The Reform of the EU Regulatory Framework
Towards Improved Performance

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Current Rules

Classical Directive (2004/18/EC)
Public works, public supplies and public services

Water, energy, transport and postal services sectors

Directive on Defence procurement (2009/81/EC)

Remedies Directives (89/665/EEC and 92/13/EC)
New Rules: Preparatory works

Green paper on modernisation (January 2011)

Evaluation of existing rules – Impact Assessment

Results of public consultation (June 2011)
- 623 replies (Business, public authorities, civil society, academics & legal experts, citizens...)

Public procurement conference (June 2011)

European Commission proposal (December 2011)
New Rules: Legislative process

February 2014: Adoption

Directive – needs to be transposed by EU Member States

2 years for transposition

4.5 years for e-procurement (at the latest)
New Rules: Legislative process

**Directive 2014/24/EU** on public procurement

**Directive 2014/25/EU** on procurement in water, energy, transport and postal services sectors

**Directive 2014/23/EU** on the award of concession contracts

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Objectives of the reform

1. Simplification, flexibility and reduction of administrative burden
2. Strategic use
3. Better access for Small & Medium Enterprises (SME)
4. Sound procedures
5. Governance
I: Simplification, more flexibility

- Increased use of negotiated procedure
  - competitive procedure with negotiations
  - New: Innovation Partnership (Research and development)
- Simplified advertising for sub-central authorities
  - Prior information notice
- Reduced time limits
- Light touch regime for social and other services
I: Reduction of administrative burden

- Self-declarations for bidders
  - Single European Procurement Document

- Proof for winning bidder
  - Certificates submitted by winning bidder
II: Strategic procurement

(1) Strategic policies may be considered in award decision
(2) Technical specifications may refer to production process
(3) Integration of disabled & disadvantaged workers
(4) Innovation Partnership
(5) Use of labels
II: Strategic procurement

**Sole Award Criterion:**

*Most economically advantageous tender (MEAT)*

- to be assessed on the basis of
  1. **price**, or
  2. **cost**, using cost-effectiveness approach (e.g. "life cycle"), or
  3. **the best price-quality ratio** using criteria such as
    - Production process
    - Social & environmental criteria
    - Innovative characteristics

**NB:** *Criteria must be linked to the subject matter of the contract!*
III: SME-friendly measures

Division into lots
- "apply or explain" principle;

Proportionate criteria for financial standing
- limited to twice contract value

Reduced documentary requirements
- "European Single Procurement Document"
IV: Sound procedures

• Conflicts of interests clarified
• Exclusion grounds strengthened and extended
• Compulsory exclusion in case of abnormally low tender
• Modifications of contracts simplified
IV: Sound procedures

Main changes:

Competitive procedures with negotiation
- Replaces current negotiated procedure with publication

Competitive dialogue
- Slightly broader scope for negotiations in the final stages

Innovation partnership
- Research services for the development of an innovative product by one or more providers plus supply contract

Negotiations without publication
- No substantial changes
V: Governance

- Monitoring, reporting (3 years)
  - level of SME participation
  - procurement fraud, corruption, conflict of interest and other serious irregularities
  - Keeping of contracts (1 million, 10 million)
- Guidance and support
- Statistical reports (below threshold estimates)
- Individual reports
Utilities Directive

- Procurement for services, supplies or works
- By utilities (public or private)
- Utility activity (water, energy, transport, postal)

- Private entities subject to procurement rules if "operating on the basis of special and exclusive rights"

- More flexible regime for utilities
Utilities Directive

Essentially same changes for the Utilities as for the Classic Directive

Differences

- **Framework contracts:**
  - max 8 years (classic 5 years)

- **Contract modifications**
  - Unforseen circumstances: unlimited (classic: max 50%)

- **Definition of special or exclusive rights**
New Directive on Concessions

- Works & service concessions ≥ € 5 million
- Classical & utilities sector
- Contracting authorities and entities
Distinction contracts – concessions

