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HISTORICAL STAGES OF PUBLIC PROCUREMENT IN THE EU

In the article, based on the theory of the EU law, the current law of the EU, the solution of the scientific task concerning the historical stages of formation of legal support for the functioning of the public procurement system in the EU is given; the most important scientific results are represented. The article analyzes the provisions of law acts on the content and designation of public procurement, identifies the grounds for the formation of the public procurement sector within the framework of the EU internal market, as well as the theoretical and legal principles of the current state of legal regulation of public procurement within the European Union on the basis of an analysis of the current normative base and activities of the EU bodies. It has been established that the new EU procurement law provides for simplification and greater flexibility in the legal regime for public procurement compared to previous Directives.

Keywords: EU, legal support, public purchases, system of purchases, historical stages.

Introduction. The system of public procurement is one of the most effective levers of the state's influence on the economy. Since the adoption of the first law on public procurement and to this day in each country of the world, the improvement of procurement practices is one of the priorities of the authorities. The reason is to focus public policy on reducing corruption while using budget funds, ensuring the acquisition of better goods, jobs and services while taking into account existing needs and financial resources. In addition, changes in the mechanism of public procurement lead to significant changes like the emergence of new approaches to the functioning of the financial system of the country, to the creation of a more perfect mechanism of bringing state financial resources to the most competitive enterprises.

That is why the purpose of this study is to analyze the European historical experience of developing the public procurement market. Based on the results of this study and taking into account the particularities of the member states, it is possible to elaborate the clearest references for the change of Ukrainian law in the field of public procurement.

It should be noted that domestic and foreign scientists investigated certain aspects of the historical development of public procurement in the EU, among them are I. Vlyalko, Z. Saksimenko, N. Tkachenko, O. Shchatkovsky, G. Priss. However, considering the constant process of development and improvement of the institute of public procurement, this question needs to be additionally studied and researched.

Regarding the peculiarities of the development of EU law in the field of public procurement, it should be noted that the process of formation of the legal basis of the system of public procurement had several basic stages of development. The division into stages is based on the periods of improvement of the secondary law in the field of public procurement. The scope of validity of European law in the field of public procurement was extended at each stage to the previously excluded sectors.

The beginning of the first stage of the formation of European law in the field of public procurement refers to the first half of the 1960s. A number of basic principles for the definition of suppliers and contractors for public contracts for the supply of goods and work execution was determined at the first stage of the development of European law in the field of public procurement. At the same time, the passed acts did not establish specific European procedures for the identification of the supplier and did not abolish existing rules and procedures for the award of public contracts in the member states.

Since its establishment, which has been linked to the adoption of a number of directives, European law in the field of public procurement has been constantly developing. For a variety of reasons, public contracts have been selected as a priority area for the development of the Community's internal market.

As the Maastricht Treaty was signed, the national market of public procurement gradually began to “expand” its borders to other EU member states¹.

Treaties of the European Union and the directives were the main source of EU law in the field of public procurement for a long time. Treaties of the European Union laid down the obligation of the authorities to follow the principles of equality of economic operators, the transparency of the procedures for placing the request for proposals, the effective competition of the request for proposals, the freedoms of movement and mutual recognition throughout the European Union. In fact, until 1992, the law of the European Communities established the requirement that the public procurement market should have been open to competition by economic operators of other member states. However, it was either improperly followed or ignored at all. Traditionally, national borders have divided the public procurement market and only two percent of contracts have been made with suppliers from other member states².

Council Directive 71/305/EEC, as well as Directive 77/62/EEC and Directive 80/767/EEC, were the first directives to coordinate the procedures for the award of public contracts for the supply of goods and work execution. However, they did not contribute to the opening of the public procurement market to the expected extent. In most cases, the directives were not incorporated into the national law of the EU member states completely, and the principles aimed at increasing the transparency of information on the public procurement market turned out to be “quasi-existent”³. In addition, the deadlines were so short that foreign suppliers or entrepreneurs did not have time to submit offers on time. Thus, the effect of the directives on the actually divided markets of public orders of the EU member states was very limited.

