

European Public Procurement Reform: Main Innovations in the Public Sector Directive – A Preliminary Assessment



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The first concrete result of the reform of the European public procurement system has been achieved with the entry into force of the "Legislative Package" in April 2004. This article briefly covers the *raison d'être* of the procurement reform, before looking at the overall new design and objectives of the public sector directive. It examines specific key innovative aspects and looks at their merits and possible drawbacks. It argues that most of the changes to the procurement rules are to be evaluated positively, but further action and guidance are required in specific areas. Moreover, materialisation of the potential benefits depends crucially on effective implementation by the Member States.

Introduction

The first concrete result of the rather long process of reforming the European public procurement system has been achieved with the entry into force of the so-called "Legislative Package" in April 2004, consisting of two new directives: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (public sector directive) and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (utilities directive).¹ This reform process has not been without difficulties. Starting in 1996 with the Green Paper and the initial Commission proposal in May 2000, the Council and the European Parliament reached an agreement in the Conciliation Committee in December 2003 and the package was finally endorsed by the Council and the Parliament at the beginning of 2004. Member States are required to implement the two new directives by 31 January 2006.²

Public procurement is a very significant area of public spending and it is estimated that the size of public procurement in the EU amounts to more than €1500 billion a year, representing 16% of the EU's GDP. This figure includes all purchases of goods, services and public works by the public sector and public utilities. It includes

procurement not regulated by the EU directives, i.e. procurement contracts of lower value than the thresholds set in the directives and those defence contracts which are excluded from the scope of the directive on the basis of national security. But even if one excludes these areas falling outside the scope of the directives, it is obvious that the procurement market in the EU is economically significant. In addition, the European rules do not only apply to the EU but also to the European Economic Area.

EU rules ensure the proper functioning of the Internal Market. Discriminatory procurement practices are considered as a technical barrier to trade, undermining the fundamental provisions of the Internal Market: the free movement of goods, the freedom of establishment and freedom to provide services. For example, a technical specification which refers only to a national standard can be considered as a measure having equivalent effect to a quantitative restriction, prohibiting market access. Besides the Internal Market rules, Article 12 of the Treaty establishing the European Community (TEC), applies, which prohibits discrimination on grounds of nationality.

Prior to the creation of the Internal Market, contracting authorities were mainly favouring domestic suppliers, which was not only incompatible with the Treaty but also had negative economic effects for the European economies and European competitiveness. It was assumed that a

liberalisation of public procurement in Member States would result in increased competition for public contracts and a reduction in prices paid by the contracting authorities. The potential benefits of greater transparency and an increased openness of public contracts were presented in the Cecchini report, mainly as savings in public expenditure and competitive and restructuring effects for European industry. The savings for contracting authorities were to be achieved through enhanced market access for foreign products to domestic markets and the pressure on domestic industry to lower their prices, resulting in a convergence of prices.³

A recent study on the impact of the Internal Market on the performance of public procurement markets over the last 10 years demonstrates that the directives have increased transparency and competition. According to the Commission's study, which is using new indicators, the EU procurement directives have increased direct and – in particular – indirect cross-border procurement and reduced by about 34% the prices paid by public authorities for goods and services.⁴ According to the Commission, a 5% cost reduction, resulting from more competitive and efficient public procurement markets would save over €70 billion.

As indicated above, the reform of European procurement policy started in 1996 with the Green Paper. Identifying the problems in the procurement area, it became obvious that some Member States failed to implement all directives, or failed to implement them correctly. The majority of the contracting authorities were not complying with the rules, mainly advertising and transparency requirements. The legal framework was considered to be too complex, with different rules applying for each type of procurement (supplies, services, works) and contracting authorities argued that the procedures were too rigid for complex procurement or involved high administrative costs.

Some of these problems have been addressed in the Legislative Package. The length and complexity of this reform process can be best explained by reference to different philosophies on procurement: the economic approach from the Commission concentrating on value for money in purchasing and the promotion of a competitive European supplier base, versus the approach by the European Parliament to use procurement rather as a tool for other policies, such as social policy.

