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WORKING DOCUMENT

on ECA Special Report 28/2023: Public procurement in the EU - Less competition for contracts awarded for works, goods and services in the 10 years up to 2021

Committee on Budgetary Control

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SUMMARY

Five years after the transposition of the 2014 public procurement directives into national law, ECA audit assessed the level of competition for public procurements in the EU's single market and the actions taken to identify and address obstacles to competitive tendering¹.

The link between effectively used public procurement processes and satisfactory level of competition is clear: public procurement is intended to obtain the best value for money, and therefore competition amongst suppliers is a prerequisite to achieve this goal.

In fact, a duly regulated public procurement process leads to the selection of the best performing companies, safeguards the public interest, strengthens transparency, equal treatment, non-discrimination and efficiency. Overall, it reduces the risk of fraud, it counters corruptive practices such as the tailoring of tender specifications to favour certain companies, and overall it enhances the efficient use of public money.

The magnitude of public procurement as one of the main drivers of economic growth and employment is confirmed by the figures provided by ECA SR: amongst them, it is worth pointing out that over 250 000 contracting authorities conduct procurement procedures in the EU single market, where both public bodies and non-public actors often operate in specific, non-competitive conditions; every MS, moreover, has at least one public body responsible for supervising public procurement.

ECA covered 2011-2021 period and analysed how competition evolved, if the Commission's monitoring is effective in identifying trends and taking actions accordingly, and if the 2014 directives had the intended impacts. To do so, ECA looked at the Tenders Electronic Daily (TED) and reviewed the Single Market Scoreboard's indicators identifying the level of competition. To carry out data analysis, ECA developed an interactive dashboard (the "ECA Public Procurement Dashboard"), launched a survey involving around 400 contacts and interviewed representatives of supervisory bodies in six member states². Moreover, ECA held a panel discussion with experts from OECD, academia and consultancy firms. Due to missing data, and in order to allow for comparability between member states, ECA's data analysis is based on the number of public procurement procedures, not on their monetary value.

ECA's findings are concerning and call for urgent remedial actions: the level of competition for public contracts decreased over the past 10 years in the EU single market and, in the same period, the share of single bidding procedures (where only one company showed interest and submitted a bid), almost doubled (from 23,5 % in 2011 to 41,8 % in 2021) while the number of bidders per procedure almost halved (from an average of 5,7 bidders to 3,2 bidders per procedure). The Special Report points out that Commission's monitoring of public procurement as part of the supervision of the effective functioning of the EU single market is suboptimal (for instance, prices of goods and services purchased under public procurement contracts are not monitored and this prevents the assessment of the consequences of the lack of competition on

¹ Directive 2014/24/EU defining generally applicable public procurement rules; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors; Directive 2014/23/EU on the award of concession contracts. Member States were required to transpose the 2014 directives into national law by April 2016; however, Austria, Luxembourg, Portugal, and Spain took until 2018 and it was only then that the changes finally entered into force in the single market.

² Croatia, Denmark, Greece, Hungary, Luxembourg and Poland selected on the ground of the data analysis and the results of the survey.

the prices level).

There is limited action by the Commission and member states to address obstacles to competition in public procurement and lack of attention is given to the analysis of the root causes of limited competition at national level.

In spite of the several initiatives that the Commissions has launched in the considered timeframe and in the most recent years, notably the recommendations addressed to a number of member states to adopt structural reforms through Country Recommendations adopted within the European Semester and milestones set up in Recovery and Resilience Plans, the overall critic depicted scenario needs counter measures. ECA recommends at least four specific actions, to help the Commission addressing the issues. Its recommendations refers to a better targeted formulation of objectives and priorities, includes the need for improved reliability and completeness of data, encompasses the improvement of the monitoring tools and ask for a deepen root cause analysis of weak competition.

The Commission has accepted all these recommendations. The latter, while acknowledging that competition depends on the management of the public procurement procedure, has however pointed out that the decrease in competition in public procurement is related to the overall macroeconomic environment and to the two major recessions that the Union has faced in the past ten years. The Commission also stresses that some of the factors influencing competition on the public procurement market and the efficiency of public spending are difficult to assess, as public procurement is very heterogeneous. An additional element of complexity is the role of the contracting authorities in the member states, which are the data providers playing a pivotal role in ensuring their quality and the completeness.