On July 26, 1971, the Council adopted Directive 71/305/EEC on the coordination of public procurement procedures in order to facilitate for companies exercising of their right to create and freedom to provide services in the competitive struggle for public procurement⁴. The scope of the Directive covered purchases with a valuation of at least 1 million units of account awarded by customers (state, regional or local authorities). The awarding of concession contracts for large public works was usually carried out by authorities of various levels (construction of roads, schools, dams, etc.) and was not covered by the principles of Directive 71/305/EEC.

On 21 December 1976, the Council adopted Directive 77/62/EEC in addition to the prohibition on restrictions on the free movement of goods, which coordinated public procurement contracts. The purpose of Directive 77/62/EEC of 21 December 1976 is to ensure a high degree of transparency by introducing equal conditions of competition for public procurement by EU member states with a view to improving the functioning of the common market⁵.

The scope of Directive 77/62/EEC covered purchases with a valuation of at least 200,000 European units of account received by customers. The scope of the Directive excluded the same three sectors (transport, energy and water sectors) as Directive 71/305/EEC, as well as the sector of communications.

In order to bring the law of the European Economic Community into line with the outcome of the Tokyo Round of Trade Negotiations, in particular the GATT, Government Procurement Agreement of 1979, the Directive was subsequently adopted and supplemented in accordance with Directive 80/767/EEC. The main change introduced by this Directive was the list of customers who were obliged to apply the provisions of Directive 77/62/EEC for procurement with an estimated value of 140,000 European units of account and the previously established threshold of 200,000 European units of account.

So, it can be seen that the initial Directives related to work execution and purchases did not open markets as far as it was expected. Law did not provide sufficient guarantees and left a certain amount

¹ *Treaty on European Union*. <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>> (2018, September, 01).

² Winter, A. (1991). Public procurement in the EEC. *Common market law review*, 08, 28, 78-82.

³ Guide to the Community rules on public procurement of services other than in the water, energy, transport and telecommunications sectors. *Official website of the European Union*. <https://europa.eu/european-union/index_en> (2018, September, 01).

⁴ Guide to the Community rules on public procurement of services other than in the water, energy, transport and telecommunications sectors. *Official website of the European Union*. <https://europa.eu/european-union/index_en> (2018, September, 01).

⁵ Evaluation of Public Procurement Directives. Markt/2004/10/D. Final Report. Europe Economics. 15 September 2006. *Official website of the European Union*. <http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf> (2018, вересень, 01).

of gaps; moreover, its application at the national level reflected the long-standing protectionism, typical of this sector.

New directives were adopted to correct the mistakes of the original legal framework: Council Directive 88/295/EEC of 22 March 1988 amending Directives 77/62/EEC and 80/767/EEC and Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC¹.

At the 2nd stage of the development of EU law in the field of public procurement, in addition to improving the system of procurement of goods and works, there was created a mechanism to protect the rights of individuals in case of violation of the European law in the field of public procurement. Thus, the improvement of public procurement law came with the adoption of the First Municipal Services Directive, Directive 90/531/EEC. Overall, the purpose of Directive 90/531/EEC was not only applicable to customer organizations in the same way as in the recently adopted Directive 89/440/EEC, but also to two other categories of persons, namely public and private enterprises. One of the conditions for the applicability of the Directive was that Treaty individuals were engaged in one of the areas of the foreseen activity, namely the four sectors that had until now been excluded from the regulations on public procurement: water, energy, transport and telecommunications.

Despite the fact that this mechanism and tools were not perfect, contained a large number of exceptions and did not apply to the whole range of public procurement undertaken by the member states of the European Community, this stage of development of European law in the field of public procurement laid the strong base for the improvement of European law in the field of public procurement.

