The reform of the EU’s public procurement directives: a missed opportunity?
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The reform of the EU’s public procurement directives

Introduction

In economic terms, public procurement accounts for a significant proportion of the economies of the Member States of the European Union (EU). In the current climate, where economic activity has tailed off and recovery is needed, public procurement may well be one of the best ways of stimulating growth. Pinpointing the extent of public procurement at the national, Community and international levels nevertheless raises an initial problem. From the point of view of its contribution to the EU’s GDP, the figures varied, according to the Commission, between 17.4% in 2006 and 19.7% in 2010. In absolute terms, national public procurement in the EU amounted to some EUR 447 billion on the basis of the notices published in the Official Journal of the European Union (OJEU). A figure of EUR 2 400 billion for all EU public procurement is given for 2010. It is widely agreed, however, that cross-border public procurement accounts for only 1.6% of contract awards, i.e. close on 3.5% of the total value of the contract notices published in Tenders Electronic Daily (TED) (according to the most recent data for the period 2006-2009). This very low figure is one of the reasons for the current reform. Moreover, according to the Commission’s figures, 85% of the European public procurement market is open to outside bidders (EUR 352 billion), in comparison with 32% in the US (EUR 178 billion) and 28% in Japan (EUR 27 billion). The markets of the emerging countries continue to be closed: the Commission estimates the value of European exports deterred by this closure or subject to discriminatory or discretionary clauses such as restricted access to financing, joint venture obligations, mandatory technology transfer, etc., to be EUR 12 billion.

The fact remains, however, that public procurement is a political priority of the Barroso II Commission. It is a key focus of the Single Market Act and possibly even its most symbolic measure. To the extent that it affects one of the main sources of growth and jobs, which is also one of the main tools for society’s development, considerable attention is being paid to the new reform in which major hopes are vested. The European Council has stressed the importance of this issue on a number of occasions, and it has been one of the main priorities of the Danish Presidency.

1. **The political background**

At a time when the European Union is preparing to complete the liberalisation of utilities industries (energy, telecommunications, postal services and railways), the Commission is initiating a modernisation of the rules on public procurement which will have an impact on public operators, enterprises, workers and employees and their representatives.

The rules on public procurement are in practice becoming increasingly important to the extent that many public enterprises as well as administrations nowadays prefer directly to award a public contract rather than to assign a mission of general interest and the attendant public service compensation to another public or public-private entity. The rules on competition, and in particular State aid, which are difficult to interpret, are generally cited as reasons, as they often lead to disputes and possibly orders for repayment from the European Commission.

1.1. **The current rules on public procurement**

1.1.1. General

As a reminder, a public contract is a contract for pecuniary interest between a public authority, also known as the "contracting authority", and an economic operator known as the "contractor". This contract is subject to particular rules...
when the contracting authority wishing to have works carried out, purchase goods or have a service provided uses public money; it must then act in the general interest in a manner which is fully transparent and non-discriminatory.

A public contract is more than the simple purchase of goods or services, bearing in mind in particular developments in the case-law of the Court of Justice of the EU (CJEU) which make the award of public contracts subject to compliance with the rules of the Treaty on the Functioning of the European Union (TFEU).

Within the European Union, this issue is governed by a hierarchy of rules. Overall, it can be said that, below certain thresholds, national law applies although the general rules of the EU Treaty nevertheless have to be respected (equal treatment, transparency, non-discrimination, freedom to provide services, etc.). Above these thresholds Community law applies to intra-Community contracts and the Agreement on Government Procurement (GPA), drawn up by the World Trade Organization (WTO), applies to extra-Community contracts, when the enterprise is in one of the 42 States which have signed the GPA.

1.1.2. The current framework

The current EU framework as regards the rules on public procurement is based on five directives:
— Directive 2004/17/EC of 31 March 2004, the "Special Sectors Directive", coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors;
— Directive 2009/81/EC, which sets out particular rules for public procurement in the fields of defence and security;
— Directives 89/665/EEC and 92/13/EEC, the "Review Directives", which set out common rules for national review procedures, in order to ensure that there are rapid and effective review channels in cases where tenderers consider that contracts have not been properly awarded.

The Member States had until 31 January 2006 to transpose the 2004 package. There were delays in transposing the Directive or only partial transposition in some Member States; transposition into national law often proved tricky


because of national traditions\textsuperscript{10}. Negotiations on the new package began when the current rules had been in force for six years and had not really become fully effective.

\section*{1.2. The reasons for the revision of the "public procurement" package}

\subsection*{1.2.1. The reasons given by the Commission}

The \textit{Europe 2020} strategy\textsuperscript{11} for smart, sustainable and inclusive growth launched by the Commission is based on three interdependent and mutually reinforcing priorities: developing an economy based on knowledge and innovation; promoting a more resource-efficient, greener and more competitive economy; and fostering a high-employment economy delivering social and territorial cohesion.

Within this strategy, public procurement has a major role to play as one of the main instruments for achieving these objectives. The Commission considers that contracting authorities can foster "greener" public procurement to support the shift towards a more resource-efficient and low-carbon economy. In parallel, it stresses that public procurement policy may help to ensure that public funds are used in the best possible way.

The reasons underpinning the Commission’s modernisation of the rules on public procurement can be summarised as follows:

\begin{itemize}
  \item making European enterprises as competitive as their foreign counterparts\textsuperscript{12}:
    this is a fundamental facet of EU policy;
  \item adapting EU rules to the review of the rules of the Agreement on Government Procurement (GPA) within the World Trade Organization (WTO);
  \item adapting public procurement rules to developments in the case-law of the CJ EU.
\end{itemize}

\textsuperscript{10} The disproportionate number of infringement proceedings before the CJ EU shows how difficult applying the package proved to be.


\textsuperscript{12} The EU is very competitive in sectors such as construction, public transport, electricity generation, medical appliances and pharmaceutical products.
1.2.2. External pressure: the Agreement on Government Procurement (GPA)\textsuperscript{13}

Progressive change

In the General Agreement on Tariffs and Trade (GATT), concluded in 1947, public procurement was expressly excluded from mandatory national treatment. It was also excluded from the main commitments on market access set out in the General Agreement on Trade in Services (GATS).

Over time, the members of the GATT, and its successor the WTO, have tried to include the issue of public procurement in the multilateral trade system.

This has led to three main areas of work:
1. The Agreement on Government Procurement (GPA);
2. Negotiations on government procurement in services, pursuant to Article XIII:2 of the GATS;
3. Work on the transparency of government procurement within the Working Group set up by the Singapore Ministerial Conference in 1996.

While an Agreement on Government Procurement was initially signed in 1979, the Agreement in its current form came into force after the Marrakesh Agreements of 1994. There have been lengthy negotiations, starting in 1997, to revise the GPA. On 15 December 2011, the negotiators reached a historic agreement on the re-negotiation of this agreement. This political decision was confirmed on 30 March 2012 by the formal adoption of the \textit{Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement}\textsuperscript{14}.

These negotiations had three aims: i) to improve and update the agreement in the light, inter alia, of developments in information technology and procurement methods; ii) to extend the coverage of the agreement; and iii) to eliminate remaining discriminatory measures. The negotiations were also intended to facilitate the accession of new parties to the agreement, in particular among the developing countries.

\textsuperscript{13} At present, 15 WTO Members are covered by the Agreement on Government Procurement: Armenia, Canada, the European Union (counting as one party), the US, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland and Chinese Taipei. China, whose accession protocol (2001) states that it will be party to the GPA and which has been an observer on the GPA Committee since 2002, is still not party to the GPA. The Commission considers that China’s accession to the GPA should secure the opening of an additional EUR 80 billion.

\textsuperscript{14} Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, WTO, Committee on Government Procurement, GPA/113, 2 April 2012.
The new Agreement on Government Procurement

The preamble to the Annex to the 2012 Protocol amending the Agreement on Government Procurement in particular recognises the need "for an effective multilateral framework for government procurement, with a view to achieving greater liberalization (our underlining) and expansion of ... international trade"; that "the procedural commitments under this Agreement should be sufficiently flexible to accommodate the specific circumstances of each Party" and that "procurements should be carried out in a transparent and impartial manner ...".

In contrast, in Article III of the Agreement, on Security and General Exceptions, no provision is made in respect of social or environmental clauses. At most, it is stipulated in point III(d), that "nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures ... relating to goods or services of persons with disabilities, philanthropic institutions or prison labour".

Article V:1 also states that "the Parties shall give special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries".

Article X:6 allows procuring entities to prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment. Following on from this, Article X:9 allows environmental characteristics to be included in the evaluation (i.e. award) criteria. Social considerations are not, however, mentioned.

Article XV:5 states that "the procuring entity shall award the contract to the supplier that the entity has determined and ... has submitted:
— the most advantageous tender (i.e. bid);
— where price is the sole criterion, the lowest price".

It would appear from a combined reading of all these provisions that the EU has not really been in a position to impose respect for a number of criteria or procedures in order to take account in particular of sustainable development, environmental, social and employment dimensions, or for criteria relating to human rights and union rights, etc., which are nevertheless formally laid down in a series of International Labour Organization (ILO) Conventions15.

The GPA is clearly an element of external pressure on the negotiations on the draft directive even though the Commission has said on a number of occasions that it has tried as far as possible to exploit the margins of flexibility that this Agreement leaves open.

