4 KEY ELEMENTS FOR THE NEW EU PUBLIC PROCUREMENT FRAMEWORK

REFLECTION PAPERS OF THE NETHERLANDS ON THE REVISION OF THE EU PUBLIC PROCUREMENT DIRECTIVES

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1. SIMPLIFICATION & REDUCING COMPLEXITY

In accordance with President Von der Leyen's Political Guidelines as entrusted to Commissioner Séjourné, we are of the opinion that the revision of the public procurement directives should be guided by the principle of simplification.

Amendments or new rules should only be considered if they make the framework simpler, clearer, lighter and more workable. The revision should eliminate overlap, avoid incongruence with sectoral legislation and preserve existing freedoms, drawing on and in places expanding the flexibilities of Directives 2014/23 and 2014/25. To prevent further fragmentation of the framework, DG GROW must firmly take the lead.

I. Substantial modification

The premise of the current provision for contract modifications is that every modification is deemed substantial, unless it falls within the strict exception criteria of Article 72. It does not provide a distinction between modifications in the performance phase that affect the market and those that do not. The thresholds for non-substantial modifications are unrealistically low (10%/15%). The current provision offers too little flexibility in practice, provides insufficient scope for dynamic developments (for example innovation during long-term software contracts), and causes legal uncertainty regarding the possibility to combine modification grounds. The result is an excessive number of re-tenderings.

Proposal

The following amendments simplify the rules by raising thresholds, broadening grounds for modification, and clarifying applicable provisions, thereby making the provision easier to apply in practice for contracting authorities.

1. Allow modifications, provided they do not lead to discrimination or unjustified distortions of competition.
2. Explicitly allow the combination of modification grounds.
3. Remove the threshold values in article 72, paragraph 2 point i.
4. Increase the percentage to 20% for services and supplies, and 25% for works in article 72, paragraph 2 point ii.
5. Introduce a clearer distinction between modifications in the tendering phase and contractual modifications during the performance phase.
    a. For works, establish a specific, more flexible regime that allows for adjustments during performance, e.g. in case of innovation, sustainability improvements, emergencies, and technological developments. This regime should also facilitate the conclusion of bridging agreements in the context of long-term and complex works or interventions in existing infrastructure.
    b. Broaden the scope for option and review clauses, at least to explicitly include room for modifications resulting from economic shocks (e.g. inflation, shortages of raw materials), geopolitical changes (e.g. sanctions and trade restrictions), and technological progress (e.g. new AI and cybersecurity requirements).
6. Ensure alignment with established practice in IT and infrastructure contracts.

II. Framework agreements

The directive provides insufficient clarity on the scope of framework agreements and the room for adjustment in unforeseen circumstances, as there is little clarity on how exceptions should be applied, especially in sectors with long-term investments. Furthermore, the standard maximum duration of four years is too restrictive. Additionally, the requirement for fully predictable revision clauses is often unfeasible in practice, particularly for complex works, supplies or services. This results in a lack of legal certainty and makes the instrument less workable.

Proposal

These amendments simplify the rules, reduce administrative burdens and enhance practicability by explicitly defining the limits and conditions for framework agreements directly in the directive and expanding these in places.

1. Explicitly define the limits and conditions for framework agreements, rather than referring solely to case law.

2. The standard maximum duration should be extended by at least two years (and longer for works in specific domains like infrastructure), while retaining the option for further extension in duly justified exceptional cases.
3. Create room for responsible adaptability in unforeseen circumstances, while safeguarding legal certainty, equal access and SME protection.
4. Broaden the scope of application of option and revision clauses.

III. Remedies and rectification

The directive contains no explicit provision on remedies or rectification. The scope for these is dependent on jurisprudence in individual cases, making it legally unpredictable. As a consequence, this scope is often interpreted too strictly, often leading to unnecessary exclusions or re-tendering. Moreover, the boundary between permissible clarification and substantial modification is unclear, resulting in legal uncertainty and undue restraint on the part of contracting authorities.

