

**NON-TRADITIONAL REGULAR PURCHASING ARRANGEMENTS IN
PUBLIC PROCUREMENT**

A doctrinal and comparative analysis on regulation and implementation systems

1. INTRODUCTION

Recent years have witnessed an increasing interest in the regulation of what we call hereinafter “non-traditional regular purchasing arrangements”, which have been undertaken with a view to enhancing efficiency and effectiveness in public procurement within national or international contexts. This can be seen in particular at the level of the EU, including some EU member states, at the level of certain African developing states, as well as at the level of the UNCITRAL. This thesis will seek to identify the main elements of the phenomenon of non-traditional regular purchasing arrangements as well as to critically assess manner in which a number of procurement systems (acting in various social and cultural situations) respond in their procurement regulation to the actual and system-specific objectives of these types of arrangements.

We define non-traditional regular purchasing arrangements in public procurement as those arrangements designed and/or implemented to meet on-going / recurrent requirements (in particular services and supplies¹) for a long-term period via purchasing such items from the free market, and where the parties, at the initiative of the contracting authority, seek to go through a number of procedural stages (for example, pre-qualification) and/or to establish a number of contractual terms, but not all, in advance of the moment when an actual need for specific items arises, followed by placement of a number of subsequent contracts or orders whenever the actual needs for items arises, on the basis of the procedural stages conducted in advance, or on the basis of the terms already agreed beforehand.

The objective of the research, based on the analysis and assessment of specific public procurement systems will be to “de-construct” non-traditional regular purchasing arrangements as currently regulated into basic elements by reference to the “core” commercial purchasing process and then to re-construct a corpus of guidance and a perspective regarding: (i) what seem to be relevant landmarks for regulating non-traditional regular purchasing arrangements by reference to the particular objectives envisaged by individual procurement systems; and (ii) what seem to be relevant

¹ Works usually do not seem particularly amenable for such arrangements but there may be exceptions.

landmarks for interpretation by practitioners, in particular from a teleological point of view, in areas where existing legislation or regulations applicable to their procurement systems are silent, inconsistent or unclear. For the purposes of this research, “relevant landmarks” refer to aspects worth being considered in a wide context by policy makers, legislators or practitioners when introducing or reviewing public procurement regulation regarding non-traditional regular purchase schemes, or when actually implementing such arrangements. These landmarks do not refer in any way to, and do not imply, a “single recipe” for non-traditional regular purchases, which is very much likely to be unachievable, but to an “orientation guide” to quite a complex phenomenon, to the historical and actual experiences of various systems, and to how such experiences may, should, or should not be used in the particular circumstances of a given or by reference to certain objectives of a certain system.

The following sections of this research proposal describe how the envisaged research outcomes are to be achieved. In section 2 we will expand and discuss the definition of the phenomenon under investigation with a view to emphasise its features, implications and its importance for the academia and for practitioners.

In sections 3 and 4 we will be looking at the appropriate methodological approaches envisaged in order to achieve accurate, relevant and reliable research outcomes. Section 3 will be looking at and discuss, mainly from a theoretical point of view, the appropriateness and limitations of the doctrinal legal research method for the subject of this research, as well as at the need to supplement this method with socio-legal, comparative and, possibly, with a few interdisciplinary methodological approaches. Section 4 will focus on practicalities of the selected methodology mix, looking at how background theory, focal theory, method/data theory and contribution are to be achieved in connection with the subject of this research proposal².

In section 5 we will be discussing and justifying the selection of procurement systems proposed for investigation, and how and why this selection is likely to offer a wide coverage of the current trends related to non-traditional regular purchasing methods in public procurement. Finally, section 6 will consist of a commentary of all previous sections and will focus on: (i) a summary of the proposed research; (ii) potential limitations of the research and approaches to ensure reliability of research outcomes related to such potential limitations; (iii) the potential original contribution of the

² Philips, E. M. and Pugh, D. S., *How to Get a PhD. A Handbook for Students and Their Supervisors*, Third Edition, Open University Press, Buckingham, Philadelphia, 2002, Chapter 6, pp. 58-61.

research and research outcomes; and (iv) the gates open for further research arising from this current research.

2. BRIEF DISCUSSION OF NON-TRADITIONAL REGULAR PURCHASING ARRANGEMENTS IN PUBLIC PROCUREMENT

As it can be noted from the definition at section 1 above, non-traditional purchasing methods in public procurement cover a wide range of arrangements whose main features are described below:

- (i) they regard on-going or recurrent needs of the contracting authority for a period of time and not one-off needs;
- (ii) the procurement / contracting process is initiated before a specific need becomes actual for the contracting authority and specifiable in all respects.

Thus, the range of non-traditional regular purchasing arrangements may include arrangements where before actual and fully specifiable needs arise potential suppliers only express an interest to supply certain types of items, possibly by employing a very brief qualification assessment (i.e. the so-called “supplier lists” or “qualification systems”), arrangements where a full qualification assessment is conducted before the actual and fully specifiable need arises, and arrangements where some or most, but not all, contractual elements and terms are agreed before an actual need arises. Within these landmarks, the possible arrangements outline the nuances of the phenomenon currently investigated³.

