



BRIEFING FOR MEMBERS

EUROPEAN COMMISSION PACKAGE AIMED AT MAKING PUBLIC PROCUREMENT WORK IN AND FOR EUROPE

Why this Public Procurement Package?

The value of goods and services procured in the EU today accounts for 14% of the GDP in the region. Because of such a significant weight, public procurement has a vast potential to create social, economic and environmental value. Also, it can drive innovation in the way that goods and services are delivered.

Tapping this potential, however, calls for a more strategic approach to public procurement and significant changes on its daily practice. The Directive 2014/24/EU on Public Procurement aimed to address this challenge by creating an enabling legal framework for such a strategic approach, moving away from a 'cost compliance only' logic and realising the full positive impact of mobilising public funds.

Acknowledging this, Eurodiaconia has been actively involved in the discussion of the rules on public procurement and the changes introduced by [Directive 2014/24/EU](#), which are key to ensuring a sustainable provision of quality social services by our member organisations. Eurodiaconia action included guidance offered to our members aimed at ensuring that social criteria contained in the Directive were incorporated into national legislation during the transposition and implementation stages¹. Because such provisions were voluntary in some cases, their effective transposition into national legislation was subject to Member States². For this reason, the inclusion of social criteria has varied across EU countries.

In this context, the European Commission released on 3 October a [Public Procurement Package](#). The Package includes a Communication, "[Making Public Procurement work in and for Europe](#)", aimed at carrying out public procurement more efficiently and in a more sustainable manner. The Communication emphasises the importance of a more strategic approach to public procurement to ensure the delivery of quality public services. To this aim, the Communication is accompanied by other specific initiatives around key areas to deliver on such a strategic approach.

The Package does not substitute or amend the legislation on public procurement put in place in 2014. Instead, it identifies outstanding issues in public procurement practice and develops specific initiatives to render it more efficient and ensure a coherence between the spirit of the Directive and daily practice. The European Commission is committed to deliver on these initiatives between now and the end of 2018. This briefing concentrates on those provisions in the Communication, as well as the accompanying initiatives, which are relevant for social services: a) *promotion of a greater uptake of social criteria*; b) *increase the professionalization of procurement officials* and c) *emphasis on joint procurement*.

¹ Eurodiaconia, [Key points for the transposition of Directive 2014/24/EU on Public Procurement](#), June 2015

² Note, however, that the Directive also applies to countries belonging to the European Economic Area.





Mainstreaming social criteria in public procurement

As the Communication acknowledges, Member States are not using to their full extent the possibilities of public procurement as a strategic tool to support sustainable, social policy objectives and innovation. The transposition process has been slow and, in some cases, late. By the end of 2016, several months after the deadline, the European Commission urged 15 EU countries to fully transpose one or more of the 3 new directives on public procurement and concessions into national law³.

Today, 55% of public procedures still use the lowest price as the only award criterion⁴. This a very restrictive use of the different provisions which had been made available for transposition by Member States, on a voluntary basis only, by the Directive. These provisions allowed for cost-effectiveness and quality-based criteria which took into consideration social, environmental, innovative, accessibility or other qualitative criteria, (summarized under the MEAT -'economically most advantageous tender'- criterion) as the ruling principle to awarding tenders. The MEAT criterion represented a very important step towards a changed perception on the value of public purchases, where a life-cycle approach is brought into cost calculations and prevented costs are equally taken into account. Annual budgets, in this regard, are not helpful to mainstream such an approach.

However, the voluntary character of such provisions has translated in some cases in restrictive transpositions with little room for social criteria in public procurement legislation at national level. In other cases, such provisions have been transposed but remain underdeveloped. For this reason, the Communication stresses the aim to mainstream social criteria, together with innovative and green ones. Such a priority is also a response to the Recommendations put forward by the Expert Group on Social Entrepreneurship (GECES) appointed by the European Commission and composed of representatives from Member States, local authorities, social entrepreneurs' organisations, the banking and finance sector, academics and civil society organisations, including not-for-profit providers of social services⁵.

Such a mainstreamed approach to social criteria will be carried out through 3 main actions:

³ http://ec.europa.eu/growth/content/public-procurement-commission-requests-15-eu-countries-transpose-new-eu-rules-public-0_en The countries concerned (as of December 2016) are Austria (3), Belgium (3), Bulgaria (1), Croatia (3), Cyprus (2), Estonia (3), Finland (3), Ireland (1), Latvia (3), Lithuania (3), Luxembourg (3), Portugal (3), Slovenia (1), Spain (3) and Sweden (3).

⁴ COM(2017) 572 final, [Making Public Procurement work in and for Europe](#), p.5

⁵ European Commission, [Social enterprises and the social economy going forward. A call for action from the Commission Expert Group on Social Entrepreneurship \(GECES\)](#), October 2016.