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15. By way of example, Convention No 94 on labour clauses (public contracts) of the International Labour Organization (ILO), 1949.
Proposal for a Regulation on the access of third-country goods and services to the EU and the access of EU goods and services to third countries

This proposal for a Regulation\textsuperscript{16}, approved by the College on 21 March 2012, has two main objectives: (a) to ensure that the internal market is coherent, as at present there are no clear rules on the access of third-country goods and services (DG Internal Market strand), and (b) to give the EU more leverage in trade negotiations\textsuperscript{18}, in particular by giving the Commission the right temporarily to limit market access for those countries which demonstrably exclude or discriminate against Union suppliers (DG Trade strand).

To that end, the proposal for a regulation sets out a dual mechanism. On the one hand, Article 6 of the proposal sets a default threshold of EUR 5 000 000\textsuperscript{19}, below which no third-country enterprise may participate in a public procurement procedure. It also provides that, at the request of a contracting authority, the Commission is to assess whether, in the case of procurement whose estimated value is EUR 5 000 000 or more, excluding VAT, tenders containing products or services originating outside the EU should be excluded from public procurement procedures.

Moreover, Chapter IV of the proposal allows the Commission to open an external investigation into alleged restrictive procurement measures when it considers that such an investigation is in the interest of the Union (Article 8). If that investigation shows that the restrictive procurement measures adopted or maintained by a third country lead to a lack of substantial reciprocity in market opening between the Union and the third country in question, the Commission may adopt implementing acts to limit temporarily the access of non-covered goods and services originating in a third country (Article 10).

The two mechanisms are intended to be complementary: the Commission is keen to change the practices of third countries in order progressively to create a level playing field in which reciprocity progressively replaces protectionist practices\textsuperscript{20} on both sides.

\textsuperscript{16} Proposal for a Regulation of the EP and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2012) 124, 21 March 2012.

\textsuperscript{17} The Commission decided to draw up its proposal as a regulation rather than a directive, as it deals with trade policy (which is an exclusive competence of the EU) and the definitions used need to be standard throughout the EU in accordance with international trade agreements and instruments (WTO legislation). The definitions used and the scope of application are parallel to those of the public procurement directives.

\textsuperscript{18} The Commission in particular stresses the need for leverage in order to gain access to certain exclusively public contracts, such as dredging.

\textsuperscript{19} There is no provision for any restrictive measure for contracts below EUR 5 million, which continue therefore to be fully open. The Commission considers this openness to be politically necessary to try to rally the Member States supporting open trade around the proposal.

\textsuperscript{20} Bear in mind, for instance, that the Chinese public procurement market is not open to competition.
Replying to those States which accuse it of protectionism, the Commission has said that its instrument has a political and educational scope and that it is not intended to be used very often. The Commission considers that one exclusion of a Chinese firm, for instance, from a major public contract could have a substantial impact on trade negotiations.

A number of Member States (including France, Italy and Spain) have already reacted positively to this initiative to give the Commission more leverage in negotiations for greater reciprocity in trade relations. Other Member States (including Germany, the United Kingdom, the Netherlands and Sweden) consider that the instrument will not enable the EU to achieve the desired reciprocity and that it sends an unfortunate protectionist signal to third countries. As matters stand, there is little opposition within the Council to the proposal for a regulation.

It is interesting that there were no adverse reactions, especially from China, when the proposal was presented (even though such reactions are common in respect of certain legislative proposals in the trade field).

Assessment of the measure

It is surprising that this proposal has not stirred up more controversy and criticism than the accusation of protectionism levelled at the Commission by Germany in particular, since it organises a potential form of “social dumping” below the threshold of EUR 5 million. In practice, a Chinese, Indian, Thai or other enterprise could win a contract within the EU without the Member State concerned being able to claim any return in terms of reciprocity from the country to which the enterprise belongs. In this respect, the proposal’s impact assessment does not seem to have given serious enough thought to the potential consequences that this provision could have on the quality of the service provided, or on working conditions or social relations within the third-country enterprise. Despite the stated aim, the proposal therefore gives almost unlimited access to enterprises from third countries which have not entered into an agreement with the EU for all contracts of a value of less than EUR 5 million.

Above the thresholds, the Member State may cite a lack of reciprocity in order to ask the Commission to open an investigation, but the fact that the Commission itself attaches a more political than operational scope to this provision may well mean that these investigations are not very frequent or detailed. It

21. The aim is in particular to help the EU in its negotiations, especially with China both before and after its accession to the GPA.

may well be that the useful effect of Chapter IV is greatly overestimated and that the provision is disregarded or circumvented.

Lastly, recital 18 of the proposal deprives the Member States of any leeway if a third-country enterprise acts in an unlawful or inappropriate way. Recital 18 of the proposal notes in this respect that "In view of the fact that the access of third country goods and services to the public procurement market of the Union falls within the scope of the common commercial policy, Member States or their contracting authorities/entities should not be able to restrict the access of third country goods or services to their tendering procedures by any other measure than the ones provided for in this Regulation" (our underlining).

1.2.3. The case-law of the Court of Justice: ongoing pressure

Since Directives 2004/17/EC and 2004/18/EC came into force, a hundred or so of the CJEU’s judgments have fleshed out Community law. It is not surprising that the most significant developments have taken place as regards the definition of a "body governed by public law" as that notion lies at the heart of the debate on the definition of needs of general interest, the financing of these bodies by the State and therefore the leeway enjoyed by the public authorities when they act as contracting authorities.

The extension of the concept of a body governed by public law: the Rundfunk, Oymans and Aigner cases

The concept of a body governed by public law is a concept specific to the Community which transcends the distinctions of States’ national law and covers contracting authorities or entities in the "public arena" in the broad sense which are therefore required to comply with the legislation on public procurement.

Directive 2004/18/EC specified what was to be understood by a body governed by public law. It is "any body:
(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
(b) having legal personality; and
(c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law".

The concept of a body governed by public law has been progressively refined in the case-law and has been developed in three ways.

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23. It would have been better if the Commission had drawn up a dynamic and transparent list of countries not respecting reciprocity conditions so that Member States do not have to initiate a necessarily long and uncertain procedure.

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(a) Contracting authority practices: avoiding national preferences
The first clarification was that "Directive 2004/18 prevents bodies which are not subject to the laws of the marketplace ... from giving preference in the award of such contracts to an applicant or tenderer favoured by them" (Opinion of Advocate General Alber in University of Cambridge, 3 October 2000). What the Court means by this is that the directives must be interpreted in the light of their aim, which is "to avoid both the risk of preference being given to national tenderers or applicants whenever a contract is awarded by the contracting authorities and the possibility that a body financed or controlled by the State, regional or local authorities or other bodies governed by public law may choose to be guided by considerations other than economic ones" (same judgment).

(b) The scope of the concept of contracting authority: extended coverage
The concept of contracting authority is to be interpreted in broad and functional terms. Bodies financed by revenue collected directly from taxpayers may be considered to be contracting authorities, when that revenue originates from a measure of the State and is not a return for the provision of a service, if the mechanism by which the amount is set is decided by the State and if there are no contractual relations between consumers and the collecting body. This view was upheld by the Court in its judgment of 13 December 2007 in Bayerischer Rundfunk and Others v GEWA: "financing ... which is brought into being by a measure of the State, is guaranteed by the State and is secured by methods of charging and collection which fall within public authority powers, satisfies the condition of 'financing ... by the State' for the purposes of application of the Community rules on the awarding of public contracts".

Thus, the German sickness insurance funds are bodies governed by public law because they are financed by compulsory contributions under public law provisions and because they lack autonomy because of the effective and permanent control of their management by public supervisory authorities.

(c) The autonomy of bodies governed by public law: mandatory competition and reduction of their margin of discretion
In its judgment of 15 January 1998 in Mannesmann, the Court held that a body which meets a need which is other than industrial or commercial (for instance, the production of administrative printed matter) is a body governed by public law if it subsequently carries out activities to meet needs of an industrial or commercial character and even if those activities predominate. If the body has been set up to meet needs in the general interest not having an industrial or commercial character, all the contracts awarded by that body are covered by the public procurement directives, whatever the respective proportions of the different activities (our underlining). This is what is known as the contagion

25. Case C-380/98, paragraph 34.
28. Case C 300/07, 11 June 2009, Hans & Christophorus Oynamns GbR.
theory. This theory was upheld in 2008 in the judgment in Aigner\(^{30}\): all the contracts of bodies governed by public law are subject to the directives, with no distinction between activities in the general interest and activities carried out under competitive conditions, even if those activities are separate in economic, financial and accounting terms. The Court nevertheless took this further and considered that a need in the general interest not having an industrial or commercial character could in principle be met by an entity in a situation of competition with other entities which are not necessarily bodies governed by public law within the meaning of the directives (see the case-law in Aigner).

As Advocate General Siegbert Alber pointed out in his Opinion in Korhonen in 2003\(^{31}\), "The determining factor in the examination of the requirements for the existence of a body governed by public law is therefore whether there is a danger of its being guided in its decisions on the award of contracts by other than economic considerations (our underlining). If this is the case, the achievement of the freedom to provide services is at risk, justifying the application of the directives on public contracts. Where, however, an entity has to bear the economic risk of its activity itself, it is in principle compelled to allow itself to be guided by economic considerations and will choose its contractual partners accordingly" (Opinion, point 79).