The analysis and debate following the presentation of this Special Report at the European Parliament, in the joint CONT/IMCO session, is integrated in the present Working Document.

In more detail, during the discussion it has been acknowledged that the use of public procurement as a tool with a wider scope, for pursuing a more comprehensive vision, is absent. SMEs are not adequately involved and simplification and digitalization did not improve tangibly, while the level of complexity of the rules is still an obstacle to be addressed. Against a background where, since the 2014 package, almost nothing has been improving and the public procurement procedure framework is not delivering according to the expected objectives, it is still undisputed its importance and the need for a due compliance with common rules. However, where implementation's results are missing, any revision of the public procurement procedure's rules requires data and analyses to identify what is suboptimal: be it the action (lack of) by MS or a change of the framework rules or a more proactive approach by the Commission. Even if the country recommendations in the European Semester are useful to have the MSs aligning their rules and practices, any undertaken action should be able to address the still suboptimal professional competence of many services across national authorities and local administrations, to be supported and assisted with an enhanced dialogue with the Commission's departments.

The Working Document points out that there is a widespread lack of awareness for competition as prerequisite for value for money procurements. It acknowledges that both the Commission and the member states pay inadequate level of attention to competition in public procurement and that the initiatives to analyse public procurement data, and to identify possible reasons for decreases in the level of competition, are rare indeed. It underlines out that the shortcomings in the Commission's monitoring tools limit effectiveness and transparency of the process. The Working Document calls for the Commission to improve the monitoring of public procurement,

currently made more difficult by the poor and inaccurate data collection on the contracts awarded. The recommendations issued by the Court are endorsed, calling on the Commission to ensure that they are implemented by end 2025.

THE COURT'S FINDINGS

The Court underlines the following outcomes of its analysis:

- The level of competition for public contracts to deliver works, goods and services, decreased over the past 10 years in the EU single market. ECA identified a high number of direct awards in several MS, which under the directives is permitted only in exceptional circumstances but that, in 2021, reached about 16 % of all the procedures reported in TED, with a large scissor between MS (from 3 % in Greece to 42,3 % in Cyprus). ECA points out that, in 2021, 23 out of 27 MSs had above 10 % of direct award, with a peak in the energy sector and an increasing trend in financial services;
- The share of single bidding procedures, where only one company showed interest and submitted a bid, almost doubled in the past 10 years, from 23,5 % in 2011 to 41,8 % in 2021, with Cyprus, Poland, and Slovenia exceeding 50 % and with peaks in the health services and transport services and equipment;
- The number of bidders per procedure almost halved over the 2011-2021 period, decreasing from an average of 5,7 bidders to 3,2 bidders per procedure;
- The direct cross-border procurement, where contracting authorities awarded to companies located outside their own member state, accounted for 2 % at the end on 1992, and reached only 5 % over the 2011-2021 period, with only Belgium, Ireland and Luxembourg awarding more than 10 % of their cumulated procurement to companies abroad over the 2011-2021: this shows very little impact of public procurement on economic integration;
- The prices of goods and services purchased under public procurement contracts are not monitored, even if decrease in competition always entails the risk of increased prices; because this information is missing, the impact of changes in competition levels on prices and the cost of lack of competition cannot be assessed;
- Three important objectives, which were targeted by the 2014 directives, notably simplification of procurement procedures, easier access for Small and Medium Sized Enterprises (SMEs) and the use of strategic procurement, were not achieved. In detail, the administrative burden is still perceived as excessive and the procedure's length has increased by half since 2011 (from 62,5 days in 2011 to 96,4 days in 2021). In the meantime, simplification measures (such as self-declaration to assess exclusion and selection criteria and digitalisation of procedures) were unsuccessful. Also the participation of SMEs in public procurement did not increase, in spite of the inclusion of provisions to allow division into lots. Also the strategic procurement had a limited impact at best: it was intended to encourage greater consideration of environmental, social and innovative aspects in the procurement of works, goods and services, by allowing contracting authorities to go beyond the lowest price criterion and aim for the “most economically advantageous tender” (MEAT);

- The Commission’s monitoring of public procurement as part of the supervision of the effective functioning of the EU single market is suboptimal: no specific or detailed information is provided on the competitive situation in the member states or in an economic sectors or the extent to which the strategic objectives of the 2014 reform were attained;
- The national authorities provided limited quantitative information, not uniformly reported in their monitoring reports;
- TED data is not yet sufficiently complete and accurate, the Commission’s Scoreboard has limited content and such content has changed several times without clarification on such methodological switches;
- There is no common unique identifier for suppliers and contracting authorities, and this prevents contracting authorities from analysing procurements by supplier; moreover, using a common unique identifier would also be beneficial for the identification of the ultimate beneficial owner, thus facilitating the analysis of indirect cross-border procurements;
- There is limited action by the Commission and member states to address obstacles to competition in public procurement and lack of attention given to the root causes of limited competition at national level.

