The role of public procurement in the defence of EU digital sovereignty and the twin transition

The EU must remain a continent of innovation. Today, such innovation is notably driven by small and medium-sized companies (SMEs), which represent 99% of all businesses in the Union, and employ over 100 million people. Among SMEs, innovative start-ups\(^1\) represent an important subset of companies which play a key role in responding to the twin challenges of the green and the digital transitions, by unlocking new technologies and sustainable solutions. Future European champions of the double digital and environmental transition will emerge from these scale-ups. Yet, these EU “unicorns” will not flourish if we do not collectively ensure a level playing field in the common market.

In this respect, the US Inflation Reduction Act raises direct concerns for the competitiveness and sustainability of European innovative companies. Following statements made by the President of the European Commission, we welcome the fact that the Union will respond, at the occasion of the 9-10 February European Council and beyond. New tools are indeed needed to support the effective pursuit of the European Green Deal and the twin transition, to preserve European sovereignty and strategic autonomy, and to put European innovative start-ups on a level-playing field with third countries’ stakeholders.

Albeit necessary, the adaptation of State aid rules and the implementation of new financial instruments will be incomplete without leveraging public procurement to support the development of innovative products and services in Europe. Expanding the strategic role of public procurement to increase the competitiveness of the EU market has several major advantages including being non-discriminatory between Member States with different financial support capacities, building on rather than expanding EU borrowing mechanisms, and ensuring the economic resilience of European innovative actors.

These new tools should notably include the revision and modernisation of EU procurement rules, the adoption of tailored criteria to ensure that the future European Sovereignty Fund will support investment in strategic areas, and a more effective promoting of innovation among public buyers. Such solutions require both amending and effectively implementing the EU institutional and legal framework, in compliance with international trade agreements and the equal treatment principle.

\(^1\) Under EU law, an innovative start-up is a company which develops for the foreseeable future products, services or processes which are new or substantially improved compared to the state of the art in its industry, and which carry a risk of technological or industrial failure, with research and development costs representing at least 10% of its total operating costs.
I. Modernising public procurement rules to help foster the response to the green and the digital transformation

We call the European institutions to revise and modernise public procurement rules, by better integrating the 'SME' and 'innovation' factors and in view of fostering the response to the green and digital transformations.

Public procurement in general offers significant opportunities within the single market for SMEs, including start-ups (PP accounts for over 14% of GDP), but remain largely untapped. A reason is that current procurement rules are not fit-for-purpose.

Innovation is addressed mostly today through a R&D lens which is limited, resulting in imperfect outcomes for procurement of tech services and products that lack an explicit R&D dimension. Although SMEs may theoretically benefit from public procurement, in practice innovative start-ups are often shunned from public procurement processes due to risk-averse buyers who are not equipped to assess the added-value of innovative start-ups’ solutions, especially in addressing environmental challenges.

Despite the references to social and environmental considerations in public procurement rules, the Green Deal dimension is not appropriately reflected in the Directives. EU public procurement rules date back to 2014, and have been marginally amended since then, merely to adjust the procurement threshold amounts beyond which the Directive is applicable, but the substance has remained untouched. The revision of EU procurement rules should thus aim to embed the Green Deal and twin digital and environmental objectives, beyond the general principle of compliance with obligations in the fields of environmental, social and labour law enshrined in Union law.

The revision of EU public procurement rules should first state more explicitly the Green-Deal related objectives and principles that should underpin procurement processes, ESG requirements, twin transition and strategic autonomy.

Furthermore, these principles must materialise within the procurement process, with specific qualitative criteria to be included at each relevant stage of the procurement process, from eligibility conditions to the criteria to award the public contracts and the relevant contract performance conditions.

- Procurement rules should better account for technology and innovation, through the lens of the added-value for the European economy, as well as contribution of the products/services to sovereignty by including the security of supply dimension;
- The circular economy must be part of the decision-making process of public buyers, assessing offers based on criteria regarding the production process, from inputs to transformation and distribution stages;
- Adverse effects must be taken into account, in particular external environmental costs (including avoided greenhouse gas emissions), which impact the value of the services/products to be procured;
Overall, an appropriate long-term view of the life cycle of products/services must be ensured, including the management of end-of-life and ease and quality of recycling, for procurement to achieve more resource-efficient outcomes.

