

Seminar

A quick introduction to public procurement - legislation and rules

Stoyan Kanatov/ Interact office Valencia / 21.03.2023

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Introduction

Rationale

The public procurement is one of the **market-based instruments** aiming to improve the conditions for business to **innovate**, to encourage the wider use of **green procurement** and the most **efficient use of public funds**, by keeping the EU procurement markets **open**.

The basics of the public procurement in the EU are detailed in the **procurement directives**, with more general provisions contained in the Treaty of Rome and the general principles of law to guide the interpretation of the directives.

The procurement directives focus on ensuring transparency, increasing flexibility, and encouraging the involvement of SMEs in public procurement. The **e-procurement** as a key factor in increasing efficiency and ensuring transparency is clearly recognized, and greater emphasis is placed on the conduct of procurement processes using electronic means. Additional provisions deal specifically with **green (environmental) issues**.

Public procurement reform

- Higher efficiency through digitalization (**eProcurement**);
- Easier participation for SMEs to bid on public contracts, by **limiting the turnover requirements** and introducing the option of **dividing tenders into lots**;
- **Lowering the administrative burden** and opening up the EU's public procurement market;
- Greater flexibility by the possibility of choosing the **best quality-price ratio (value for money)**;
- To encourage **innovation in public administration** and allowing for **new rules in concession**;
- Addressing societal challenges by using the public bodies' purchasing power to choose **socially responsible goods**;
- Preventing corruption by creating a culture of **integrity and fair play**.

Legal background

The **Treaty on the Functioning of the EU** establishes a number of fundamental principles relevant to public procurement:

- prohibition against discrimination on grounds of nationality;
- free movement of goods;
- freedom to provide services;
- freedom of establishment.

General Principles of Law, emerging from the case law of the Court of Justice of the European Union:

- equality of treatment;
- transparency;
- mutual recognition;
- proportionality.

Legal framework

Directives

- Public Sector Directive 2014/24/EU replacing Directive 2004/18/EC2;
- Utilities Directive 2014/25/EU replacing 2004/17/EC3;
- Concessions Directive 2014/23/EU4, which creates a new regulated regime for the award of works and services concession contracts.
- Two “remedies” directives: the public sector remedies Directive 89/665/EC and the utilities sector remedies Directive 92/13/EC5, both significantly amended by Directive 2007/66/EC6.
- The “defence” Directive 2009/81/EC7 applies a more flexible and confidential regime to the procurement of military supplies and related works and services.

Scope of the directives

The directives do not seek to impose a common regulatory regime. Each Member States can continue to apply their national procedures to the extent that these rules are not in conflict with the directives or with Treaty provisions.

As a result, Member States remain free to regulate in the following areas:



Publicity of proposed procurement contracts



Design of technical specifications



Choice of procurement procedure



Qualification and selection of candidates and tenderers



Award of contracts

Basic principles of public procurement

Competition

Competition allows the different economic operators to communicate the prices of goods and services, reflecting the demand and supply conditions, as well as the differences in quality and sale conditions. This is why advertising is so important, allowing economic operators from all over the EU to participate.

Equal treatment

The identical treatment of identical situations and identical people. As a result, all economic operators of EU nationality and all bids, including goods of EU origin, must be treated equally (this is the principle of non-discrimination).

Non-discrimination

Any condition of eligibility or origin (based on nationality or local provenance) will automatically give rise to unequal treatment, since it will discriminate against a certain group of economic operators or favor another group.

Transparency

Advertising requirements guarantee transparency, as publication of the technical specifications and the selection and award criteria permits stakeholders to verify that they are fair and non-discriminatory. Recording and reporting requirements ensure that the actions of the contracting authorities may be verified where appropriate.