One of the main consequences of this debate in the case-law has been to make the Commission amend the definition of a body governed by public law in a way which slims down the concept. Article 2(6)(a) of the new proposal, which replaces Article 1(9) of Directive 2004/18/EC, is expanded as follows: "for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character" (our underlining).

In the debate on social and environmental considerations, this definition of bodies governed by public law is obviously not neutral as it emphasises that such a body must concentrate on its economic missions, without also trying to achieve, at the same time, missions in the general interest of a social or environmental character. We see this as a missed opportunity to use public procurement as a lever for sustainable development.

**Relations between public authorities: the Teckal, Stadt Halle, Parking-Brixen, Coname and Carbotermo judgments\(^{32}\)**

In November 1999, following the judgment in Teckal\(^{33}\), the "in-house" relationship and the issue of "similar control" became significant public procurement issues. The Court ruled on a relatively well-known question of admin-

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30. Case C-393/06, 10 April 2008.
31. Case C-18/01, 22 May 2003.
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istrative law – the freedom of administrative organisation of a contracting authority – in a judgment which seemed set to bring about significant change. In substance, the CJEU considered that two conditions had to be satisfied for the relationship to be considered as "in-house cooperation":

"a public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority. There is therefore no need to apply the Community rules in the field of public procurement".

For that purpose, the contracting authority must exercise over the legal person in question a control which is similar to that which it exercises over its own departments and that entity must carry out the essential part of its activities with the controlling public authority or authorities.

This rule is to be interpreted strictly and the burden of proving the existence of exceptional circumstances justifying the derogation to those rules lies with the person seeking to rely on those circumstances.

This also means that "the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment ... in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors".

"The central question", as Advocate General Stix-Hackl pointed out in respect of the Teckal case, "is what shareholding is required for the exception threshold to be reached? Various answers have been mooted, from 'above 50%' via 'to a predominant extent' and 'almost exclusive' to 'exclusive'".

While the approach which emerges from the case-law is undoubtedly inconsistent, it is more finely shaded than it might appear. The Court thus recognised in Carbotermo that there needed to be a shift away from too narrow a conception of the turnover to be taken into account towards a more qualitative interpretation. Similarly, Advocate General Stix-Hackl challenged the criterion of 80% in Article 13 of Directive 93/38/EEC. She pointed out that even though this criterion may be objective and appropriate, its rigidity may represent an obstacle to an appropriate solution.

36. Settled case-law since the judgment in Teckal cited above.
37. See in particular Case C-458/03 Parking Brixen, 13 October 2005, paragraph 63.
38. Case C-573/07 Sea, 10 September 2009, paragraph 47.
The question is important as a restrictive interpretation could well substantially limit cooperation between public authorities, or make it difficult in practice, thus increasing the pressure for a more widespread use of the rules on public procurement and therefore a kind of privatisation of the economic activity currently in the hands of public authorities. The Commission has opted for a very broad interpretation by setting the threshold of the activities carried out for a contracting authority at 90% (see p. 27). The result could be a kind of covert privatisation "on the sly" of the activities of public authorities.

Prior stipulation of the weighting of the selection and award criteria and sub-criteria: the Lianakis case

In its judgment of 24 January 2008 in Lianakis, the CJEU confirmed its case-law on two important points relating to the award of public contracts: — the need to distinguish between selection criteria and award criteria; — the need to stipulate from the very outset of the procedure not just the weightings of award criteria but also those of sub-criteria.

As regards the prior stipulation of weighting coefficients, the Lianakis judgment confirms and simplifies earlier judgments of the Court which upheld the principle in a low-key but rather ambiguous way.

There are now clear stipulations: the principle of equal treatment and the obligation of transparency mean that all the elements taken into account by the contracting authority when identifying the most economically advantageous tender and their relative importance must be known to potential tenderers when they are drawing up their tenders.

That will certainly make matters more transparent but could well reduce the margin of interpretation of contracting authorities and encourage them to simplify the criteria and sub-criteria to comply with EU rules. There is no certainty that this provision will ultimately help contracting authorities to give priority to tenders which are more "social" and/or "environmental" than others, if the contracting authority has not set the relevant criteria in advance in a sufficiently detailed way.

41. The case related to a land registry and town planning project for the Greek municipality of Alexandroupolis, i.e. a service contract covered by Directive 92/50 of 18 June 1992. The three award criteria were as follows: the proven experience of the expert on projects carried out over the last three years; the firm’s manpower and equipment; and the ability to complete the project by the anticipated deadline. The respective weighting of these three criteria, not stipulated at the beginning of the procedure, were 60%, 20% and 20% respectively.
42. Case C-331/04 ATI Viaggi Maio, 24 November 2005.
1.3. The "public procurement" approach takes precedence over the "State aid" approach

The Communication from the Commission entitled "European Union framework for State aid in the form of public service compensation" states that aid will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only where the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement (point 19 of the Framework). This quasi-obligation for contracting authorities to give precedence to the "public procurement" approach when awarding State aid in the form of public service compensation restricts the fourth criterion of the Altmark judgment and gives the "public procurement" approach precedence over the "State aid" approach.

1.4. The background to the revision of the "public procurement" package

1.4.1. The Green Paper on public procurement rules

On 27 January 2011, the Commission published a Green Paper on the modernisation of EU public procurement policy, subtitled Towards a more efficient public procurement market, thereby launching a wide-ranging public consultation on the legislative changes that could be envisaged to make the award of public contracts simpler and more flexible and to enable this instrument to be put to better use in support of other policies.

The purpose of the Green Paper was to survey various key areas to be reformed and to obtain the opinion of stakeholders on the options that could actually be envisaged for that purpose. The questions covered in particular included the need to simplify procedures and make them more flexible and to enable the strategic use of public contracts to promote other policy objectives (greener, and more socially responsible and innovative purchasing, etc.), giving SMEs better access to public contracts and combating favouritism, corruption and conflicts of interests.

Many replies were received to the public consultation, which came to an end on 18 April 2011. In total, the European Commission received 623 contributions from a wide range of stakeholder groups (Member States’ central authorities, regional and local public procurement bodies and their associations, enterprises, professional federations, universities, civil society organisations, including trade unions) and individuals. Most of the replies came from the

United Kingdom, Germany and France and, to a lesser extent, from Belgium, Italy, the Netherlands, Austria, Sweden, Spain and Denmark.

The results of the consultation were summarised in a synthesis document which was presented and discussed at a public conference held on 30 June 2011\(^{45}\).

Those taking part in the consultation had differing views on the priority to be attached to each of the reform’s aims. Simpler procedures, better access to contracts, especially for SMEs, and the promotion of innovation were popular. Everyone considered that it was particularly important to rationalise procurement procedures and make them more flexible.

The evaluation also shows that it is possible to strike a better balance between the costs of the regulatory system and the advantages that it provides, especially from the point of view of low-value orders\(^{46}\).

The preparatory work at the Commission took a year and a half.

1.4.2. The European Commission’s impact assessment\(^{47}\) and its evaluation

The impact assessment of the proposal for a directive, carried out by the Commission, drew on the extensive external expertise, consultations and analysis that underpinned the 2011 evaluation of public procurement.

It also drew on the findings of two Green Paper consultations on:
— the modernisation of EU public procurement policy (see above);
— expanding the use of e-procurement in the EU (77 replies).

These two Green Papers were supplemented by a number of conferences and consultations via the Advisory Committee for Public Contracts (ACPC).

Three key problems were identified by the impact assessment:
— insufficient cost efficiency of public procurement;
— a failure to optimise resources;
— the lack of a European public procurement dimension\(^{48}\).

\(^{45}\) Towards a more efficient procurement market, Conference on the modernisation of European public procurement policy, 30 June 2011. (http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/conferences/index_en.htm)

\(^{46}\) On average, a procurement procedure takes 108 days and costs EUR 28 000. The procedure takes three times as long in the least efficient Member States as in those achieving the best results.


\(^{48}\) Over 98% of the contracts awarded according to EU rules (i.e. approximately 96% of total value) are won by national bidders.
The reform of the EU’s public procurement directives

The impact assessment concluded that there were five main causes for these problems:
— overly complex rules;
— disproportionate and inflexible procedures;
— uncertainty and insufficient provisions on the integration of strategic goals;
— regulatory and “natural” market barriers;
— different models and administrative capacities across the Member States.

The Commission therefore drew up three specific objectives to try to resolve the main problems described above:
— improving the cost efficiency of EU public procurement rules and procedures;
— taking advantage of all opportunities in compliance with the Treaties in order to deliver the best possible outcomes for society;
— creating EU rather than national markets for public procurement.

The impact assessment also evaluated the cost of the proposed measures. It estimated that the saving generated by more widespread electronic procedures was somewhere between EUR 50 and 75 billion. It also proposed that self-declaration be accepted at the beginning of the procedure (Article 57) in order to shorten times and reduce administrative costs by approximately 80% (a potential saving of EUR 169 million).

A range of legislative (LEGI) and non-legislative (SOFT) options were examined in order to find answers to each of the five main problem areas.

After further screening, two legislative options (LEGI), differing in their degree of ambition, were retained for each problem, as well as soft law options (SOFT) for problems in access and governance. The Commission considers that the best solution combines the LEGI and SOFT options in the grey areas of the following table.