Firstly, the third stage of the development of European law in the field of public procurement is characterized by the spread of its effect on public procurement of services. Thus, a significant change was the adoption of Council Directive 92/50/EEC of 18 June 1992 on the coordination of procedures for the award of public contracts. It was based on the same principles as the early directives on work and procurement. Since 1993, six different directives have been put into effect, with amendments and additions that have created a basis for regulating public procurements within the EU. These are: Directive 93/36/EEC on public procurement of goods; Directive 93/37/EEC on public procurement of works; Directive 92/50/EEC on public procurement of services; Directive 89/665/EEC on remedies (concerning appeals); Directive 93/38/EEC on municipal entities; Directive 92/13/EEC on means of redress for municipal entities (concerning complaints in the municipal sector).

At the 4th stage of the development of European law in the field of public procurement, a strong reform of the law in the field of public procurement was carried out. The result of the reform was the codification of the standards on the purchase of goods, works and services and their merging into a single document. In addition, one of the main modern principles of the organization of European law in the field of public procurement was solidified – the division of regulation of all purchases into general and special parts was.

Thus, adoption of The Agreement on Government Procurement of the World Trade Organization in 1994 brought significant changes to the public procurement directives, before major reform in 2004, that were introduced as part of the adoption of Directive 97/52/EC and Directive 98/4/EC, which aimed at bringing the Community law in accordance with the results of the Uruguay Round. The main changes concerned the consolidation of transparency, the correction of certain terms and, respectively, of their thresholds, which were completely different for contracts that were the subject of international obligations.

In the mid-2000s, a legal regulation reform took place and the directives mentioned above were replaced by two consolidating acts: Directive 2004/17/EC and Directive 2004/18/EC.

Directive 2004/18/EC aims to ensure open competition for public contracts in the traditional sector. Public contracts are procurement contracts concluded in writing between one or more economic entities on the one hand and one or more customer bodies on the other, with the subject of work execution, the supply of goods or provision of services. Customer bodies are state bodies, local authorities, bodies whose activities are regulated by public law, the association of one or more such bodies. To conclude a public contract, one of the parties should have the status of the client authority. This concept is wide enough, even more so as the EU Court interprets it in a functional sense, so as not to allow itself to be drawn into such legal formulations as may be offered by public authorities seeking to withdraw from the EU norms. Public

¹ Trepte, P. (2007). EC Public Procurement: Case Law and Regulation. *Common Market Law Review*, 12, 11, 1233-1236.

contracts are concluded as a result of a procedure that ensures equal participation on a competitive basis. There are four main types of procedures: the advertised bidding process and the procedure for conducting tenders with limited participation, negotiation procedure and competitive dialogue. The directives allow the customer body to choose between these types. The advertised bidding process involves the access of all interested parties, and the procedure for conducting tenders with limited participation in the procurement provides for the possibility of submitting a tender proposal only to invited participants.

A special act regulating the order in the market for so-called utilities is Directive 2004/17/EC. Accordingly, the previous directives of the 90s are canceled. The above analyzed principles and rules, with the exception of the competitive dialogue, are also applied in Directive 2004/17/EC on special sectors or on the so-called “municipal” sector that regulates the procurement of utility services (gas, heat and power supply, water and drainage system), as well as orders for transport and postal services, exploration or production activities for oil, gas, coal and other solid fuels, in order to ensure the operation of seaports, airports. The provisions of the above-mentioned directive apply to all customer bodies and organizations that operate in one of these areas. Separately, Directive 2007/66/EC on procedures for appealing decisions concerning the award of contracts should be singled out. At the same time, in 2009, another sector of legal regulation at the level of the European Union emerged – defense procurement¹.

The 5th stage of the development of European law in the field of public procurement is characterized by the adoption of three new directives. Thus, in 2014 significant changes took place in the field of legal regulation of public procurement in the EU, when the European Parliament adopted new EU directives, such as:

- Directive 2014/23/EC on the award of concession contracts²;
- Directive 2014/24/EC on public procurement and repeal of Directive 2004/18/EC³;
- Directive 2014/25/EC on the procurement by entities operating in water, energy, transport and postal services sectors and repeal of Directive 2004/17/EC⁴.