Such new measures must be seen as complementary to the recent EU reform for an International Procurement Instrument (IPI) Regulation, which promotes reciprocity in access to international public procurement markets. These measures would align with the key principles applied in relation to public procurement, notably considering the Treaty-based principle of equal treatment and non-discrimination (including on basis of nationality) unless differentiated treatments are objectively justified, as well as international law commitments of the European Union.

II. Introducing consistent criteria in eligible investment targets of the European Sovereignty Fund

If European institutions were to propose a European Sovereignty Fund ("ESF") supporting investment in strategic areas, we believe that legal criteria for eligibility to funding from the ESF should also better reflect the objectives of the twin transformation and be commensurate with the EU framework for the screening of direct investments from non-EU countries on the grounds of security or public order. Strategic areas eligible to investment from the European Sovereignty Fund should include critical infrastructure (whether physical or virtual), critical technologies, and supply of critical inputs, taking into account value-chains that are essential of the European economy.

The relevant sectors in scope, as in the legal framework for the screening of foreign direct investments into the Union, should include energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, and financial services. Eligible technologies should range from artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies to nanotechnologies and biotechnologies.

Where relevant, the link between ESF funding and public procurement rules should be clearly defined. Together, this would provide innovative start-ups and SMEs with legal clarity and predictability, and thus cement their ability to compete for tech public procurement and access to ESF-backed funding.

III. Supporting and promoting innovation and digital sovereignty in public procurement

We believe it is also possible to further support and promote innovation in public procurement beyond legislative reforms (the latter remaining however crucially needed). In that respect, the European Commission could draw from the experience acquired in the expansion of Green public procurement (GPP).

GPP required the inclusion of clear and verifiable environmental criteria for products and services in the public procurement process, which the Commission accompanied with various support measures. A similar approach should be considered for innovation.

The Commission has already adopted an interpretative Communication on innovation. This guidance suggests policy actions and clarifies the applicable framework for public procurement. That said, it remains a note of practical guidance which is not legally binding. It creates neither rights for SMEs and innovative start-ups, nor obligations for public authorities.
Therefore, what is needed today is more concrete tools, such as training toolkit for public buyers. Public purchasers often lack the skill set and knowledge to procure innovation, in particular internal expertise about relevant products or services, as well as innovation specific skills (for instance risk assessment, or intellectual property rights management). This also translates into public procurement lots on a scale which is inappropriate for SMEs and innovative start-ups, concretely discouraging them from public tenders.

These soft law tools should of course be complementary to and not mutually exclusive of a more in-depth reform (see I.).

**Conclusion**

Following the op-ed published in 2022 by key actors of the tech ecosystem in Europe,² we believe that the time has come for a review of public procurement rules. Such a review will help unlock concrete and sustainable demand perspectives for innovative SMEs.

Actors developing innovative breakthrough technologies or solutions to environmental issues underline that while financial support, especially in grants, may be useful in the early stages of their project, the key to their sustainable development and competitiveness is revenue. They call EU institutions to concretely address competition distortions that result from different public procurement practices in third countries, where local candidates are given (de jure and de facto) preference in public contracts. The review of public procurement rules will thus help to restore a true level-playing field among market players.

SMEs, start-ups, and scale-ups will be key players in addressing the green transition and sovereignty challenges facing the EU. Where needed, measures to introduce further flexibility in State aid rules may be envisioned, but we strongly believe that the focus should rather be on structural reforms, materialising and increasing a sustainable demand for tech-related and innovation-based products and services among public buyers to limit potential risks of fragmentation due to diverging budgetary constraints among the 27 Member States.

European institutions should thus consider a modernisation of public procurement rules as a full-fledged tool to foster a competitive European industry in the context of the twin green and digital transition.

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² Les Echos I Opinion - Numérique : il faut instaurer un "Buy European Tech Act", 10 août 2022