to reflect this. The success of creating and the flawless operation of mandatory online confirmation documents introduced to facilitate the submission of tenders, as well as electronic tools and databases as part of electronic contact and catalogues will have a great impact on the system of submitting and the assessment of tenders. One of the significant challenges of the forthcoming period is the development and operation of the *Electronic System for Public Procurement* ("*elektronikus közbeszerzési rendszer*" /EKR) which will provide electronic support during the entire term of the procedure. *E.g.:* we anticipate that implementing the e-ESPD will result in significant savings in time when verifying the grounds for exclusion, thus accelerating assessment, with less requests for supply of missing information and uninterrupted verifiability of data in the event of cross-border tenders.

7.9 The Aim of Technical Specifications under Public Procurement Law, Special Applications of Technical Requirements

The subject of the public procurement is the aggregate of each and every term and condition specified by the contracting authority. The technical specifications form part of the public procurement documentation, setting forth the desired characteristics and specific parameters of the work, supply or service which shall meet the procurement demand, be linked to the subject matter of the contract, the required methods or the life cycle, and must be proportionate to its value and its objectives. When drafting the technical specifications criteria of accessibility for disabled persons shall also be considered.

The technical specifications shall guarantee equal access of economic operators to the public procurement procedure and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. *Competition is artificially narrowed* where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators. Compliance with the requirements laid down in the technical specifications *is the guarantee that the tenderers are in fact capable of fulfilling their contractual obligations. The purpose of the procedure is guaranteeing performance.*

With the exception of cases justified by the subject matter of the contract or specified by the law, the technical specifications shall not refer to items of a specific make or origin or a particular procedure characterizing the products or services offered by a given economic operator, or to trademarks, patents, activities, persons, types or a specific origin or

manufacturing process, provided that this would result in providing preferential treatment to or the *exclusion* of certain economic operators (*i.e.* the aggregate of discrimination and unfavourable terms). Such reference shall be permitted only in exceptional cases if the subject matter of the contract cannot be accurately and clearly described. Such descriptions shall indicate the following note: "or the equivalent thereof." The required characteristics shall refer to the material substance of the subject matter of the public procurement, the functional characteristics of the supplies or the features of the works or services.

Joint procurements may take several forms based on authorisation given by the Directives. Whether the achievements of *centralized public procurement* implemented in the Member States (such as the Hungarian system operated by state requirements) are taken into account or those of the coordinated procurement; we may even examine public procurement procedures carried out separately by several contracting authorities through the elaboration of *joint technical specifications* of works, supplies or services to be procured; or discover joint public procurement procedures or those carried out through a mandate. International relationships and cooperation between the Member States may constitute achievable objectives for the EU through joint procurements, the economic significance of which is an unexplored terrain for a trade power holding the world's largest single market. Participants of joint procurements shall be collectively responsible for their obligations under such procedures.

7.10 Summary

The study explores the history of Hungary's public procurement legislation as it has evolved since the Treaties of Rome, where common commercial policy became a part of the harmonized field of law. Let Anita Németh lead us along this celebratory conference by highlighting certain problematic issues that occurred during the term in question in relation to public procurement.