



Improving EU public procurement policy

Public procurement is an important policy issue, not only in terms of the completion of the EU single market, but also in keeping Europe's economy competitive, sustainable and social.

EU rules on public purchasing are firmly anchored in internal market policy. The current generation of directives dates from 2004, with a separate 2009 directive covering defence procurement. However, these rules have been criticised as overly complicated and unclear. They have led to much case law and have limited Member States' discretion in determining policy priorities. Furthermore, access of SMEs to the European procurement market remains limited.

The new Commission Green Paper opens the debate on reform of the Union's rules. It addresses a wide range of issues, from improving efficiency to integrating green and social objectives into procurement rules.

However, there are questions as to how much new EU rules can achieve. Some policy options might have unintended consequences, while others might prove too costly, given the vast extent of the EU's procurement market. Changing the regime should be well considered, as adapting to new rules can be costly for procurers and companies alike.

Some ideas, such as encouraging the use of ecolabels, may help achieve better outcomes without major changes to the legislation.

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Context

The public sector is a major player in the EU's economy. Public procurement (defined as purchases by the public sector of goods and services from private sector companies) accounts for about 16 % of the Union's GDP.

Because public sector bodies are shielded from the constraints of the market, transparent and fair procedures are needed to protect the economy against corruption, favouritism, protectionism and waste.

The EU's role in public procurement

If national contracting authorities favour bidders from their own country over other EU bidders, this impedes the completion of the single market. This is what brings public procurement within the EU's sphere of competence.

But the EU's role goes beyond simply taking infringement procedures against Member States (MS) who fail to ensure their contracting authorities respect the single market. The EU also has a role in harmonising the procedures for contracting authorities across the Union, because if each country has different procedures, it will be difficult for cross-border bidders - especially small and medium enterprises (SMEs) - to compete on equal terms.

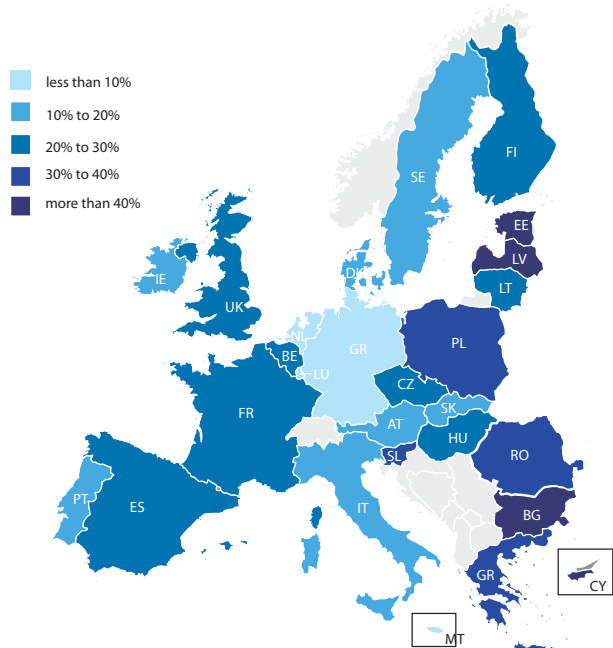
There is broad agreement that the drive to create a single market has stalled in recent years, with public purchasing and services considered as key stumbling points.



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Across the Union, the extent to which cross-border procurement is facilitated varies substantially. Figure 1 illustrates this, in terms of the varied use by MS of the official EU channel for advertising tenders.

Figure 1 - Percentage of total public procurement advertised in the Official Journal of the EU (2008)



Source: Eurostat

A changing context for EU public procurement

In the wake of the crisis, many EU countries are struggling to tighten their budgets. This makes the issue of efficiency in public procurement more important than ever. Equally, there may be considerable further potential in terms of using procurement policy to achieve environmental and social policy goals. However, this must not be done at the expense of transparency or in contravention of EU law on the single market.

In addition, the financial crisis has opened new legal questions in respect of the applicability of the Union's procurement rules. It is as yet unclear whether banks under the protection of bailout programmes should be subject to the full extent of EU law when they make purchases.

Existing EU law

Basis in primary law

The legal basis in primary law for European policy on public procurement is provided for in Articles 28, 43 and 49 TFEU. As such, the basis is firmly rooted in internal market policy¹.

Article 34 prohibits discrimination against products imported from another Member State.

Article 49 guarantees the right of establishment and activity of firms within the EU.

Article 56 guarantees the right of provision of services by individuals established in a Member State other than that for which the services are destined.

The Commission is therefore empowered to initiate infringement procedures against MS on the basis of Treaty law. A 2006 [Interpretive Communication](#) from the Commission explains this further.

However, Treaty law also provides an important limitation to the EU's powers in this area. Article 346 TFEU allows MS to disregard single market rules for national security reasons. This has frequently been invoked to preclude defence public procurement from EU rules.