Additionally, the Court underlines that proper design of public procurement procedures matters, and less competition in public procurement is also the result of market concentration, which would deserve more analysis (of the Member States interviewed, only Poland and Hungary had initiated studies on the matter: in Hungary’s case this was requested under the Recovery and Resilience Plan and by the rule of law conditionality procedure). To be mentioned that the Commission’s 2022 study on market concentrations confirmed an increasing trend in market concentration across all industrial and services sectors.

Moreover, insufficient administrative capacity can have a negative impact on competition in public procurement, as well as payments delays (which are not regulated in the public procurement directives).

THE COURT'S CONCLUSIONS AND RECOMMENDATIONS

The ECA recommends that the Commission:

1. Clarify and prioritise public procurement objectives

The Commission should initiate a process in order to:

- a) Formulate and prioritise fewer, but clearer and measurable objectives;
- b) Reflect whether EU strategic policy objectives should be achieved by means of:
 - Strategic requirements for public procurement procedures, or rather
 - Further regulation of the specifications for works, goods and services.

Target implementation date: mid-2025 - *Accepted* by the Commission.

2. Address the shortcomings of public procurement data

The Commission should:

- a) Further improve the reliability and completeness of TED data, notably by promoting the use of optional input fields and embedded controls at data entry;
- b) Collect additional relevant monitoring data from complementary sources. This data should include unique identifiers for suppliers, beneficial owners, contracting authorities;
- c) Use the Public Procurement Data Space to monitor the quality of the data provided through eForms and published in TED;
- d) Require member states, in their monitoring reports on public procurement, to provide complete and accurate data in a consistent manner.

Target implementation date: end of 2025 - *Accepted* by the Commission.

3. Update the Commission tools to better monitor competition in public procurement

The Commission should:

- a) Align the Scoreboard's scope with the objectives in the directives, in particular by including additional indicators, e.g. relating to cross-border and strategic procurement;
- b) Show the multiannual trends in competition in public procurement at EU, member state and economic sector level;
- c) Disclose its indicator definitions and calculation methods and any changes thereto
- d) Introduce advanced reporting features for further exploration of public procurement data;
- e) Disclose information on appeal procedures launched by unsuccessful bidders;
- f) Include information on competition in member states and economic sectors based on KPI;
- g) Explore new ways of monitoring public procurement prices in EU and member states.

Target implementation date: end of 2025 - *Accepted* by the Commission.

4. Deepen the root cause analysis and put forward measures to overcome key obstacles to competition and promote best practice

The Commission should

- a) Analyse in cooperation with the member states the root causes of weak competition in public procurement (aggregate per geographic and economic clusters);
- b) Put forward measures addressing contracting authorities' key concerns, such as unnecessary administrative burden, development of efficient procedures, particularly as regards choosing selection and award criteria, strengthen administrative capacity and foster exchanges of best practices, leveraging artificial intelligence to overcome language barriers and make public

contracts more attractive to companies, in particular for SMEs.
Target implementation date: end of 2025 - *Accepted* by the Commission.