The subject of this research also includes urgent procurement, in as far as such arrangements regard a potentially recurrent or on-going needs of a contracting authority, that are estimated to some extent by a particular contracting authority on the basis of the assumption that urgent situations (disasters) are inevitably happening from time to time and that the type of items needed to deal with such events can at least broadly be identified in advance⁴. If the contracting authority initiates the procurement / contracting process in advance of such events, with a view to place subsequent

³ Arrowsmith, S. draft works, unpublished. The idea of nuances or shades of the phenomenon of non-traditional regular purchasing arrangements was also emphasised by Professor Arrowsmith, S. in academic discussions (PhD supervisions sessions) with the author. Under this approach, the various methods for such regular purchasing arrangements as defined or implemented in various procurement systems, such as the framework agreements under the EC system, or the so-called “supplier lists” or, say, the requirements contracts under the US federal procurement system, or urgent procurement arrangements can be regarded as shades of the phenomenon to be investigated rather than completely different concepts.

⁴ Schwartz, as quoted in *Public Procurement (LLM) Module Guide Part III*, University of Nottingham, Autumn 2006, by Arrowsmith, S., Williams, S. and La Chimia, A., p. 12.

contracts or orders when actually needed then, naturally, such arrangements fall under our definition of non-traditional purchasing arrangements and will be investigated as part of this research (for example, the US approaches following Hurricane Katrina).

A few further features of non-traditional regular purchasing arrangements emerge from the above definition of the phenomenon: (i) aggregation of requirements usually into a *single* procurement exercise that results into a number of subsequent orders or contracts: the contracting authority is estimating and then proceeding to the procurement of items that are to fulfil recurring needs over a period of time (not one-off needs); (ii) the object of procurement usually consists of rather standard items, in particular in connection with “framework” arrangements, and may range to quite complex items as we move towards “supplier list” arrangements – this is so because the more complex the item(s) are, the more difficult it is to establish a great number of terms or even go through a significant part of the procurement stages before the need for item(s) becomes actual and fully specifiable; (iii) while non-traditional regular purchasing arrangements are distinct from traditional procurement methods by lots, it is possible to employ non-standard regular purchasing arrangements divided into lots⁵.

In connection with point (iii) above, a brief explanation needs to be given here about the distinction between procurement by lots and non-traditional regular purchasing, as both are means of aggregating a number of requirements into a single award procedure for reasons of efficiency of the procurement process. However, while the range of items to be procured via a single award procedure may belong to the same class or are somehow linked, or deemed to serve the same need of the contracting entity, they may be different in nature and may not all fall under the specialised expertise of a supplier.

Therefore, one or a number of suppliers may not be capable or interested to tender for the whole range of items tendered. Also, they may not be able to offer the best terms and value for money for the whole range of items, but only for a segment of the requirements. In these cases procurement by lots is desirable, as it gives the option to suppliers to tender for one or more lots, and the contracting authority to award, within the same award procedure, different lots to different contractors in accordance with the best terms offered for each individual lot, or to award more lots to the same supplier if he is able to offer the best terms for more lots.

⁵ For example, the framework agreements divided into lots employed under the public procurement system for EC’s external aid programmes.

As it can be noticed, procurement by lots and non-traditional regular purchasing are of a different nature but do not exclude each other. Procurement by lots is aimed obtaining best terms in consideration of market conditions regarding particular types of items (that can be aggregated into a single award procedure that can generate one or more contracts, depending on the offers received), while non-traditional purchasing is aimed at ensuring overall security, efficiency and best terms for supply of the items that meet the contracting authority needs in cases where it is not possible or desirable to establish all terms of before an expected need becomes actual. This is why procurement by lots is applicable to both non-traditional regular purchases where the procurement process is initiated before the needs become actual (on the basis of an expectation of needs) and to “classic” purchases where the procurement process is started when the needs are actual and specifiable.

Moving to different considerations, of particular relevance for the purposes of this research in general, reasons why such usually more complex arrangements, like non-traditional regular purchases, may be worth being employed include: (i) ensuring security and flexibility of supply over a period of time at short notices, in particular where the non-traditional purchasing arrangements provide for a commitment of the supplier or suppliers within the arrangement to supply⁶; and (ii) the objective impossibility or inadequacy of establishing all terms or best terms of the actual requirements well in advance of the actual supply. On the other hand, the contracting entity may like, need or be required to actually go through a number of procedural stages or seek to a number of establish a number of terms in advance of the need for supply becoming actual in view of ensuring flexibility of supply and/or of economies of scale (that may result from aggregation of requirements in terms of, for example, either obtaining better prices, where the contracting authority commits to demand certain quantities, and/or from reducing the administrative burden or transaction costs that may arise from dealing with a reduced number of procurement exercises), that are potential benefits likely to arise, under certain conditions, from implementing such non-traditional regular purchasing arrangements.

However, depending on how they are regulated or implemented, non-traditional regular purchasing arrangements may also provide challenges or difficulties. For example, because such arrangements are rather complex, usually involving two distinct procedural phases, there will be a need for experienced procurement personnel to understand the arrangement and ensure consistency of approach throughout the entire process. This may not be easily achieved, for example, in the case

⁶ Arrowsmith, S., draft works, unpublished.

of a multi-purchaser multi-supplier arrangement where pre-qualification/selection and a number of “framework” terms are established by a team from one institution, and where smaller contracts or orders within the framework are placed by the other institutions in the purchasing “consortium” by completing (or even amending) specifications for the items and establishing the remainder of the terms⁷. Another example is the case of institutionally based non-traditional regular purchasing arrangements, such as the so-called “qualification systems” or “supplier lists” where for example, a full qualification assessment is conducted in order for a supplier to be included on the institution’s list of qualified suppliers. In such cases, it will be important to avoid the risk of the list being closed which is likely to lead to complacency of the suppliers already on the list and affect competition, thus preventing the contracting authority from obtaining competitive offers.