This article limits itself to highlighting and discussing the main changes in the public sector directive. It does not address the new provisions in the utilities directive. It looks at the overall new design and objectives of the directive and identifies the key innovative areas in the procurement process, assessing their potential benefit and possible practical implications. By way of conclusion it will raise some implementation issues in relation to the *à la carte* provisions and express concern as to whether Member States will have the new provisions in place by the required deadline.

Overall objectives of the changes

The new directive aims at simplification, increased flexibility and modernisation: simplification in terms of reducing the complexity of the legal framework, flexibility in terms of reducing the rigidity of the procedures, and modernisation in terms of adapting legislation to the changing economic environment and the use of electronic procedures and instruments.

Furthermore, public procurement does not operate in a vacuum and European procurement policy has been influenced by Treaty changes and political developments:

mainly Article 6 TEC which states that environmental protection requirements must be integrated into the definition and implementation of Community policies, and the endorsement of a sustainable development strategy by several European Councils, emphasising that economic, social and environmental policies are mutually reinforcing. This is clearly reflected in the directive:

"This directive therefore

clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts".⁵

As explained in the initial proposal from the Commission the objective is to simplify, clarify and restructure the provisions.

In terms of simplification, the new directive merges the previous three directives for the award of public supplies, works and services contracts into one directive and reduces the number of articles. The preamble provides relevant guidance for further interpretation of the articles and the "rules on public contracts" are restructured in such a way as to follow an award procedure and to make it more user-friendly. Annexes have been updated as to the coverage of the contracting authorities, yet these lists are neither exhaustive nor binding. Certain procedural inconsistencies between the former three directives have been removed and the thresholds above which the directive applies are expressed in euro.

In terms of clarification, the new directive integrates the considerable and increasing jurisprudence of the European Court of Justice (ECJ) as it has developed over recent years in the field of public procurement. This relates particularly to principles of the Treaty applying to public contracts and the use of secondary policy objectives such as environmental and social considerations in the award of public contracts.

The objective of increased flexibility is addressed in the directive via the introduction of new procedures and more flexible ways for contracting authorities to define the purpose of contracts. Modernisation of the procurement regime is being tackled via the introduction of electronic means, tools and procedures.

The main question is, however, how these principles need to be interpreted for those areas not regulated or only partially governed by the procurement directives.

Specific provisions and changes, their merits and possible drawbacks⁶

The principles of the Treaty

Reflecting ECJ case law, the directive states in a recital that contracts awarded by authorities in the Member States are governed by the principles of the Treaty (freedom of movements of goods, freedom of establishment, freedom to provide services) and the principles deriving therefrom: equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The objective of the directive is to draw up coordinating provisions for the award of public contracts above certain thresholds which are based on these principles in order "... to ensure the effects of them and to guarantee the opening-up of public procurement to competition".

According to the directive the award of public contracts is subject to the principles of the Treaty. The main question is, however, how these principles need to be interpreted for those areas not regulated or only partially governed by the procurement directives, such as contracts below the threshold value, services concessions and residual services. No guidance on the actual application and interpretation of the Treaty principles is provided for these cases in the directive. In addition, the jurisprudence of the ECJ has not offered sufficient guidance on the concrete and practical implications so far. This is of particular relevance as to the exact interpretation of the transparency obligation, requiring a degree of advertising. There are several cases pending before the ECJ and clarification is required, as contracting authorities are facing considerable uncertainty as to when and where they would need to advertise for those contracts falling outside the scope of the directive.⁷

Under the directive, contracting authorities are required to treat economic operators equally and non-discriminarily and they must act in a transparent way.⁸

Flexibilities – New procedure and provisions

In order to provide flexibility and take account of the different circumstances and developments in the Member States, the directive provides for an *à la carte* implementation of some of the new key provisions. Member States may decide whether their contracting authorities may use framework agreements, central purchasing bodies, dynamic purchasing systems, electronic auctions or the competitive dialogue procedure.⁹

I will first cover the competitive dialogue, framework agreements and central purchasing bodies and other new provisions relating to technical specifications and the selection and award criteria, and then discuss the dynamic purchasing systems and electronic auctions under the electronic procurement heading.