THE RAPPORTEUR'S RECOMMENDATIONS

1. *Welcomes the Court's report on public procurement and its assessment of the suboptimal level of competition achieved following the transposition of the 2014 public procurement directives into national law;*
2. *Believes that public procurement is a key driver of economic growth and employment and reminds that about EUR 2 Trillion is spent on procurement every year, corresponding to approximately 14 % of the gross domestic product (GDP) of the EU's 27 MS;*
3. *Acknowledges the importance of a duly regulated public procurement process leading to the selection of the best performing companies, and by that pursuing the safeguard of the public interest, strengthening equal treatment and non-discrimination and enhancing efficiency;*
4. *Is aware that, as public procurement involves large amounts of public money, there is a risk for fraud and corruptive practices, such as the tailoring of tender specifications to favour certain companies;*
5. *Maintains that transparency in public procurement is crucial not only to allow processes and decisions to be monitored and controlled, but also to ensure that decision-makers are held accountable and that public money is used efficiently;*
6. *Appreciates the Court's recommendations, which aim at supporting the Commission in its actions to enhance the level of attention towards competition in public procurement and at increasing awareness across the national contracting authorities;*
7. *Understands that the level of complexity in implementing and monitoring procurement procedures is linked to the high number of operators involved; notes that over 250 000 contracting authorities conduct procurement procedures in the EU single market, mostly public bodies at national, regional or local level, but also non-public actors operating in specific, non-competitive conditions; reminds, in this regard, that every member state has at least one public body responsible for supervising public procurement and, within the Commission, two Directorates-General share responsibility for public procurement policies and the MSs' implementation of the directives; notes that this landscape represents a considerable challenge to ensure effective cooperation and to achieve increased integrity and transparency;*
8. *Is concerned by the findings of the Court's audit work, in particular about the indications of a decreased competition level, which entails the risk of increased prices; reminds its resolution on public procurement strategy package³, which pointed out that competitive bidding is vital in public procurement, and regretted the decrease in the intensity of competition in public procurement in the Union and urged the Member States recording a high percentage of single bidding procedures to address the problem;;*
9. *Stresses that in the last ten years (2011-2021) the increase in the number of single bidding procedures (from 23,5 % in 2011 to 41,8 % in 2021) and the almost halved number of*

³ European Parliament resolution of 4 October 2018 on the public procurement strategy package (2017/2278(INI)) (2020/C 11/07)

bidders per procedure (from an average of 5,7 bidders to 3,2 bidders) are tangible indicators of the disappointing results of the directives on public procurement;

- 10. Regrets that the objectives pursued by the 2014 directives, in terms of simplification, flexibility and easier access for SMEs have not been adequately achieved, as suggested by the fact that administrative burden is still perceived as excessive, the procedure's length has increased by half since 2011 (from 62,5 days in 2011 to 96,4 days in 2021), self-declaration and digitalisation of procedures were not adequately used and the participation of SMEs in public procurement did not increase;*
- 11. Expresses concerns that the economic integration has not progressed in this area, with a very poor increase of direct cross-border procurement (cases where contracting authorities awarded to companies located outside their own member state were 2 % at the end on 1992, and only 5 % over the 2011-2021 period);*
- 12. Stigmatises the very limited use of public procurement as a strategic tool intended to encourage greater consideration of environmental, social and innovative aspects, pursued by endorsing the awarding to "most economically advantageous tender" (MEAT) but which achieved very limited impact;*
- 13. Understands that it would be consistent with the current horizontal approach to focus on performance more than on the compliance with the procurement rules, and do not limit the Commission's area of intervention to the transposition of the directives into national law but encompassing a more in-depth analysis of the results; accordingly, calls on the Commission to explore the possibility of monitoring the trends of prices for goods, services and works awarded via public procurement; believes that a corresponding effort should be done by member states in identifying the root cause of limited competition;*
- 14. Maintains that coordination, dialogue and exchange of best practices are effective tools to address the lack of effort in tackling the weak competition levels, and that such remedies should be endorsed and fostered under the Commission guidance, as supervisor of public procurement in the Union;*
- 15. Observes with interest the Commission's proposal in its 2017 strategy⁴ identifying in the relevant committees of the Parliament and the Competitiveness Council the drivers of a forum for ongoing political debate on public procurement in member states; agrees that this input could take the form of a voluntary structured dialogue aligned with the European Semester process, taking into account that the Commission already assesses the functioning of national public procurement markets as drivers of the single market within the European Semester; suggests to the Commission to give bigger emphasis to competition in public procurement when proposing country-specific recommendations to the Council;*
- 16. Regrets that small and medium sized enterprises' participation in public procurement have remained unsatisfactory over the audited period; underlines that bigger efforts should be devoted to reducing unnecessary administrative burden, promoting efficient procedures and making opportunities more attractive for SMEs;*
- 17. Acknowledging the pivotal role of the national authorities in this matter, reiterate its call*

⁴ COM(2017) 0572 "Making public procurement work in and for Europe".

on the Commission to keep a high level of support and assistance to member states, in order to strengthen their administrative capacity, their competence and the ability to design and implement strategies that are focused on tackling the detected weaknesses at national level and at improving cross-border procurement, where possible and appropriate by leveraging artificial intelligence to overcome language barriers and incentivisations for the deployment of similar actions;

