

FIT FOR FUTURE Platform Opinion

Topic title	Public procurement
	AWP 2023
	Directive 2014/24/EU of 26 February 2014 on public procurement <i>Legal reference</i>
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	In its proposal on the Green Deal Industrial Plan, the European Commission highlights the role of public procurement as a lever for increasing the demand for net-zero products. It further announces it will "define sustainability characteristics and possible requirements for net-zero products, using available legal tools and existing EU standards [to][...] promote a more predictable and uniform demand for net-zero solutions and allow public authorities to set out ambitious sustainability requirements." It further announces it will deploy the International Procurement Instrument (IPI) for the first time in 2023.
	<input type="checkbox"/> Contribution to the (ongoing) evaluation process - <i>Title of the (ongoing) evaluation</i> -
<input checked="" type="checkbox"/> Included in Annex VI of the Task force for subsidiarity and proportionality Annex VI of the report of the Task force for subsidiarity and proportionality highlights that public procurement rules, and more specifically the inclusion of strategic procurement criteria, potentially cause an unnecessary complexity for local and regional authorities.	

	<p><input checked="" type="checkbox"/> Other</p> <hr/> <p>Based on submissions through the Have your say: Simplify! portal.</p> <p>In its proposal on the Green Deal Industrial Plan, the European Commission highlights the role of public procurement as a lever for increasing the demand for net-zero products. It further announces it will "define sustainability characteristics and possible requirements for net-zero products, using available legal tools and existing EU standards [to][...] promote a more predictable and uniform demand for net-zero solutions and allow public authorities to set out ambitious sustainability requirements." It further announces it will deploy the International Procurement Instrument (IPI) for the first time in 2023.</p>
<p>Have your say: Simplify!</p>	<p>Urban Agenda Partnership on Innovative and Responsible Public Procurement</p> <ul style="list-style-type: none"> - Possible adaptations to the Directive in relation to the responsible public procurement (see: Annex 1)
<p>Commission follow up</p>	<p>REFIT Scoreboard: Public procurement</p> <p>Annual Burden Survey: The EU's efforts to simplify legislation (2023)</p>

SUGGESTIONS SUMMARY

- Suggestion 1:** Simplify and streamline public procurement procedures and clarify definitions and criteria
- Suggestion 2:** Encourage procurement for innovation
- Suggestion 3:** Promoting the requirement "link to the subject matter" at European level to allow for sustainable procurement
- Suggestion 4:** Explore possibilities to exempt companies created by public sector entities from the scope of public procurement rules in order to promote social and environmental aspects
- Suggestion 5:** Facilitate flexible public procurement in times of crisis
- Suggestion 6:** Ensure an efficient and low-burden deployment of the International Procurement Instrument (IPI)
- Suggestion 7:** Make the remedies regime more efficient

SHORT DESCRIPTION OF THE LEGISLATION ANALYSED

Public procurement plays an important role in Europe's strategy for smart, sustainable and inclusive growth. Every year, over 250 000 public authorities in the EU spend around 14% of GDP on the purchase of services, works and supplies. In many sectors, including energy, transport, waste management, social protection and the provision of health or education services, public authorities are the principal buyers.

[Directive 2014/24/EU on public procurement](#), formally in force since April 2014, transposed since April 2016, establishes purchasing procedures for public buyers through an EU-wide set of minimum harmonised rules in order to create a level playing field for all businesses across Europe and enable procurers to make better use of public procurement in support of common societal goals. Specifically, these rules organise the way public authorities and certain public utility operators purchase goods, works and services. Transposed into national legislation, they apply to procurements with a value estimated to be equal to or greater than certain thresholds, revised by the Commission periodically, in line with fluctuations of the value of WTO Government Procurement agreement (GPA) thresholds. For procurements of lower value, national rules apply.

The procurement rules include features such as Standard Forms for publication of notices in the supplement of the EU Official Journal (TED), European Single Procurement Document, which is a standardised self-declaration that aims to facilitate participation in procurement procedures, or new procedure to promote the development of innovative products, services or works where, to facilitate the participation of small companies, the new rules encourage public authorities to divide up large contracts into individual lots.

In 2021, the Fit for Future Platform adopted a dedicated [Opinion on eProcurement](#).

Sources:

[Directive 2014/24/EU of 26 February 2014 on public procurement](#)

PROBLEM DESCRIPTION

Existing Commission evidence and evidence submitted through the Have your say: Simplify! Portal suggest the following issues:

In May 2021 the Commission published its first [report](#) on the implementation and best practices of national procurement policies in the internal market¹. The report identified the most frequent sources of wrong application or of legal uncertainty (as reported by Member States); measures against fraud, corruption, conflict of interest and serious irregularities; SMEs participation; and practical implementation of national strategic procurement inclusive of green, socially responsible and innovation public procurement. The report has shown that there is room for improvement, both regarding quantitative and qualitative reporting. Moreover, taking into account the strategic procurement considerations is seen to be very valuable for supporting an inclusive recovery, promoting a just transition and strengthening socio-economic resilience in line with the European Green Deal as new growth strategy for the EU.

