

Im Auftrag des Brüsseler Kreises

Brüsseler Kreis e.V.
Geschäftsstelle
Daniel Kiesel
c/o Stiftung Liebenau
Siggenweilerstraße 11
88074 Meckenbeuren
E-Mail: daniel.kiesel[at]bruesseler-kreis.de



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ASSESSMENT OF THE NEW PUBLIC PROCUREMENT DIRECTIVE AND ITS IMPACT ON SOCIAL SERVICES

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1. Background and introduction

Since 2011, when the EC launched the initiative of modernizing public procurement rules, EPR within Social Services Europe network have followed the process with an eye in particular on the rules regarding the procurement on social services.

In 2012, EPR produced a paper analysing in details the text proposed by the European Commission as well as the implementation of the current directive on public procurement (2004/18/EC) and its impact on social services¹. On the basis of such analysis EPR and Social Services Europe produced some recommendations on how to strengthen the declared aim of the revision to use public procurement to deliver wider “common societal goals” as well as “ensuring the best possible conditions for the provision of high quality social services”². EPR jointed also Social Platform to advocate for these recommendations with the relevant decision makers.

On Wednesday 15 January 2014 the European Parliament voted in favour of the directive on public procurement which had already been agreed with the EU member state last June 2013 in the Council of Ministers. “The new rules which have been adopted today by the European Parliament have three main objectives: simplification, flexibility and legal certainty. Through this reform, public authorities can optimise their use of public procurement which, with nearly 19% of European GDP, is a key driver of our economy. Thus, the simplification of procedures, greater flexibility and their adaptation to better serve other public sector policies or the possibility of the best quality-price ratio (‘value for money’) will make public procurement more efficient and more strategic, respecting the principles of transparency and competition to the benefit of both public purchasers and economic operators”³, said the EU Internal market Commissioner Michel Barnier. The directives will enter into force 20 days after publication in the Official Journal of the European Union. After this date, member states will have 24 months to implement the provisions of the new rules into national law.

¹ For more detailed information consult the paper published on the EPR website at the following link:

http://www.epr.eu/images/EPR/documents/policy_documents/Analytical%20Paper_Public%20Procurement.pdf

² Social Services Europe recommendations published on the following link:

<http://www.socialserviceseurope.eu/images/Social%20Services%20Europe%20022012%20Briefing%20on%20Draft%20Public%20Procurement%20Directive1.pdf>

³ Press release “Commissioner Michel Barnier welcomes European Parliament vote on the Directives on public procurement and concessions” - European Commission - MEMO/14/18 15/01/2014

The new Public Procurement Directive recognises the specificities of social, health and other services provided directly to the person. These services have objectives, types of users and characteristics different to other services and moreover contribute to social cohesion and inclusion, promote the enjoyment of human rights, and they address everybody but in particular the most in need. The adoption of simpler rules and more tailored to the nature of these services, is the first big achievement for this sector.

In addition, under the new Public Procurement directive, social issues are tackled in a number of ways. Contracting authorities will now be able to consider social aspects amongst other criteria for determining which bid is the most economically advantageous to accept. However quality of social services has not been made a mandatory element of the most economically advantageous tender ("MEAT"). The risk is that this weak formulation can leave open to the possibility for contracting authorities to award social services only on the basis of the cost.

This briefing examines how the EPR and Social Services Europe recommendations are taken into account in the text adopted and highlights other relevant part of the text.

2. Specific characteristics of social services of general interest

The specificity of social services is recognized in the new text of the EU directive, which was not the case in the 2004 directive. Taking into account their limited cross-border dimension (Recital 11), social services are entitled to a special "lighter" regime and they have a higher threshold that means that for service contracts under 750.000 the procurement rules do not apply. This special regime is regulated by art. 74 – 76 and the rest of the directive does not apply to these services.

Recital 114 stated that *"certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold than that which applies to other services"*.

Article 4d foresees a threshold of EUR 750 000 for public contracts for social and other specific services listed in Annex XVI. This special regime is regulated by art. 74 – 76.