Proposal

These new rules simplify public procurement procedures by merging previously scattered legal principles and case law into clear, accessible provisions within the directive.

1. Include an explicit provision allowing rectification, provided that equality, transparency, and the avoidance of distortion of competition are safeguarded.
2. Make a distinction between rectification by economic operators and rectification by contracting authorities, with greater opportunities for rectification by economic operators, so that errors without material impact can be corrected in a proportionate manner.

IV. European Single Procurement Document

The European Single Procurement Document (ESPD) was introduced to reduce the administrative burden and complexity for practitioners, but in practice it fails to meet these expectations. Both contracting authorities and sellers often struggle to correctly fill out the form, leading to increased workload and the risk of exclusion due to minor administrative errors. The underlying problem lies in the ESPD's outdated design based on an analogue mindset, requiring manual input and uploads of scanned documents and pdfs which are also not in line with the "only-once" principle.

Proposal

The following proposals lower administrative burdens, lower complexity and increase legal certainty by leveraging digitalisation.

1. Radically simplify the ESPD by reducing it to a single core field ("do you comply: yes/no"), with the digital signature covering the entire tender.
2. The ESPD should be backed by real-time digital verification. Tools like the digital wallet can be used to store evidence and reuse them across tenders.
3. Special attention should be paid to cross-border procurement as contracting authorities should be able to verify the suitability of foreign suppliers. This requires an EU approach to promote interoperability standards for national wallets or procurement platforms to enable access for contracting authorities across the EU.

V. Agreements between entities within the public sector

An agreement between contracting authorities automatically qualifies as a public contract, unless the strict conditions of Article 12 are met. This leads to juridification of inter-administrative cooperation, disproportionate procurement obligations, and obstacles for cooperation between unequal partners, for example, when smaller municipalities are involved that only provide money or administrative involvement.

Proposal

These amendments simplify the rules by clearly anchoring cooperation between contracting authorities outside the public procurement obligation, surrounded by clear safeguards.

1. Amend the directive so that cooperation between contracting authorities falls outside the procurement obligation where the public character is safeguarded.
2. Asymmetric cooperation should be possible, including financial contributions or administrative involvement.
3. Ensure clear safeguards: transparency, joint influence over strategic decisions, and contractual anchoring to prevent misuse aimed at circumventing competition.

VI. Determination if a procurement obligation exists

It is in some instances not clear whether a contract falls within the scope of the directives and whether an exclusion for the procurement obligation applies. The directive does not provide a systematic framework for assessing whether a procurement obligation exists, leaving contracting authorities to assess for themselves whether agreements such as subsidies, partnerships, concessions or in-house arrangements fall within the scope. This legal uncertainty creates divergent interpretations. As a consequence, contracting authorities often interpret the rules too strictly and interpretation is ultimately left to the courts[1]. This hinders cooperation and innovation and adds to administrative burdens.

Proposal

Contracting authorities should have a more predictable and systematic framework. This improves workability, reduces legal uncertainty and prevents disproportionate risk-avoidance.
Codify and streamline the rules on contracts within the scope of the directives and exclusions.

VII. Make it easier to set standards on green, social and innovative procurement

The public procurement rules on environmental, social and labor provisions are premised on minimum requirements in the European Union and/or Member States, but do not explicitly state or clarify to which extent contracting authorities can go beyond these minimum requirements. Although is it possible to go beyond these requirements from a legal point of view, in practice contracting authorities are reluctant to do so due to the disproportional extra administrative burdens to justify. Furthermore, it is not always clear for contracting authorities whether going beyond these requirements, especially for social and labor issues, are in line with the internal market and the public procurement rules.

Proposal

1. Explicitly state in the public procurement rules that contracting authorities can go beyond the minimum requirements on environmental, social and labor provisions, without harming the internal market
2. Give guidance for contracting authorities to which extent they can go beyond minimum requirements in procurement, especially on social and labor provisions.