Some specific suggestions on the Public Procurement Directives were tabled by a stakeholder, and further elaborated by some members of the Platform, suggesting the addition of the following:

- Add a new type of reserved public contracts, based on the size of the companies, in Art 20 of the directive. The introduction of reserved contracts for small and medium-sized companies (entrepreneurs) would have a positive effect on the overall economy of the awarding region as contract reserved for small and mediums size companies are less likely to be won by entrepreneurs located outside the regions. However, the contracting authority's ability to award this type of public procurement would have to be limited in order to avoid unacceptable restrictions of competition and prevent disproportionate unequal treatment of large companies. A possible limitation may be the ratio of reserved public contracts to the total number of public contracts awarded by the contracting authority for a certain period²;
- To change Art. 70 of the directive introducing a provision that would explicitly allow contracting authority to allocate a certain percentage of the contract to designated subcontractor(s). The possibility for the contracting authority should require from the general contractor that a certain part of the contract must be performed by a certain subcontractor. That could have a positive effect on the involvement of local workers and companies in the public contract and thus part of the funds would remain directly at the place of their expenditure. A positive effect could also be seen in the social area because

¹ This document reflects the contributions that Member States submitted during the first reporting and monitoring exercise. Due to the delayed transposition of the rules, the first implementation of the reporting obligation took place in 2018. Consequently, the reports covered in principle the period between the 1 January 2017 and 31 December 2017, depending on data availability;

² Such proposal would have to be analysed in light of the previously carried out analysis of possibilities of SME eases, including with the legislative process of the currently discussed directive, and the conclusions that have been reached. The way of SMEs opening within the 2014 was extensively discussed in: https://ec.europa.eu/growth/news/new-eu-public-procurement-rules-less-bureaucracy-higher-efficiency-2015-11-19_en and https://ec.europa.eu/growth/news/new-opportunities-smes-under-reform-public-procurement-legislation-2016-03-08_en. Secondly, it would have to be legally analysed how such measure relates to the general principle of the internal market, i.e. fair competition and equal treatment. Within the feasibility analysis, it would have to be checked how the provision would function, being obligatory or voluntary, as intended, and with what effects;

local people would be employed. Contracting authorities would also be given the opportunity to establish lists of local small entrepreneurs/sole traders (with their consent) which the general contractor would have to address with an offer for the completion designated part of the public contract. That would create positive benefits in both social and economic as well as environmental area (local workers do not have to travel long distances)³;

- After Art. 48 of the directive, to adopt a new instrument of the so-called *future standards*. This would allow the contracting authority to present its requirements for the performance of public contracts in the social and environmental area in advance. Consequently, the requirements presented in this way could not be subjected to review by the inspection body for their disproportionate nature⁴;
- Art. 12 (1b), (3b) - for self-governing units, to reduce the share of the total activity allocated to controlled entity by controlling entity (contract authority) from 80% (in the Czech Republic – municipalities and regions). Municipal and regional companies could be better used and obtain more resources to implement the social integration policy of local governments, such as employing people at a disadvantage, providing re-training or offering an internship program. Possibility to introduce two regimes, the current one with an 80% share of activities for controlling person and the other with a reduced share in the event that a given controlled company will implement a social-integration program to a relevant extent to its size⁵.

Sources:

[Commission report on the implementation and best practices of national procurement policies in the internal market COM\(2021\) 245 final 20.05.2021](#)

Have your say: Simplify! submission (see: Annex 1)

The Fit for Future Platform has acknowledged the issues raised by the legislation concerned as follows:

Public authorities are providers of public goods and services. By strategically using their purchasing power, public buyers across Europe could stimulate the demand for a greener and more socially responsible economy. Clearly, EU public procurement and concession rules have a big potential in speeding up transitions towards climate neutrality, circular economy, upward social convergence and increased collective bargaining coverage. However, the implementation of approaches such as the most economically advantageous tender, life-cycle costs, and

³ A feasibility analysis would have to take into account existence of such solution in one of the procurement directives (defence and security procurement directive) and the fact that the provision is in practice not used (see [the evaluation report of the defence and security procurement Directive](#);

⁴ As a principle these possibilities are already offered by the Directive, thus, it would need to be analysed, if there are any problems or drawbacks connected with application of the existing solutions;

⁵ The purpose of the provision (including the 80% level) is to allow the Member States' administrations to establish special purpose entities, but not to allow that these entities at the same time benefit from their de facto public administration situation and simultaneously play on the open market like normal market player. Decreasing this level could risk diminishing the purpose of the provision;

sustainability considerations has been slow or piecemeal. At the same time, as an alternative to public procurement, authorities may always choose to provide public services in house.

