



## BRIEFING FOR MEMBERS

# KEY POINTS FOR THE TRANSPOSITION OF DIRECTIVE 2014/24/EU ON PUBLIC PROCUREMENT

## Why is this Directive important?

Public procurement is the purchase of goods and services by public authorities from providers selected for that purpose. EU public procurement plays an important part in the development of the single market and the main goal of its regulation is to widen the choice of potential suppliers to public operators.

Economic, social and political developments, together with budgetary constraints in the current context of crisis, motivated the most recent revision of public procurement rules through Directive 2014/24/EU<sup>1</sup>. The aim of the new Directive was thus to establish simpler and more efficient procurement rules, while respecting the principles of transparency and competition between providers. The Directive was voted by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014. The Member States have until April 2016 to transpose the new rules into their national law (except with regard to e-procurement, where the deadline is September 2018).

Public procurement procedures falling under the Directive are estimated to account for EUR 425 billion or, equivalently, 3.4% of EU GDP (2011 figures). However, the actual impact of the Directive is even greater because, while procurement contracts falling outside the scope of the Directive -that is, below its threshold<sup>2</sup>- are to be governed by national rules only, these will have to respect the principles set by EU law as well.

Furthermore, social considerations that are legally acceptable in procurement contracts fully covered by the procurement Directive may also, a fortiori, be included in procurement contracts not affected by the Directive if national authorities decide to do so. For these reasons, all public procurement expenditure in the EU –just below 20% of GDP on purchasing services, works or supplies- is affected to some degree by the rules of the new Directive.

Most importantly, this Directive has a crucial relevance for social services, as it recognises their special characteristics and thus creates a lighter, more flexible regulatory framework for them.

## How can this short guide for transposition be helpful for you?

The overall assessment of the Directive is positive but the text leaves room for interpretation in several key provisions. This is what makes the transposition phase so important, as it needs to ensure that the different opportunities for a procurement regulation favourable to social services providers like diaconal ones are fully incorporated into national legislation.

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<sup>1</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024>

<sup>2</sup> The specificity of social, health and other services provided directly to the person was recognized with a higher threshold of EUR 750.000. Below this limit, contracting authorities have freedom to choose service providers in the way they consider most appropriate (art.4 d).





The goal of this short guide is to offer key messages that support Eurodiaconia members' advocacy work targeted at their respective national governments. Messages concentrate on the above mentioned discretionary provisions contained in the Directive and on which national governments have the last word.

So far, only the UK has transposed the Directive, but more transposition measures are expected by the end of 2015. In fact, the European Commission and Member States are currently working together in order to ensure the timely transposition of the Directives. In particular, the Commission is providing assistance to Member States through the organization of expert groups, bilateral meetings and exchange of best practices in each country<sup>3</sup>. The table in Annex 1 offers an overview of the current state of play of the transposition in EU countries for which information is available.

## Main points to be addressed

### Public authorities' approach towards procurement

Procurement is one among different possibilities to deliver social services. In addition, it is not necessarily the cheapest or the most straightforward way of complying with EU competition rules. Therefore, stable forms of cooperation between public authorities and non-profit providers of public services should still be considered as viable options to ensure long-term relationships that bring more quality and sustainability to services provided<sup>4</sup>. National governments should thus be reminded as a principle that procurement should not constitute, by default, the preferred option to organize social service provision.

### Reserved contracts

Member States have, according to the new Directive, the option to reserve contracts for the provision of health and social services to social enterprises (art 77). However, the Directive's definition of a social enterprise, as detailed in art. 77.2, does not allow a neat distinction between genuine social enterprises and other formats falling under the wider definition of the 'social economy'<sup>5</sup>. During transposition, the defining criteria to be fulfilled by social enterprises with a right to enter reserved competitions should be tightened as much as possible to avoid commercial services interfering in these bidding format. In addition, it would be helpful that Member States clarified that the awarding principles of quality, continuity or accessibility listed in article 76 of the Directive should also –and especially- apply in the case of reserved contracts.

In the same vein, the Directive opens a possibility to establish reserved contracts applying specifically to Work Integration Social Enterprises (WISE). With regard to this '*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 (...) provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers*' (art. 20). Therefore, it is key that Member States embrace this possibility during the transposition period.

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<sup>3</sup> The Internal market and Consumer Protection (IMCO) Committee of the European Parliament held its first scrutiny session on the 2014 public procurement modernisation package on 23 April, 2015. The Commission confirmed that there are no fundamental concerns for the moment. IMCO Members agreed that a regular update on the transposition of the new public procurement Directives is necessary, Notice to members of the IMCO Committee, "Legislative scrutiny time" on the new public procurement Directives, IMCO\_CM(2015)55470, p. 2 available at <http://www.europarl.europa.eu/committees/en/imco/notices-to-members.html>

<sup>4</sup> Recital 114 of the Directive explicitly says that: Member States and public authorities remain free to organise social services 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 that this made according to the principles of publicity, transparency and non-discrimination.