It is also possible that some non-traditional regular purchases arrangements are not attractive to either contracting authorities or suppliers. For example: (i) an arrangement where the contracting authority does not commit to purchase a certain quantity; (ii) procedural requirements that may be regarded by procurement actors as too bureaucratic for the purpose of a specific arrangement, such as those required for the second stage of the dynamic purchasing system under the EC Procurement Directive⁸.

The above challenges in connection with non-traditional regular purchases arrangements illustrate just how important the legal regulation of such arrangements is for their success or otherwise. This is the case in particular due to the impact that legal regulation has on behaviours of the persons to whom it applies⁹.

⁷ A specific experience in this connection can be found in the US Federal Procurement System. The US Government Accountability Office has found for example that in certain multi-purchaser, multi-supplier ‘framework agreements’ (or multi-agency indefinite delivery / indefinite quantity contracts, as they are called in the US system), the institution placing orders exceeded significantly the scope of the underlying ‘framework arrangements’. Bleicher N B, Dunn W I, Gordon D I, Kang J L, *Accountability in Indefinite-Delivery / Indefinite Quantity Contracting: The Multifaceted Work of the U.S. Government Accountability Office*, in Public Contract Law Journal, Volume 37, Number 3, Spring 2008, p. 407.

⁸ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, published in the Official Journal of the European Union No. L134/2004, as amended. The publication and other administrative requirements in the process of awarding orders under the dynamic purchasing system appear to limit the attractiveness of using this system,

⁹ Popa, N., *Teoria generala a dreptului (General Theory of Law)*, All Beck, Bucharest, Romania, 2002, p. 134. (Popa, N is a professor at the University of Bucharest, President of the High Court of Romania, and former President of the Romanian Constitutional Court).

Generally, there is agreement that public procurement needs to be regulated¹⁰ and the main question that emerges is how best to regulate public procurement such as to guide the general procurement activity towards the wider political objectives of a specific procurement system (for example, efficiency, or transparency, or promotion of international trade, etc.) while at the same time taking into consideration the market rules and influences that are inherent to the “core” commercial process of purchasing items from the free market. This assumption will be applied to non-traditional regular purchasing arrangements in public procurement for the purposes of this research and to the proposed methodology that is described below.

3. THEORETICAL CONSIDERATIONS OF THE METHODOLOGICAL APPROACH

The word “method” comes from the Greek word “methodos” which means way, road but also the fashion in which something is presented¹¹. As discovery of scientific knowledge involves a permanent activity of gradual approximation and the progressive effort¹² of a number of scholars and practitioners, this section will describe the author’s “road” towards achieving the research outcomes as well as the stages of this “trip”.

The research will be looking at non-traditional regular purchasing arrangements that fall under the definition we have stated at section 1, arrangements that currently exist within public procurement legislation/regulation of a number of selected national and international public procurement systems. Thus, the first step of the proposed research is to identify, describe and analyse these arrangements. Since we seek to identify and understand the arrangements as provided for in various legal / public procurement systems, the doctrinal¹³, interpretive methods will form the basis of the research. In this connection, the research will be mainly a doctrinal one with a few particular features that are presented below.

¹⁰ For example, Serban Filipon, *A Review of European Union’s Public Procurement Procedures in External Environments*, MSc Dissertation, University of Strathclyde, UK, 2006.

¹¹ Popa, N., *Teoria generala a dreptului (General Theory of Law)*, All Beck, Bucharest, Romania, 2002, p. 16

¹² Constantinesco L-J, *Tratat de Drept Comparat (Comparative Law Treaty)*, Volume 1, All, 1997, Bucharest, Romania, p. XXI (Forward by Vlad Constantinesco).

¹³ Bartlett, P., Hervey, T., and Hasson, E., *Legal Research Methods 2008-09*, University of Nottingham, School of Law, pp. 10-11.

For each individual system, the relevant legislation, regulations and case-law¹⁴ will be reviewed by employing the legal interpretive methods such as grammatical interpretation, systemic interpretation, logical interpretation, historical and teleological interpretation. The outcomes of this exercise will then be placed into a perspective and checked for accuracy by contrasting them with findings of the relevant literature applicable to each individual procurement system investigated.

While the doctrinal method provides some certainty as to what the “legal reality” is in the systems researched, it offers a segmented view on the subject of the non-traditional regular purchase arrangements, as the legal reality cannot be isolated from the social reality to which it applies. Some regulations or rules may have become obsolete, although possibly still formally in force, and/while others may benefit from adjustment amendments as indicated by the practice of procurement.

Thus, a socio-legal perspective¹⁵ is further envisaged, i.e. analysing not only what the law provides for but also, to some extent: (i) how the legal norms actually influence the social behaviours of the persons to whom they apply, i.e. how legal norms influence the procurement practice; and also (ii) the other way round, how certain elements of practice or other social circumstances surrounding the researched phenomenon are, may, or should be included in, and formalised by, legal norms, to some extent that such considerations arise incidentally from the secondary sources reviewed (it should be emphasised here that the main objective of the research does not include, and the proposed methodology mix does not provide for, a comprehensive analysis or perspective from this angle, but such considerations will be included where they arise from existing papers or reports).

For the purposes of this research, legal norms are regarded as a special type of social norms prescribing a certain behaviour to persons in a given situation and usually providing for adequate sanctions in case that the prescribed behaviour is not followed. Once regulated by legal norms, social situations become legal situations (or legal relationships) and persons become “subjects” of law¹⁶. Under the proposed investigation, the remedies available where legal norms fail to be observed by the “subjects of law” in each individual system will be one of the main analysed elements.