**Right to exploit the work or services (sometimes with payment)**

- transfer of operating risk
- no guarantee to recoup the investments and costs.
- risk can be limited by regulation, but always real exposure to possible loss, not merely nominal or negligible
- demand or supply risk or both
Duration of Concessions

The duration of concessions shall be limited

General principle for concessions lasting more than 5 years:

- Shall not exceed time necessary to recoup investments made for operating works/services with return on invested capital

- Possibility to take into account investments at beginning and during life of concession and those necessary to achieve specific contractual objectives.
Concessions: few procedural rules

- Publication (ex-ante & ex-post)
- Transparency, equal treatment, non-discrimination
- Procedural guarantees, not defined procedures
- Exclusion (=), selection criteria (light)
- Objective award criteria
Single Market Scoreboard

Public procurement performance indicators
Introduction

• Single Market Scoreboard – 28 Member States
  • First published 2013, paper scoreboard successor.
• Raises awareness and provides information about important policy issues.
• Functions as a motivating benchmark, highlights strengths and weaknesses, helps finding best practice.
Performance per indicator

1. Number of pending infringement proceedings
2. Duration of infringement proceedings (in months)
3. Duration since Court’s ruling (in months)

|   | BE | BG | CZ | DK | DE | EE | IE | EL | FR | IT | CY | LV | LT | LU | HU | MT | NL | AT | PL | PT | RO | SI | SK | FI | SE | UK | EU |
| 1 | 50 | 25 | 23 | 20 | 46 | 10 | 22 | 65 | 60 | 59 | 73 | 12 | 11 | 10 | 19 | 19 | 12 | 30 | 26 | 41 | 36 | 22 | 19 | 21 | 18 | 25 | 33 | 30 |
| 2 | 32.2 | 27.2 | 27.4 | 25.9 | 30.4 | 17.9 | 32.5 | 27.9 | 31.0 | 25.1 | 25.1 | 17.5 | 31.2 | 20.2 | 18.7 | 37.1 | 32.6 | 29.5 | 20.5 | 30.2 | 27.5 | 22.6 | 20.7 | 26.4 | 27.0 | 40.6 | 32.6 | 27.9 |
| 3 | 14.2 | 15.6 | 1.8 | 11.2 | 16.5 | 23.4 | 22.7 | 19.4 | 25.7 | 22.8 | 3.1 | 9.0 | 12.0 | 6.8 | 10.6 | 13.7 | 17.1 | 15.6 | 24.9 | 7.6 | 3.8 | 7.5 | 15.6 | 14.3 | 18.2 |

Indicators [1] and [2]: An average (+/- 10%) score was rated as "yellow"; a score below it as "red" and a score above it as "green".
Indicator [3]: Duration of more than 18 months was rated as "red", between 8 and 18 months, as "yellow", and less than 8 months as "green".
Public procurement in the Single Market Scoreboard

**Motivation**

- Promotes public procurement as an important policy issue for the wider public.
- Highlights aspects of ground-level procurement market functioning, helps identify best practices and problem areas.
- Single information platform for performance indicators, annual public procurement indicators and other statistics, achievements, and priorities.
Three indicators for key aspects

Public procurement

• Bidder participation indicator: proportion of awards with more than one bidder (excluding framework agreements).
• Accessibility indicator: proportion of notices with procedures facilitating access for bidders.
• Procedural efficiency indicator: the average time between receiving bids and awarding a contract for open procedures.
A simplifying yet useful perspective

- Indicators provide rough and simplifying information. They disregard:
  - Structure of procurement
  - Structure of the economy
  - Interdependency of tendering options
- They still reflect crucial aspects of public procurement.
  - Clear normative interpretation
  - Comparable even with underlying differences
  - Transparent and simple
Other possibly relevant indicators

**Public procurement**

- Performance of public procurement has many other aspects. For example:
  - Professionalism of contracting authorities
  - Digitalization
  - Corruption
  - Administrative burden
  - ...
- These are more difficult to measure. If we succeed in finding more indicators, however, we will add them.