<table>
<thead>
<tr>
<th>Problem groups</th>
<th>Options</th>
<th>No change options (NC)</th>
<th>Soft law options (SOFT)</th>
<th>Legislative option generally within current framework (LEGI)</th>
<th>Legislative option – new or significant change (LEGI)</th>
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<tbody>
<tr>
<td>Scope (SCO)</td>
<td>SCO. NC</td>
<td>SCO. SOFT</td>
<td>SCO.LEGI.TARGET (clarify boundaries)</td>
<td>SCO.LEGI.REDUCE (significant re-scoping)</td>
<td></td>
</tr>
<tr>
<td>Procedures (PRO)</td>
<td>PRO. NC</td>
<td>PRO. SOFT</td>
<td>PRO.LEGI.DESIGN (improve definitions and design)</td>
<td>PRO.LEGI.FLEXIB (increase choice, increase e-procurement)</td>
<td></td>
</tr>
<tr>
<td>Strategic use (STR)</td>
<td>STR. NC</td>
<td>STR. SOFT</td>
<td>STR.LEGI.FACILIT (facilitate strategic public procurement)</td>
<td>STR.LEGI.ENFORC (enforce strategic public procurement)</td>
<td></td>
</tr>
<tr>
<td>Access (ACC)</td>
<td>ACC. NC</td>
<td>ACC. SOFT</td>
<td>ACC.LEGI.FACILIT (facilitate access)</td>
<td>ACC.LEGI.ENFORC (enforce tools for access)</td>
<td></td>
</tr>
<tr>
<td>Governance (GOV)</td>
<td>GOV. NC</td>
<td>GOV. SOFT</td>
<td>GOV.LEGI.TARGET (optimise the use of resources)</td>
<td>GOV.LEGI.ENHANC (enhance control and responsibility)</td>
<td></td>
</tr>
</tbody>
</table>


The general view is that quality of the impact assessment is somewhat flawed. First of all, it is not based on other sources (documents or analyses) that support the options chosen by the Commission.
Secondly, the assessment camouflages a number of gaps which have been stressed by the delegations to the working groups of the EC Council, especially as regards the financial impact of the new procedures, which will mean that contracting authorities will have to adapt their administrative apparatus. The same goes for the "governance" strand of the Directive which will have a major impact on the Member States. It seems, moreover, overly optimistic about certain proposals and seriously underestimates the scope of some of the suggested changes.

For instance, one of the stated aims of the reform is to make e-procurement more widespread among all the Member States by 2016. In its Communication of April 2012, the Commission lists the many merits of a full transition to e-procurement. Over and above the administrative simplification that it would provide for enterprises and public administrations, e-procurement would save paper and reduce the amount of waste; it would offer a better result at a better price while stimulating greater competition within the internal market and extending e-procurement to third countries. In support of its reasoning, the Commission cites a German study which estimates that a more widespread use of e-procurement would entail savings of between EUR 50 to 75 billion in the EU and would have a significant macroeconomic impact of some 0.1 to 0.2% of EU GDP after five years. At the Competitiveness Council on 30 May 2012, Commissioner Barnier even cited the staggering figure of a potential saving of EUR 100 billion, i.e. close on two thirds of the EU’s total annual budget. These figures, and the savings that might be generated, seem greatly overestimated as the Member States and public authorities have to some extent already anticipated this move. It should be borne in mind, moreover, that more widespread e-procedures will have no effect on all the stages following on from the drawing up of the special terms and conditions.

Lastly, it seems to have disregarded or minimised certain particular problems or practices mentioned in the replies to the Green Paper, to which the Commission has not paid enough attention in its impact assessment.

49. France has estimated that the governance strand of the proposal for a directive would cost it some EUR 23 million to comply with the terms of the directive. The figure for Austria is estimated at EUR 4 million.


51. Only 5-10% of public procurement procedures taking place outside the EU use electronic methods, despite ambitious political commitments. According to the Manchester Ministerial Declaration of 24 November 2005 “all public administrations across Europe will have the capability of carrying out 100% of their procurement electronically” and “at least 50% of public procurement above the EU public threshold will be carried out electronically by 2010”.

52. See: e-procurement – Public procurement worth two trillion euros needs smarter spending, Deutsche Bank research (February 2011).

In conclusion, it is generally felt that the assessment is based on a set of political assumptions and in particular an overly optimistic vision of market economy mechanisms. It is surprising that the findings of the impact assessment, which should be carried out independently, mirror the results of the GPA negotiation almost point by point.

1.5. Presentation of the new "public procurement" package

On 20 December 2011, as announced in the Single Market Act, the Commission adopted three proposals for directives intended thoroughly to modernise public procurement in the European Union.

The revision of the current legislative framework covers two of the existing directives, namely Directive 2004/17/EC (procurement procedures in the water, energy, transport and postal services sectors) and Directive 2004/18/EC (public works, public supply and public service contracts) in the so-called "classic" sector. The Commission has also adopted a proposal for a directive on the award of concession contracts, hitherto only partially regulated at European level, which is not analysed in this study. There is no revision of the Directive on defence public procurement or the "Review" Directive.

The reform is intended to pursue four complementary objectives:
1. simplification and flexibilisation of procurement procedures;
2. better access to the public procurement market by SMEs;
3. fostering a better qualitative use of public procurement through a strategic use of public contracts and better inclusion of social and environmental criteria, whether life-cycle costing (see point 2.2, p. 33) or the inclusion of vulnerable and disadvantaged people;
4. better governance.

1.5.1. The new proposal for the Classic Directive on "Public works, supply and service contracts"

It should be pointed out first that the Commission’s new proposal is based largely on the old Directive 2004/18/EC and takes up many of its provisions.

In the following pages, we have opted to look at six particular themes which we feel are fuelling the liveliest debate among the co-legislators and among the social partners and civil society.

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55. This proposal represents a real overhaul of the two existing directives (2004/17 and 2004/18) as it makes major changes to the legislation in force.
Scope of application (Articles 1 to 14)

A relatively unchanged scope of application

The scope of application of Directive 2004/18/EC has been only partly changed, with some sections remaining the same. The definitions and the scope of application have been clarified in various ways in order to improve the legal certainty of the text. The Commission has, for instance, proposed that the distinction between priority and non-priority services be abolished. The Commission also considered that the rules on public-public cooperation needed to be clarified in order to codify the rules set by the case-law.

Do non-priority services fall within the scope of the Directive?

The current situation

The European Directive currently in force (Directive 2004/18/EC) makes a distinction, as regards public service contracts, between A services (or "priority services" in the sense that they are considered to be a priority for the completion of the internal market) and B services (or non-priority services).56

Eleven types of services57 are concerned, including personnel placement and supply services; education and vocational education services; health and social services, etc.

These services are included in Annexes II.A and II.B of Directive 2004/18/EC (see Annex 2 for a list of A and B services).

A services must comply with all the provisions of Directive 2004/18/EC (mandatory advertising, provisions on qualitative selection, provisions on technical specifications, awarding rules, etc.) while B services are subject to more flexible rules.

B services must comply only with:

– the principles of the Treaty (non-discrimination, equal treatment, transparency, etc.);
– the provisions on technical specifications, in particular the ban on drawing up technical specifications which create obstacles to competition;

56. The European Commission has always considered the distinction between A and B services to be temporary. It has always reserved the right to carry out a revision of these lists based on an assessment of the cross-border nature of the services included in the list of B services (leading therefore to the transfer of services from Annex II.B to Annex II.A). This is what the present proposal in substance does.

57. Legal services; hotel and restaurant services; rail transport services; water transport services; supporting and auxiliary transport services; investigation and security services, except armoured car services; recreational, cultural and sporting services, other services except employment contracts and contracts relating to broadcasting organisations (taken from the list in Annex II.B of Directive 2004/18/EC).
The reform of the EU’s public procurement directives

- mandatory publication of a contract award notice, at least in the case of contracts whose estimated value exceeds the European threshold applicable to services.

The Commission’s proposal

The Commission has taken the assessment of the efficacy of Union legislation on public procurement as a basis for calling into question the distinction between A and B services. Yet the impact assessment showed that a number of services (social and health services; administrative, education, cultural and health-care services; compulsory social security services; other community, social and personal services; services supplied by trade unions and religious services) have specific features, have only a limited cross-border dimension, are not subject to the GPA and are supplied in a context differing greatly from one Member State to another because of administrative, organisational and cultural differences.

In its new proposal, the Commission abolishes the distinction between A and B services, except for the services mentioned above, which are included in a new annex – Annex XVI.

It advances two arguments to support its reasoning:
- The impact study showed that the distinction was blurred and that it was difficult to implement because the lists referred to the CPV nomenclature;
- Studies by the Commission showed that the cross-border impact of priority and non-priority services was identical overall.

The particular case of social and health services

In the case of social and health services, the Commission has decided to keep a more flexible system, the justification for which is explained in recital 11 of the proposal:

“Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to

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58. This threshold is EUR 200 000 (excluding VAT) or EUR 130 000 for central authorities. The contract award notice sets out the results of the award procedure, in particular giving details of the enterprise (+ nationality) to which the contract has been awarded and the value of the contract.
59. The Commission has always considered that this distinction between A and B services had a provisional status and would ultimately be abolished.
60. The CPV nomenclature is a Europe-wide classification system intended to make public contracts subject to the Community directives more transparent. The aim is to make it easier to include public calls for tender in the Official Journal of the EU (OJEU) and thus to help enterprises to find calls for tender relevant to them. This classification endeavours to cover all supply, works and services needs. The CPV nomenclature combines a description of a contract subject-matter, for which there is a version in each of the EU’s official languages, with each numerical code. The main nomenclature includes some 8 200 numerical codes which each have eight digits and are subdivided into divisions, groups, classes and categories.
different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR 500 000 (Note: instead of the current EUR 200 000). Services to the person with values below this threshold will typically not be of interest to providers from other Member States unless there are concrete indications to the contrary, such as Union financing for trans-border projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting entities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee.  