To what extent the new procedure, the competitive dialogue procedure, will provide for more flexibility and will be used for complex contracts remains to be seen.

- Competitive dialogue procedure
- Under the three public sector directives, a dialogue between the contracting authority and the economic operator is not allowed in open or restricted procedures. In open procedures any interested economic operator can submit a bid. With restricted procedures, any economic operator may request to participate, but only those which have been short-listed by the contracting authority are invited to submit a bid. Use of negotiated procedures with prior publication is only permitted in specific cases. Practice has demonstrated, however, that these procedures are not sufficient for the award of complex contracts. To what extent the new procedure, the competitive dialogue procedure, will provide for more flexibility and will be used for complex contracts remains to be seen. Recourse to the competitive dialogue¹⁰ is only possible if it is a "particularly complex contract" with the only permissible award criterion being the economically most advantageous tender. "Particularly complex" means that the contracting authority is not objectively

- able to define the technical terms for satisfying its needs or objectives, and/or the contracting authority is not objectively able to specify the legal and/or financial make-up of a project. Examples are integrated transport infrastructure projects, large IT projects or projects in the health or education sectors. This procedure has been much inspired by the Private Finance Initiative (PFI) in the UK which involves contracts with a complex mix of capital, development and long-term service delivery, and the need to finance large infrastructure projects such as Trans-European Networks (TENs).

- The competitive dialogue procedure is a mixture of the restricted and negotiated procedure with provisions on how the negotiations should be structured. The burden of proof that the contract in question is particularly complex rests with the contracting authority. The new procedure has been welcomed both by the contracting authorities and the economic operators, yet several question marks remain as to the definition of a "complex contract", the complexity of the procedure itself, the difference between it and the negotiated procedure with prior publication, its suitability for complex Public Private Partnerships (PPPs) and the issue of post-tender fine-tuning/negotiations.¹¹ The Commission will come forward with an explanatory document to clarify the provisions of this new procedure.

- Framework agreements
- The directive introduces for the first time explicit provisions for the use and operation of framework agreements. In the past, framework agreements were only covered in the utilities directive. Framework agreements offer flexibility and are used when contracting authorities do not know the time and quantity of their purchases, or when market prices change. They are used for repetitive purchases or for example for the procurement of translation services, training and consultancy services and the purchase of IT equipment. With a framework agreement, contracting authorities are

not obliged to apply the normal procedures under the directive for each contract, which results in savings in terms of time and costs.

According to the directive, "a framework agreement is an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged".¹² Framework agreements are limited to four years; only under "exceptional circumstances" can they be concluded for a longer period if this is required by the subject of the agreement. Contracting authorities are obliged not to use framework agreements in such a way as to prevent, restrict or distort competition. The framework agreement itself must be concluded in compliance with the rules of the directive. A distinction is made between contracts which are based on a framework agreement in which all terms are laid down, and those in which not all terms are set out in the framework agreement. In the first case, an agreement can be concluded with one or several economic operators (a minimum of three). In the latter case, where not all terms are set out, a mini round of competition between the parties to the agreement is required. The detailed procedure for organising this mini competition is explained. The inclusion of framework agreements in the directive is a positive development. Since, in practice, framework agreements are used frequently, their inclusion in the directive provides legal certainty to the contracting authorities and the economic operators.

- Central purchasing bodies

The directive provides legal certainty for the use of central purchasing bodies, which is already practice in several Member States, such as CONSIP in Italy, OGCbuying. solutions in the UK and the Bundesbeschaffungsamt in Germany. A central purchasing body is defined as "...a contracting authority which acquires supplies and/or services intended for contracting authorities, or awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities".¹³ Contracting authorities are deemed to have complied with the directive insofar as the central purchasing body has complied with it. Central purchasing bodies may become increasingly important for local authorities who may not have professional procurement expertise.

