



Public Procurement

Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions

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General context

To understand the basics of public procurement in the European Union (EU), it is necessary to look at the procurement Directives themselves as well as the context in which they were adopted. Even with the Directives in place, more general provisions contained in the Treaty of Rome and more general principles of law will apply and will guide the interpretation of the Directives. It is also important to understand the role of the various EU institutions.

Treaty on the Functioning of the European Union (TFEU)¹: The TFEU does not include any explicit provisions relating to public procurement. It does establish, however, a number of fundamental principles (Treaty principles) that underpin the EU. Of these fundamental principles, the most relevant in terms of public procurement are the following:

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

General Principles of Law: In addition to these fundamental Treaty principles, some general principles of law have emerged from the case law of the Court of Justice of the European Union (CJEU). These general principles of law are important because they will often be used by the CJEU to fill in gaps in the legislation and to provide solutions to situations that are often very complex. The most important of these general principles of law in the procurement context are the following:

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

These general principles apply independently of the Directives so that, even if the Directives do not apply, the principles may still apply to the procurement and award of contracts by contracting entities.

EU Directives: To underpin the Treaty principles in the field of public procurement and to provide the necessary guidance to Member States, the EU has adopted a series of procurement Directives. The most recent procurement Directives (2014 Directives), which cover predominantly procedural issues, are the following:

- Public Sector Directive 2014/24/EU replacing Directive 2004/18/EC²;
- Utilities Directive 2014/25/EU replacing 2004/17/EC³ ;
- Concessions Directive 2014/23/EU⁴, which creates a new regulated regime for the award of works and services concession contracts.

The deadline for the transposition of these three directives by Member States into their domestic law was 18 April 2016.

¹ Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union (OJEU)*, C 326, 26 October 2012.

² Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

³ Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

⁴ Directive 2014/23/EU on the award of concession contracts, 26 February 2014.

Two “remedies” Directives apply to complaints and review: the public sector remedies Directive 89/665/EC and the utilities sector remedies Directive 92/13/EC⁵. These two remedies Directives were both significantly amended by Directive 2007/66/EC⁶.

In addition, the “defence” Directive 2009/81/EC⁷ applies a more flexible and confidential regime to the procurement of military supplies and related works and services.

The European Commission has supplemented these Directives by further legislation dealing with various aspects of the procurement process.

Scope of the Directives

The Directives do not seek to impose a *common* regulatory regime on EU Member States in the field of procurement, and Member States can continue to apply their national procedures as *adapted* to the Directives. They thus permit Member States to maintain or adopt substantive and procedural rules to the extent that these rules are not in conflict with the Directives or with Treaty provisions. As a result, Member States remain free to regulate a number of issues, mainly practical matters.

In essence, the common rules of the Directives consist of applying the basic principles, notably non-discrimination, equal treatment and transparency in the following areas:

- publicity of proposed procurement contracts;
- design of technical specifications;
- choice of procurement procedure;
- qualification and selection of candidates and tenderers;
- award of contracts.

Rather than seeking to regulate with precision all public procurement contracts within the EU, the EU legislator chose to regulate in the Directives only those contracts that were most clearly capable of affecting trade between Member States. Those falling within this broad definition include the following:

- contracts that are of a sufficiently high value to attract economic operators from other Member States (i.e. where the potential benefits of winning the contract outweigh the extra costs of providing the goods, works or services from a greater distance);
- contracts concerning objects that are amenable to cross-border trade.

Legal Effect of the Directives

Member States are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the EU. The Directives, like all directives, are by definition not directly applicable, which means

⁵ Directive 89/665/EEC on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, 21 December 1989, as amended and Directive 92/13/EEC co-ordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, 25 February 1992.

⁶ Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, 11 December 2007.

⁷ Directive 2009/81/EC on the co-ordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, 13 July 2009.

that they do not apply automatically.