¹⁴ Case-law will be investigated even where a legal system is not based on case-law (i.e. where case law is not in itself a mandatory source of law to parties that are not involved in a specific case), such as Napoleonic French and Romanian systems in order to provide an in-depth assessment of how the procurement regulation is interpreted by courts or other review bodies.

¹⁵ Popa, N., *Teoria generala a dreptului (General Theory of Law)*, All Beck, Bucharest, Romania, 2002, pp. 28-32.

¹⁶ Popa, N., *Teoria generala a dreptului (General Theory of Law)*, All Beck, Bucharest, Romania, 2002, pp. 250-272.

The sanction element of the legal norm though may not be present (or at least visible) in all legal norms, such as the so called “permissive” norms¹⁷ or recommendation norms. This kind of norms will also be looked at under this research, for example the norms UNCITRAL model law on procurement.

As it can be noted, there is a dynamic, two-way, relationship between the letter and the “spirit” of the legal norms on the one hand, and the social reality to which they apply, on the other hand. Losing sight of this relationship in reviewing the assessing legal norms (legislation, regulations, case-law) would deprive the research from identifying potential nuances or explanations.

In reality, socio-legal research is closely linked to the historic or teleological interpretation of legal norms, trying to respond to important questions like: (i) what were the factors that determined a change in the procurement law; or (ii) what were the actual intentions or objectives of the legislator when enacting a particular piece of procurement legislation. Very frequently, the answers to these questions are to be found in the social/political contexts that surround a specific subject at a specific moment in time, such as the subject of non-standard regular purchasing arrangements in public procurement¹⁸.

While identifying, understanding and describing the “socio-legal reality” of each of the non-traditional regular purchasing arrangements recognised by each of the public procurement systems under investigation substantiate the basis of this research, the scope of the research goes further than simply describing what the individual arrangements reviewed consist of and why they are regulated as they are. The final objectives of the research are: (i) to identify and assess considerations in each procurement system investigated that tend to promote or detract from fulfilment of certain objectives of the regulation of non-traditional regular purchasing arrangements, as well as the circumstances in which such promotion or detraction is likely to occur; and (ii) to provide a “corpus” of policy guidance for legislators and interpretation guidance for practitioners in connection with non-traditional regular purchases arrangements.

In order to achieve this degree of generalisation of the research outcomes as described above, two complementary methods will be applied to the outcomes of the “socio-legal” analysis of the

¹⁷ Idem, 145-146.

¹⁸ In more practical terms, such considerations regarding the reasons for amending or enacting a piece of legislation are to be found in the recitals of the respective act, or explanatory notes issued prior or at the same time with the act, in other preparatory material of the act or in the specialised literature.

selected public procurement systems: the comparative method¹⁹ and, to some extent, the interdisciplinary method²⁰. These methods and the appropriateness of employing them for this research are described below.

The comparative method will seek to compare the legal norms/regulations across the public procurement systems under investigation in as far as the non-traditional regular purchasing arrangements are concerned. The proposed objective is to identify and explain similarities and differences between them with a view to draw, where appropriate, on elements of commonality in regulating and interpreting provisions regarding non-traditional regular purchasing arrangements.

A potential limitation or difficulty of the comparative method as applied to this research may arise from the variety of the legal systems (and procurement systems) under investigation that will each have their own objectives, features, cultural or administrative backgrounds, etc., which will be described in section 5. Another potential risk of comparative research is for its outcomes to remain somehow: (i) superficial, i.e. simply describing in parallel the various case studies and outlining a number of connections between their various elements at random; or (ii) irrelevant, i.e. operating “micro-comparisons”²¹ between various elements of the case studies taken in isolation that are likely to result in accurate but fragmented data unable to offer the insights and the depth of the knowledge required in order to draw guidance for legislators and practitioners.

Below we explain how we intend to use the comparative method as a tool for legislative policy and as a means to understand areas where the various procurement systems might benefit from sharing their experiences and practices as well as to understand current trends relevant to non-traditional regular purchase arrangements.

As emphasised in the literature, the “tertius comparationis” or the comparability rule is of the essence for comparative research. In other words, “only comparable things can be compared but only the comparison itself will in the end indicate whether the things were comparable”²². The comparability rule clearly indicates that, in order for the comparison to generate valuable knowledge, it has to compare elements with a certain degree of commonality.

¹⁹ For example, Constantinesco, L. J., *Tratat de drept comparativ – introducere in dreptul comparat – Vol I (Comparative Law Treaty – Introduction to Comparative Law, Vol. I)*, Editura All, Bucharest, 1997, in particular pp. 230-231.

²⁰ Bartlett, P., Hervey, T., and Hasson, E., *Legal Research Methods 2008-09*, University of Nottingham, School of Law, pp. 17-18

²¹ Constantinesco, L. J., *Tratat de drept comparativ Vol I (Comparative Law Treaty, Vol. I)*, Editura All, Bucharest, 1997, in particular p. 228.

²² Idem, p. XII, Foreword by Vlad Constantinesco.

While, as indicated above, there is a wide range and variety of non-traditional regular purchase arrangements in the systems we research (and also a wide variety in the way they are regulated), all have in common the commercial process of ensuring supply over a period of time, where the purchase arrangements is started before an actual and fully specifiable need arises via establishing a 'framework arrangement' within which contracts or orders are then placed when the need becomes actual. So, the comparative element of the research will deal with the fashion in which regulation relates to this commercial process in various systems and, as it can be noticed, the "tertius comparationis" rule is observed.