- Technical specifications

The changes to technical specifications are innovative, inspired by procurement practice and case law. Technical specifications define the required characteristics of a product or service, quality, environmental performance, safety, testing, packaging, labelling, etc. in a contract document¹⁴ and should not have the effect of creating obstacles to the opening up of procurement to competition. Technical specifications are to be defined either by reference to national standards transposing European standards,

technical approvals, international standards, etc. or – in the absence of those – to national standards, technical approvals, etc. Each reference must be accompanied by "or equivalent". A higher degree of flexibility is given in comparison to the current provisions, mainly with the introduction of performance or functional requirements and the possibility of including environmental characteristics if related to the subject matter of the contract. The directive also offers the possibility of combining the reference to standards approach and performance/functional requirements approach. It encourages contracting authorities to lay down technical specifications in such a way as to be of benefit to all users, in particular, disabled people. As the development of European standards is lagging behind technological development and as contracting authorities may in practice rely on too narrow specifications, not being aware of what the market is able to offer, these changes to specifications will stimulate more innovative solutions and technological development. Furthermore, they strengthen the possibility of including environmental and social considerations in procurement.

- Selection and award criteria

The directive requires that any candidate or tenderer who has been the subject of a conviction for participating in criminal activities (criminal organisation, corruption, fraud to the detriment of the financial interests of the European Communities, money laundering) must be excluded from participation in a public contract. The exclusion of such economic operators should take place as soon as the contracting authority has knowledge of a judgement. Member States are required to specify and implement these provisions concerning the personal situation of the economic operator in accordance with their national law. An economic operator can also be excluded for non-observance of national law, for example in case of non-respect of environmental legislation, employment protection provisions or working conditions in force in a Member State.

The main change to the award criteria, the explicit listing of environmental considerations, has been inspired by the judgements of the ECJ. So-called non-economic criteria can be used as award criteria insofar as they are objective and linked to the subject matter of the contract, are

expressly mentioned in the tender documents and comply with the fundamental principles of the Treaty.

Contracting authorities are also required to indicate the criteria for the award of a contract and the relative weighting of each criterion in the contract notice or tender documents. In exceptional cases, if weighting is not possible for objective reasons, the contracting authorities must list the criteria in descending order of importance. These changes are positive for economic operators since they are able to concentrate on the most relevant requirements when preparing a tender. It is a safeguard against arbitrary decisions, although contracting authorities may feel restricted.

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Modernisation – Electronic procurement

The directive provides the legal basis for carrying out electronic procurement at European level. It provides a definition of “electronic means” and their use, and covers electronic communications and the new tools available, such as dynamic purchasing systems and electronic auctions. The directive does not intend to regulate all aspects of electronic procurement as this is an area which undergoes constant development and technological change, and indicates that other electronic purchasing may be used as long as it complies with the rules of the directive and principles of equal treatment, non-discrimination and transparency.

The Commission expects that electronic procurement will lead to considerable economic benefits in terms of time and financial savings. When fully implemented, electronic procurement is expected to contribute to annual savings amounting to €19 billion by 2010.¹⁵ It is also recognised that there are potential risks with the introduction of electronic procurement, which could lead to new legal, technical and organisational barriers, resulting in considerable market fragmentation. Therefore, in December 2004 the Commission issued an Action Plan on the implementation of the electronic procurement provisions and in July 2005 a working document was published in order to assist Member States in the coherent implementation of the new legal framework for electronic means.¹⁶

• Electronic means and communication

The use of electronic means in the procurement process is put on an equal footing with traditional means of communication. The directive provides that the tools for communicating via electronic means and their technical characteristics must be non-discriminatory, generally available and interoperable with information and communication technology products in general use.¹⁷

The directive provides for a reduction of timescales when notices are compiled and transmitted electronically and when contract documents are made available electronically from the date of publication of the notice. If notices are submitted electronically to the Office for Official Publications of the European Communities in Luxembourg,

- notices are published on Tenders Electronic Daily (TED)
- within five days instead of 12 days.