In order to produce their effects within the Member States, the Directives need to be implemented or “transposed” into national law. Member States are therefore required to take the measures necessary to give full effect to the provisions of the Directives in national law and to ensure that no other national provisions undermine the applicability of the Directives’ provisions. These measures normally take the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

The Directives are binding only in terms of the result to be achieved but generally leave to national authorities the choice of form and methods. It is not necessary for EU Member States to produce an exact copy of the Directives in their national legislation, although some Member States have done precisely that.

Failure to implement the Directives correctly or on time does not mean, however, that the Directives have no effect. Member States are not entitled to deprive the subjects of those Directives (contracting authorities and economic operators) of the rights that they are intended to enjoy under the Directives. In accordance with the CJEU’s doctrine of “direct effect”, individuals may enforce in national courts the rights conferred by the Directives wherever the appropriate conditions are satisfied.

The conditions required in order to give rise to the direct effect of a particular Directive are as follows:

- the obligation imposed on Member States is clear and precise;
- the obligation is unconditional;
- in the event of implementing measures, Member States or EU institutions are not given any margin of discretion.

The CJEU has stated that many of the provisions of the Directives do have direct effect, but that each provision is to be considered individually.

Basic principles of public procurement

From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU Member States. Creating a common procurement market means removing any barriers to trade arising from the procurement context.

Barriers to trade can be erected by means of legislation or by the actions of contracting authorities or economic operators. Legislation can create barriers by imposing requirements to “buy national”. Contracting authorities can impose barriers by making discriminatory award decisions. Economic operators can also create barriers by colluding to arrange tender prices dishonestly. All of these barriers have the effect of distorting competition in the common procurement market. One of the primary purposes of public procurement legislation is to eliminate existing barriers and prevent the erection of new barriers. It does so by applying the basic principles flowing through the legislation.

While they are all interlinked, these principles can be reduced to a series of core principles:

- **Competition**

From an economic perspective, “competition” operates as a discovery procedure by allowing different economic operators to communicate the prices at which goods and services are available on the market. Those prices act as guideposts and reflect the demand and supply conditions at any given moment. They also reflect the differences in

quality and in terms and conditions of sale of the different (non-homogeneous) products available.

This is why advertising is so important. Advertising guarantees the widest possible publicity and competition, enabling economic operators from all over the EU to participate, thus ensuring the greatest possible choice.

Keeping competition fair (or maintaining a “level playing field”) is a key concern for achieving efficient and economic procurement results. Procurement legislation seeks to prevent any distortions or restrictions of competition within the EU, and any attempt to prevent economic operators from being able to tender is to be prohibited.

Such attempts can take many forms and can affect the products or services or the economic operator itself. As a result, the legislation prohibits barriers to the free movement of goods, such as import restrictions and “buy national” policies, and barriers to the freedom to provide services, such as attempts to restrict foreign economic operators from tendering through the use of local registration requirements.

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

- **Equal treatment and non-discrimination**

The concepts of equal treatment and non-discrimination are not the same. In general terms, all procurement legislation will seek to maintain equality between economic operators. In the EU context, however, that equality will also be based on “nationality”.

Equal treatment is a concept that generally requires identical situations to be treated in the same way or different situations not to be treated in the same way, and it requires the identical treatment of identical people. In a sense, it implies that contracting authorities will not take into account the different abilities or difficulties faced by individual economic operators but will judge them purely on the results of their efforts, i.e. on the basis of the tenders they submit. It provides for an objective assessment of tender prices and tender qualities and ignores any considerations that are irrelevant to the discovery of the economically efficient tender.

In the EU context, the concept of equal treatment requires yet another definition, as in that context the concept of equality is, in addition, based on nationality or on the origin of the goods. As a result, all economic operators of EU nationality and all bids, including goods of EU origin, must be treated equally (this is the principle of non-discrimination).

This concept of non-discrimination is more than simply an extension of the concept of equal treatment. It implies that any condition of eligibility or origin (based on nationality or local provenance) will automatically give rise to unequal treatment, since those conditions will, by definition, discriminate against a certain group of (foreign) economic operators or favour another group. However, while discrimination in a given context will produce unequal treatment, unequal treatment does not always give rise to discrimination.