The promotion of these fundamental policy objectives also requires a broader approach to public procurement in the context of good governance. To this end, public procurement needs to effectively contribute to the realisation of democratic, more transparent and participative processes. In other words, reporting and evaluation of the implementation and application of the public procurement directives cannot only be limited to the drawing-up of the call for tender and the awarded contract, but should also pay greater attention to the reasons for and aims of the external contracting, as well as the question of whether and how these objectives were achieved by the contracting, including also the monitoring of compliance with any conditions set out under the contract in terms of environmental and social sustainability.

In its handbooks *Buying Green* (2016) and *Buying Social* (2021), the Commission has further identified good practices capable of contributing to sustainability objectives through public procurement. In this context, however, a clear distinction must be made between green and social minimum obligations that must always be respected under any public tender, and other types of additional social and green requirements contracting authorities may introduce on a voluntary basis to further promote sustainable development. By in parallel presenting practices linked to compulsory as well as voluntary conditions, there is a clear risk that these two handbooks rather may blur rather than contribute to the understanding of what is to be considered as ambitious green and socially responsible procurement policies. Clearly, barely complying with minimum obligations prescribed by law cannot be framed as sustainable procurement.

While a big share of public procurement and thus government expenditure is carried out by regions, cities and municipalities, they – together with small and medium-sized enterprises (SMEs) – are the level facing the most difficulties when implementing the public procurement directives in general, and strategic procurement objectives in particular. While innovative, green, and socially responsible public procurement are considered important by those levels, the overly complex legal framework often exacerbated by poor transposition of EU law at national level, or due to over-regulation or fragmentation at national level as well as a lack of professionalisation, and the fear of litigation prevent them from using strategic procurement procedures.

Regarding: modernisation and future proofing of existing laws, including via digitalisation, the efficient labelling, authorisation and reporting obligations, the simplification of EU legislation:

- Both bidders and public buyers are often faced with very complex procurement rules leading to burdensome, inefficient and costly procedures with an outcome that frequently creates legal uncertainty. This opinion puts forward a number of suggestions to address some of these issues.
- There is legal uncertainty for public buyers as to how to implement green and social procurement policies to their full potential. With 14 % of EU GDP, there is still a huge untapped potential of what public procurement can achieve by stimulating public

demand for more sustainable goods and services. To this end, public procurement may also contribute to the realisation of other policy objectives of the EU, as set out e.g., by the Social Pillar and the Green Deal.

- It must be borne in mind that a balance needs to be always found between the impact of public procurement upon other EU policies and its main purpose of effectively opening purchases of public entities to EU-wide competition, to ensure the most efficient use of citizens' money, considering that additional requirements (such as green, innovation, social, fair trade, international level playing field) tend to make procurement rules more complex to implement, against a backdrop of declining internal public procurement competitiveness.

If relevant, specific issues on the local and regional level:

The specific issues encountered at local and regional level are:

- The aforementioned issues are most felt at the regional and local levels of government. Small local and regional authorities have by definition limited resources and expertise. They have repeatedly voiced their concerns and highlighted their difficulties in applying public procurement rules in the many consultations that have taken place on this topic since the 2014 Directive entered into force.
- In terms of social and territorial cohesion, it should also be explored how public procurement could contribute to buying locally produced products and services, without prejudice to EU law and treaty principles. At the same time, it is important to recall that public services can always be provided in-house. There is no obligation to source out services, and especially not if private entities are not able to deliver with the same high environmental and social standards as the procuring entity itself would be. For services that require long-term continuity (eldercare or childcare) even the length of contract can be a problem, whatever the content.

[Network of Regional Hubs for EU Policy Implementation Review: Implementation Report First Consultation on Public Procurement \(2019\)](#)

Network of Regional Hubs for EU Policy Implementation Review: Public procurement consultation 2023

Suggestion 1: Simplify and streamline public procurement procedures and clarify definitions and criteria

Description: While the majority of stakeholders consulted in the [2019 RegHub public procurement consultation](#) and the 2023 RegHub public procurement consultation valued the use of strategic criteria, there are concerns due to the lack of resources, technical expertise and overall commitment. Due to legal uncertainty, procuring entities may be hesitant to introduce specific green and social requirements in their tenders. Difficulties include the over-complexity of the legal framework, particularly in the national rules transposing the Directive and the challenges in objectively describing or defining the specific quality aspects which could be made subject to competition and thus have to be objectively quantifiable.

Recommendations:

- Reduce legal uncertainty with regard to strategic procurement through increased use of quality criteria by clarifying their scope - clear guidance on the definition/ use of these criteria reduces the likelihood of errors and legal challenges and may eventually increase the use of some procedures. However, the complexity introduced by any predefined criterion should be clearly set off by its potential added-value;⁶ In this context, the quality criteria could include 'green criteria', or minimum requirements in the technical specifications (in the form of environmental standards, eco-labels). Similarly, 'social criteria', such as the requirement of having a collective agreement, should be further promoted as minimum requirements, taking into account the needs of employers to direct and distribute their work. In some sectors, especially where bidders from third countries with prices near dumping level and with very low social standards are active, the imposition of certain respective social standards should be considered with a view to social aspects and fair competition.
- Streamline procedures for checking whether the tender meets the qualification requirement by simplifying the documents needed to initiate procurement procedures.
- A digital portal where the contracting authorities can consult and verify, directly and autonomously, the regularity of the documents produced by the bidders, without intermediation of the latter.
- Clarify the scope of Green Public Procurement (GPP) – what is meant by "goods, services, and works with a reduced environmental impact." It could, for instance, also include the principle of territorial proximity as a useful criterion, in order to reduce the environmental impact related to certain categories of services, which, by their nature, have a limited cross-border dimension for contracts below the thresholds of the Directives and for which the Commission could provide guidance, may lead to a more efficient spending of public resources. This could help public authorities better