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If contract documents are made available electronically from the start, an additional reduction of up to five days for the receipt of tenders and for the receipt of request to participate is possible. In the meantime, the regulation on the new standard forms¹⁸ for procurement notices (prior information notices, contract notices and contract award notices) has entered into force. The forms integrate the new provisions of the directive and are available online at the SIMAP website (<http://simap.eu.int>).

The setting-up of buyer profiles is encouraged. Contracting authorities may like to publish prior in-

- formation notices, information on ongoing invitations to tender, contracts awarded, past procurement procedures, and general information in their buyer profile on the Internet.¹⁹

- Dynamic purchasing systems
- A dynamic purchasing system is defined as “... a completely electronic process for making commonly used purchases ... which is limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria...”²⁰

- Dynamic purchasing systems are not defined as a new procedure but as a new process/system which needs to be carried out exclusively by electronic means. Contracting authorities must allow admission to the system throughout the entire period for any economic operator, but it may not last for more than four years, except in duly justified cases.
- There are specific procedural rules which are not covered

here. Suffice it to say, dynamic purchasing systems have not been utilised by procurement practitioners so far. They are similar to a qualification system, intended for repetitive purchasing and commonly used purchasing, and are free of charge. Practitioners, however, wonder about the usefulness of dynamic purchasing systems and

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- the transactional costs and administrative burden involved for the contracting authorities. If applied in practice, it may be more appropriate to use this system for niche markets and not for commonly used purchases.

- Electronic auctions

The use of electronic auctions has been practiced in some Member States. The directive provides legal certainty and specific rules and guidance for their application at European level. It is an instrument which may be used for the evaluation of tenders, but only for those aspects which can be evaluated automatically. These can be either the price or features which are quantifiable and can be expressed in numbers or percentages, for example delivery time. Evaluations of the tenders need to be carried out in accordance with the award criteria prior to the start of an electronic auction. The use of electronic auctions is only allowed for works, supplies or services contracts for which the specifications can be determined with precision and where it is possible to establish the respective ranking of tenderers at any stage of the auction. In addition, there are detailed rules on the running of such an auction and communications with tenderers.²¹

The purchase of "intellectual" works or services through electronic auctions is explicitly excluded.

The inclusion of electronic auctions in the European procurement rules is a valuable instrument for current and future procurement practice. Some lessons as to the requirements for the use of electronic auctions may be learnt from the private sector: the existence of competitive markets, training, clear specifications and clear bidding rules.

The experience of electronic auctions in the public sector is more recent. Experience in the UK demonstrates that the projected savings can be considerable. A specific case was an online auction for IT hardware (desktop PCs and laptops) for a group of National Health Service Trusts. According to the Office of Government Commerce the achieved projected savings were worth nearly 30% of purchasing costs.

On the one hand, electronic auctions are a useful tool for bringing prices down and delivering significant financial benefits, on the other hand, they may only be suitable for the procurement of certain types of products and services.²²

Concluding Remarks

Most of the changes to the procurement rules are to be evaluated positively. Legal certainty is given to contracting authorities for the use of framework agreements, central purchasing bodies and the use of electronic procurement. More flexibility and innovation will be achieved through changes to technical specifications and the possibilities for incorporating environmental and social considerations into procurement. The new competitive dialogue procedure will need to demonstrate its value in practice and will require further guidance and interpretation. Electronic procurement is introduced

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and the potential savings to the contracting authorities are estimated to be considerable, if the procurement process itself is streamlined and not simply made electronic. Guidance and legal certainty are required as to the actual application and interpretation of the Treaty principles for those areas falling outside the scope of the directive.