In order to handle scientifically the wide variety of arrangements we will be looking at, as well the differences between them, and in order to ensure that relevant and essential information / data can be filtered, a structure for analysis, research and presentation of all case studies will be developed and adjusted as the research progresses, while additional or missing elements are being identified in various systems. This structure will in the first stage guide the research and presentation of each individual case study and at a later it will drive stage the full comparison exercise.

Finally, in order to ensure relevance of the comparative exercise and of its outcomes at a procurement policy level, the following elements are also to be fully considered:

- (i) the careful selection of case studies, having in view, mainly but without limitation, their volume, their influence on other procurement systems, and the links between them (the justification of the systems selected can be found at Section 5 below;
- (ii) the elements being compared will be regarded within their social, political, cultural and economic context they emerged from and by employing a historic / teleological perspective²³.

Interdisciplinary legal research has been defined²⁴ as follows: (i) asking the same questions as in traditional legal research but using other disciplines in order to answer these questions; (ii) asking research questions that are not about the law itself; (iii) incorporating scientific methods into legal thinking. While the current research does not appear to fully "meet the bill" of interdisciplinary legal research, it does however include a few "trans-disciplinary" approaches, which, for the purposes of

²³ Popa, N., *Teoria generala a dreptului (General Theory of Law)*, All Beck, Bucharest, Romania, 2002, pp. 22-24.

²⁴ Mathias M. Siems, *The Taxonomy of Interdisciplinary Legal Research: Finding a Way out of the Dessert*, December 2008 (available on the Internet via http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1146162).

this research, refer to including or using the review of papers, terms, concepts, approaches, standards and considerations from other disciplines that are linked to the “mainstream” of this research. We would therefore attempt to define “trans-disciplinary” approaches as some sort of middle-ground between legal research *per se* and interdisciplinary research *per se*, for the purpose of “opening” the scope of legal research, without actually losing the focus on the legal phenomenon and methods.

For example, as already shown, each procurement system will not only be compared with other procurement systems, but this comparison exercise will be made by reference to the obvious elements of commonality between these procurement systems (and between the non-traditional regular purchasing arrangements), i.e. the underlying commercial / management process that is inherent to acquiring items from the free market.

Further, public procurement in itself is a “trans-disciplinary” subject²⁵ and therefore application of a “trans-disciplinary” approach seems to be not only appropriate but also desirable as legislation / regulation alone cannot provide all answers in public procurement. In order to conduct successful procurement, knowledge of legislation needs to be supplemented by knowledge in other areas such as management, business, finance-budgeting, cultural approaches, etc., and this research will take into account such considerations.

By way of example, one important element that emerges from a “trans-disciplinary” approach to the subject of procurement is the balance between “rigidity”, which is defined as the behaviour that is compulsory for procurement officers when conducting procurement activities and “flexibility” which is defined as the degree of discretion allowed to procurement officers in order to exercise their knowledge of the market, their commercial and management experience in order to conduct procurement in the most efficient and effective way. Otherwise, the procurement process would be reduced to a purely bureaucratic and administrative function, which would be remote from its real nature and objectives.

As already suggested above, given the subject and scope of the proposed research, no qualitative or quantitative methods are envisaged, but we will consider qualitative or quantitative empirical evidence that already exists, where public institutions or academics collected data regarding the effects or influence of the regulation of particular non-traditional regular purchasing arrangements on the procurement practice and on the fulfilment of wider policy goals of procurement regulation.

²⁵ Refer to note no. 10.

The author's experience in the area of public procurement may be used but only after a prior "objectivity test" by triangulating the relevant experience with other resources. Ethics in research will be strictly observed, such as the principles of: (i) confidentiality; and (ii) objectivity (triangulation before generalisation).

4. PRACTICALITIES OF THE METHODOLOGY MIX PROPOSED

This section of the research proposal will generally seek to provide an indication of the background theory, focal theory, data theory and contribution envisaged for this research in more practical terms²⁶. As suggested in Section 3, the basis of the research will be a literature review aimed to ensure that the research is fully up to date with existing literature relating to what we define as non-traditional regular purchasing arrangements pertaining to the selected public procurement systems, i.e. with the background theory available during and up to the completion of the research. The literature review will consist of two main layers of literature for each procurement systems:

- (i) primary literature, that we define as the official regulatory instruments or preparatory materials for such regulation of the non-traditional regular purchases under the selected procurement systems – more specifically, the relevant sections of legislation, implementing norms, preparatory works for such instruments and case law issued on the basis of such regulatory instruments, for example: the EC Directives regarding Public Procurement and Public Utilities, the European Court of Justice Jurisprudence; the Romanian Public Procurement Law, the Implementing Regulations and Guidance documents and the relevant Romanian case-law; the French Procurement Codes; the US Federal Procurement Policy Act; the preparatory work for introduction of framework agreements in public procurement in Ghana, as well as the relevant Ghana legislation and case-law should this become available during the course of the research; the UNCITRAL reform preparatory works for introduction of non-traditional regular purchases arrangements in the UNCITRAL model law on procurement and the actual provisions on such arrangements should they become available during the course of the research; the

²⁶ Refer to note no. 2.

IBRD²⁷ procurement guidelines; and the relevant provisions in EC external actions procurement regulation and guidance documents;

- (ii) secondary literature, that we define as any academic or specialised literature relating to the subject investigated, excepting those already defined as primary literature, that may include specialised textbooks, articles or published PhD theses - for example, the research will build on the existing works of the Public Procurement Research Group (University of Nottingham), such as, without limitation, the works of authors like Professor Sue Arrowsmith, Peter Trepte or the articles published in the Public Procurement Law Review.