[1] For example C-107/98 Teckel, C-553/15 Undis Serviczi, C-399/14 Tirkkonen and C-700/17 Azienda Sanitaria Locale di Lecce

2. EU PREFERENCE FRAMEWORK

As Europe appears to become more vulnerable due to the geopolitical changes, it is desirable to strengthen resilience by opting for a EU preference principle in specific strategic sectors. In particular, in markets where the government is a launching customer in the market, it strengthens the demand side and, as a result, production can be (further) developed and/or maintained in the EU. This makes us more resilient to changing geopolitical relationships and thus avoids major impacts on our society.

However, competition from outside the EU is needed for innovation. If incentives for R&D and efficiency are weakened in the market where only European companies operate, it will create a risk that the quality of tenders will decrease and prices increase. In addition, EU companies cannot always absorb the demand in every emerging sector. Commitment to European production also means more reliance on scarcity, such as space, money and labour. This may lead to a situation where there are insufficient resources to pursue other public interests.

Therefore, an EU preference principle for strategic sectors and technologies should be used with caution, which requires careful consideration of the costs and benefits of each sector.[2] In principle, the instrument should only be used to strengthen the resilience of the Union and, where less intrusive measures are insufficient, to stimulate strategic new markets. Its application should be temporary, efficient and proportionate.

Access for like-minded trading partners should not be unduly hampered. Compliance with the EU's international legal obligations is an important criterion in this respect.[3] In addition, a structural reform of public procurement rules and accompanying policies to remove barriers to scale-up are essential prerequisites for the use of this instrument.

This is why we propose the following policy recommendations when using an EU preference principle in public procurement:

Focus on structural reforms in the revision of public procurement rules in all sectors.
The application of an EU preference principle could also be linked to greater harmonisation of public procurement rules between Member States, for example by setting up procurement processes more quickly and efficiently. In this way, European businesses can benefit from a better functioning internal market. This is in principle separate and desirable in any case, but it may be considered in a comprehensive way, where our commitment to putting more emphasis on this issue could be taken into account.

Use the EU preference principle with restraint and only in strategic sectors that increase our resilience or with the objective of increasing security.
Make a distinction between three objectives: economic and national security, sustainability and earning capacity. Where strengthening the security of supply and/or localisation of a sector is necessary for the protection of security interests, a preference principle can serve as targeted support and is legally more sustainable. Take into account alternatives such as demand subsidies and/or standardisation, which may be more efficient in certain cases. In addition, compliance with the EU's international obligations based on World Trade Organisation (WTO) agreements and bilateral trade agreements is an important pre-condition.

Use the power of the government as a launching customer in public procurement for certain strategic sectors and technologies, but do not steer directly on location.
Public authorities can stimulate and guide innovation by acting as launching customers. Public procurement is a tool to scale up new products and technologies, create certainty and confidence for investors, strengthen competitiveness and accelerate transitions. Such intervention can increase economies of scale and certainty for investors in (digital and green) technologies and industries. However, steering the location is not always the right tool, but it can contribute to strengthening European market positions in strategic sectors and technologies. The expected effectiveness of an EU preference principle depends on the extent to which the strategic sector or technology concerned is effectively hampered by competition from non-EU parties' participation in

[2] Where benefits and costs are not only monetised but also evaluated qualitatively, for example, a contribution to sustainability.
[3] In addition to WTO compliance, also for example the European Climate Law and the Paris Agreement.

public procurement procedures. On the contrary, the sector or technology in question may face competition from cheaper, less sustainable European alternatives, making an EU preference principle ineffective. For (green) demand creation and innovation, instruments such as targeted public demand with qualitative (sustainability) criteria (socially responsible procurement) or demand subsidies for new technologies/product criteria should therefore be preferred. Indeed, an EU preference principle can harm competitiveness by crowding out other businesses from labour market constraints, higher procurement costs and/or lower quality.