It is now up to the Member States to comply with the public sector and utilities directives by 31 January 2006. As indicated above, there is some flexibility for transposition, as Member States are free to decide whether they allow the use of some of the new provisions. Some doubt may be expressed as to whether Member States will have the new regime in place by the required deadline. However, when implemented, the changes in the public sector directive will be a significant step forward in the overall reform of the European procurement system. ::

NOTES

- ¹ 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. Official Journal of the European Union, L 134 of 30 April 2004 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector. Official Journal of the European Union, L 134 of 30 April 2004.
- ² Green Paper "Public Procurement in the European Union: Exploring the Way Forward" adopted by the Commission on 27 November 1996, COM (96) 583; Commission communication "Public Procurement in the European Union" COM (98) 143 of 11 March 1998; Commission proposal concerning the Public Sector COM (2000) 275 of 10 May 2000.
- ³ Commission of the EC, Basic Findings, Vol. 5, Part A, The "Cost of Non-Europe" in Public Sector Procurement (1988).
- ⁴ European Commission, "Report on the functioning of public procurement markets in the EU", 3 February 2004.
- ⁵ Recital 5.
- ⁶ For a full account of the changes in the public sector and utilities directive see Sue Arrowsmith, "An Assessment of the New Legislative Package on Public Procurement", *Common Market Law Review*, Volume 41, (2004) pp. 1277-1325.
- ⁷ Regarding contracts below the threshold values, there is a case pending before the ECJ (Case C-195/04 *Commission v Finland*, *Senaattikiinteistö*). There are several judgements dealing with public service concessions which also fall outside the scope of the procurement directives (C-324/98 *Telaustria*; C-275/98 *Unifron Scandinavia*) and the most recent case dealing with this subject, *Coname* (C-231/03). Regarding Annex 1 B services there are several pending cases: C-507/03 and C-532/03 (Commission versus Ireland).
- ⁸ Article 2 Principles of awarding contracts.
- ⁹ Recital 16.
- ¹⁰ The main article dealing with the competitive dialogue is Article 29, however, one should also examine recital 31 and the definition in Article 1 (11) (c).
- ¹¹ For a critical analysis of the competitive dialogue see Adrian Brown, "The Impact of the New Procurement Directive on Large Public Infrastructure Projects: Competitive Dialogue or Better the Devil you Know?", *Public Procurement Law Review*, Volume 13, Issue 4, (2004) pp. 160-177.
- ¹² Article 1 (5), see in particular Article 32 and recital 11.
- ¹³ Article 1 (10), see in particular Article 11 and recital 15.
- ¹⁴ Annex VI provides a definition of certain technical specifications in case of public works contracts and public supply and service contracts and definitions on standards, European technical approvals, common technical specifications and technical references.
- ¹⁵ European Commission, "Cutting public procurement costs in the EU", *Single Market News*, No. 38 August 2005.
- ¹⁶ European Commission, "Action plan for the implementation of the legal framework for electronic procurement", 13 December 2004 and Commission Staff Working Document, "Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC", SEC(2005) 959 of 8 July 2005.
- ¹⁷ Article 42 (4). There are also specific provisions relating to the devices for electronic transmission and receipt of tenders and receipt of requests to participate Article 42 (5) and Annex X.
- ¹⁸ Commission Regulation (EC) No. 1564/2005 of 7 September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council. Official Journal of the European Union, L 257 of 1 October 2005.
- ¹⁹ See Annex VIII and Article 35 (1) and 36 (5).
- ²⁰ Article 1(6), the main provisions are in Article 33, see also recital 13.
- ²¹ The definition of an electronic auction is provided in Article 1(7), the main provisions are in Article 54, see also recital 14.
- ²² For a comparative study on the use of electronic reverse auctions and their benefits and possible disadvantages see United Nations Commission on International Trade Law, "Comparative study of practical experience with the use of electronic (reverse) auctions in public procurement", 16 February 2005, A/CN.9/WG.I/WP.35.

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