Primary literature will be reviewed by employing the doctrinal / socio-legal methods described at Section 3 and it is proposed that the outcomes of the primary literature review for each of the public procurement systems selected for investigation be placed into a perspective and validated through triangulation through the outcomes of the secondary literature review available (or selected) for each of the said public procurement systems.

The focal theory of the research will be developed on the basis of the outcomes of the background theory, along with the comparative law method and trans-disciplinary approaches (see above). The non-traditional regular purchases arrangements identified in each of the public procurement systems investigated via the literature review will be compared seeking to identify and explain elements of commonality and differences among the various arrangements and systems investigated by reference to the common commercial process of acquiring items from the free market and the inherent rules of the free market that cannot be overlooked in both the regulation of public procurement or in the actual conduct of public procurement exercises.

At this stage of the research, further and up to date literature review in areas such as project management, process management, quality management, commercial practice, finance-budgeting, cultural studies and relationship management will be conducted, and the outcomes will be used as a “benchmark” against which individual non-traditional regular purchases methods within individual public procurement systems investigated will be assessed with a view to identify considerations that tend to promote or detract from fulfilment of certain wider policy objectives that ultimately determined the regulation of non-traditional regular purchasing arrangements.

²⁷ The International Bank for Reconstruction and Development.

The data theory, i.e. the reliability of the sources to be used and of the methodological approaches proposed have already been described and a more detailed presentation of the potential limitations of the research and ways to counteract or interpret such limitations in a scientific fashion will be made in Section 6.

The envisaged contribution of the research consists of drawing on the resources, the methodological approaches discussed above and the features of the selected public procurement systems in order to generate a rather general, as appropriate and scientifically justified, corpus of guidance in the area of non-traditional regular purchases both for legislators regulating such arrangements at a policy level in accordance with their own policy objectives, and also for practitioners for interpreting and identifying practical courses of action in areas where the existing regulation of such arrangements is silent or inconsistent. As mentioned before, this guidance is not regarded in any way as a “unique recipe” for the subject, but seeks to provide orientation as to relevant aspects that legislators or practitioners may like to consider in order to achieve certain objectives under certain circumstances, by reference to experiences or trends in similar or different circumstances or systems.

5. THE PUBLIC PROCUREMENT SYSTEMS PROPOSED FOR INVESTIGATION

Nowadays public procurement is generally rather heavily regulated in particular in as far as the tendering stage is concerned. Public procurement may be regulated at national level or at international level and these systems will have their own objectives that underlie such regulation.

For the purposes of this research the author sought to analyse a number of different systems such that the various non-traditional regular purchases arrangements within each of these systems can be placed into perspective that may reveal unexpected angles. The sample of case studies is not a random one though. It is one carefully selected bearing in mind the size of the public procurement markets in question, their experience, and their ability to have influenced other procurement systems, to mention just the main considerations, consistent with the methodological approaches underlying the research. The policy objectives of the selected procurement systems have also had their weight in the selection. These system are described in some detail below.

The EU public procurement system, regulated by the relevant EC directives of 2004, seeks to open national procurement markets to suppliers from other member states, in line with the economic integration envisaged by the EC Treaties (as amended and completed) and will be less interested in

providing for detailed rules or guidance on how contracting authorities achieve efficiency in procurement²⁸. The EU public procurement system was selected in the light of the sheer volume of public procurement conducted within this large market as well in the light of its direct influence on no less than the 27 national public procurement systems of the member states of the EU²⁹. Further reasons for selecting this system were: (i) the familiarity of the author with this system; as well as (ii) the availability of the primary and secondary literature in the English or French a languages that the author is literate into.

Among the national procurement systems of EU member states, this research will deal with France, Romania and the UK in order to provide for a wide range of experiences and legal traditions³⁰. France and the UK are older member states experienced in public procurement although their practice and traditions differ. While France has a Napoleonic (civil law) legal system, the UK has a common law system. France has a tradition of issuing very detailed regulations in the form of Procurement Codes, and a rather prescriptive approach to regulating procurement (although there may be a recent change in this approach)³¹ and as a legal / procurement system influenced a large number of other civil law states in its approach to the subject. Availability of literature in a language in which the author is literate (i.e. mainly French) is a further reason for selecting this system.

In the UK the conduct of public procurement is to a high degree left of the discretion of contracting authorities or procurement officers and emphasis is placed on their professional expertise and ability to make sound procurement decisions for each individual need they have to meet via purchasing. Even when transposing EC procurement directives, the UK simply passed on the options provided by the directives to member states, further to contracting authorities / entities³². Again, on the one hand, this system has influenced a number of other legal / procurement systems and presents an interesting balance between prescriptibility and flexibility while, on the other hand, availability of literature in the English language are further reasons for selecting the UK as one of the systems to be investigated.

²⁸ For example, Peter Trepte, *Regulating Procurement – Understanding the Ends and Means of Public Procurement Legislation*, Oxford University Press, 2004, p. 41.

²⁹ The EU member states have the obligation to transpose in national legislation provisions of the directives in as far results envisaged by the Directives are concerned while the means of achieving those results are left at the discretion of member states, consistent with their legal traditions.

³⁰ The selection was also influenced by the author's knowledge of the relevant languages which will obviously have an impact on the level of analysis that will be performed.

³¹ For example, Laurence Folliot-Lalliot, draft works, unpublished.

³² Arrowsmith, S., draft works, unpublished.