Recital 11 continues: "Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting entity, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination".

Another two important conclusions may be drawn from this provision.

First, personnel placement and supply services, legal services and rail transport services are moved into the category of priority A services. Those services will therefore have to respect all the provisions of the Directive.

Second, contracts of a value of less than EUR 500 000 will be assumed to have no cross-border impact and to be of no interest to economic operators and providers from other Member States with the result that the Directive will not apply to them. However, for services whose value is more than EUR 500 000, contracting entities must make their intention to award a public contract known by publishing a contract notice, which is not currently the case, publish the results of the procedure in a contract award notice (currently mandatory from EUR 200 000) and respect the principles of transparency, equal treatment and non-discrimination (Article 76). That will have an impact especially for placement offices or offices placing jobseekers working "in house" which might well be brought into competition.

While the new regime is presented as less binding and more flexible than the current regime, the need for transparency will increase the administrative burden on contracting authorities before and after the award of this kind of contract.

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During discussions in the Council, several Member States, including France, Belgium and the United Kingdom, said that they preferred to keep the current system based on the distinction between priority and non-priority services and the maintenance of the present system (see Annex 2).

The particular case of compulsory social security schemes

In its proposal, the Commission has included compulsory social security schemes in Annex XVI, which again raises the fundamental question as to whether these services can be covered by public contracts, even with a higher threshold. The fact that the Commission tries to justify its decision by arguing that no Member State is likely to have to resort to it but that, in such a case, the procedures would be simpler, seems specious to us.

Belgium and France, referring to the Court’s case-law\(^6\), have challenged the economic nature of compulsory social security schemes included in Annex XVI, citing the system of solidarity which they implement.

Belgium and France have therefore not only called for these services to be withdrawn from Annex XVI (“light” regime) but also and in particular that they be specifically excluded (in Article 10) from the scope of application of the proposal for a directive.

Cooperation between public authorities

Context

Article 11 sets out one of the most important provisions of the proposal for a directive and one on which there is a great deal of Court of Justice case-law (see point 1.2.3., p. 14) about which much has been written. It relates to the award of a contract by a contracting entity to another contracting entity without respecting the rules on public procurement in view of the close links between the two entities. These contractual relations between a contracting entity and an entity which is both separate from but closely linked to it, such as an internal department of the contracting entity, are known as “in-house”. This provision is in particular the basis for intermunicipal syndicates.

Presentation

In recital 14 of the proposal, which states that "there is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules" and that "the relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities", the Commission notes that "the sole fact that both parties to an agreement are themselves contracting

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authorities does not as such rule out the application of procurement rules" even though it immediately goes on to say that “the application of public procurement rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks”.

In its proposal, the Commission therefore makes the award of a contract by a contracting entity to another legal person subject to three conditions:

- the contracting authority must exercise over the legal person concerned a control which is similar to that which it exercises over its own departments;
- at least 90% of the activities of that legal person must be carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;
- there must be no private participation in the controlled legal person.

Evaluation of the provision

Analysis shows that the conditions specific to the "in-house" situation are much stricter than in the Court’s case-law, even though the proposal draws on that case-law. In Article 11(1)(b), for instance, the Commission requires a percentage of "at least 90% of the activities". This is a restriction of the scope of application of this exception, as current case-law, albeit inconsistent, is based on the majority of activities (our underlining) and the procedure may prove to be pointlessly complicated and legally uncertain as it will raise the question of how this criterion is to be determined: balance sheet total, turnover, working time, number of customers, etc.

Other questions are also raised: does the creation of a public structure continue to be a prerogative reserved to the Member States’ public authorities by Article 51 of the Treaty on the Functioning of the European Union (TFEU), whether the delegation to other entities is total or partial? Can in-house operations of the administration, whether by intermunicipal syndicates or the creation of establishments specifically designed to meet needs that go beyond their limits, continue to exist? Could organisational and management decisions of public services kept within the sphere of the public administrations continue to be governed by the exercise of public authority and thus fall outside the TFEU?

A negative answer to these questions would permanently weaken Article 345 of the TFEU, which defines the principle of the EU’s neutrality in respect of the system of property ownership.

Lastly, it is surprising that no definition of private participation is given.

In our view, the Commission is interpreting the case-law too restrictively and that may well lead to the privatisation of a whole raft of public authority activities.

63. Article 345 of the TFEU: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".
2. The strategic use of public procurement combined with respect for the social and environmental dimensions

Social and environmental clauses seek to impose, through public contracts, a certain number of social objectives (for instance reducing unemployment, integrating disadvantaged social groups, training for trainees, work with sheltered workshops or social enterprises) or environmental objectives (respect for the environment, life-cycle costing of products, carbon footprint, etc.). These various notions are defined by the European legislature.

As far back as 2001, following the Beentjes and Commission v France ("School buildings – Nord-Pas-de-Calais") cases, the Commission specified, in two interpretative communications, "other possibilities and, in particular, practices that go beyond the current system of the public procurement directives...insofar as they are compatible with Community law".

The inclusion of considerations other than economic in public procurement can be envisaged at four different stages of the procedure: when deciding on the subject-matter of the contract and the technical specifications, in the qualitative selection of the enterprise (exclusion clause or selection criteria), when choosing the most advantageous tender or price (award criterion) or in the performance of the contract (performance conditions). In its 2001 Communication, the Commission said that "It is especially during the execution of the contract, that is, once the contract has been awarded, that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives". The Commission specified, however, that "the main possibilities for 'green purchasing' are to be found at the start of a public

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64. The case-law of the CJEU upheld social clauses for the first time in the Beentjes judgment of 20 September 1988 (Case 31/87). The Court held that it is not incompatible to impose social conditions or requirements (a condition relating to the employment of long-term unemployed persons in that case) provided that they comply with all the relevant principles of EU law and that they have no impact on tenderers from other Member States.


purchase process ... notably when defining the technical specifications, the selection criteria and the award criteria of a contract\footnote{\text{Communication (2001) 274, op. cit., p. 3.}}.

One of the objectives of the reform announced by the Commission was to strike a balance between the need to take account of social and environmental needs and the resolve to prevent obstacles to the opening up of the single market. For that reason, the Commission has not included a "mandatory special chapter" on social and environmental clauses in its proposal, arguing that they are cross-cutting and could potentially increase the cost of public procurement for enterprises.

The binding approach (which would have taken the form of quotas) has been ruled out because of its adverse effects (price increases in particular). The Commission’s view is that more binding provisions could, if necessary, be included in sectoral legislation.

In its proposal, the Commission has decided:
- to maintain the link with the subject-matter of the contract (Articles 66 and 67);
- to promote the use of labels under certain conditions (Article 41);
- to sanction breaches of social, labour or environmental law by exclusion from procedures.

In the case of environmental aspects, the Commission proposes to retain respect for this type of criterion in technical specifications (Article 40) and in the award criteria (Article 66). It has also tried to clarify the notion of life-cycle costing so that external factors can be taken into account (Article 67(1)(b)).

As regards social aspects, it has opted for a more targeted approach in the case of the criteria which may be taken into account in the process of production. Thus, criteria relating to health and the integration of disabled workers could be included among the contract award criteria (Article 66). The Member States could also reserve the right to participate in public procurement procedures to sheltered workshops (Article 17) whose main aim is the social and professional integration of disabled and disadvantaged workers, and the threshold is lowered from 50% to 30% of workers.

In the following pages, we shall look at the provisions of the proposal relating to social and environmental considerations, differentiating between the process of production and cost.
Summary of the procedures and criteria relating to environmental and social considerations

<table>
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<th>Technical specifications</th>
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<th>Characteristics which the product or service must meet in order to be fit for the use for which it is intended</th>
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<td>Mandatory or optional grounds on the basis of which operators and tenderers may be refused access to contracts</td>
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<td>Award criteria</td>
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<td>Reserved contracts</td>
<td>Article 17</td>
<td>Participation in a procedure reserved to certain tenderers (sheltered workshops, social integration enterprises, etc.)</td>
</tr>
</tbody>
</table>

2.1. Contract award criteria (Article 66)

2.1.1. Presentation of the measure

Article 66 is the provision governing the award criteria on the basis of which a contract is awarded to a tenderer. Article 53 of Directive 2004/18 left it to the contracting authorities to choose between various criteria (including quality, price, environmental characteristics, etc.) when the contract was awarded to the most economically advantageous tender, i.e. solely on the basis of the lowest price. In the new proposal, the contracting authorities may take either the most economically advantageous tender (MEAT) or the lowest "cost" as a basis. While the difference may not be substantive, it is no less real. The Commission is trying to encourage contracting authorities to award contracts on the basis of the MEAT without making this compulsory or ruling out price as a deciding criterion. In the case of the MEAT, the proposal states that the relative criteria must be based on criteria connected with the subject-matter of the contract. These criteria include environmental characteristics and innovative character. An award criterion could therefore promote a label when that label grades energy consumption, for instance.