Use a preference principle in combination with other incentives (policy mix).
In many sectors, barriers to scaling up are currently being experienced due to peripheral problems, such as labour market constraints, lengthy permitting pathways or funding opportunities. In that context, only demand shifts will be ineffective. There is therefore also a need to reflect on absorption capacity and how to increase it, as is currently the case in the defence industry. Such a principle could also be useful within a policy mix in which the public authorities already commit resources to build future activities within the EU and use the instrument as a last resort.

Wherever possible, it should be ensured that access for like-minded trading partners to EU procurement procedures is not unduly hampered.
Excluding companies from like-minded countries or restricting their access to the EU procurement market is generally not necessary to reduce risky strategic dependencies and may entail high costs and loss of knowledge, efficiency, innovation and competition. In addition, an EU prefernce principle could put pressure on economic relations with non-EU countries and trigger possible counter-reactions that hinder European companies' access to non-EU markets. Such measures are detrimental to the earning capacity of European companies. Completely excluding non-EU trading partners, European companies may have less access to foreign procurement markets. Cooperation with like-minded countries is therefore preferable to a strictly European preferred principle. In doing so, the EU must take into account its international obligations (WTO GPA, bilateral agreements). An intermediate option is to keep the European public procurement market open, but apply a limited preferred principle similar to the NZIA.

3. MITIGATING RISKS FOR NATIONAL SECURITY

It is of the utmost importance to mitigate risks for national security and vital interests that could occur in non-defense public procurement. Public buyers are in need of simple and easy to apply public procurement legislation to mitigate these risks in non-defense public procurement procedures accordingly. However, the current procurement directives require too complex and burdensome justification for the application of measures or use of exclusion grounds and do not meet this need for simplicity for public buyers. Therefore, we propose several ideas on how to improve the current directives. These changes should enhance the toolkit of contracting authorities, while ensuring the functioning of the internal market.

I. Add an exclusion ground to the public procurement directives

It is not always possible to exclude economic operators based on security concerns in the procurement directives. The defense and security procurement directive contains an exclusion ground which enables a contracting authority to exclude a economic operators if it has been found that the economic operators does not possess the reliability necessary to exclude risks to the security of the Member State. Such an exclusion ground does not exist within the directives.

Proposal:
The exclusion ground in article 39 (2) (e) of Directive 2009/81 should be added to the public procurement directives.

II. Increase possibilities for contracting authorities to control the use of certain goods or services by contractors or subcontractors

The exclusion, selection and contract award criteria focus on the entity of the economic operators and subcontractors, but not on the goods and services used by economic operators and subcontractors. This limits the ability of contracting authorities to prevent risks for security in the supply chain as risks for national security could be present with the goods/services used by the economic operators or subcontractors. This applies both to the procurement and contract phase.

Proposal:
Introduce or reinforce possibilities in the public procurement directives, e.g. exclusion grounds or criteria, to control the use of subcontractors, or the use of certain goods and services by the economic operators or subcontractor. For instance by allowing contracting authorities to impose an upper limit of the value of the contract to be performed by subcontractors, if security concerns justify this limit, or by introducing provisions regarding requirements for security of information, as in Directive 2009/81/EC.

III. Criteria on security are generally linked to the subject-matter of the public contract

Contracting authorities are expected to set up selection criteria which relate to suitability, economic and financial standing and technical and professional ability, which are sufficiently linked to the subject-matter. There is generally no instance where it would be permissible for public procurement to introduce risks for national security or vital interests. To make the public procurement legislation more effective, it should be made possible in the public procurement directives that a contracting authority can set criteria and requirements that reduce risks for (national) security and protecting vital interest.

Proposal:
Make a provision in the public procurement directives that explicitly states that contracting authorities can set selection based on risks for (national) security and protecting vital interest.

