



The Scope of Directive 2014/24/EU on Public Procurement

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Introduction

The legislative package in the field of European public procurement includes three new directives: the procurement directive, namely Directive 2014/24/EU on public procurement, which repeals Directive 2004/18/EC on public works, supply and service contracts; the utilities Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, which repeals the current directive applying to utilities, Directive 2004/17/EC; and for the first time a directive on the award of concession contracts, Directive 2014/23/EU.

The new EU public procurement directives including those on the award of concessions were published in the Official Journal of the EU on 28 March 2014 and entered into force on 17 April 2014.¹ Member States are now required to transpose most of the provisions within 24 months; however, for some provisions, for example in the area of electronic communications, longer deadlines for national implementation (54 months) are provided for.

The European procurement reform is aiming at 'simplification and flexibilisation' of the procurement procedures; strategic use of procurement; better access for small and medium-sized enterprises (SMEs) and sound procedures. In the proposal from the European Commission (EC) from 2011² the issue of governance and professionalisation of procurement received special attention. Yet, the EC's proposal that each Member State would designate a single national oversight body which would be responsible for controlling, monitoring and for the application of the procurement rules has not found its place in the directive, due to considerable opposition from the Member States.

This brief note will limit itself to examining the scope of the new procurement directive, Directive 2014/24/EU, and will not address the manifold changes relating to other key areas. It will neither address changes to the utilities directive, nor examine the new directive on the award of concessions contracts. The objective of this rather technical policy note is to familiarise contracting authorities with the revised scope of the directive, as one of the key questions to be answered is whether a contract is covered by the procurement directive and which rules need to be followed.

Structure

A cursory look at the directive will demonstrate an extension of its length, not so much in terms of the number of articles (extension from 84 to 94 articles), but by extending the number of recitals (from 51 to 138) and the Annexes (from 12 to 15). Relevant substantive text and clarifications are included in the recitals, the preamble of the directive, and a few provisions which were included in the core text of Directive 2004/18/EC have now been moved to the Annexes. When reading the 94 articles of the directive it is apparent that they cannot be fully comprehended without considering the recitals. The text of the recitals has become even more relevant than in Directive 2004/18/EC and Member States need to be aware that when transposing the provisions consideration needs to be given to the recitals, as they provide guidance to the interpretation of the directive.

The new directive is restructured and provides clarification as to the scope, definitions, exclusions and the general rules. The rules relating to public works concessions are now covered by the new concessions directive and service concessions, which were excluded from Directive 2004/18/EC are included in the new concessions directive.

Services

In the new procurement directive, the distinction between Part A and Part B services has been abolished.³ Under Directive 2004/18/EC services are divided into two groups: A and B services, depending on their potential cross-border trade. Part A services cover 16 service categories and the full procurement rules do apply to these services. The so-called less tradable Part B services cover 11 categories whereby category 27 is 'other services' and Part B services are only subject to a few rules of the directive (technical specification and contract award notice) and they are governed by the general principles of the Treaty.

Under the new procurement directive, services are fully covered by the procurement rules unless they are explicitly excluded or covered by the so-called 'light regime', which applies to social, health and cultural services and to some other services that are exhaustively listed in Annex XIV of the directive. The light regime requires *ex ante* and *ex post* publicity for contracts with a value equal to or above EUR 750 000. Contracting authorities are required to comply with the principles of transparency and equal treatment of economic operators. Member States need to develop national procedural rules for these specific service contracts, implying more freedom for the Member States as they are not limited by those procedures which are exhaustively listed in the directive.

Certain legal services, to the extent that they are not excluded, as well as hotel and restaurant services are covered by the light regime. This is surprising since the Evaluation Report on the Impact and Effectiveness of EU Public Procurement Legislation had shown a high degree of cross-border trade for these specific sectors.⁴ Hence, on the basis of the results of this evaluation the Commission had these services included under the full regime in its proposal. Recital 10 of the Commission's proposal states '[...] the full application of this directive is extended to a number of services (such as hotel and legal services, which both showed a particularly high percentage of cross-border trade)'.⁵

Contracting authorities need to be aware that references to nomenclatures need to be made by using the Common Procurement Vocabulary (CPV) which prevails in comparison to other classification systems, as clarified in Article 23, Annex II and Annex XIV.⁵ There is no longer the prevalence of other classification systems such as NACE (*Nomenclature statistique des activités*) or CPC (Central Product Classification) in case of different interpretations. This implies that the CPV classification is binding and it avoids legal uncertainty. Furthermore, Recital 119 explains that '[...] reference to a division does not implicitly entail a reference to subordinate subdivisions. Such comprehensive coverage should instead be set out explicitly by mentioning all the relevant positions, where appropriate as a range of codes.' This is of particular relevance to some of those services which are excluded by specific CPV codes in Article 10, those research and development services in Article 14, and most



importantly those services which are explicitly listed in Annex XIV, falling under the light regime. For example, only those services which are explicitly identified at the level of category or group, i.e. the lower levels of the hierarchical system of CPV codes, are covered and not the entire division which would include the entire range of services.⁶

For certain health, social and related services, the directive provides that contracts can be reserved for organisations '[...] which are based on employee ownership or active employee participation in their governance, and for existing organisations such as cooperatives to participate in delivering these services to end users.' Recitals 118 and 119 further explain that the scope is limited. Those services which are covered are listed by reference to specific CPV codes in Article 77 and include for example, supply services of domestic help personnel, preschool education services, library, archives, museums and other cultural, training and sporting services. The list of services

under the reserved contract rules is considerably narrower than those services covered in Annex XIV. It is up to the Member States to decide whether they want to provide for this possibility when transposing the directive, as this provision is optional. The conditions which need to be fulfilled by the organisations are set out in Article 77.

