



EU Legal Framework in Reform

Talk held at the Symposium

“U.S. and Others meet Europe”

House of Literature Munich

2 July 2014



Overview

- I. EU Procurement Law Reform through Directives
- II. Targets
- III. How to pursue the targets
- IV. Two selected focus areas
 1. Secondary considerations: Strategic use of public procurement
 2. Selection, qualification and exclusion of tenderers
- V. Assessment



Starting point:
The EU and its
member states



Source: BBC



EU law background: Directives

- Article 288(3) TFEU: “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”
- EU law defining goals that need to be achieved, the way to get there lies in the discretion of each member state (implementation)
- Obligation of timely implementation: contents and goals need to be achieved, EU-conform standards need to be established within the time-limit given (here: April 2016)



- In some cases direct effect: deficits or late/no implementation plus sufficiently concrete and absolute provisions with the consequence that colliding national laws are either non-applicable or void
- No justification for missing implementation, neither regard to internal problems in legislation nor because other member states also failed to implement the Directive (properly)
 - Treaty-violation-procedure
 - Liability



I. EU Procurement Law Reform through Directives

- The revised package includes:
 - Directive 2014/24 replacing Public Procurement Directive 2004/18
 - Directive 2014/25 replacing Public Utilities Directive 2004/17
 - New: Directive on Concession Contracts 2014/23



Public Sector Directive 2004/18

- Public service concessions not regulated by the Directive: only European primary law applicable
 - Public works concessions only superficially regulated in Title III (Articles 56 ff.)
- Discussion: procurement law “light” for concessions

New Directive 2014/23

- New Directive on concessions (2014/23)
 - Bringing clarity and legal certainty
 - Concessions awarded due to procurement principles of transparency, equality and competition
 - Remedies Directives modified (scope extended to all concession contracts above the thresholds)



- Not affected are:
 - Directives concerning defense and security (passed in 2009)
 - Directives on judicial review
- Helpful explanations on:
ec.europa.eu/internal_market/publicprocurement



II. Targets

- Targets
 - Simpler and more flexible procurement procedures (procedural efficiency)
 - More legal certainty, especially through (partly alleged) codification of ECJ jurisprudence
 - Possibility to increase use of public procurement as a strategic means to realize political goals
 - Improvement of access of small and medium enterprises (SMEs) to public contracts
 - Improvement of so-called governance



- Strategic environment
 - Ongoing financial crisis and thus increased awareness of the EU Commission for the importance of public procurement law as a means of budgetary policy and of fighting corruption
 - Prevailing framework of primary EU law
- No “big bang”, but a lot of small changes (continuity, clarification, specification): typical for the EU?



III. How to pursue the targets

1. Simplification

- Clarification of the Directive's scope/text
 - Definition of certain key notions revised in the light of the case law of the ECJ
 - E.g.: “in-house” (Article 12); contract changes (Article 72)



Contract changes

Public Sector Directive 2004/18	New Directive 2014/24
<ul style="list-style-type: none">• Directive focused on actions until conclusion of contract → Issue of contract changes easy to overlook• ECJ: possible duty to retender the contract	<ul style="list-style-type: none">• Article 72(5): substantial changes lead to duty to retender• Article 72(1) and (2): exceptions• Article 72(4): criteria for substantiality



- Abolishment of the complex and partly artificial distinction between “priority” and “non-priority” (List A and List B) services
 - Full application to all services
 - But: privileges for social services and other special services according to Annex XIV (among them legal services)
 - Regime “light” (Articles 74 ff.)
- “Tool-Box-Approach”
 - Set of four procurement procedures
 - Six specific techniques and tools for aggregated and more electronic procurement:



- Framework agreements
- Dynamic purchasing systems
- Electronic auctions
- Electronic catalogues
- Central purchasing bodies
- Joint procurement

→ Partly new tools, partly just improved and clarified



- Less bureaucracy
 - Self-declarations as prima-facie evidence on the selection stage
 - Standardized document (“European Single Procurement Document”) as proof for the absence of exclusion grounds (validity for four years)