Proportionality

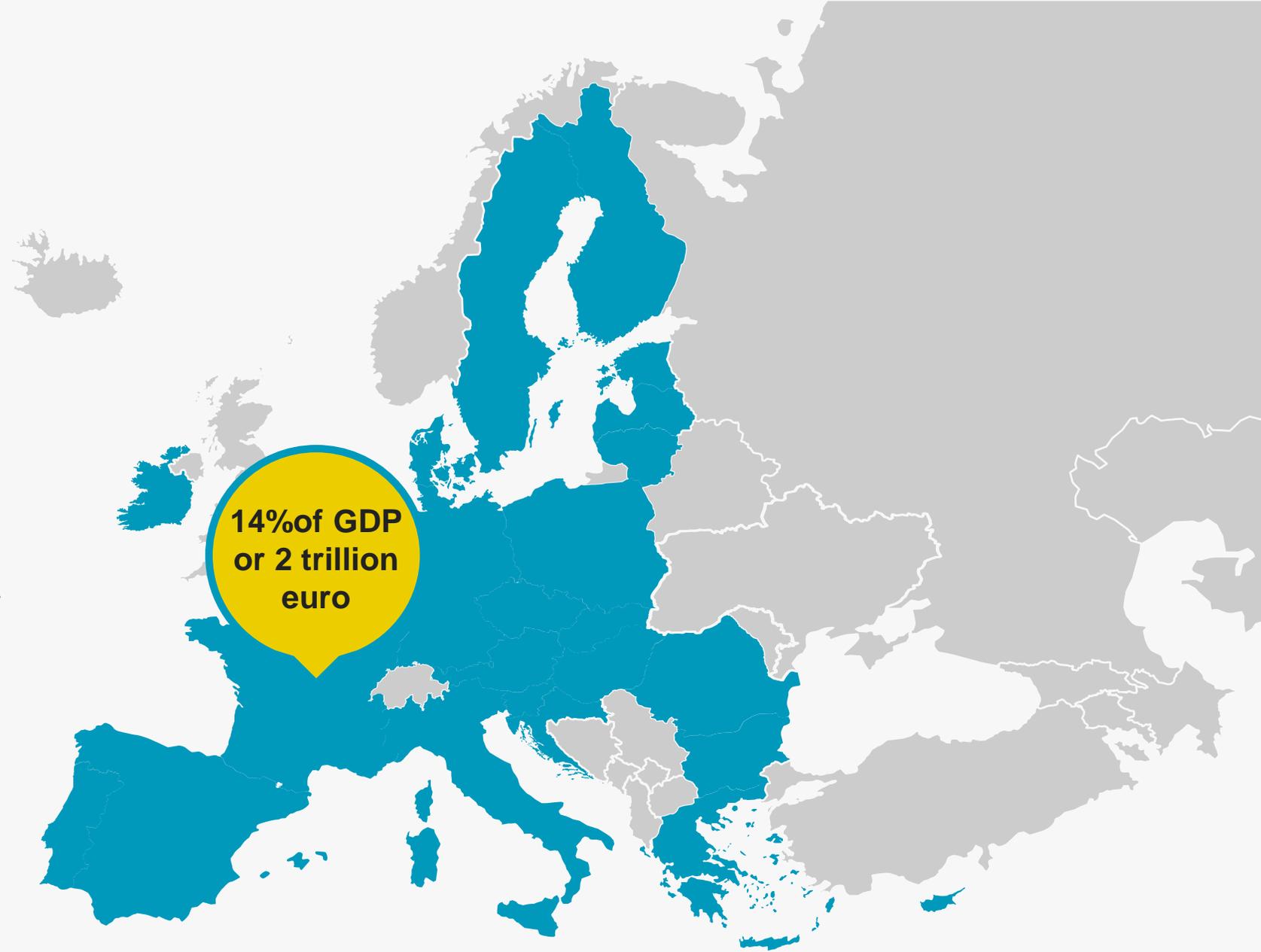
Protecting competition is a question of maintaining equality of treatment, avoiding discrimination, applying mutual recognition principles (of equivalent products and qualifications), and ensuring that any exceptions are proportional.