<sup>5</sup> In particular, the Directive requires that profits are reinvested with a view to achieving the objective of the organisation taking part in a reserved contract (art. 77.2 b). This definition would allow private companies performing social services to reinvest their profits freely according to their corporate goals. In view of this, an alternative wording stating the need to reinvest profits on the organization's 'social objective' would make competition fairer to genuine social enterprises.



## Social criteria

The Directive contains a mandatory social provision referred to the need to ensure that operators comply with applicable environmental, social and labour law during the performance of the contract (art. 18.2). Beyond this, transposed legislation should opt for an enabling approach towards social criteria and allow that public authorities further introduce these requirements along the different stages of the procurement procedure.

For instance, public authorities are allowed to require 'social' characteristics as technical specifications whenever these are linked to the subject matter of the contracts and are proportionate to the contract's value and objectives (article 42). Secondly, contracting authorities can also ask for social labels when they deal with contracts looking for specific social characteristics. These labels can be required during the technical specification, award criteria and/or contract performance phases (art. 43). Third, during the awarding phase, the assessment of the 'most economically advantageous tender' may also be carried out through a best price-quality ratio that introduces social criteria in the assessment (art. 67). Finally, additional social considerations may as well be included during the performance of the contract (art. 70).

Therefore, there is wide room for the introduction of social criteria at different points of the procurement procedure well beyond the mandatory requirement of complying with applicable law. It is thus essential that transposition allows social criteria to pour along the different stages of procurement procedures.

## Quality criteria

The quality of social services delivered is of critical importance to make social interventions effective and reach the needs of users facing individual risks. While the Directive contains several references to quality, these are never identified as compulsory elements to be taken into account when awarding tenders.

Notwithstanding this, the Directive recalls that public authorities still have every right to define the quality conditions of services procured in order to pursue their objectives (Recital 7). Furthermore, in order to encourage the quality orientation of public procurement, the Directive also states that Member States should have the right to prohibit or, at least, restrict the use of price only or cost only criteria in their assessment of bids (Recital 90). Article 67 specifically mentions quality as a key dimension to be incorporated into the 'best price-quality ratio' assessment of bids, which is one among several possibilities to identify the 'most economically advantageous tender' when awarding contracts.

To ensure quality standards, contracting authorities are also allowed to request certificates drawn up by independent bodies showing that economic operators comply with certain quality assurance standards including on accessibility for disabled persons (article 62). The importance of quality for services to the person are given special emphasis. In this case, discretion to Member States on how to organize the choice of service providers is justified '(...) [g]iven the importance of the cultural context and the sensitivity of these services'. In particular, the Directive suggests that contracting authorities use the quality criteria set out in the voluntary European Quality Framework for Social Services agreed by the Social Protection Committee<sup>6</sup>.

The quality of staff employed to perform procured services is of special relevance and references to this appear throughout the Directive. However, the text only acknowledges such possibilities as voluntary. In particular, there is an open option to use the qualification, organisation and experience of staff as an award criterion (Recital 94). Secondly, contracting authorities could also impose that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard (art. 58.4).

In the light of these opportunities, Member States should incorporate quality criteria on procured social services and the staff performing them. These are key points to guarantee effective social services with a focus on a positive impact on users.

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<sup>6</sup> SPC/2010/10/8 final, A Voluntary European Quality Framework for Social Services.



## Pricing and alternatives to lowest price

Best value for money does not necessarily mean having to accept the cheapest bid. On the contrary, this concept that is underpinning the Directive should be defined as the optimum combination of whole-life cost and quality to meet users' needs<sup>7</sup>.

The Directive make clear that contracts will be awarded to the supplier that puts out the 'most economically advantageous tender' (MEAT) (art. 66.1). The basis to identify the MEAT will still be price and cost. However, the Directive is still open to widening the assessment of the MEAT towards, for instance, the best price-quality ratio, '*which shall be assessed on the basis of criteria including qualitative, environmental and/or social aspects*' (art. 67.2). This possibility is left to the discretion of the contracting authority.

The same idea is reiterated with specific regard to social services, stating that Member States have a possibility to 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*' (art. 76).

In as much as these criteria are not made compulsory already by the Directive, there is room for public authorities to award social service contracts on a price or cost-only basis. Such narrow approach would only make sense in very specific cases, like highly standardised products where quality is not relevant. As a general rule, transposition should restrict as much as possible this option because, first, it decreases the probability of success of not-for-profit service providers in procurement procedures and, secondly, is clearly detrimental for the quality of the services provided. Eurodiaconia therefore advises that Member States limit as much as possible the use of price criterion only in the transposition of the Directive.