Regarding public procurement (Recommendation number 9), the GECES called for a greater uptake of social criteria in procurement procedures and proposed concrete actions to this aim (recommendation 9):

"Public buyers should make the best use of the new public procurement rules and insert social considerations, including reserved contracts for the social and professional integration of disabled and disadvantaged persons (art. 20) as well as health, social and cultural services (art.77), in their tendering procedures. Actions should include:

- updating the Commission's "Buying Social" guide published in 2011 and monitoring best practices ([to be carried out by the European] Commission);*
- developing dedicated capacity building programmes and communication campaigns (Commission and Member States);*
- conducting/developing specific training for European civil servants, to take social aspects into consideration when drafting tendering specifications (Commission);*
- creating networks to stimulate the commitment of various stakeholders in this process (Member States, contracting authorities, social enterprise organisations)".*



A) Updating existing guidance on social public procurement

In this regard, the Communication announces an update of existing guidance on social public procurement; namely the European Commission guide [Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement](#)⁶. The update will be preceded by a consultation with stakeholders to gather suggestions on the scope and issues to be addressed in the guidance.

Note, however, that further action on mainstreaming social criteria will not be undertaken until procurement markets in Europe become “fully operational”. The Communication states that the Commission will, first, continue to provide support and guidance to Member States to strengthen their public procurement systems and, only after that, engage further into mainstreaming social, green and innovative criteria despite the strategic importance of this objective.

B) More extensive use of pre-market consultation

Pre-market consultation refers to actions by contracting authorities (e.g. consultations) aimed at preparing the procurement process and informing potential suppliers of procurement plans, requirements, etc. Such actions are compatible with the legal requirements of procurement processes provided that they do not distort competition or jeopardise the principles of non-discrimination and transparency. Pre-market consultation can be an opportunity to bridge the distance between contracting authorities and smaller providers or social enterprises with less capacity to undertake procurement processes without previous knowledge or support, but able to offer greater added value through social criteria.

C) Launch of a public consultation on how to stimulate innovation through public procurement

Finally, the Package also includes the launch of a targeted public consultation to collect feedback from stakeholders on how to stimulate innovation through public procurement⁷. Importantly, social innovation is understood by the Guidance and the consultation as a key dimension of innovation at large. Public procurement, in this regard, enables innovation by addressing arising needs, modernising public services or helping social start-ups.

The consultation is basically linked to a draft document on [Guidance on Public Procurement of Innovation](#), which basically summarizes the provisions contained in the Directive 2014/24/EU that can enable a thriving environment for innovation. The consultation is open until 31 December 2017 and will feed into future guidance for public authorities, addressing issues such as how to set a strategy, organise support for innovation procurement or use innovation-friendly procurement tools.

The *Guidance* lists several instruments aimed at creating a thriving environment for innovation. Recognising that social enterprises often lack the scale, capacity or track record required by public procurement processes, the *Guidance* points at: **reduced administrative criteria** (for instance, a standardised self-declaration by tenderers that they fulfil all administrative requirements, or the presentation of actual certificates required only if the tenderer is evaluated as the best one); **lighter financial guarantees** to demonstrate the financial capacity of the tenderer, which *de facto* exclude lower turnovers if too high; or the possibility of **dividing public contracts into lots** as a way to accommodate the different sizes and operational capacities of potential tenderers.

Specific provisions to promote innovation and social innovation among tenderers with bigger capacities are equally included. In this framework, emphasis is made once again on the MEAT criterion and the best price

⁶ <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978>

⁷ http://ec.europa.eu/growth/content/targeted-consultation-draft-guidance-public-procurement-innovation_en



quality ratio as the ruling principles to awarding tenders. The use of MEAT privileges sustainability as an award criteria. In a similar vein, the use of the best price quality ratio opens the way for a justified preference by contracting authorities for innovative offers bringing added value in the form of special quality requirements.

The Guidance also makes reference to specific innovation friendly procurement procedures, such as *competitive procedure with negotiation* and *competitive dialogue*. These are two concrete instruments of pre-market consultation, as mentioned above, where efforts to match the demand and supply of goods and services are made prior to the launch of procurement processes. In both cases, public procurers will enter a direct dialogue with potential providers that, in light of their experience, may help shape contracts in a way that enables innovation to be properly incorporated by contracting authorities in the procurement process and hence brought to society at large⁸.

Example

Strategic public procurement in practice: Norway

The transposition of the Public Procurement Directive in Norway constitutes an example of a strategic approach towards the social potential in procurement legislation by national authorities.

The Norwegian Parliament adopted of a new addition to public procurement legislation applicable to health and social services. Procurement processes, in these cases, will stress service features such as diversity, quality, continuity and user involvement. Also, a specific role has been reserved to non-profit actors, who have been granted reserved contracts provided that their bids meet the objectives of the good of the community and budgetary efficiency.

In addition, Norwegian authorities have made an explicit commitment to a strategic objective of 25% of public procurement being granted to not-for-profit operators by 2025.

Eurodiaconia members in Norway, however, highlight that not-for-profit providers benefitting from reserved contracts tend to face an additional pressure on prices. This points at a potential trade-off between access to reserved procedures and adequate pricing of contracted services.