Value for money

A key economic driver underlying procurement processes is the need to ensure that all purchasing represents value for money. The directives do not specify this issue, but it is important to not lose sight of the need to ensure that value for money will be one of the main outcomes of the procurement process. The term value for money means the optimum combination between the various cost-related and non-cost-related factors that together meet the contracting authority's requirements.

Scope

For public authorities, procurement is a powerful tool for spending public money in an efficient, sustainable and strategic manner, especially in times of strained national budgets. Better managed procurement can lead to significant savings in public budgets and to more investment.



Procurement issues today

At EU level, several initiatives launched in the past years are starting to bear fruit

- The cross-border procurement (direct and indirect) has increased in recent years, to around 23% of the total value of procurement in the EU;
- Strategic procurement possibilities are not sufficiently used. 55 % of procurement procedures still use the lowest price as the only award criterion.
- Innovation procurement is hampered by various barriers, which could be improved by a wider use of the innovation partnerships procedure;
- Often, public procurement is still considered as a mere administrative procedure;

Procurement issues today - 2

- Public procurement relies on open competition to deliver the best value for public money, but the competitive process is losing intensity. 5 % of public contracts published in TED are awarded after negotiation, without a call for tender being published, and the number of tenders with only one bid doubled;
- The digital transformation of public procurement is slow. Only a few Member States rely on digital technologies for all major steps of the procurement process and are not yet using the advent of new technologies as an opportunity to simplify and accelerate their procurement procedures;

Procurement issues today - 3

- Contracting authorities are rarely buying together, as only 11 % of procedures are carried out by cooperative procurement. Buying in bulk often leads to better prices and also offers an opportunity to exchange know-how and obtain better quality. Although not all types of purchases are suitable for aggregation, overall low aggregation rates suggest lost opportunities.
- Procurement procedures are too complex and suffer from an excessive administrative burden, even after the major reform and simplification.

Positive example

Change can also happen bottom-up

The **Pact of Amsterdam** is a broad partnership among a large number of stakeholders and institutions, including urban authorities, aiming at a balanced, sustainable and integrated approach to deal with urban challenges. Procurement is one of the key means to achieve this, including through innovative, green and responsible public procurement.

Such examples can inspire others to follow similar paths.





What needs to improve

The Commission has identified six priority areas, where clear and concrete action can transform public procurement into a powerful instrument in each Member State's economic policy toolbox, leading to substantial benefits in procurement outcomes.

1. Ensuring wider uptake of strategic public procurement

- Establish a voluntary ex-ante assessment mechanism for large infrastructure projects;
- Update guidance on green and social procurement and provide guidance on innovation procurement and;
- Exchange good practices regarding strategic procurement, including key sectors (construction, healthcare, IT).

2. Professionalising public buyers

- Adopt a recommendation on the professionalisation of public buyers;
- Develop a European competence framework for public procurement with the essential skills and competences procurers need;
- Create an e-competence centre, as a central information portal and an e-library of good practice on procurement;
- Establish an EU-wide network of National Innovation Procurement Centres.

3. Improving access to procurement markets

- Further improve access to non-EU procurement markets through trade agreements;
- Strengthen the remedies system by further networking of first instance review bodies and guidance notices on remedies; and
- Launch pilots to boost SME participation via business intermediaries and innovation brokers.

4. Increasing transparency, integrity and better data

- Issue new procurement standard forms to improve the collection of data;
- Promote the establishment of publicly accessible contract registers; and
- Provide guidelines on practical application of new integrity provisions and on exclusion grounds relating to collusion, and set-up a database on irregularities.

5. Ensuring wider uptake of strategic public procurement

- Extend the scope of the e-Certis tool and further improve IT systems; and
- Support the implementation of the European Single Procurement Document, the 'onceonly principle and electronic invoicing in the Member States.

6. Cooperating to procure together

- Promote joint cross-border public procurement, including innovation by large buyers;
- Launch a pilot training on 'SME-friendly policies in Central Purchasing Bodies'.

Discussion