Romania is a very new member state of the EU and a former centralised economy up until 1989. Therefore, its procurement experience – in the sense of public institutions purchasing from the free market – is limited. The first piece of coherent public procurement legislation, based on the UNCITRAL model law, is dated 2001. Consistent with commitments related to EU integration, new legislation was enacted in the summer of 2006 and revised a few times since, in line with the EC procurement directives of 2004³³. The Romanian public procurement system tries to find a balance between: (i) efficiency in absorbing EU post-accession funds (an important part of which are to be disbursed via the national public procurement system); (ii) ensuring safeguards to EU public procurements values; and (iii) the challenges inherently posed by a rather limited institutional capacity and experience in public procurement. These pressures and objectives of the Romanian system make it an interesting case study relevant for the research. As the author is of Romanian nationality, practicing the legal/procurement profession in Romania, familiarity with the language, the system, as well the relevant institutions and professionals, were further reasons for selecting this system from the new EU member states.

Two non-EU national procurement systems will also be carefully analysed for the purposes of this research: the US Federal procurement system and the procurement system of an African state. In the US Federal procurement system focus seems to have come on efficiency and speed of supply rather than on observing strict transparent and competitive rules, or open and efficient review systems, in line with the US Government objectives and a tendency towards more business-like procurement. As the literature emphasised³⁴, it is probably impossible to accommodate for desiderates of public procurement like efficiency, value for money, transparency, competition integrity a.s.o. and some will have to be trade-off against others. The US appears to have made its choices although, more recently, there seems to be a stronger preoccupation for enhancing competition and transparency³⁵ (and also for wider contestability). Since the US Federal procurement tradition seems to have an extensive experience in regular purchases, particularly in complex multi-purchaser / multi-supplier arrangements, this system is of great interest for the purpose of this research. The volume of the US

³³ The approach was to codify in one piece of primary legislation the provisions of the 2004 Public Sector Directive, the 2004 Public Utilities Directive and the Remedies Directive 89/665. This piece of primary legislation was then supplemented by implementing norms and a Procurement Guide, and also by a number of collateral pieces of legislation dealing mainly with the monitoring and review system of the public procurement.

³⁴ For example, Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, in Public Procurement 2008/2009 Reading Materials: part I, University of Nottingham.

³⁵ *Idem*.

public procurement market, its influence on certain international instruments, such as the GPA and the UNCITRAL, as well as the availability of literature in the English language are further reasons for selecting this system.

In Africa, given its general poor economic and institutional development and rather limited experience and training of procurement officers, as well as rather difficult market conditions, there is a concern that a certain degree of flexibility in the regulation may encourage errors or corruption in the award of public procurement contracts. However, there is preoccupation for modernising public procurement systems, either in line with the UNCITRAL model law or in line with the principles of the EC directives³⁶. While certain states in Africa have formally implemented regulations regarding framework agreements³⁷ others have not done so by now.

In this connection, Ghana has just, as recent as October 2008, issued a policy document towards the introduction of framework agreements³⁸ as a procurement method aimed at increasing efficiency of procurement. At this stage of this research, Ghana is considered for inclusion among the systems to be investigated, however a final decision will be made during the research, in the light of the specific literature available in a language known by the author and the specific findings of reviewing such literature. In any event, inclusion in the scope of the research of a procurement system of an African state is very likely to provide valuable insights on how major/experienced public procurement systems may influence or determine procurement systems in the developing world.

Other international public procurement systems that will be analysed include the EuropeAid facility, the IBRD³⁹ and the UNCITRAL. The scope of the EuropeAid facility is to provide external (outside EU) aid programmes. These projects are financed from the EC general budget and procurement is mainly regulated by the provisions of the EC Financial Regulation⁴⁰ and by the guidance issued in the form of a Practical Guide⁴¹ that is revised from time to time. This procurement

³⁶ Karangizi S.R., draft works, unpublished.

³⁷ Refer to the preceding note. Literature reveals that states like Uganda, Malawi and Tanzania are the most advanced in this connection.

³⁸ Announcement available on the Internet via the website of the Ghana Public Procurement Authority at http://www.ppbghana.org/story_detail.asp?story_id=34

³⁹ Refer to note no. 27.

⁴⁰ Council Regulation (EC, Euratom) of 25 June 2002 on the Financial Regulation applicable to the General Budget of the European Communities, published in the Official Journal of the European Communities No. L 248/2002, as amended.

⁴¹ Available on the Internet via http://ec.europa.eu/europeaid/work/procedures/implementation/practical_guide/index_en.htm . The latest version published is applicable as of 01 January 2009. Previous versions are also available via the same Internet address.

system is more prescriptive than the one provided for EU member states in the EC directives⁴². A number of consultancy services are procured via framework agreements with this system, and therefore this system is also of interest for the research.

The IBRD procurement system⁴³ is also an international procurement system, however it is a system employed by an international development loan provider, which shapes its procurement system in a more flexible fashion since the funds are to be returned to the bank anyway by the concerned state, whether or not the projects financed with such funds meet their objectives. The procurement system of the IBRD, applicable mainly for borrowing institutions, is of particular relevance to this research as it: (i) is applied in, and influences the procurement systems of a large number of various countries⁴⁴; (ii) is used as an example for other development banks; (iii) provides for the perspective of a loan organisation. The procurement guidance⁴⁵ is intended to ensure success of the projects financed through these loans. Availability of the relevant literature in the English language and familiarity of the author with this system are further reasons for selecting this system.