- **Transparency**

“Transparency” emerged more recently as a principle in its own right, although it is probably better to think of it as a tool to be used to achieve other objectives. For example:

- Publication and accessibility of the legislation provides clarity and certainty for all stakeholders and enables contracting authorities and economic operators to be aware of the rules of the game.

- Advertising requirements guarantee transparency in the discovery process.
- Publication in advance of the technical specifications and the selection and award criteria permits stakeholders to verify that these specifications and criteria are fair and non-discriminatory.
- Recording and reporting requirements ensure that the actions of the contracting authorities may be verified where appropriate.

Recording and reporting requirements are also a fundamental aspect of “accountability”, i.e. holding procurement officers accountable for their decisions and actions. “Accountability” is also often an explicit objective of national procurement systems, and the transparency provisions reinforce this accountability.

The importance of the principle of transparency in the EU context, however, is that it applies independently of the legislation. As a result, if a particular procurement contract falls outside the scope of the Directives, it is then possible that the principle of transparency will continue to apply so as to impose advertising requirements. The CJEU confirms that this is the case.

Some of the above principles are articulated differently or combined in national legislation. You might find, for example, principles stated in legislation, such as “economy and efficiency”, “value for money”, and “probity” or “integrity”.

Value for money

A key economic driver underlying procurement processes is the need to ensure that all purchasing represents value for money. The Directives do not specifically address this issue, but it is important to not lose sight of the need to ensure that value for money will be one of the main outcomes of the procurement process. The term value for money means the optimum combination between the various cost-related and non-cost-related factors that together meet the contracting authority’s requirements. The elements constituting the optimum combination of these various factors differ from procurement to procurement and depend on the outputs required by the contracting authority for the procurement exercise concerned.

The Directive and the Utilities Directive require all contracts to be awarded by applying the “most economically advantageous tender” criterion. These Directives place significant emphasis on contracts being awarded on the basis of a combination of cost-related and non-cost-related factors.

Role of European institutions

A number of organisations are involved in procurement at the European level. These organisations are the Council of the European Union, the European Parliament, the European Commission, and the Court of Justice of the European Union.

Council of the European Union (Council): The Council is made up of government ministers from each EU Member State. Government ministers meet in the Council to discuss, amend and adopt laws and co-ordinate policies. The ministers have the authority to commit their governments to the actions agreed on in the Council meetings. Together with the European Parliament, the Council is the main decision-making body of the EU.

European Parliament (Parliament): The Parliament is the EU’s law-making body. EU voters directly elect the Parliament every five years. The Parliament has three main roles: legislative, supervisory and budgetary. The Parliament negotiates and adopts EU procurement laws, together with the Council, based on proposals from the European Commission.

The Council and the Parliament acting together (the “EU legislator”) adopted the 2014 Directives, using the “Ordinary Legislative Procedure”.

European Commission: The European Commission is the EU’s politically independent executive arm. The European Commission is solely responsible for drawing up proposals for new European legislation, and it implements the decisions of the Parliament and the Council.

In addition to acting as the proposer of legislation, the European Commission is also designated by the Treaty as its guardian. It has been given the explicit task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant to it are applied.

Thus as well as acting as the primary policy maker in the field of procurement, the European Commission is also responsible for the application and general enforcement of the Directives. In the case of procurement, the responsible directorate-general is the DG for Internal Market, Industry, Entrepreneurship and Small and Medium-sized Enterprises (SMEs) – DG GROW. Implementation measures taken by DG GROW include the adoption of secondary legislation.

While enforcement in national courts/review bodies against contracting entities in breach of their obligations is in the interest of economic operators, infringements by those public authorities, as emanations of the Member State, will simultaneously amount to a failure of the Member State to fulfil its obligations under the Treaty. The CJEU may directly challenge such a failure.

