



EUROPEAN COMMISSION

## MEMO

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# Revision of Public procurement Directives - Frequently Asked Questions

## 1. Why modernise public procurement rules now?

Public procurement rules organise the way public authorities and certain public utility operators purchase goods, works and services. They set up specific contract award procedures to ensure that public purchases are made in the most rational, transparent and fair manner.

Public purchasing has to be underpinned by particular safeguards. These prevent any preferential treatment that could favour specific economic operators and guarantee sound competition between economic operators, so as to ensure that contracting authorities get the best value for European taxpayers' money.

Public procurement is a key part of the [Europe 2020](#) strategy for smart, sustainable and inclusive growth. It is one of the market-based instruments to be used to achieve the Europe 2020 objectives by improving the conditions for business to innovate and by encouraging the wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open Union-wide (all the more in times of financial crisis).

In the face of these challenges, the existing public procurement legislation needed to be revised and modernised in order to make it better suited to dealing with the evolving political, social and economic context.

The revision of the European Union public procurement rules was one of the twelve levers for growth set out in the Single Market Act ([IP/11/469](#)), and in December 2011, the Commission proposed the revision of the existing Directives (see [IP/11/1580](#) and [MEMO/11/931](#)).

## 2. Will the new Directives provide for higher thresholds?

No, the thresholds will remain at their current level. This is due to the international obligations of the EU and in particular its obligations under the World Trade Organisation's [Government Procurement Agreement](#) (recently re-negotiated). The EU has committed to ensuring that the procedural guarantees anchored in the Directives would apply to all contracts beyond the same value as that of the current directives. Therefore, increasing thresholds would imply a breach of EU international obligations.

However, it has to be noted that the thresholds have been adapted in accordance with the procedure in force by Regulation (EU) [No 1336/2013](#) of 13 December 2013<sup>1</sup>.

### **3. How are the public procurement rules going to be simplified?**

The new Directives introduce a number of simplified rules and procedures. They broaden the possibilities for negotiation: the competitive procedure with negotiation may be used when justified by the specific circumstances in relation to the nature, complexity or the legal and financial make-up of a given project, or by the fact that the needs of the contracting authority cannot be met by an 'off the shelf' type of solution.

The documentation required is reduced, notably through the compulsory acceptance of self-declarations from bidders (through a standardised European Single Procurement Document) - only the winning bidder will have to submit formal evidence (certificates and attestations). The minimum deadlines to submit tenders are shortened.

The mandatory use of means of electronic communication in public procurement will increase accessibility to procurement thereby allowing EU companies – especially SMEs – to exploit the full benefits of the Digital Single Market and will bring efficiency gains (estimated savings: € 100 billion annually on total EU public procurement).

### **4. How will local authorities benefit from the new rules?**

The local and regional authorities will be the first to benefit from the general simplification measures. They will be able to advertise their contracts via less burdensome prior-information notices (instead of contract notices). Furthermore, they will be able to agree with the pre-selected bidders on the deadlines in their procurement procedures.

Local authorities will also be able to benefit from the new simplified regime put in place for social, health, cultural and assimilated services (see question n° 9).

### **5. To what extent is cooperation between public entities exempted from the application of the rules?**

On the basis of the principles set out in the relevant case-law of the Court of Justice, the Directives clarify the conditions under which cooperation between public entities is exempt from the application of the Directives. Cooperation between public entities is an important means for public authorities to perform their public service tasks. The related exemption however cannot result in a distortion of competition in relation to private economic operators. In this context, the conditions laid down strike a good balance between the freedom of public authorities to organise public services and fair market access for economic operators. In particular, it was agreed to limit the activities that may be performed in the open market, i.e. outside the public-public cooperation, to 20 %, and to exclude direct private capital participation in controlled entities (with the exception of non-controlling and non-blocking forms of private capital required by national law)

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<sup>1</sup> Official Journal of the European Union L 335 of 14.12.2013, p. 17

## **6. Will SMEs take full advantage of the new EU public procurement rules?**

Further facilitating the access of SMEs to public procurement was precisely one of the objectives of the revision of the rules. As far as general simplification measures are concerned, self-declarations will primarily benefit SMEs. In addition, there are two SME-specific measures: the division of contracts into lots is being encouraged through the "apply or explain" principle. As far as the proof of financial capacity of the economic operator is concerned, the turnover requirements will be limited to a maximum of twice the estimated value of the contract, except in duly justified cases.

## **7. Do the new rules contribute to the implementation of the Europe 2020 strategy objectives for a greener, more social, innovative and inclusive economy?**

The new rules will contribute to the implementation of the Europe 2020 Strategy for a greener, more social, innovative and inclusive economy. It should be stressed that no "what to buy" obligations are provided for. Contracting authorities will decide if they want to take advantage of the new possibilities put at their disposal.

The concept of "life-cycle costing" which is introduced in the Directives will encourage public authorities to consider the full life-cycle of products in their purchasing decisions. The life-cycle cost will include internal costs and costs imputed to environmental externalities (including the CO2 footprint) linked to the product, service or works during its/their life cycle.

In their award decisions, contracting authorities may take into account criteria linked to the production process of the works, services or supplies to be purchased such as the inclusion of vulnerable and disadvantaged people or the use of non-toxic substances.