The notion of "lowest cost" has then been preferred to "lowest price" in order to extend the options open to contracting authorities to take a decision on the basis of a more comprehensive assessment and not just price on its own. Although the difference between the two notions is rather hazy, commentators seem to think that this will broaden out the assessment of the tender by the contracting authorities.
2.1.2. Evaluation

In our view, the opening up of the market by the Commission is limited for four reasons.

First, making it mandatory to include price or cost among the criteria used to determine the MEAT is a step backwards from the current directive under which price does not have to be included when there are several criteria. That flexibility gave the contracting authorities a margin of manoeuvre as they could set a fixed budget and not include price as an award criterion.

Second, social characteristics or the social dimension are not included as such among the award criteria in Article 66, although recital 41 specifies their scope: "In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States ...". 69.

The restrictive scope of recital 41 should be noted here: social considerations must be directly linked to the process of production, be limited to the health and integration of persons and be limited to characteristics that have immediate consequences for staff members in their working environment. Some "indirect" returns or repercussions, not connected with the subject-matter of the contract, cannot be included.

Third, a highly complex procedure for verifying the award criteria is established: contracting authorities have to specify, in the contract notice, the relative weighting that they attach to each of the criteria chosen to determine the MEAT and effectively verify the information furnished by tenderers.

Lastly and in particular, the changes that the Commission has made are more symbolic than practical and do not appear to be enough to bring about new practices among contracting authorities.

69. By referring to Directive 96/71, the Commission explicitly specifies that the minimum wage cannot be an award criterion.
2.2. **Life-cycle costing** (Article 67)

2.2.1. Presentation of the measure

The Commission’s proposal contains a notion which did not exist in Directive 2004/18, that of life-cycle costing. The aim is to send a political signal to public procurers. The notion of the life cycle describes all the phases through which a product passes from its design to its marketing and the discontinuation of its production. The notion of life-cycle costing covers both internal costs, i.e. the costs borne by the contracting authority or other users (Article 67(1)(a)), and external costs, i.e. the “costs which may be attributed to external environmental factors” (Article 67(1)(b)). These costs do not just include direct monetary expenditure, but also external environmental costs, provided that their monetary value can be determined and verified. Where there is a common method in the European Union for calculating life-cycle costs, contracting authorities must use it.

2.2.2. Evaluation

First, we feel that it is regrettable that the social dimension and employment have not been included in life-cycle costing. The Commission seems implicitly to consider that these dimensions are variables which are separate or may be separated and should not interfere in life-cycle costing. This assumption is likely to place an obstacle in the way of contracting authorities which consider that these aspects should be considered as criteria to be included in life-cycle costing.

Second, the proposal unfortunately leaves aside the question of a common methodology. Not imposing a common methodology obviously means that operators from third countries continue to have access. The Commission accepts that a national methodology may be used provided that economic operators are informed about it in a transparent way by the contracting authority and that economic operators may use alternative methodologies. However, assessment by contracting authorities of the various methodologies used by economic operators may well generate significant costs for these authorities and could lead to discrimination, to the detriment of SMEs in particular, which would have to pay additional certification costs to gain access to...
national contracts. The Commission’s proposal, moreover, raises major practical problems, in particular in terms of the comparability of tenders, and may be a source of disputes.

Third, the system envisaged by the Commission seems pointlessly complicated and cumbersome for contracting authorities. The life-cycle costing methodology used in procurement documents will have to respect a set of conditions, all of which have to be met: scientific nature, repeated or continuous application and accessibility to all interested parties, which it will often be difficult to satisfy.

2.3. Contract performance clauses

2.3.1. Conditions for performance of contracts (Article 70)

In its proposal, the Commission allows contracting authorities to lay down special conditions relating to the performance of a contract provided that they are indicated in the call for competition or in the specifications. It is stipulated in particular in Article 70 of the proposal that "these conditions may in particular concern social and environmental considerations". Pursuant to recital 43, therefore, they may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment or the protection of the environment. They may, for instance, involve the obligation during performance of the contract to recruit long-term jobseekers or to implement training measures for the unemployed or for young persons, to comply in substance with fundamental International Labour Organization (ILO) conventions or to recruit more disadvantaged persons than are required under national legislation.

Recital 44 states that, in the performance of a public contract, Directive 96/71 on the posting of workers applies and that failure to apply it constitutes serious misconduct.

The conditions for performance of contracts refer to respect for social clauses by third countries and respect for Annex XI. Annex XI lists 12 international social and environmental conventions which must be respected by tenderers.

It may nevertheless be wondered how social and environmental criteria are to be verified and how contracting authorities will be able to check them, especially when production is in situ.

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74. Some products require the development of specific methodologies if they are to be functional.
2.4. Preparing for the procedure

Before launching a procurement procedure, contracting authorities may carry out consultations to assess the structure, ability and capacity for carrying out the contract and inform economic operators of their studies and requirements.

(a) Technical specifications (Article 40)

Technical specifications define the characteristics required of works, services or supplies. These technical specifications may include requirements in relation to a specific process of production (such as the inclusion of environmental or social aspects in accordance with recital 41 of the proposal). If, for example, a contracting authority wishes to give priority to local rather than “exotic” products, it could include transport in the costs while ensuring that there is no discrimination between operators.

Few changes have been made in comparison with Directive 2004/18. Any derogations which are envisaged will have to be more clearly circumscribed and be justified in the contract documents to prevent this obligation from being systematically circumvented.

(b) Labels (Article 41)\textsuperscript{75}

When contracting authorities lay down environmental and social characteristics of works, services or supplies, they may require them to bear a specific label certifying that they possess certain qualities\textsuperscript{76}.

The Commission makes it a requirement, however, that the certification systems used must relate to characteristics connected with the subject-matter of the contract, must be drawn up on the basis of scientific information, and must be established in an open and transparent procedure which is accessible to all interested parties.

Although Article 41 is very similar to the current rules, social considerations are mentioned in the same way as environmental considerations. The Commission’s intention was to send a political signal. It will nevertheless be difficult to put into practice because the procedure is so cumbersome.

\textsuperscript{75.} The Court of Justice of the European Union, in a judgment of 10 May 2012, (Case C-368/10 Commission v the Netherlands known as Max Havelaar) ruled that a public purchaser must not refer to specific labels but make use of technical specifications to describe the subject-matter of the contract. In the case at issue, the contracting authority referred to the Max Havelaar label with a view to favouring products from organic farming. While a contracting authority may require or desire that certain products to be supplied come from organic farming or fair trade, it must use technical specifications rather than referring to ecolabels or specific labels. Applied to a construction contract, this decision means that an enterprise whose product satisfies the technical specifications does not have to have an ecolabel. It must simply be possible to prove that the product meets these technical specifications. As each product must be subject to certification and bearing in mind the wide range of both national and European labels (there is a European ecolabel for many products such as paints, varnishes, heat pumps, etc.), this decision limits the administrative requirements for enterprises.

\textsuperscript{76.} That applies, for instance, to a label certifying that a product has been manufactured without using child labour.
Firstly, the procedure introduces a disproportionate burden for contracting authorities, which will have to comply with five cumulative conditions: open and transparent procedure, link with the subject-matter of the contract, scientific proof, universal accessibility and independent setting of the label criteria.

Secondly, some conditions will be difficult to satisfy. "Scientific" information will often be tricky to prove and difficult to verify. The Commission, which, during its work, indicated that this point was to some extent open to discussion, would do well to delete this reference and to stick solely to the obligation that the criteria for obtaining the label must be objective.

2.5. Exclusions for violations of social and environmental obligations
(Articles 54(2), 55(3)(a), 69(4)(2) and Annex XI)

2.5.1. Presentation of the provisions

At three points in the proposal, the Commission states that the contracting authority may decide not to award the contract to a tenderer.

(a) Selection of participants and award of contracts
In Article 54(2), the Commission states that contracting authorities may decide not to award a contract to a tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or with the international social and environmental law provisions listed in Annex XI.

This provision is intended to ensure compliance with the main obligations arising from the EU’s social and environmental legislation and to prevent social and environmental dumping in respect of third-country operators.

(b) Qualitative selection criteria
Article 55(2) of the proposal states that an economic operator is to be excluded from participation in a contract if the contracting authority is aware of a decision having the force of res judicata establishing that it has not fulfilled obligations relating to the payment of taxes or social security contributions incumbent upon it. This provision could well lead to delaying tactics by an economic operator not acting in good faith, with the intention of putting off any decision by the legal authority for as long as possible, which would run counter to the application of this measure.

(c) Abnormally low tenders
Under Article 69(4)(2), a contracting authority must reject a tender if it can prove that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.
The Commission's intention is to send a clear message to third countries concerning respect for environmental and social standards equivalent to those in the EU.

2.5.2. Evaluation of the provisions

The Commission wanted to make public procurement more ethical in its proposal, but has not entirely succeeded in doing so. The measure is undermined in three areas.