Building the capacity of procurement authorities

Procurement authorities and officials are instrumental in mainstreaming social and strategic criteria into daily practice. Acknowledging this, a core priority of the Package is to act upon the professionalisation of public buyers as a way to boost social and strategic criteria which, in spite of having been transposed into national legislation, remain underdeveloped. With that purpose, the Package includes a Recommendation⁹ with an action plan. According to it, the Commission will support Member States -that remain in charge of leading the process- in their efforts to boost the professionalisation of public buyers around three axis:

-ensuring an appropriate policy architecture that enables such professionalisation, including support at local and regional levels and continuation across political cycles.

-improving the skills, competences and training of public procurement practitioners and related functions such as auditors and officials responsible for the review of public procurement cases. This includes: a) the

⁸ The main difference between the two modalities lies in the degree of maturity of the project. In a *competitive procedure with negotiation*, the public procurer has a more precise idea of the nature and subject matter of the public procurement contract. Instead, in a *competitive dialogue*, core choices regarding the nature and subject matter are still to be made.

⁹ Commission Recommendation C(2017) 6654 final on *The professionalisation of public procurement. Building an architecture for the professionalisation of public procurement*.



identification and definition by Member States of frameworks for skills and competences to support recruitment and career management processes and in designing training curricula; and b) the creation of a common competence framework for public procurement at European level.

-provision of tools and methodologies which underpin a more strategic approach to public procurement. In this case, the emphasis is on the development and standardisation of IT tools and the digitalisation of procurement processes. Importantly, the Recommendation also points at the need to promote tools that support the integrity and transparency of procurement processes (codes of ethics, guides, etc.).

The Recommendation on the professionalisation of public procurement is accompanied by a Toolbox of good practices targeting decision-making bodies, regulatory agencies and contracting authorities/entities in Member States¹⁰. The good practices listed in the Toolbox are linked to the priority areas raised by the Recommendation and provide concrete examples on how to address these.

Scaling up procurement processes

Finally, the Package also emphasizes the idea of joint procurement as an important dimension of strategic public procurement. According to the Communication, only 11% of procedures are carried out through cooperative procurement among contracting authorities. In the eyes of the European Commission, buying in bulk often leads to better prices and also offers an opportunity to exchange know-how among authorities. The Communication also states that joint procurement is also a way to obtain better quality but acknowledges the fact that not all purchases are suitable for aggregation.

The stress on Central Purchasing Bodies (CPBs) as way to increase the leverage of public purchasers and standardise procurement processes, especially in markets dominated by a small number of operators¹¹, targets specific sectors, such as healthcare.

The Communication envisages CPBs as promoters of standardised procurement processes: through easier procedures, they would enable a higher participation from smaller providers which usually face greater obstacles to access procurement markets. However, this overlooks the fact that a turn towards standardization in procurement processes is likely to result in a greater stress on price competition only.

Emphasis on demand aggregation may prompt parallel efforts to bringing bidders together as an attempt to counteract the leverage of contracting authorities through CPBs. In the eyes of Eurodiaconia, this can be detrimental to smaller providers of services or providers with a competitive advantage on a differentiated or specialised supply of services, usually through higher quality standards. These providers may face difficulties in bringing such specificities to the fore if joint procurement translates into a move towards more standardised offers among suppliers in consortium.

What can members do?

You are invited to share with the Eurodiaconia secretariat your updates and information on the state of public procurement legislation in your country as the transposition of the Directive is finalised and implementation advances.

It is key to **understand the position of not-for-profit providers** of social services under the new legal framework, as they are key to bring the social dimension of strategic procurement into reality. For this reason,

¹⁰ Commission Staff Working Document SWD(2017) 327 Final, [Toolbox of good practices. Accompanying the Commission Recommendation on the professionalisation of public procurement. Building an architecture for the professionalisation of public procurement.](#)

¹¹ COM(2017) 572 final, p.12



we encourage you to share examples of good (and bad) practice on how contracting authorities can boost better social outcomes through public procurement.

The different initiatives contained in the Public Procurement Package are the result of a shared diagnosis, namely that Member States can do more to release the full potential for social considerations in public procurement. **Member States, therefore, are expected to take the lead** in the implementation of the initiatives described in this briefing. For this reason, Eurodiaconia members should engage in an effective manner with national authorities to monitor the progress of such initiatives and ensure an implementation which is suitable to not-for-profit actors. Working with local and regional authorities is equally essential, also because they usually understand better how such actors are often in a better position to respond to specific needs in local and regional contexts.

Also, you are encouraged to share with Eurodiaconia your experience with the implementation of the measures contained in the Package. This will enable Eurodiaconia to maintain an effective dialogue with the European Commission with information from the ground on the progress of each initiative, the issues associated to implementation and new challenges that could be addressed.

Background information

Eurodiaconia, [Key points for the transposition of Directive 2014/24/EU on public procurement](#), June 2015.

[Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.](#)

Social Platform, [Public Procurement for Social Progress: a guide to the EU Public Procurement Directive](#), October 2015.

Social Services Europe, [Assessment of the new EU Public Procurement Directive](#), May 2014.

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November 2017