Finally, the activity of the working group for revision of the UNCITRAL model law on procurement is also of great interest for this research. The scope of the UNCITRAL is to promote international trade via international trade law, and the UNCITRAL model law seeks to provide guidance to developing states in drafting their own national procurement regulations. On the other hand, the UNCITRAL model law on public procurement is particularly relevant since it is based on wide input from many states and it is intended to provide general guidance for legislators seeking to introduce modern public procurement systems within their jurisdictions.

The working group for the revision of the UNCITRAL model law on procurement considers introduction of provisions regarding certain types of non-traditional regular purchasing arrangements and therefore the interest in these works is threefold: (i) in the actual content of the provisions regarding regular purchases; (ii) in the methodology employed for drafting those provisions; and (iii) in the legal technique employed for expressing the agreed norms in a “legal language” of a very general level as required by such an international model law.

⁴² Directives 2004/17/EC and 2004/18/EC, as amended.

⁴³ An in-depth analysis of the IBRD procurement system can be found, for example, in the PhD thesis entitled *“The World Bank Procurement Regulations: A critical Assessment of the Enforcement Mechanism and of the Application of Secondary Policies in Financed Projects”* by Marta Meireles, the University of Nottingham, 2006.

⁴⁴ For example, Buthan.

⁴⁵ “Guidelines for employment of consultants by World Bank borrowers” and “Guidelines Procurement under IBRD loans and IDA credits”.

The influence of the UNCITRAL model law on a large number of systems and the availability of relevant literature in the English language are further reasons for selecting this procurement system.

While the objectives of each individual procurement system research will define the fashion in which regular purchases are regulated, de-construction of these provisions into basic elements and comparisons with basic elements of other systems should allow for the identification of synergies among the various systems and, possibly, of certain elements and approaches that could, might, or should not be “imported” into other systems and/or adjusted as necessary. The analysis and comparison should also allow for the identification of the main trends in the area researched, as well as of policy guidance/landmarks for legislators and practitioners (once again, not as a “unique recipe” but as orientation considerations in the light of existing experiences).

6. COMMENTARY ON POTENTIAL LIMITATIONS OF THE RESEARCH, ORIGINAL CONTRIBUTION ENVISAGED AND FURTHER RESEARCH QUESTIONS

To summarise, the proposed research will analyse non-traditional regular purchasing arrangements as defined at Sections 1 and 2 that are available under and regulated within the public procurement systems specified at section 5. The envisaged intermediary and final research outcomes are: (i) concise and comprehensive descriptions and justifications of each such individual arrangement; (ii) identification and discussion of considerations that tend to promote or detract from fulfilment of certain policy objectives of the procurement regulation of the systems proposed for investigation, as well as of the circumstances which may influence such promotion or detraction, in particular where a balance needs to be maintained between various and potentially contracting policy objectives; and (iii) a comparison among the specific non-traditional regular purchasing arrangements and among the procurement systems investigated, by reference to the underlying “core” market, commercial and management process inherent when buying items from the free market with a view to identify and explain elements of commonality and differences among those arrangements or systems.

The final scope of the research, by employing the methodological mix detailed at Sections 3 and 4, will be to generate a rather general “corpus” of orientation guidance both for legislators in enacting regulations regarding non-traditional regular purchasing arrangements in accordance with their own policy goals and for practitioners applying such regulation in particular in areas where the

existing regulation or other existing guiding instruments lack clarity or consistency. While it is obviously not possible to produce a general recipe for “appropriate” non-traditional regular purchasing arrangements, applicable to any system, the intention of this research is to provide legislators and practitioners with the skills and landmarks that they can rely on in their regulation or interpretation activities. Such a rather general “corpus of orientation guidance” should also constitute a research model that can be further enhanced and refined by including information from a wider range of systems and contexts.

A note needs to be made here regarding the (rather large) number of case studies envisaged for research that may put down the reader, leaving him or her the impression that quantity might overpass in-depth and quality of the investigation. While indeed, we are talking about eight procurement systems, we are though talking about analysing a limited niche of these procurement systems, i.e. how are they dealing with non-traditional regular purchasing arrangements. Also, it needs noticing that some of the case studies (i.e. France, UK and Romania) are sub-systems of the EU system.

Thus, in the light of such determined boundaries, the scope of the research appears comprehensible and it should allow for an in depth analysis of the systems described above, as well as for a scientifically reliable comparison exercise between them. On the other hand, with the notable exception of the US Federal procurement system, which is quite different from the others, there are a number of commonalities and certain links between the systems researched, which are likely to facilitate the analysis and comparison.

One of the questions set forth though is: to what extent is it possible to generalise and theorise on the basis of the results from the analysis of eight, very different, public procurement systems? Firstly, as already stated, the scope of this research is to provide neither general procurement regulation, nor general interpretation recipes, but only landmarks, guidance, and a research model for such activities.

The author further recognises that there may be issues, practical or regulatory possibilities that are not covered by the research. However: (i) the proposed successive steps in the methodology mix is intended to provide for validation, or otherwise, of the various research outcomes; and (ii) the scope of case studies, as explained in Section 5, is intended to be sufficient to ensure that potential

limitations of the coverage of the research are kept to a minimum and that the research is of quite wide value.

Inevitably, all research investigations fully meet their outcomes if they raise further research questions. On the other hand, any research has its own limitations and constraints and the main ones are time and other resources. Thus, an useful development of this current research, via a separate research carried out outside this PhD research, could be, among others that may arise during the research, an assessment via qualitative methods, such as interviews or think tanks, of the gaps between the current regulation and actual practice regarding non-standard regular purchasing arrangements within a wider range of public procurement systems, and involving a wide range of procurement academics and practitioners, with a view to identify best practice elements that may be worth formalising through procurement regulation.