In addition, contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, as long as only the criteria and characteristics of the label which are linked to the subject-matter of the contract are required and that equivalent labels are accepted.

To favour social inclusion, the current contracts' reservation in favour of sheltered workshops has been extended to economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers; and the minimum required percentage of disabled or disadvantaged employees is reduced from 50% to 30%.

Finally, innovation will be fostered by the new partnership procedure where the contracting authority shall cooperate with a company – selected in a regular competitive tender procedure – to develop an innovative product, work or service, which does not exist on the market.

## **8. Are social and environmental clauses part of EU public procurement rules?**

Yes, the Directives recall the principle that the applicable obligations in the fields of environmental, social and labour requirements established by Union law, national law, collective agreements or by relevant international environmental, social and labour law provisions, have to be complied with in the performance of public contracts, provided that such rules, and their application, comply with Union law in force.

## **9. Is the distinction between the current so-called "A" ("priority") services and "B" ("non-priority") services abolished?**

This distinction is indeed abolished in the new Directives. A new simplified regime is put in place for social, health, cultural and assimilated services. This new regime will however also be applicable to other services such as legal services, hotels and restaurants services, catering and canteen services. Under the new rules, the current "B" (non-priority) services, such as the water transport, agricultural and forestry services, will be subject to the full set of rules of the Directives, unless listed in the "new simplified regime" annex to the Directives. All services not explicitly listed fall under the full regime of the Directives.

## **10. Is the "new simplified regime" simpler than the current regime applicable to the so-called "B" ("non-priority") services?**

The new simplified regime is simpler because:

- 1) it benefits from a much higher threshold of 750 000 €;
- 2) rules implementing the corresponding national procedures no longer have to respect EU rules on technical specifications that apply to the current "B" ("non-priority") services;
- 3) apart from the general EU principles, the only obligations that have to be respected are the ones relating to transparency and publicity, namely: *ex ante* (through prior information notice) and (existing) *ex post* (contract award notice) publicity.

In addition, Member States will have to make sure that contracting authorities may take into account, i.a. all quality and continuity criteria they consider necessary for the services in question. Member States may also eliminate the price as sole award criterion for such services.

## **11. Do the Directives include measures to further guarantee sound public procurement procedures?**

Yes, they clarify notably the notion of "conflict of interests". The notion shall at least cover "*any situation where staff members of the contracting authority who are involved in the conduct of the procedure or may influence its outcome have, directly or indirectly, a financial, economic, political or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure*". Member States have to take measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of public procurement procedures.

Exclusion grounds are strengthened and extended e.g. to cases of undue influence on the decision process or serious misrepresentation in providing information on the absence of grounds of exclusion.

The Directives will now provide for the compulsory exclusion in case of abnormally low tender when it is due to non-compliance of EU law in the field of social and labour law and environmental law and international social and environmental law.

Finally, the rules governing the modifications of contracts have been simplified.

## **12. Is the mandatory use of means of electronic communication excessive and too burdensome for SMEs? When will e-procurement come into force?**

On the contrary, electronic communication should improve access to public procurement, including for SMEs. Recent Eurostat figures show that nearly 99% of SMEs have access to the internet. Moving towards e-procurement therefore means SMEs will have access to the whole EU procurement market and hence significant opportunities to grow and create more jobs.

The agreed e-procurement deadline for full electronic communication is 54 months as from formal adoption date (transposition deadline of 24 months + 30 months).

## **13. The creation of single national oversight bodies was not accepted by the co-legislators. Has anything changed as far as governance in public procurement is concerned?**

In order to improve the enforcement and implementation of EU public procurement rules in the Member State, the Commission had pleaded for an ambitious approach on governance and the necessity of a specific operational structure at national level, in charge of monitoring, implementation and control of public procurement. As both the Council and the European Parliament opposed such structure, the Commission agreed to limit the Directives to the identification of the tasks to be fulfilled while leaving decisions on the internal organisation to Member States.

The measures on governance agreed upon provide for increased monitoring at national level and for Member States' obligations to transmit to the Commission every three years a monitoring report covering information on: the sources of wrong application, legal uncertainties, level of SME participation, prevention, detection and adequate reporting of procurement fraud, corruption and conflicts of interest and other serious irregularities. This should help reducing the errors caused by the incorrect application of public procurement rules in the handling of EU funds.

On the request of the Commission and not more than every three years, Member States shall also provide information on the practical implementation of national strategic policies.

## **14. What are the main specific changes brought to the regime applicable to the "utilities" sectors (water, energy, transport and postal services)?**

In particular, the new Directives clarify and improve the mechanism for exemption from the procurement rules provided for in the current Article 30 of [Directive 2004/17/EC](#). They explicitly clarify the notion of "special and exclusive rights". They exclude from their scope the exploration for oil and gas, because this sector has consistently been found to be exposed to competition.

## **15. When will the new rules come into force?**

Once the Council has formally adopted the new legislation, the new rules will enter into force on the twentieth day following that of the publication of the Directives in the Official Journal of the European Union.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within 24 months after its entry into force. For implementing electronic procurement fully, Member States may extend this period by up to 30 months.

See also Michel Barnier's statement [MEMO/14/18](#) and [MEMO/14/19](#) on concessions