2. Modernization

- More flexible procedures
 - Widening the scope and conditions for the negotiated procedure and the competitive dialogue
- More flexible time-limits
 - Time-limits for participation and submission of offers
- Less strict differentiation between selection and award criteria



Public Sector Directive 2004/18

- Strict division between selection and award criteria (so-called Lianakis doctrine: selection criteria have to be fulfilled by tenderers, but thereafter play no role for the award)
- Strict order

New Directive 2014/24

- Separation between selection and award criteria (no fusion!)
 - Flexible order
 - Allowed in open procedures: first award and then selection criteria possible (Article 56)
 - Possible to choose quality of staff as award criterion, esp. concerning contracts for intellectual services (Recital 94, Article 67(2)(b))



3. Strategic use of public procurement

- Strategic use of procurement in response to new challenges and the “Europe 2020” goals
- But: no obligations on “what to buy”
- Award criterion life-cycle costs
 - Long-term costs of a product, service or works
 - Covering all costs, even external environmental costs
- Specified under IV.1



4. Better access for SMEs

- Huge potential for job-creation, innovation and growth
 - Unlock this potential via more easy market access
 - Remove barriers
 - Less bureaucracy
- Fostered subcontracting (Article 71)
- Division in lots (Article 46)



5. Sound procedures

- Public procurement as a risk area for favoritism, corruption, conflicts of interest: Exclusion (see below)
 - Additional protection:
 - Specific provisions on how to deal with conflicts of interest (contracting authority);
 - Provisions against unfair advantages for participants who have advertised the contracting authority or who have been involved in the preparation of the procedure



6. Governance

- National oversight bodies
 - Ensuring that member states consistently and systematically monitor the implementation and functioning of the public procurement rules
 - Designate a single national authority in charge of monitoring and control
 - Text concluded contracts to oversight bodies in order to have the texts scrutinized



- Knowledge centers
 - Getting the expertise to deal with complex projects
 - Independent professional support
 - Not necessarily cost factors as costs for installation, fine-tuning or re-organization are neutralized by reduced costs of litigation, costs due to delay and misapplication or bad preparation
- Administrative co-operation between national oversight bodies to share information and best practice
 - Co-operation through “Internal Market Information System” (IMI)



IV. Two selected focus areas

1. Secondary considerations: Strategic use of public procurement

Public Sector Directive 2004/18	New Directive 2014/24
<ul style="list-style-type: none"> • Solely regulated by Article 26 relating to the admissibility of performance criteria: “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications.” • Intense debate on compatibility with the aims of non-discrimination and open market 	<ul style="list-style-type: none"> • Member states shall take appropriate measures to ensure compliance with applicable obligations in the fields of environmental, social and labour law (Article 18(2))



Public Sector Directive 2004/18

New Directive 2014/24

- Compliance can be controlled when choosing participants (Article 57(2)), when verifying exclusion grounds (Article 57(3)) and when dealing with abnormally low tenders (Article 69(2))
- Connection to subject-matter of the contract is necessary
- Esp. with reference to the conditions for performance:
 - Connection to the subject-matter
 - EU primary and secondary law (incl. Posted Workers Directive)



2. Selection, qualification and exclusion of tenderers

- Extension of exclusion grounds (Article 57(1)–(3)), including a violation of obligations referred to in Article 18(2)
- Recovery of reliability through “self-cleaning” (Article 57(6)), including indemnification for contested claims?
- Including debarment?
- Necessity to establish a corruption/procurement register nationwide or EU-wide?



V. Assessment

Positive	Negative
<ul style="list-style-type: none">• More clarity and legal certainty (adoption of ECJ's concepts)• Better access and more tools for the fostering of SMEs• Better possibilities to integrate secondary considerations• Modernization (e-procurement)• More clarity regarding selection and award criteria• Better prevention of favoritism and corruption	<ul style="list-style-type: none">• Not much benefits regarding simplification (more regulation): everything becomes more complicated and sophisticated• Not much flexibility (flexible procedures only in special cases; optional)• Different structures and administrative skills in member states not taken into account



Never forget:

Procurement is not a target of its own –
it shall help to fulfill public tasks successfully and quickly