⁶ 2019 RegHub report;

understand what kinds of products and services should be considered for GPP. The Commission should support strategic procurement efforts by Member States (including initiatives based on the already existing EU Ecolabel and voluntary GPP schemes), continuing the policy of developing model green criteria for individual product groups, organising training workshops and sharing good practices. In this respect, it should be noted that the current version of the European Commission's published voluntary 'green criteria' also lacks the 'territorial proximity criterion' in the context of a preference for local suppliers, both with regard to the basic green criteria (taking into account basic environmental characteristics) and to the set of the comprehensive criteria (with taking into account higher levels of environmental characteristics). In order to apply the criterion in a lawful manner, it would be helpful if the relevant European Commission services could provide indicative guidance/clarification.

- Before considering adding further detail to the procurement directive, the alternative solution of building on national initiatives to inform and educate companies and procuring bodies should be considered. This is all more important given the growing number of sectoral initiatives (batteries, energy efficiency, construction materials, etc) that may further complicate procurement; in the absence of national initiatives, interregional exchange formats that promote strategic procurement and provide information and training on its use should be fostered;
- Light-touch regime - provide further explanations for the list of CPV (Common Procurement Vocabulary) codes set out in Annex XIV to the Public Sector Directive and Annex XVII to the Utilities Directive. The current Annexes are inconclusive or too general and require public procurement officers to carry out cross-reference checks against the full CPV code list;⁷
- Promote and further clarify the scope of socially responsible public procurement. The Commission already issued *Buying Social - a guide to taking account of social considerations in public procurement* (2nd edition)⁸ giving a good overview of possibilities brought by social procurement. It should be further explored and explained how “appropriate measures” could be put in place by Member States and contracting authorities to verify compliance with applicable social and labour standards in the award and execution of public contracts, so as to ensure that clarity on this matter is a starting point for any public procurement procedure. On the other hand, as part of more socially responsible procurement practices, the use of socially relevant criteria and requirements should be further promoted so as to empower Member States and procuring entities to go further, introducing more stringent and ambitious social conditions for access to public contracts, notably when it comes to respect for collective bargaining rights and collective agreements. This could also be achieved by the introduction of measures to foster the creation of platforms and networks that bring together all relevant players

⁷ 2019 RegHub report;

⁸ C(2021) 3573 final, <https://ec.europa.eu/docsroom/documents/45767>

(businesses, public authorities, organisations from the social economy and representing disadvantaged groups as people with disabilities, etc.) to identify and promote best practice, peer learning and the transfer of know how.

- Light-touch regime - reduce the arbitrariness of the classification of services and unequal treatment of similar economic activities and equal treatment of different forms of services. Therefore, the option of introducing a separate framework for intellectual services should be explored, provided it includes the necessary procedural guarantees, for instance to allow for design contests.
- MEAT/awarding criteria - while the quality criterion/criteria other than price is/are seen as a positive development, its implementation has been slow and piecemeal. For intellectual services – the result of which cannot be known at the outset and which play a crucial role in addressing major challenges in our society and which therefore cannot be awarded on the sole basis of price – the application of MEAT criteria is essential and should therefore be made mandatory. Furthermore, the managing of technical commissions to evaluate it is perceived as burdensome⁹. A handbook, providing guidance based also on best-practices, for drawing up objective and *measurable* evaluation/award criteria other than price and quality control procedures could be particularly useful for smaller contracting authorities, as they face difficulties in describing complex conditions and additional specifications.¹⁰ Given the importance of quality criteria and in this context also the consideration of the full life cycle costs of a product, the aforementioned handbook could provide more information regarding these aspects which can substantially contribute to purchase better and more sustainable products. What is more, social considerations may be useful indicators of quality services such as, and insofar as relevant, whether the employer has signed a collective agreement, implements dedicated measures to promote equality, subscribes to corporate social responsibility principles, has stable employment, favouring open-ended contracts and life-long learning opportunities, quality apprenticeship schemes and initiatives for people with disabilities and other disadvantaged groups, etc. Moreover, the aforementioned handbook could also provide information and guidance in view of concerns of some stakeholders who feel that the concepts of cost-effectiveness and economically advantageous are too vague and their application could eventually lead to a lower quality of services or to litigation instigated by unsuccessful tenderers¹¹; for the everyday implementation of the New European Bauhaus and Green Deal objectives in the built environment, innovative planning solutions are essential, therefore, optimized tools such as architectural design competitions need to be promoted as a viable legal option and also through the handbook.