3. Quality of social services

This issue is closely linked to the recognition of the specific nature of social services, as quality is essential for the service to achieve its goal of meeting needs. EPR welcomes the reference to the Voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee in the recital 114, which underlines the need to guarantee high quality services.

According to the 2004 directive, public authorities can decide whether to evaluate tenders on the basis of the most economically advantageous tender ("MEAT") or price only. Therefore, in the recommendations, EPR and Social Services Europe called for the abolition of lowest

cost as selection criterion, recommending that MEAT should be the only criterion, taking into account quality criteria.

The current **Article 67** says the following: (1) *“Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, **contracting authorities shall base the award of public contracts on the most economically advantageous tender**”*.

Regarding the way MEAT should be determined, **Article 67** continues stating the following: (2) *“The most economically advantageous tender from the point of view of the contracting authority shall **be identified on the basis of the price or cost**, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and **may include the best price-quality ratio**, which **shall be assessed on the basis of criteria including qualitative, environmental and/or social aspects** linked to the subject-matter of the public contract in question”*.

This means that MEAT will be determined on the bases of the price or cost but may also include the best price-quality ratio using qualitative, environmental and/or social criteria. The use of “shall”, “can”, “may” create certain ambiguity on the compliance of privileging quality rather than cost in the award criteria and leave it up to public authorities the decision of taking into account or not qualitative, environmental and/or social aspects.

To better understand what is meant by MEAT within the directive, it is also important to take into account the following recitals, which reinforce the idea of the freedom of contracting authorities in defining what is to be considered the economically best solution (Recital 36aa) and specifying that it is still an option for contracting authorities to carry out the assessment of the MEAT on the basis of the price/cost effectiveness only (Recital 37).

Recital 89: *“The notion of award criteria is central to this Directive; it is therefore important that the relevant provisions are presented in as simple and streamlined a way as possible. This may be obtained by using the terminology “most economically advantageous tender” as the overriding concept as all winning tenders should finally be chosen in accordance with what the individual contracting authority considers to be the economically best solution among those offered. To avoid confusion with the award criterion that is currently known as the “most economically advantageous tender” in Directives 2004/17/EC and 2004/18/EC, a different terminology should be used to cover that concept, the “best price-quality ratio”; consequently, it should be interpreted in accordance with the relative jurisprudence under those Directives, except where there is a clearly materially different solution in this Directive”*.

Recital 90: *“[...] It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions. In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate”*.

This implies that even if the lowest cost criterion has been abolished, the way MEAT is defined in Article 67 and in the Recitals mentioned above, will *de facto* allow contracting authorities to evaluate tenders on the basis of the cost/price only.

It is important to clarify that Article 67 does not apply to the special regime, and the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services still remain optional for contracting authorities. **Article 76.2** says “*Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services*”. However it does not provide any obligation for Member States. Thus, everything will depend on how Member States will transpose the new directive into their national law.

4. Definition of social services in the special regime

Annex XVI of the new text of the directive lists “*social and other specific services*” for which the special regime applies. The list refers to health and social services, administrative, educational, healthcare and cultural services, compulsory social security services, other community, social and personal services, services provided by Trade Unions and religious services. **Recital 114** refers to “*services to the person, such as certain social, health and educational services*”, while the explanatory memorandum refers to “*social, health and education services*”.

In the analytical paper published in 2011, EPR advocated for all the references to social services in Annex XVI to be replaced with an open list that refers to only social services and eliminate non-economic services (e.g. social security services, religious services, trade union services) in order to rectify the lack of consistency and legal clarity in the text proposed by the Commission.

Religious services, services furnished by trade unions, social security services and compulsory social security services are still included in services listed in Annex XVI of the new EU directive.

However the Commission has stated that in case a public authority wishes to contract such a service only the special regime would apply. In addition, a footnote has been added regarding compulsory social security services stating the following: “*These services are not covered by the present Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as noneconomic services of general interest*”.