## Exclusion grounds

In a context where the questionable financial running of social services by private companies has sometimes jeopardized its provision, contracting authorities should be able to restrict competition to reliable providers. For such effective discrimination to take place, national legislation could incorporate to some degree, and in addition to the compulsory ones, the discretionary exclusion grounds suggested by the Directive (art. 57.4),

## What can members do?

These are the key messages that you should convey to national authorities to ensure a positive transposition of the Directive:

- **Procurement is only one among different possibilities** to deliver social services. Stable forms of cooperation between public authorities and non-profit providers of public services still have to be considered as valid options by contracting agents.
- Member States must embrace the **option to reserve contracts for the provision of health and social services to social enterprises** (art. 77). However, national legislation should clarify the definition of social enterprises in order to avoid commercial services interfering in this bidding format. National legislation should equally apply the **possibility to reserve contracts to WISE** (art. 20).
- Transposed legislation should allow public authorities **to introduce social criteria at the different stages of the procurement procedure**. In the technical specifications phase, such criteria are acceptable as far as they are linked to the subject matter of the contract and are proportionate to the value and objectives of the tender (art. 42). During the awarding phase, the assessment of the 'most economically advantageous tender' through a best price-quality ratio could constitute a way to introduce social criteria in the assessment (art. 67). Finally, additional social considerations may as well be included during the performance of the contract (art. 70). Social labels could be useful tools to signal compliance with social criteria.

<sup>7</sup> *Buying Social. A guide to taking account of social considerations in public procurement*, European Commission, 2011, p. 19



- National legislation should emphasize that **contracting authorities have every right to define the quality conditions of services** procured. Quality could be incorporated in the best price-quality ratio assessment of bids (art. 67), which is one of the alternatives to identify the 'most economically advantageous tender'.
- The importance of quality for services to the person should be reflected in procurement procedures accordingly. Discretion allowed to Member States should be interpreted as an **opportunity to use the voluntary European Quality Framework for Social Services as a guiding principle to design quality requirements** in this type of services.
- The quality of staff employed to perform procured services is particularly relevant to ensure a qualitable delivery of services. National legislations **should incorporate the qualification, organisation and experience of staff as an award criterion** (recital 94) and enable contracting authorities to impose the necessary experience and human and technical resources as an appropriate quality standard.
- The notion of **best value for money**, which is mainstreamed across the Directive, **should mean that quality and sustainability criteria are integrated, as a rule, into the price assessment of bids**. This approach is especially important with regard to social services and the Directive's suggestion to take into consideration quality aspects in this case (art. 76) must be fully endorsed by national legislation.
- In as much as the adoption of such criteria is voluntary, **there is a risk that transposition gives way to awarding contracts on the basis of price or cost only**. As a general rule, transposed legislation must restrict this option to highly standardised products where quality is not relevant.

## Background information




- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, [here](#).
- Social Services Europe assessment of the Directive, available [here](#).
- Side event on 'Social Economy Enterprises and public procurement: a win-win combination for social inclusion!' at the 2014 European Platform against Poverty and Social Exclusion (EPAP). Read the news [here](#).

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## Annex 1

### State of play of the transposition of Directive 2014/24/EU in the EU and the EEA\*

	Transposition status	Relevant documents
Austria		
Belgium		
Bulgaria		
Croatia		
Cyprus		
Czech Republic		
Denmark	Consultation finished 8 January 2015. Legislation is expected to come into force on 1 October 2015. More information <a href="#">here</a>	
Estonia		
Finland	For a state of play, click <a href="#">here</a> and <a href="#">here</a> .	
France	Consultation period finished 30 Jan 2015. Draft legislation available.	 FR_draft legislation.pdf
Germany	Key points for transposition and draft legislation already available	 DE_key points.pdf  DE_draft legislation.pdf
Greece		
Hungary		
Iceland		
Ireland	Consultation finished 12 December 2014, more information <a href="#">here</a> .	
Italy		



Latvia		
Liechtenstein		
Lithuania		
Luxembourg		
Malta		
Norway		
Netherlands		
Poland		
Portugal		
Romania		
Slovakia		
Slovenia		
Spain	Draft legislation available	 ES_draft legislation.pdf
Sweden		
UK	England, Wales and Northern Ireland	The Public Contracts Regulations (SI 2015/102) came into force on February 26, 2015  UK_pub contract regulations.pdf
	Scotland	Consultation finished 30 April 2015.  Scotland_consultation guide.pdf  Scotland_policy note on consultation

\*The table is not exhaustive and should be considered as a work in progress as the transposition phase among countries advances. Specific information and updates on specific countries is welcome.

Source: own elaboration and Network for Sustainable Development of Public Procurement