⁹ Please note that there is no requirement of an evaluation committee in the Public Procurement Directive and these specifications come from the implementation at the national level;

¹⁰ 2019 RegHub report p. 21;

¹¹ 2019 RegHub report p. 21 – 24;

- The Commission could publish good examples from different Member States related to the application of qualitative criteria for the evaluation of tenders, including specific methodologies with qualitative indicators.

Expected benefits: making it easier and more efficient for public authorities to make full use of the possibilities the 2014 Directives offer to use public procurement as a policy tool.

Suggestion 2: Encourage procurement for innovation

Description: While the goal of innovation procurement is generally supported by procuring authorities, existing instruments such as the innovation partnership are used by only a very small share of them.¹² When the tools could be used and are not, it appears that this is mainly due to a lack of resources (including both staff and training), an increased administrative burden, and legal unclarity regarding criteria and definitions of what is actually meant by “innovative” procurement, which may eventually lead to mistakes and litigation. These inhibiting factors play an even bigger role for small contracting authorities with limited administrative resources. In particular, local and regional authorities are careful in their approach to the new opportunities, especially due to lack of experience in using 'functional' descriptions to their need instead of prescribing the solution to be purchased in the technical specifications.¹³ At the same time, innovation procurement can be an important economic factor in remote or outermost regions, or regions with geographic specificities, such as mountainous regions or islands, which require innovative solutions for specific problems such as rock fall monitoring and relevant protection structures or the provision of drinking water. However, such regions are usually sparsely populated and have only limited access to R, D & I infrastructure and experts. On the side of SMEs, and particular "newcomers"/start-ups, the suitability requirements laid down by the contracting authority are often inhibitive and reduce their access to public tenders. In particular with regard to innovation partnerships, there is a further obstacle due to the fact that many companies consider them problematic due to the disclosure of trade secrets and intellectual property rights although the onus lays predominantly on the correct design of such partnerships.¹⁴

In order to improve the up-take of innovation procurement, it is suggested to:

- Consider under what circumstances higher thresholds could be applied and when more flexibility for public tenders with specific regional interest could be provided;
- Consider under what circumstances the contracting authority could be encouraged when selecting candidates to apply criteria concerning the candidates' capacity to develop and implement innovative solutions, including social innovation and thus social economy;
- Establish a common definition of innovative projects, with guidance, based also on concrete best practices, regarding their evaluation;¹⁵ this definition should be broad

¹² Commission report (2021); 2019 RegHub report; 2023 RegHub public procurement consultation

¹³ 2019 RegHub report p 46-49

¹⁴ 2023 RegHub public procurement consultation

¹⁵ 2019 RegHub report p 48

enough to take into account the variety of possible innovative procurement subject-matters;

- Encourage a further professionalisation of contracting authorities; strengthen the role of regions in encouraging the use of innovation procurement and innovation partnerships¹⁶;
- Provide more targeted training for national, local and regional authorities and develop an ECTS (European Credit Transfer and Accumulation System) accredited education offer which, besides an innovative focus, also seeks to heighten general competences including commercial understanding and sustainable procurement;
- Create an accessible and user-friendly online repository of best practice examples; and build on previous experiences with Interreg-funded projects such as CircPro or Prominent Med to promote innovative and circular procurement among regional authorities in an interregional context¹⁷;
- For the everyday implementation of the New European Bauhaus and Green Deal objectives in the real estate environment, innovative planning solutions are essential. Therefore, optimized tools such as architectural design competitions need to be promoted;

Expected benefits: A common understanding of innovative markets will enable purchasers to use the innovation partnership/innovation procurement more securely, and eventually help increase its up-take.

Suggestion 3: Promoting the requirement "link to the subject matter" at European level to allow for sustainable procurement

Description: Public authorities can include social and environmental criteria in their procurement documents, such as the supplier's commitment to sustainability or to fair labour practices. However, these criteria must be clearly linked to the "subject matter of the contract", and the evaluation of these criteria must be objective and non-discriminatory. Other challenges include the limited resources of the contracting authority's finances, as this is advantageous for lower bids and can thus lead to some rogue bidders cutting corners and not respecting labour legislation, which can be difficult to check. In the Commission's public procurement implementation report of 20 May 2021, Member States reported on some challenges they encountered in the implementation of green public procurement (GPP). One aspect that was highlighted was the lack of legal certainty on the correct interpretation of the requirement for "link to the subject matter of the contract". The 2023 RegHub public procurement consultation further confirms that the often very strict interpretation of the "link to the subject matter of the

¹⁶ 2023 RegHub public procurement consultation;

¹⁷ 2023 RegHub public procurement consultation;

contract" by administrative courts of contract appeals, prevents the inclusion of environmental and social criteria to a large extent.