2004 Public Procurement Directives

The current framework, adopted in March 2004 takes the form of two directives: a [general directive](#) (see box, next page) and a [separate directive](#) covering procurement in utilities markets². The separate treatment of utilities was designed to simplify and relax procurement obligations in those areas, in light of market liberalisation in the 1990s. This - it was thought - had led to greater competition and hence a more natural incentive on the part of utilities to choose best value contractors.³



The framework sets out detailed procedural rules for contracting authorities. It applies to public purchasing for goods and services over certain euro-value thresholds.

Case-law

Since the directives came into force, there has been a large amount of EU case-law, on a wide range of procedural issues. As a result of the complicated and sometimes contradictory findings of the Court of Justice of the European Union (CJEU), analysts have pointed out that many contracting authorities are confused as to how to operate tenders correctly according to EU rules. The uncertainty has also been blamed for adding to costs for contractors.

The 2009 Defence

Procurement Directive

Defence procurement is a sensitive area for MS keen to safeguard national security interests. However, studies show considerable potential for savings through the creation of a single EU market for defence procurement.

The 2009 [Defence Procurement Directive](#) seeks to overcome the misuse of Article 346 TFEU by MS contracting authorities to favour their own national companies. Although it gives contracting authorities greater scope with regard to issues such as security of supply and subcontracting, this directive sets out a procedural framework for procurement in the same way as the 2004 directives.

The deadline for transposition of the Directive is August 2011.

The Remedies Directive

The [Remedies Directive](#) of 2009 strengthens the public procurement framework by helping losing bidders to challenge public

contracts which were not awarded in breach of EU rules.

Commission Green Paper

The Commission's [Green Paper](#) on the modernisation of EU public procurement was published in January 2011, in response to ongoing criticism by stakeholders of the EU's procurement regime.

The period for submission of contributions by interested parties was closed on 18 April, 2011.

The Green Paper looks at a wide range of issues, under six headings:

Scope and definition

Possibly the most important question raised is whether the distinction between "Part A" and "Part B" services in the general procurement directive should be done away with and replaced by a more streamlined, uniform procedure for all services.

Improving the toolbox for contracting authorities

As not all contracting authorities are the same,

the legal and operational framework should be sufficiently flexible to account for these differences. One idea is to have special (lighter) procedural rules for small contracting authorities. Another important idea under this heading is enabling the use of joint procurement, i.e. where two or more contracting authorities work together.

A more accessible European procurement market

A key element here is the role played by SMEs in public procurement contracts. The Green Paper puts forward a number of ideas

The general **Procurement Directive** covers three main areas:

Works - Building and engineering capital works over €6 242 000

Supplies - Supply, lease, rental or hire purchase of goods over €249 000

Services - Supply of services over €249 000 (Does not apply to employment contracts).

Services are divided into two categories. Part A services are subject to the full regime, while for Part B services, there are only minimal requirements in place.

Part A	Part B
Accounting	Catering
Market research	Legal services
Mngmnt consult.	Health and social
Financial services	Educational
Cleaning/property	Security
IT services ...	



on measures to encourage greater participation in tenders by SMEs, including restrictions on the size of financial pre-requirements which contracting authorities may impose, positive discrimination in favour of SMEs or indeed requiring successful tenderers to subcontract to SMEs.

Ensuring fair and effective competition

Measures such as splitting contracts into lots and allowing for individual bids by lot may encourage efficient competition and help benefit the overall market structure. The idea of stronger measures to safeguard against anticompetitive practices and to regulate the provision of contracts in the case of exclusive rights are also raised.

Strategic use of public procurement

The key part of this heading is the promotion of secondary objectives, such as environmental or social objectives. Another aspect is the use of public procurement policy to drive innovation.

Ensuring sound practices

While measures to discourage corruption are foremost in the discussions on best practice in other contexts (i.e. the OECD policy debate, China or developing countries) the EU has up to now paid relatively little attention to ensuring sound practices. It was considered that anti-corruption measures are best taken at Member State level, but the Green Paper acknowledges that this results in considerable variation in procedures across the Union. EU-level minimum standards to prevent conflicts of interest, and to stamp out favouritism and corruption could help create a more level playing field.

Access of third-country suppliers to the EU market

In line with a general trend for a more assertive trade policy, the Green Paper notes

that foreign companies often have better access to EU public procurement markets than EU-based companies have abroad. Measures to improve symmetry of procurement market access are to be considered. Such measures could build upon the EU's international obligations under the [Government Procurement Agreement](#), but may also apply to non-GPA countries.

Efficiency issues

The academic literature suggests that the optimal design for procurement systems will depend on the market of the goods in question. For some markets - for instance in healthcare or defence technologies - competitive tendering may increase the overall cost of production. This is because companies, knowing they have to bid repeatedly (and may lose future bids), will need to recover fixed costs more quickly.

Problems also exist in cases where the government is the sole buyer of a certain good or service. Cost competition under such circumstances may stifle innovation or undermine quality.⁴

Is it efficient to revamp the rules?

Changing regulation and codes of practice too rapidly, even if the changes are towards a more efficient and transparent system, can

lead to confusion and limit access, particularly for contractors who are SMEs. This suggests that before acting, the EU should consider well the full extent of any major change to the current regime. The impact study currently underway on the efficiency of the 2004 regime should be studied carefully before legislative proposals are drafted.