- 18. Remarks that accessible data and reporting are suboptimal where compared to needs and expectations; notes that the Court reviewed the Tenders Electronic Daily (TED) and the Single Market Scoreboard, finding the data in TED unsatisfactory per accuracy, reliability and completeness and the Scoreboard's indicators inadequate to assess the directives' objectives, in particular as regard cross-border and strategic procurement and to review multiannual trends aggregated in geographical or sectorial clusters;*
- 19. Reiterates the need to use a common unique identifier for the economic operators and the contracting authorities; stresses that the common unique identifier would allow the easier identification of the ultimate beneficial owner, facilitate the analysis of procurement by supplier and of indirect cross-border procurement, making TED a strategic database for monitoring;*
- 20. Calls on the Commission to swiftly implement the Court's recommendations, and to engage in a constructive, permanent dialogue with the member states and the national contracting authorities, whose pivotal role is material to address effectively the weaknesses detected by the Court's analysis.*

1. EP resolutions

European Parliament resolution of 4 October 2018 on the public procurement strategy package (2017/2278(INI)) (p. 28–35).

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018IP0378>

European Parliament resolution of 23 November 2023 on job creation – the just transition and impact investments (2022/2170(INI)) (paragraph 15).

European Parliament resolution of 18 April 2023 on eGovernment accelerating digital public services that support the functioning of the single market (2022/2036(INI)) (paragraphs 35-43).

European Parliament resolution of 6 July 2022 on the EU action plan for the social economy (2021/2179(INI)) (paragraphs 14-15).

European Parliament resolution of 25 November 2020 Towards a more sustainable single market for business and consumers (2020/2021(INI)) (paragraphs 26-29).

2. A selection of parliamentary questions

Implementation of social criteria at all stages of the public procurement procedure

24.5.2022 - Question for written answer E-001928/2022 to the Commission Rule 138 with answer given by Mr Breton on behalf of the European Commission on 18.8.2022

https://www.europarl.europa.eu/doceo/document/E-9-2022-001928_EN.html

Review of the Public Procurement Directive and SMEs participation SMEs to public procurement

15.12.2020 - Question for written answer E-006855/2020 to the Commission Rule 138 with answer given by Mr Breton on behalf of the European Commission on 22.2.2021

https://www.europarl.europa.eu/doceo/document/E-9-2020-006855_EN.html

Electronic auctions in public procurement procedures

16.10.2020 - Question for written answer E-005650/2020 to the Commission Rule 138 with answer given by Mr Breton on behalf of the European Commission on 17.12.2020

https://www.europarl.europa.eu/doceo/document/E-9-2020-005650_EN.html

EU legislation on public procurement

19.3.2021 - Question for written answer E-001514/2021 to the Commission Rule 138 with answer given by Mr Breton on behalf of the European Commission on 16.6.2021

https://www.europarl.europa.eu/doceo/document/E-9-2021-001514_EN.html

German public procurement - low publication rate for highly decentralised nature of public administration in Germany resulting in a high number of contracts of relatively small value

26.8.2020 - Question for written answer E-004651/2020 to the Commission Rule 138 with answer given by Mr Breton on behalf of the European Commission on 12.10.2020

https://www.europarl.europa.eu/doceo/document/E-9-2020-004651_EN.html

3. Studies and briefings

Contribution to Growth: European Public Procurement Delivering improved rights for European citizens and businesses

Policy Department for Economic, Scientific and Quality of Life Policies

Directorate-General for Internal Policies - Author Prof. Dr Christopher Bovis

PE 626.088- January 2019

Systems and e-Procurement - Improving Access and Transparency of Public

Procurement - A briefing Requested by the IMCO committee

Policy Department for Economic, Scientific and Quality of Life Policies

Directorate-General for Internal Policies - Author Prof. Dr. Jörg Becker (University of Münster, ERCIS, Germany)

PE 618.990 - April 2018

The EU's Public Procurement Framework - How is the EU's Public Procurement Framework contributing to the achievement of the objectives of the Paris

Agreement and the Circular Economy Strategy? A briefing requested by the IMCO committee

Policy Department for Economic, Scientific and Quality of Life Policies

Directorate-General for Internal Policies - Author Jorge NÚÑEZ FERRER

PE 648.770 - April 2020