Different views exist as to how the subject matter link should be understood. These can be narrow and mainly focus on the environmental impact of the product and services that are being procured. Broader interpretations take into account other criteria such as social, economic and functional criteria. These different interpretations can create legal uncertainty, which leads to green and socially responsible procurement not reaching its full potential. For smaller contracting authorities, these challenges are even more pronounced due to a lack of human resources, professionalisation and financial capacity.

It is therefore recommended to produce guidance which clarifies the requirement of the "link to the subject matter" in the Directive in a manner conducive to allowing sustainable public procurement. It is also important that efforts are accompanied by measures to promote adequate training, especially for procurement officers in authorities with limited economic resources.

In order to reduce the ambiguity of the "link to the subject matter", the following is suggested:

- Ask the Commission to clarify how award criteria related to the presence and respect of collective agreements are always to be seen as linked to the subject matter, in particular in labour intensive sectors.

Expected benefits: The objective of the clarification of the requirement of the "link to the subject matter" at the European level would be to put an end to interpretation problems and to considerably increase legal certainty for green and socially responsible public procurement. Thus, it would be easier for contracting authorities to establish the right and unambiguous criteria, allowing them to award contracts to the bidders who best meet environmental and social requirements and buy the most suitable products and services.

Suggestion 4: Explore possibilities to exempt companies created by public sector entities from the scope of public procurement rules in order to promote social and environmental aspects

Description: One way of supporting environmental or societal objectives in public procurement would be to reduce the threshold in the [2014/24 Directive](#). In Art. 12 of the directive an 80% public activity threshold is set to allow in-house contracts to be exempt from the scope of procurement rules. According to the 2023 RegHub public procurement consultation, contracting authorities find it difficult to establish selection criteria, award criteria and specific execution conditions. The lack of know-how, in particular at the local level, further prevents the implementation and guidance documents – from EU or national sources – are often not well-known.

Also, it should be noted, that some Member States are currently considering possibilities of increasing competition, for example by restricting the use of these in-house entities. It is not only a question of an individual agreement to be concluded, but also of how the market has evolved after the agreement period. Therefore, careful analysis will be needed and the

Commission should provide a list of suitable cases for the application of the in-house exemption, in accordance with the applicable legislation. Reducing the threshold mentioned in Art. 12 should not lead to a distortion of competition nor to reduced competition. Member States have different ways of using the opportunities of in-house entities in public procurement and they should be able to implement the procurement directives in the best possible way also in the future, taking into account the internal market and the functioning of the market.

Recommendations:

- Explore the possibilities to ease the criteria for public contracts between entities within the public sector in the context of social integration policies.
- Promote voluntary standards such as the social accountability standard SA 8000:2014 for companies and organisations as standard requirement;¹⁸

Expected benefits: Social integration policies of local or regional governments could benefit from additional resources and public companies could be better involved in implementing these policies. This must not lead to unnecessary weakening competition for publicly funded contracts.

Suggestion 5: Facilitate flexible public procurement in times of crisis

Description: Recent crises such as the Covid-19 pandemic or Russia's war against Ukraine have constituted external shocks that pose new challenges. Disrupted supply chains, rising energy prices, as well as the urgent task of providing adequate accommodation and care for Ukrainian refugees, require fast and efficient procurement procedures. During the Covid-19 crisis, it became evident that there is a need for a clarification or a slight relaxation of the possibility of direct award in the event of serious crises (not only for pandemics, but also for urgent counter-terrorism action for example). It seems that the current conditions are too strict in this regard. Practical experience has shown that, in some cases, it can be impossible to draw up technical specifications and award criteria and call for multiple bids. If these steps are completed, the contracting authority risks that the products/services in question will in the meantime be purchased by another contracting authority, delaying the necessary reaction in emergency situations. At the same time, a minimum of procedural requirements must be kept to ensure technical and professional solvency and accountability, and the verification of results. Furthermore, it should be noted that there are other situations in which urgent action is indispensable, for instance geographically limited emergency situations such as floods or earthquakes. Art. 32, point 2 (c) of the 2014/24 Directive provides for a negotiated procedure without prior publication in situations of extreme urgency.

The 2023 RegHub public procurement consultation shows that the reaction of all levels of government to the crises is largely evaluated positively in retrospective. The respondents point to specific challenges and a need to sustainably learn from the crises, in order to shorten the timespan between the outbreak of and the reaction to a crisis in the future. To this end, public

¹⁸ [SA8000:2014 Standard - SAI \(sa-intl.org\)](https://www.sa-intl.org/)

authorities at all levels need to be involved in dialogue formats promoting the exchange of best practice.