Position of a key stakeholder

The German Local Umbrella Associations (Kommunale Spitzenverbände), are together one of the EU's largest stakeholders at municipal level. They have responded to the Green Paper, calling for the threshold amounts at which EU rules apply to be doubled from current levels. Other elements of the current regime, such as the distinction between works, supply and services, should be kept as is.

The Umbrella Associations have also called for greater discretion in integrating non-economic award criteria into public procurement.

SMEs access

Despite their high overall importance to the European economy, SMEs are under-represented in public procurement generally, and also in cross border public procurement.

A recent UK study blames the poor access of SMEs on a number of factors, notably:

- Difficulties in finding information about tenders.
- The costs of tendering are fixed, implying a disproportionate cost burden for smaller companies.
- Overfocus on price, as SMEs tend to offer greater quality, but at a slightly higher price.
- Pre-qualification criteria, e.g. the need to have minimum financial reserves.

Possible measures to improve SME access

Many of these concerns could be overcome through streamlined tendering procedures such as eProcurement⁵. Unbundling contracts into 'lots' can also help improve access for SMEs.

Other support measures that have been considered include better training for staff of contracting authorities, so that they are better able to manage calls for tender. Another option would be to provide administrative support (for example, a Hotline service) for SMEs seeking access to EU-level contracts.

However, a 2007 evaluation done by the European Commission⁶ warns that some of the support measures could add to the administrative burden of authorities. For example, a procedural requirement that tenders be unbundled, if possible, could become complicated, as it would have to take into account product-specific differences. Other measures (i.e. administrative support for SMEs) could be very expensive, due to the very large number of companies involved.

Green and social procurement

In a 2001 annex to the initial proposals for the 2004 directives, the Commission set out the possibilities to integrate environmental concerns into public procurement rules⁷.

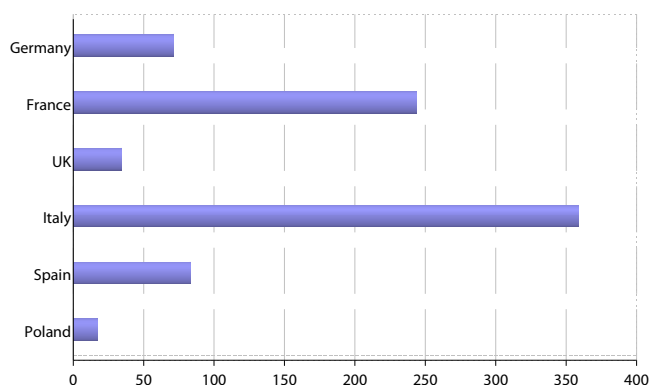
However, it is clear that such measures are considered as options. There is no provision in the directives for such secondary objectives to be mandated at EU level.

Furthermore, as the thrust of EU policy is to protect against discrimination across the internal market, secondary objectives can only be included provided equality of access is not compromised.

Sheltered workshops

The only significant concession which was included in the 2004 general directive as adopted related to "sheltered workshops". These provisions allow for contracts to be reserved, in the case where the contract award procedure concerns an employment scheme in which a majority of employees are handicapped persons (Article 19).

Figure 2 - Number of ecolabel licence holders in the six largest MS



Data source: [European Commission](#)

Case-law

Overall, the case-law of the CJEU has had the effect of reducing the MS' scope to implement social and environmental secondary objectives in their public procurement policy. A landmark 1988 [case](#) found that social requirements could only be linked to the product or service delivered -



not to the company that is bidding. A 2007 [case](#) delivered a further blow to social procurement, ruling that the absence of a profit motive among companies seeking public contracts did not exclude them from the requirements of EU law.

Ecolabels

Promoting and developing the use of EU-wide [ecolabels](#) is one way in which EU policy can have a large potential impact on encouraging green public procurement. If products carry ecolabels, this can help procurers easily identify product requirements and write these into calls for tender.

Although the use of ecolabels has increased dramatically since their introduction in 1992, there remains a great deal of variation between MS (see figure 2).

Further reading

[The past and future evolution of EC procurement law: From framework to common code?](#) Arrowsmith, S, Nottingham University, 2006

[Green Paper](#) on the modernisation of EU public procurement policy, European Commission, 2011

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Endnotes

¹ This contrasts markedly with the public procurement policy in the US, or in the MS themselves, where the issue is primarily one of budgetary control.

² Utilities are 'entities operating in the water, energy, transport and postal services sectors'.

³ [The Past and Future Evolution of Procurement Law: From Framework to Common Code?](#) Arrowsmith, S. *Public Contracts Law Journal* 35, 2006.

⁴ [Economic Incentives and the Defence Procurement Process](#), Rogerson, W. P. Kellogg University, 1993.

⁵ The 2004 directives provide for the possibility of eProcurement processes, but do little to encourage their use.

⁶ [Evaluation of SMEs access to public procurement markets in the EU](#), GHK and Technopolis, for DG Enterprise and Industry (EC) 2007.

⁷ Commission interpretative communication. on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, [COM\(2001\)0274](#).