In addition **Recital 5** specifies that “*nothing in the Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of Article 2(7). The provision of services based on law or regulations, or employment contracts, should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or compulsory social security services*”.

In addition **Article 5** (subject-matter and scope) clarifies that the Directive does not affect the way in which the Member States organise their social security systems.

5. Discretion of Member States to organise social service provision

It is important to note that Member States are not always obliged to use public procurement in social service provision. According to **Recitals 4** and **114** of the directive, Member States are free to choose how to organise their social service provision, but some obligation do apply.

Recital 4: *“The Union rules on public procurement are not intended to cover all forms of disbursement of public money, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this directive whether they are implemented through purchase, leasing or other contractual forms [...] Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorization schemes (for instance licenses for medicines or medical services)”*.

Recital 114 describes in more detail the limits of the discretion: *“Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination”*.

There is also discretion for contracting authorities regarding how the procurement procedures are organised: **Article 76.1:** *“Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question”*

Therefore in principle, local authorities which use partnership models for social service provision (based on grants and subsidies), can continue to do so as these are outside the scope of the directive if they can be classified as “mere financing” or are not classified as a public contract. Examples of such models are the “*recueil d'initiatives*” in France (where local authorities assess local needs, highlight general priorities based on these needs, and develop partnerships with organisations with initiatives responding to these needs), or the “*co-progettazione*” in Italy (where policies and services are developed through public/private

partnerships, based on general priorities highlighted by the public authority - see Lombardia n. 9/1353)⁴.

However the notion of “*mere financing*” of services is not entirely clear. The European Commission Guide on the application of public procurement rules does not define mere financing further, but it refers to scenarios which are **not** mere financing and which fall under the scope of the Public Procurement Directive, including situations where “*the aim of the contract is to meet needs previously defined by the public authority within the framework of its competences*”⁵.

6. Reserved contracts for social and health services

Within the special regime a new article was introduced very late in the negotiation process, **Article 77** “*reserved contracts for certain services*”. Whilst at first glance the article would seem to provide an opportunity for not-for-profit organisations to be favoured when contracting authorities seek a provider of the services in the annex XVI, the definition of the organisation that would qualify for a reserved contract does not correspond to any existing definition of cooperatives or social enterprises, and could be open to many organisations that would not normally qualify as such structures. In this article much is left open and is necessary for the member state to define in the transposition of the legislation which could work in favour of not-for-profit structures, not really favour such structures at all, or make it difficult for any structure to qualify.

The **Article 77.2** states that the organisation referred to in paragraph 1 must fulfill certain conditions:

“**Part (b)** *profits are reinvested with a view to achieving the organisation’s objective. Where profits are distributed or redistributed, this should be based on participatory considerations.*

Part (c) *the structures of management or ownership of the organisation performing the contract shall be based on employee ownership or participatory principles, or shall require the active participation of employees, users or stakeholders.*

Part (d) *the organisation shall not have been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years”.*

In this respect it is not clear what does mean “*profits are reinvested*”; how much is not defined, considering that it must not mean all profits because the next part of the text states “*where profits are distributed or redistributed*”. It is not clear whether “*distributed or redistributed*” refers to external or internal distribution. This redistribution shall also be based on “*participatory considerations*”, another term that does not carry a specific meaning in itself.

Moreover the **Article 77.3** states that “*the maximum duration of the contract shall not be longer than three years*”. An organisation can only be awarded a contract for a maximum of three years and couldn’t be awarded a contract under a reserved contract procedure twice,

⁴ Font: Social Services Europe

⁵ Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest. The guide has no legal value. http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

which raises concerns about continuity. However, it could be possible that before the end of that contract the contracting authority launches another more open procedure whereby the same organisation could reapply to run the service.

7. Sheltered workshops

Article 20 says the following: *“Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons or provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers”.*

8. Social clauses

In their recommendations EPR and Social Services Europe called for social production characteristics (such as working conditions or the qualification and experience of the staff assigned to performing the contract) to be permissible in the technical specifications.