Recommendations:

- Provide a clear definition of what constitutes an *extreme urgency* and at what moment in time it ceases being one. The lack of such guidance risks leading to divergent interpretations and conflicts between those who carry out the purchases and those who control how the purchases are carried out. Member States should be encouraged to timely and explicitly provide guidance to lower-level public authorities; This can be supported by collecting experiences from Member States and publishing a catalogue of examples and good practices;
- Encourage the creation of interregional cross-border task forces, building upon the experiences made during the Covid-19 crisis and existing forums that have resulted thereof. This may be done in conjunction with existing networks such as the Union Civil Protection Knowledge Network¹⁹, but focus specifically on the exchange of best practices in the area of emergency procedures and public procurement;
- In the framework of strategic foresight, encourage the establishment of contingency plans at EU and national level, with due consideration of the regional and local levels, for various crisis scenarios, which build upon thorough analyses of past experiences and the projections of current developments, e.g., linked to the consequences of climate change and natural disasters. Such plans could include emergency procurement plans, or even a possible crisis regulation that would take into account the appropriate guidelines on urgency allocations and thresholds – an increase of value limits, for example, should already be discussed. It could also include more areas for joint procurement and common criteria for action;
- Encourage Member States to evaluate the implementation of public procurement, in particular with a view to contradictions between national and regional provisions. This can help reducing legal complexity and make quicker reactions possible;

Expected benefits: Provide a flexible and streamlined process for procurement in emergency situations, allowing for faster and more efficient procurement procedures to be used in situations where speed is of the essence, while still complying with EU procurement rules. In this context, it is important that exceptions are clear and precise so that regulation does not allow unnecessary exceptions from the obligation to tender, which is the main rule. It should also be noted that various instruments for crisis procurement have recently emerged (e.g. SMEI), and that it is important to make sure that these different emergency instruments are compatible.

¹⁹ [About the Knowledge Network | UCP Knowledge Network: Applied knowledge for action \(europa.eu\)](#)

Suggestion 6: Ensure an efficient and low-burden deployment of the International Procurement Instrument (IPI)

Description: The aim of the IPI is to open up the procurement and concessions market of third countries that restrict access of EU companies. It enables the Commission to investigate cases of alleged restrictions of EU companies in a third country's procurement and concession markets. In parallel, the Commission will hold consultations with that third country on removing the alleged restrictions. However, if the consultations with the third country concerned fail, the Commission can adopt IPI measures such as score adjustment measures or an exclusion from the tender in EU public procurement tenders. Once an IPI measure is imposed, the Member State's contracting authorities or contracting entities have to apply it for contracts above certain thresholds (equal to or above EUR 15 000 000 net of VAT for works and concessions, and equal to or above EUR 5 000 000 net of VAT for goods and services).

Therefore, the implementation of the IPI could potentially increase administrative burdens on local and regional authorities and companies. For example, if the EU were to exclude companies from a particular country that has engaged in discriminatory practices from EU public procurement tenders, local and regional authorities will have to apply the respective IPI measures. This would require certain additional administrative effort. Similarly, economic operators will have to provide the necessary supporting documents to demonstrate they are not impacted by an IPI measure and the successful tenderers will have to comply with additional contractual obligations as provided by in the IPI.

Currently, only a few local and regional authorities and companies are aware of the possible consequences that the implementation of the IPI might have on the procurement markets they participate in and on the requirements, they would have to fulfil in order to comply with the instrument. Given the already complex legal framework and documentation related to public tenders, contracting authorities and economic operators need clear and simple guidance.²⁰

In February 2023 the European Commission has published "Guidelines to facilitate the application of the IPI Regulation by contracting authorities and contracting entities and by economic operators" in form of a Communication of the Commission (OJ 2023/C 64/07). These guidelines contain guidance on the determination of the origin of an economic operator as well as on the determination of the origin of goods and services which can be necessary in cases of an application of the IPI. Furthermore, these guidelines contain guidance regarding the obligations of the successful tenderer in cases in which the IPI is applicable.

Recommendations:

- Contracting authorities may find it difficult to identify the origin of the economic operator, especially in the case of groups, and therefore guidance presenting the most common situations and the documents that can provide relevant information, as well as case studies, is be useful; it should therefore be checked whether the aforementioned

²⁰ 2023 RegHub public procurement consultation;

guidelines of the European Commission provide sufficient information and if more guidance is necessary.

- Provide technical and training support to contracting authorities that do not fall under the exemption clause in Article 7 of the Regulation (list of contacting authorities exempt from the application of the IPI).

Expected benefits: Minimise any negative impacts of the IPI and to provide support to affected public authorities and businesses where possible. Additionally, the long-term benefits of promoting fair trade and creating a level playing field for European companies may ultimately outweigh any short-term administrative burdens.

Suggestion 7: Make the remedies regime more efficient

Description: The remedies regime is composed of a set of rules that aims to ensure effective and timely remedies for economic operators that may have been harmed by breaches of EU public procurement law. This system allows economic operators to challenge procurement decisions made by contracting authorities/entities if they believe that the procurement process was conducted unfairly or unlawfully in front of national public procurement review bodies, independent of contracting authorities/entities. The regime includes minimum time limits for bringing legal challenges to procurement decisions to ensure that remedies are provided in a timely and effective manner and a suspension of the award of contract. A review body can issue interlocutory measures, set aside the unlawful discussion or award damages. The regime also includes strict time limits for bringing legal challenges to procurement decisions to ensure that remedies are provided in a timely and effective manner.