The Court of Justice of the European Union (CJEU): There are two EU-level courts, each with its own jurisdiction: the General Court (previously the Court of First Instance), which deals with actions against EU institutions, and the Court of Justice of the European Union (CJEU). In most cases related to procurement, it is the CJEU that is of interest.

The CJEU ensures the observance of the law in the interpretation and application of the Treaty and its implementing rules. To this end, a number of powers have been expressly conferred on the CJEU. These powers are mainly intended to enable the CJEU to judge the acts and omissions of the institutions and the Member States in accordance with EU law and to ensure uniformity in the interpretation of EU law and in the application of this law by the national courts.

There are three areas of the CJEU’s work that are important in the case of procurement:

- **Dispute Resolution**

The CJEU has jurisdiction to hear disputes between the European Commission, acting as guardian of the Treaty, and Member States in respect of a member state’s failure to fulfil its obligations under the Treaty. These hearings are often referred to as the European Commission’s infringement proceedings.

- **Preliminary Rulings**

A critical power conferred on the CJEU is the power to pronounce, by means of a preliminary ruling, on the *interpretation* of the Treaty and on the *validity* and *interpretation* of acts of institutions of the EU if a question on this subject is raised before a national court or tribunal.

Thus in disputes between Member States and private persons or between private persons themselves, questions relating to the interpretation, application and validity of EU law that arise in the context of national proceedings may be referred to the CJEU. Where such questions arise in the context of a procurement dispute that has been brought in a national court/review body under the Remedies Directive, for example, the national courts may refer them for interpretation to the CJEU. Under this procedure, the national court/review body will establish the facts of the case and formulate questions

of interpretation for the CJEU, the answers to which are necessary for the resolution of the case.

- **General Principles of Law**

In the exercise of its jurisdiction, the CJEU has cause to apply and interpret EU law and, in so doing, is often obliged to fill any gaps in EU law by reference to general principles of law. These gaps are unwritten rules, not contained in the Treaty but inspired by those common general principles of law recognised in the national legal systems of EU Member States.

Role of EU Member States: For the purposes of the EU, the Member States are bound to take all appropriate measures to ensure the fulfilment of the obligations arising from the Treaty or resulting from actions taken by the institutions of the EU. They are required to facilitate the achievement of the EU's tasks and must abstain from any measure that could jeopardise the attainment of the objectives of the Treaty.

In terms of the Directives, the Member States are therefore required to take the measures necessary to give full effect to the provisions of the Directives in national law and to ensure that no other national provisions undermine their applicability. This requirement normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

It is important to note that although the Directives are directly effective where specific conditions are met (as discussed above) in that they can convey rights even if not implemented, the Directives are not directly applicable, i.e. they need to be transposed into national law.

Moreover, they are binding only in terms of the result to be achieved, but generally leave to the national authorities the choice of form and methods of transposition into national law. Thus it is not necessary for Member States to produce an exact copy of the Directives in their national legislation.

Provided that they achieve the same results, national authorities can reproduce the provisions of the Directives in identical fashion by amending existing legislation or by creating new legislation or codes, for example.

Further information

Publications

SIGMA (2015), *Public Procurement Training Manual* – Modules A1, A2 and A3, OECD Publishing, Paris, <http://www.sigmaweb.org/publications/public-procurement-training-manual.htm>

Public Procurement Briefs

<http://www.sigmaweb.org/publications/key-public-procurement-publications.htm>

SIGMA (2014), *EU Directives: Concessions*, Brief 31, OECD Publishing, Paris

SIGMA (2014), *EU Directives: Public Sector and Utilities Procurement*, Brief 30, OECD Publishing, Paris

Other sources

Legislative framework: The various texts that make up the EU legislative framework for procurement, along with a range of other useful documents and links, can be found on the European Commission's DG-GROW website: <http://ec.europa.eu/growth/single-market/public-procurement/>

EU Treaty texts can be found on the Europa website: http://europa.eu/eu-law/decision-making/treaties/index_en.htm