As indicated above, the distinction between Part A and Part B services has been abolished, which implies a broadening of the scope of the directive; yet there are many additional new exclusions for specific services. Article 10 (d), for example, includes a whole range of legal services which are excluded from the directive, such as services provided by lawyers, notaries, providers designated by court or connected with the exercise of official authority. Other new exclusions include the civil defence, civil protection and danger prevention services provided by non-profit organisations or associations. Furthermore, political campaign services awarded by a political party in an election campaign are not covered by the procurement rules. Some changes have been introduced concerning audiovisual and financial services, as well as loans. It is clarified that public passenger transport services by rail or metro are governed by a different legal regime.⁷ When purchasing these services, contracting authorities are not required to follow the procurement rules as laid down in this directive.

As for research and development (R&D) services, the directive clarifies in Recital 35 that only those R&D services which are not co-financed by the private sector fall under the procurement rules, and where the R&D activities accrue to the benefit of the contracting authority itself. R&D services on security and defence materials are excluded as they are governed by the rules of the defence and security procurement directive, Directive 2009/81/EC.⁸ The covered R&D services are explicitly and exhaustively listed in Article 14.

The specific defence and security exclusions are dealt with in Article 15: these are contracts falling either under the scope of the defence and security procurement rules, contracts excluded from Directive 2009/81/EC, exempted contracts due to the protection of the essential security interests of a Member State, exemptions covered by Article 346(1) TFEU, or secret contracts.



Public-public cooperation

For the first time, rules are included concerning 'in-house contracts' as well as public-public cooperation for contracts concluded exclusively between contracting authorities governed solely by the public interest. Following the many cases before the Court of Justice of the EU (CJEU), these provisions determine the conditions under which contracting authorities do not need to apply a procurement procedure. These detailed rules will provide guidance to the contracting authorities, yet, it is expected that the cases before the Court will continue.



Modification and termination of contracts

The scope of the procurement rules is extended beyond the conclusion of the contract, by including new provisions on the modification and termination of contracts. Article 72 of the directive (modification of contracts during their term) clarifies in which cases contracts and framework agreements can be modified without going through a new procurement procedure, and in which cases a substantial change leads to a retendering of the contract. This article is based on the case law of the CJEU and provides additional clarifications.⁹ For example, for additional works, services or supplies which were not included in the original contract, the directive provides considerably more flexibility for contracting authorities in comparison to the situations allowing for a negotiated procedure without prior publication of a contract notice under Directive 2004/18/EC (Article 31 (4)). Contracts may be modified successively under certain conditions, as the 50% value limit for additional works, supplies and services applies to the single modification and not to the aggregate value of contracts. The specific requirements are addressed in Article 72 (1b) and (1c). Contracting authorities which make use of these possibilities are required to publish a notice and justify the circumstances.

Member States must ensure that contracting authorities are able to terminate contracts during its term under certain conditions and in line with national legislation (Article 73). Contracting authorities should be able to terminate a contract in one of the following cases: a) a substantial modification of a contract; or b) if the economic operator should have been excluded from the procedure on the basis of the mandatory exclusion grounds (Article 57 (1)); or c) if the CJEU concludes that a contract has been awarded in breach of EU law (infringement procedure under Article 258). The last case applies when Member States argue that their national legislation does not provide for the termination of contracts.

Conclusions

This brief note concentrated on the revised scope of the new procurement directive. Other key innovations in relation to procedures, optional and mandatory exclusion criteria, strategic procurement and the codification of the case law in the new directive could not be addressed in this short contribution. EIPA organises comprehensive seminars on the new rules and on the transposition requirements for the procurement directive and the directive on the award of concession contracts.

Notes

- ¹ Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC, 26 February 2014, OJ L94 of 28 March 2014, pp. 65-242. Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014, OJ L94 of 28 March 2014 pp. 243-374. Directive 2014/23/EU of the European Parliament and of the Council on the award of concession contracts, 26 February 2014, OJ L94 of 28 March 2014, pp. 1-64.
- ² European Commission, Proposal for a Directive of the European Parliament and of the Council on public procurement, COM (2011) 896 final, 20 December 2011.
- ³ Part A and B services are those services listed in Annex II A and Annex II B of Directive 2004/18/EC.
- ⁴ European Commission, Evaluation on the Impact and Effectiveness of EU Public Procurement Legislation, SEC (2011) 853 final, 27 June 2011.
- ⁵ Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV), OJ L 340, 16 December 2002. This was amended by Commission Regulation (EC) No 213/2008 of 28 November 2007, OJ L 74, 15 March 2008.
- ⁶ On the 'light regime', reserved contracts and the CPV Codes hierarchy, see Smith, S., 'Articles 74 to 77 of the Public Procurement Directive: The New "Light Regime" for Social, Health and Other Services and a New Category of Reserved Contracts for Certain Social, Health and Cultural Services Contracts', *Public Procurement Law Review*, Sweet and Maxwell, Issue 2, 2014, pp. 159-168.
- ⁷ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L315, 3 December 2007, p. 1).
- ⁸ Directive 2009/81/EC of the European Parliament and of the Council on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, 13 July 2009, OJ L216 of 20 August 2009, pp. 76-136.
- ⁹ On modification of contracts and the new rules see Treumer, S., 'Contract Changes and the Duty to Retender under the New EU Public Procurement Directive', *Public Procurement Law Review*, Sweet and Maxwell, Issue 2, 2014, pp. 148-155.