In the [2019 RegHub consultation on public procurement](#) the importance of rebalancing or even replacing the remedies regime was highlighted. The reason for this was a perceived need to reduce the risk of legal challenges for contracting authorities as well as that the threat of legal challenge may lead to risk-averse behaviour such as running more expensive procurement procedures than strictly necessary, or even changing a decision to outsource a service in the first place.

Many respondents to the 2023 RegHub consultation on public procurement have confirmed persisting problems resulting from the current legal framework. According to them, too many economic operators misuse the regime to either delay the contract conclusion and thereby extend their ongoing contracts, or to obtain economic compensation for the cost of the bid. This is partly due to very low national thresholds to launch an appeal. In many cases, even an unjustified appeal leads to precautionary suspensions of the contract process, causes considerable delays and thereby harms the public interest. Different views exist on whether the regime needs to be reviewed or whether additional measures can be taken to re-balance suboptimal outcomes and ineffective tenders. Raising the costs of appeals has been pointed out to be a possible means to decrease their numbers.

On the other hand, a system for effective remedies in public procurement is indispensable in order to safeguard a correct, fair and non-discriminating application of the EU public

procurement rules and to fight corruption in this area. Therefore, widening of the comparatively narrow scope of application of these remedies should be considered, as according to EU law effective remedies in public procurement are applicable only from the very high EU thresholds and a raising of costs for appeals must not impede the use of effective remedies in this sector.

Recommendations:

- Evaluate the effectiveness and efficiency of the Remedies Directives in light of the above evidence. Based on the data gathered, a decision should be taken on a possible review to optimize the regime and/or accompanying measures to help prevent legal challenges and avoid ineffective public tenders;
- When a review is justified, for instance to counter corruptive behaviour, this remedy should be straightforward and cost effective;
- Consider improvements to EU-wide mechanisms for exchange of best practices²¹ on how to expediently deal with litigation. This is particularly important for small contracting authorities at the local and regional level;
- Based on the results of an evaluation, consider revision of the Remedies Directive and investigate possible ways to render the framework more efficient and effective to ensure good functioning of the procurement market.
- As a general principle, the application of the Remedies Directive should be guided by the rule of law, i.e. ensuring that everyone is treated fairly under the legal system, not to protect certain interests over others. When procurement is not done fairly, the public interest is undermined and therefore the emphasis on remedies should be on corrective measures, as opposed to compensating individual companies. In other words, a clearer link is needed between public procurement and good governance, and the rule of law.

Expected benefits: A more efficient remedies regime could lead to faster and more timely resolution of disputes. This could result in smoother and more efficient procurement procedures, which could ultimately save time and money for both contracting authorities and economic operators. It could also help to reduce the burden on contracting authorities by streamlining the complaints and review process. This could free up resources for other important tasks and reduce the workload of procurement officials. In addition, it could increase the attractiveness of public procurement markets by promoting greater legal certainty and reducing the risks of participating in such markets. This could encourage more economic operators, including SMEs, to participate in public procurement tenders, leading to increased competition and better value for money for contracting authorities. Overall, efficient remedies improve the effectiveness, efficiency, and fairness of public procurement, benefiting all parties involved in the procurement process.

²¹ Exchange of experience within the remedies system is already taking place within the Network of the First Instance Review Bodies;

DISSENTING VIEWS

Dissenting view from Christoph Bausch (BusinessEurope)

Rationale for dissenting views on the suggestions:

We appreciate the changes made under suggestion 4 however we are still categorically opposed to the notion. A large part of our comments stem from how the opinion has positioned local and in-house procurement. This is an area where our membership is actively challenging the procuring entities in court cases against improper usage of in-house procurement. A suggestion such as number 4 cannot be accepted in principle, as it fundamentally undermines the level-playing field and the Single Market principles enshrined in the Treaties. We note that the 'Recommendations' and 'Expected Benefits' remain the same.

Regarding our other points of concern these still stand.

We cannot accept the 'problem description'

- On page 6, at the very beginning, we cannot agree with the sentence “*At the same time, as an alternative to public procurement, authorities may always choose to provide public services in house*”. It is a fundamental question of the economic model we are choosing.
- On page 6 too, at the end of the paragraph “*In its handbooks Buying Green...*”, we cannot agree with the last sentence “*Clearly, barely complying with minimum obligations prescribed by law cannot be framed as sustainable procurement*”. It is a question of legal certainty.
- On page 7, in the paragraph “*In terms of social and territorial cohesion...*”, we do not agree with the part “*At the same time, [...], whatever the content*”.
- Moreover, we oppose the “buying locally” approach in the framework of the internal market rules on procurement; references to the principle of territorial proximity appear in other parts of the draft (for example in paragraph “*Clarify the scope...*” on page 8 and 9, what goes against the Treaties. The Platform cannot issue opinions promoting discrimination on the basis of origin within the EU, let alone the procurement regulated at EU level.

ANNEX 1 – HAVE YOUR SAY: SIMPLIFY! SUBMISSIONS



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