The technical specifications define the characteristics required of a product or a service such that they fulfill the use for which is intended. These characteristics may include environmental performance, design, conformity assessment, performance, safety, dimensions, quality assurance, and production methods, on the condition that they relate to the subject of the contract. The tenderer's offer is valid if he/she manages to prove that it meets the requirements defined by the technical specifications. The non-compliant bids to the technical specifications shall be rejected. Therefore it is important that technical specifications are clear and correct for not receiving inadequate offers.

The possibility to include environmental production characteristics in the technical specifications is new but social production characteristics may only be used as contract award criteria when choosing between proposals. **Article 67.2** lists criteria that qualify as technical specifications and include *“quality, technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character”* and *“organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff employed can significantly impact the level of performance of the contract”*.

As regarding the technical specifications **Article 42.1** states that *“for all procurement which is intended for use by natural persons, whether general public or staff of contracting authorities, the technical specifications shall, except in duly justified cases, be drawn up so to take into account accessibility criteria for people persons with disabilities or design for all users. Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto”*.

In describing a final product's characteristics (whether works, supplies or services) contracting authorities shall (*again – our emphasis*) ensure that goods or services allow access for people with disabilities. However, this is not obligatory for contracts under the

special regime as it falls under the second section of the legislation, but contracting authorities could require it.

The last consideration about social clauses concerns contract performance conditions. Such conditions refer to specific obligations pursuing social objectives that the tender has to comply in performing the contract, as for instance, the obligation to recruit unemployed, to implement training measures or to promote equal opportunities for disabled people to take a number higher than any quota obligation prescribed by national legislation.

Article 70 states that “*contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67(3) and indicated in the call for competition or in the procurement documents*”. Those conditions may include economic, innovation related, environmental, social or employment-related considerations.

Recital 99 helps to identify what could be the subject of the contract performance conditions: “*protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question [...] such conditions may refer, amongst other things, to the employment of long-term job seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users*”.

EPR welcomes the extensive references to social clauses into articles related to contract performance conditions but expresses concern that contracting authorities in laying down technical specifications are not obliged to take into account accessibility criteria for people with disabilities or design for all users. It is still only a recommendation: ‘shall’.

9. Conclusion

The overall approach of the new directive is welcomed by EPR as it is recognising the specificities of social services, ensuring them a higher threshold (750.000 euros) and giving them specific award criteria including quality, affordability, accessibility, availability and comprehensiveness of the services, with specific references to the European Voluntary Quality Framework (recital 114). Moreover the text clearly stated that Member States are free to provide social services themselves or to organise them in a way that does not entail the conclusion of public contracts.

In addition, in the text an important reference to the UNCRPD has been added and the accessibility criteria for persons with disabilities and reference to design for all are present in many of the Articles of the directive.

Recital 3 says as following: *“When implementing this Directive, the United Nations Convention on the Rights of Persons with Disabilities should be taken into account, in particular in the connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions”*.

Reserved contracts, in particular for sheltered workshops, are clearly supported by the article 20 but the conditions to reserve contracts to certain health and social services as stated in the Article 77 are ambiguous in their formulation. Regarding the need to guarantee high quality services, EPR considers that even if the Article 67 says that contracting authorities shall base the award of public contracts on the most economically advantageous tender, the use of “shall”, “can”, “may” create certain ambiguity on the compliance of privileging quality rather than cost in the award criteria.

EPR regrets that quality of social services has not been made a mandatory element of the MEAT as well as that the formulation of Article 76.2 does not make compulsory for Member States to take into account the need to ensure quality and affordability of social services as well as users ‘involvement.

Member States now have two years to implement the new provisions and show their commitment to make strategic use of public procurement for social and environmental policy goals as well to make tangible steps towards the promotion of a stronger social Europe improving access to and quality employment in the healthcare and social sector. Much will depend from how Member States decide to transpose the directive, thus we ask the European institution and the Member States to work together on a correct implementation of the new procurement rules, once the new directive will enter into force, and to make use of all the possibilities to promote quality social services.