The directives entered into force on April 17, 2014. From the Ukrainian side, the principles of the Association Agreement provide for a transitional period of up to eight years to adapt the Ukrainian system of public procurement to the EU standards in full degree. First, this is reflected in the timetable for the implementation of the existing EU Directives, but also provides for their reliable and effective implementation. Although the Association Agreement does not refer to the principles of the four new Directives, the approach to the approximation of law in the Agreement is that its principles are “living tools” and thus means that all the EU law novelties must be followed (including historical decisions of the EU Courts).

Thus, the new EU law on public procurement provides simplification and greater flexibility in the legal regime for public procurement compared to previous Directives. It envisages, in particular, the widespread use of electronic communications, support for small and medium enterprises, the ability to take into account the full life cycle of products, support in the field of the environment and social and labor relations, measures to stop corruption, reducing the formal requirements for applications and participants, the possibility of applying new, simplified procedures, including in the healthcare, cultural and social fields.

Conclusions. Thus, for more than semicentennial history of the development and improvement of European law in the field of public procurement, the EU member states managed to create a working and effective system of legal regulation of public procurement, which provides the application of general

¹ European Commission. Internal Market. Public Procurement. *Official website of the European Union*. <http://ec.europa.eu/internal_market/publicprocurement/rulesdefence_procurement/index_en.htm> (2018, September, 01).

² *Directive 2014/23/EU on the award of concession contracts* (The European Parliament and the Council of the European Union). <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0023>> (2018, September, 01).

³ *Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC* (The European Parliament and the Council of the European Union). <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>> (2018, September, 01).

⁴ *Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC* (The European Parliament and the Council of the European Union). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG> (2018, September, 01).

principles and norms of EU law in the procurement, including preliminary monitoring and control of procurement, as well as the possibility of challenging customer actions at all stages of the procurement. The results of functioning of this legal system have been the elimination of part of existing non-tariff restrictions (in terms of public procurement) and minimization of the negative impact of non-eliminated sustainable practices of member states in the field of public procurement. It has made a significant contribution to the development of economic integration across Europe. Thus, after analyzing the historical development of the public procurement institute in the EU, it becomes clear that this field is in a constant transformation due to changes of the economic situation, legal regulation of other fields at the level of the European Union, adapting to new challenges of progress.

References:

1. *Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors* (The European Parliament and the Council of the European Union). <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004L0017>> (2018, September, 01). [in English].
2. *Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts* (The European Parliament and the Council of the European Union). <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0018&from=en>> (2018, September, 01). [in English].
3. *Directive 2014/23/EU on the award of concession contracts* (The European Parliament and the Council of the European Union) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0023>> (2018, September, 01). [in English].
4. *Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC* (The European Parliament and the Council of the European Union) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>> (2018, September, 01). [in English].
5. *Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC* (The European Parliament and the Council of the European Union). <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG> (2018, September, 01). [in English].
6. European Commission. Internal Market. Public Procurement. *Official website of the European Union*. <http://ec.europa.eu/internal_market/publicprocurement/rules_defence_procurement/index_en.htm> (2018, September, 01). [in English].
7. Evaluation of Public Procurement Directives. Markt/2004/10/D. Final Report. Europe Economics. 15 September 2006. *Official website of the European Union*. <http://ec.europa.eu/internal_market/publicprocurement/docs/final_report_en.pdf> (2018, September, 01). [in English].
8. Guide to the Community rules on public procurement of services other than in the water, energy, transport and telecommunications sectors. *Official website of the European Union*. <https://europa.eu/european-union/index_en> (2018, September, 01). [in English].
9. *Treaty on European Union*. <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN>> (2018, September 01). [in English].
10. Trepte, P. (2007). EC Public Procurement: Case Law and Regulation. *Common Market Law Review*, 12, 11, 1233-1236. [in English].
11. Winter, A. (1991). Public procurement in the EEC. *Common market law review*, 08, 28, 78-82 [in English].