First, it is paradoxical that the consequences of a failure to respect obligations established by the EU in the field of social and labour law are optional under Articles 54(2) (award of contracts) and 55(3) (exclusion grounds): "Contracting authorities may decide not to award a contract ..." whereas under Article 69(4) (abnormally low tenders) the tender must be rejected ("shall reject the tender"). The fact that the Commission has made it possible to decide to award a contract even when the EU's social and environmental legislation is infringed is perplexing as there is no longer a level playing field. The Commission is creating a loophole for which there is no justification. For its part, the Commission considers that the case set out in Article 69(4) justifies the obligation to reject the tender whereas an optional rejection is justified in the other cases.

Second, the reference to international instruments and respect for the obligations established by EU law "at least in an equivalent manner" raises concerns about the real scope of this provision which continues to be vague about the social and environmental requirements incumbent upon third countries.

It has to be asked, moreover, whether the responsibility for implementing the rules on exclusion for infringement of social and environmental obligations should not lie with Member States rather than contracting authorities. Such authorities do not usually have the resources to verify in practice that EU law or equivalent international conventions are being respected by candidates and to find evidence of infringements of these rules.

Moreover, and this comment applies to all the exclusion grounds, the practical implementation of this provision by the Member States and the contracting authorities and their supervision of compliance with it appear to be little more than theoretical progress. This is freely acknowledged by the Commission, which is sending a political signal rather than introducing a genuinely binding provision. It would therefore seem that the main target of the proposal is the group of third countries which have not signed up to the GPA and have not signed agreements with the EU including a "public procurement" strand. In this latter group, purchasers are likely to have much greater leeway as they are not bound by any agreement.

The Commission has lastly recognised that the provision will be very difficult to implement in practice and is more of a political message to third countries.
than a mechanism intended to be put into actual practice, in the same way as Articles 58 and 59 of Directive 2004/17/EC, which have never been applied.

2.5.3. The absence of a number of ILO Conventions from Annex XI

The lack of reference to Convention No 94 (labour clauses in public contracts) has led to surprised reactions in both the Council and the European Parliament.

The European Economic and Social Committee, in its opinion of 13 July 2011, attached a pivotal role to this Convention (point 5.4 of the opinion). It proposed that the Convention be ratified by the Member States which had not yet done so and called for the Convention to be cited in the recitals of the proposal and its provisions.

From the point of view of the list of ILO Conventions, it may be wondered why several other important Conventions, which provide a foundation for social, environmental and labour provisions, have not been mentioned as mandatory references for tenderers. These include:

– Convention 81 (labour inspection);
– Convention 94 (public contracts, labour clauses);
– Convention 95 (protection of wages);
– Convention 102 (social security, minimum standards);
– Convention 122 (employment policy);
– Convention 138 (minimum age);
– Convention 155 (occupational safety and health).

These conventions are part of the culture and legal order of the Member States. Even if they have not been formally ratified, they are often applied voluntarily by the EU Member States and many of the EU’s trading partners. The fact that the Commission has said States or contracting authorities could, if they so wish, refer to these Conventions in public contracts when the Directive itself makes no mention of them, seems highly specious.

Reference to these Conventions would have consolidated the level playing field between the EU and its trading partners even though the set of Conventions mentioned in Annex XI are among the exceptions provided for by the GPA. The fact that they have not been included is an indication of the balance that the Commission wishes to strike as regards respect for the social, environmental and labour dimensions.

2.6. Reserved contracts (Article 17)

Article 19 of Directive 2004/18 allowed Member States to reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped
persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions.

In the new proposal, the notion of "handicapped persons" has been replaced by "disadvantaged persons" as the former seemed too restrictive. The Commission has justified this provision by the need to offer special advantages to some groups of people who cannot otherwise participate in public procurement. As regards the notion of "disadvantaged persons", the Commission has said that a percentage of 30% of disadvantaged persons is the minimum threshold per contract below which it is not possible to fall. It is nevertheless entirely possible for the Member States to set a higher figure (50% for instance).
3. The role of the co-legislators

3.1. The European Parliament: targeted criticism by the rapporteur

The Belgian MEP Marc Tarabella (Group of the Progressive Alliance of Socialists and Democrats in the European Parliament) has been appointed as the rapporteur of the European Parliament’s Committee on the Internal Market and Consumer Protection on the modernisation of Directives 2004/17/EC and 2004/18/EC.

In his report, dated 3 May 2012, Marc Tarabella suggested three different kinds of change to the proposal.

3.1.1. Efficient and socially sustainable public procurement

The rapporteur considers that the Commission proposal does not go far enough, particularly on social aspects. He thus proposes that compliance with social standards be introduced at all stages of the public procurement procedure.

Technical specifications should therefore be allowed to include requirements concerning environmental performance, the qualifications and experience of workers entrusted with implementing the contract, safety, particularly methods for evaluating the quality of products, packaging and instructions for use, life cycle and features relating to the socially sustainable production process.

Marc Tarabella has devised the concept of "socially sustainable production process", which he defines as the production process linked to the subject-matter of the contract that ensures respect for the health and safety of workers and for social standards.

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The exclusion grounds should be mandatory for any economic operator which has breached its obligations under social and labour law or which is unable to provide up-to-date information on the payment of its social security contributions.

As regards the selection criteria, contracting authorities should be able to lay down participation conditions that are linked to compliance with workers’ health and safety standards and with social and labour law as defined by national and European legislation and by collective agreements.

As regards award criteria, the notion of the lowest price should be scrapped in favour of the notion of the most economically advantageous tender. Contracting authorities should take account of strategic societal aspects, social criteria, environmental criteria and fair trade. The definition of the life cycle should include the place of production. The European Union should give preference to local producers in certain specific cases in order to provide contracting authorities with a tool to alleviate the local impact of the economic crisis. The award criteria should always be linked to the subject-matter of the contract.

3.1.2. Healthy subcontracting to ensure effective participation by SMEs

Cascade subcontracting should be restricted by imposing a limit of three consecutive subcontractors. The principle of responsibility should be introduced throughout the subcontracting chain so that all stages in the process bear responsibility for respecting fundamental rights, workers’ health and safety and current labour laws.

The provisions on abnormally low tenders should also be tightened up to avoid any possibility of subcontracting that does not comply with labour law.

The rapporteur supports making e-procurement the general rule. He wishes nevertheless to retain the current bid submission deadlines under Directive 2004/18 so that SMEs in particular have enough time to draw up an adequate tender. The rapporteur also supports the creation of the e-passport.

3.1.3. Simplifying public procurement for contracting authorities

While in principle supporting more widespread use of the negotiated procedure with publication, the rapporteur considers that it is necessary to retain a degree of transparency in public procurement.

He also considers that there should be more flexible rules on relations between public authorities and to that end calls for exceptions to the principle of a total ban on private participation in certain bodies involved in such collaborations. He considers that horizontal cooperation between bodies governed by public
law should be more clear-cut and promoted, and in some cases not be subject to procurement rules. For instance, a social welfare centre in Belgium which supplies meals to older persons’ homes in a municipality should be able to build on its core business and, for instance, supply school canteens that come under a different contracting authority. That would enable an economy of scale especially as such cooperation is already widespread and successful as a result of the development of intermunicipal syndicates. He also supports exceptions to the principle of a total ban on private participation, particularly for certain social housing bodies which have a private capital holding.

He supports the abolition of the distinction between priority and non-priority services and considers that the creation of a special scheme is appropriate for social services in view of their characteristics. He proposes nevertheless to make the scheme less stringent by removing the requirement of ex-ante publication, while stressing the need to comply with the principles of transparency and equal treatment.

As regards the national monitoring authority, the rapporteur considers that it is important for each Member State to have an authority responsible for the proper operation of public procurement. However, he wishes to avoid any additional administrative burden which might slow down the work of the contracting authorities. Accordingly he considers that, in those Member States that already possess such an authority, the latter should be given new responsibilities.

3.2. The position of the EU Council

The Competitiveness Council examined the proposal in a working party specially set up to examine public procurement. Fifteen or so one-day meetings gave the experts an opportunity to take a detailed look at the proposal’s provisions, broken down into ten themes. The Competitiveness Council had two discussions on some fundamental aspects of the proposal.

At the Competitiveness Council held on 20 February 2012, Ministers held their first orientation debate on questions connected with public procurement and the lighter regime for social and other services.

A minority of Member States clearly opposed wider use of the negotiated procedure with publication, while a different minority considered that if the procedure were to be used more widely, it should be accompanied by essential safeguards and a strict framework in order to limit the risks of contracting authorities misusing their discretion or applying discrimination.

78. The ten themes included more flexible procedures, the strategic use of public procurement, reducing documentation requirements, e-procurement, SME access, aggregation of demand, other procedural requirements, sound procedures, governance and scope of application.
A majority of Member States were in favour of the more widespread use of the negotiated procedure with publication, acknowledging that this brought added value.

It also emerged that a minority of Member States (France, United Kingdom, Netherlands, Belgium, Cyprus) were keen to retain the distinction between A and B services. The majority of Member States nevertheless wished to keep a "light" regime for social services and for also for some other services (legal services in the case of Germany and Hungary, environmental services in the case of Finland, etc.)

At its meeting on 30 May 2012, the Competitiveness Council looked at the issue of more widespread use of electronic systems (e-procurement) and the governance and monitoring of procurement procedures.

In this second debate, the majority of Member States accepted that public procurement could become more virtual by means of e-procurement, but nevertheless attached certain conditions. The vast majority of Member States accepted that reporting, monitoring and guidance in respect of public procurement were the responsibility of existing structures in the Member States and not of a new structure set up specifically for that purpose.

During the negotiations, the Danish Presidency suggested a number of clarifications and compromise proposals for the proposed directive. In the particular case of the strategic use of public procurement policy, the Presidency proposed to promote the development of life-cycle costing and clarify how it can be integrated into the award criteria for public contracts; to encourage the Member States, when drawing up technical specifications, to make full use of performance and functional requirements as a method likely to foster innovation; to take steps to ensure that public procurement rules continue to focus on "how to buy" and not "what to buy" and such that Member States wishing to do so are in a position to promote political objectives provided that the criteria used for this purpose are linked to the subject-matter of the contract; to refine the scope and conditions for a light regime for certain services, including social, health, cultural, educational and hotel/restaurant services, while promoting transparency and competition.

The Cyprus Presidency took over on 1 July 2012 and ten or so meetings of the "public procurement" working party have been scheduled. The Competitiveness Council on 10 and 11 December 2012 is to examine either partial joint guidelines (an optimistic view) or a progress report accompanied by a document setting out the Member States' positions in footnotes.

It will be for the Irish Presidency to complete the negotiations and open a dialogue with the European Parliament with a view to obtaining approval at first reading. Despite Commissioner Barnier’s determination to have everything wrapped up by the end of 2012, the co-legislators will probably not approve the proposal before March-April 2013 at the earliest.
Conclusion: a hollow reform?

At the end of this study we unfortunately have to conclude that the Commission has not given itself the resources that it needs to meet the ambitious goals that it had set itself. The College wanted to simplify procedures and make them more flexible, stimulate competition and make the European Union more competitive, to set in motion a strategic use of public procurement by supporting sustainable development, in particular by including social and environmental criteria and making better use of innovation, to facilitate SME access to public procurement, etc.

It would seem that none of these goals has been fully met. The overall result therefore seems relatively mediocre, not to say disappointing, bearing in mind the hopes that the Commission had raised.

First, in the case of competitiveness, the Commission has tried to make its proposal compatible with the rules of the Agreement on Government Procurement (GPA). In so doing, it has taken the risk of abandoning any obligation to refer to ten or so International Labour Organization Conventions on labour clauses, which are intended to ensure a level playing field among the countries party to the GPA and in respect of third countries without thereby dismantling the Community acquis. All in all, this could turn out to be a tool which neither enhances the EU’s competitiveness nor promotes sustainable development. At most, the Commission has set out a series of policy aims that are difficult to apply in practice and that contracting authorities and the Member States will be hard pressed to use.

Second, as regards simpler and more flexible rules, it has to be concluded that that goal too has not been met. The reform may well have taken away some of the administrative burden on enterprises and relieved them of various procedural obligations. The fact remains, however, that, far from reducing the overall burden, the Commission is now placing a disproportionate administrative and financial burden on the Member States and on contracting authorities.

Third, the proposal has failed to meet the main goal that it set itself. Faced with an evident need for harmonisation, the Commission has introduced yet more vague notions that are open to interpretation, specific cases that may entail "procedural traps" and, ultimately, has increased legal uncertainty. The Commission has not given the Member States or contracting authorities the wherewithal successfully to achieve the goals of the reform.
Lastly, and this is probably the most worrying element, the Commission has, under the pretext of codifying the rules, imposed new obligations on contracting authorities. It has opted to apply EU case-law more strictly and tighten up rules on various points, especially in the field of public-public cooperation. Without putting the Commission in the dock, there seems to be a kind of instrumentalisation of public procurement law which may well lead to a progressive privatisation of contractual relations between public authorities.

It is now up to the European Parliament and the Council to rebalance the proposal to make it as ambitious as it deserves to be. It will be up to the European Parliament’s rapporteur, Marc Tarabella, and the Cypriot Presidency of the European Union to make the package more coherent and to make clear and consistent choices to meet the challenges facing the EU.

We consider that the reform must resolutely stand up for sustainable development. Public contracts are in practice a key element in economic recovery and endogenous growth which need to respect strict social and environmental standards. An attempt must be made to simplify procedures and make them more flexible without placing an additional burden on the Member States and contracting authorities. The transition to e-procurement may help here, but it is in a real relationship of trust that an agreement between economic operators and contracting authorities must be sealed.

Let us hope that all the stakeholders make the most of the next few months to make this reform as ambitious as it deserves to be.
# Annexes

## Annexe 1 – The various type of procedure

<table>
<thead>
<tr>
<th>Open procedure</th>
<th>Restricted procedure</th>
<th>Competitive procedure with negotiation (currently called &quot;negotiated procedure with publication&quot;)</th>
<th>Negotiated procedure without publication</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compulsory publication</td>
<td>Compulsory publication</td>
<td>Compulsory publication</td>
<td>No compulsory publication</td>
</tr>
<tr>
<td>Always admissible</td>
<td>Always admissible</td>
<td>Admissible only in strictly limited cases</td>
<td>Admissible only in strictly limited cases</td>
</tr>
<tr>
<td>Takes place in one stage</td>
<td>Takes place in two stages: 1. selection of candidates 2. submission of tenders</td>
<td>Takes place in two stages: 1. selection of candidates 2. submission of tenders</td>
<td>Takes place in one or two stages</td>
</tr>
<tr>
<td>Tenders cannot be amended: tenders cannot be amended after they have been opened and may be excluded if they are.</td>
<td>Tenders can be amended: the tenders submitted may be negotiated in order to obtain the most advantageous tender for the contracting authority in the light of the requirements of the contract documents.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very inflexible: formal procedure. Example: if a tenderer mistakenly includes in its tender a clause from its own sales conditions which is contrary to the conditions laid down in the contract documents, the tender may be rejected as irregular even if it is the most advantageous.</td>
<td>Flexible: errors and inaccuracies in tenders may be corrected during negotiation, while respecting the principle of equal treatment. Example: a provision in the tender which incorporates a sales condition of the tenderer which is contrary to the conditions laid down in the contract documents may be corrected.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>High level of legal protection: the mechanisms set out in the &quot;Review&quot; Directive 89/665/EEC apply in full, in particular the standstill period (of 15 days between the award decision and the signature of the contract so that tenderers who consider that they have been unfairly treated may lodge an appeal in good time).</td>
<td>Lower level of legal protection: partial application of the mechanisms set out in the &quot;Review&quot; Directive 89/665/CEE: no standstill.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Office of the Prime Minister of the Kingdom of Belgium (2012)
Annexe 2 - List of A and B services

A services (Annex II.A of Directive 2004/18/EC)

1. Maintenance and repair services
2. Land transport services
3. Air transport services (of passengers and freight)
4. Transport of mail (by land and by air)
5. Telecommunications services
6. Financial services (insurance services, banking and investment services)
7. Computer and related services (ICT)
8. Research and development services
9. Accounting, auditing and bookkeeping services
10. Market research and public opinion polling services
11. Management consulting services and related services (consultancy)
12. Architectural and related services
13. Advertising services
14. Building-cleaning services and property management services
15. Publishing and printing services
16. Sewage and refuse disposal services; sanitation and similar services

B services (Annex II.B of Directive 2004/18/EC)

17. Hotel and restaurant services
18. Rail transport services
19. Water transport services
20. Supporting and auxiliary transport services
21. Legal services
22. Personnel placement and supply services\(^7\)
23. Investigation and security services
24. Education and vocational education services
25. Health and social services
26. Recreational, cultural and sporting services\(^8\)
27. Other services (services to draw up address lists and despatch services, photographic services, debt collection services, translation services, services to maintain parks, gardens and plantations, dry cleaning services, decorating services, etc. See Federal Circular – Public Procurement of 2 December 1997)

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\(^7\) Except employment contracts.
\(^8\) Except contracts for the acquisition, development, production or co-production of programmes by broadcasting organisations (read: radio and television) and contracts for broadcasting time.
## Annexe 3 – Thresholds above which the Directive’s rules apply

<table>
<thead>
<tr>
<th>Central contracting authorities</th>
<th>Works contracts, public works concessions, some subsidised works contracts</th>
<th>EUR 5 000 000</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All contracts concerning services listed in Annex II B; all design contests concerning these services and all subsidised services.</td>
<td>EUR 200 000</td>
</tr>
<tr>
<td></td>
<td>All contracts and design contests concerning services listed in Annex II A except contracts and design contests concerning certain telecommunications services and R&amp;D services.</td>
<td>EUR 130 000</td>
</tr>
<tr>
<td></td>
<td>All supplies contracts awarded by contracting authorities not operating in the field of defence.</td>
<td>EUR 130 000</td>
</tr>
<tr>
<td></td>
<td>Supplies contracts awarded by contracting authorities operating in the field of defence:</td>
<td>EUR 130 000</td>
</tr>
<tr>
<td></td>
<td>— concerning products listed in Annex V:</td>
<td>EUR 200 000</td>
</tr>
<tr>
<td></td>
<td>— concerning other products:</td>
<td></td>
</tr>
<tr>
<td>Other contracting authorities (regional, local, etc.)</td>
<td>All service contracts, all design contests, subsidised service contracts, all supplies contracts.</td>
<td>EUR 200 000</td>
</tr>
<tr>
<td></td>
<td>Works contracts</td>
<td>EUR 5 000 000</td>
</tr>
</tbody>
</table>
The reform of the EU’s public procurement directives: a missed opportunity?

Éric Van den Abeele

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