IV. Guidance and central coordination of directives

Contracting authorities are in need of clear guidance on the scope and the substance of Directive 2009/81/EC for non-military goods and services. We ask the European Commission to provide further guidance. Not only would this aid contracting authorities in their procurement processes, this will also prevent differing views between Member States. The aim of this guidance should be to make it more simple and easy for contracting authorities to apply the directives.

Proposal:
Give guidance on scope and substance of directive 2009/81/EC for non-military goods and services.

4. DIGITALISATION & MONITORING

The upcoming revision of the EU Public Procurement Directives provides us with an opportunity to embed procurement data and information as a public interest and strategic resource requiring secure and sovereign management in a shifting geopolitical landscape. At the same time, with the advent of new technologies, the directive should harness technology and integrate digital tools and data for more transparent, effective, efficient, and accessible public procurement. Article 22 of the 2014/24 Directive should radiate digital first – streamlining and optimising the procurement process by leveraging automation, data analytics and other tools to strengthen competitiveness and resilience in the EU single market.

I. Legal anchoring of procurement data: new data chapter

High-quality public procurement data is a strategic lever for competitiveness, innovation and ensures transparent and efficient public spending. However, there are problems with data quality that hinders effective monitoring. With shifting geopolitical dynamics, stronger safeguards for data control are needed. Sensitive tender data (documents) stored on commercial platforms (outside the European Union) may face shifting international policies and regulations. A dedicated data chapter should secure and govern the importance of procurement data as a strategic resource.

Proposal:

1. Add a data chapter to the directive, recognising public procurement documents (incl. confidential information submitted in tenders) and data in all procurement stages as a *public interest*, essential for transparency, accountability and efficiency in public spending and strategic decision-making.
2. The chapter should recognise that procurement data is a *strategic resource* requiring secure and sovereign management within the European Union and ensure that procurement platforms remain secure, autonomous, and aligned with European data governance and standards.

II. Rethink data collection and transition to automated data retrieval

Various tools from eForms to eCertis have an outdate design based on an analogue mindset, requiring manual input or uploads. This is burdensome and not in line with the only-once principle.

Proposal:

1. Encourage and facilitate automated data collection. For example, to improve eCertis' usefulness, it should be interoperable with public services and sources to provide real-time information on evidence requested across the EU. The approach to eCertis should be reassessed to ensure its functionality *in* the procurement process instead of a tool that is outside the procurement process.
2. Mandate an EU-wide interoperability framework for cross-border procurement the Commission, enabling API-based, GDPR-compliant data exchange between procurement platforms and national registers. When using European standards for interoperability in cross-border procurement networks and standards like PEPPOL should be interoperable with alternative networks to avoid dependency on one network.
3. For reporting the focus should not only be eForms, rather the starting point should be automatic reporting and the re-use of current monitoring fields. Inspiration should be taken from ViDA (real-time automatic reporting on VAT) and the Digital Product Passport (structured, verified data on a product's entire life cycle).[4]

III. Monitoring and coherence

One of the conclusions of the Coherence studies is that there is an incoherence in monitoring obligations in sectoral files. Additionally, increasing monitoring requirements, driven by manual input, add to the administrative burden. Furthermore, currently the changes to eForms also lack a broad approach on how to deal with changes overall. The advisory procedure is used for changes to eForms[5] in which Member States have little power to influence significant changes.

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[4] Under Article 13 of the Ecodesign for Sustainable Products Regulation (ESPR), the Commission will establish and maintain an EU Product Passport Registry to centralise valid data carriers and unique product identifiers (UPIs), and environmental and technical data from Digital Product Passports (DPPs).

[5] Art. 51(1) Directive 2014/24/EU jo art. 4 and 5 of Regulation EU 182/2011. Article 51(1) requires that notices under Art. 48-50 shall include the information set out in Annex V in the format of standard forms. These forms, incl. corrigenda are adopted by the Commission through implementing acts, using the advisory procedure under Article 89(2). Regulation (EU) No 182/2011

Proposal:

1. Streamline current sectoral files and see where new developments like the DPP can be included.
2. Introduce a governance mechanism to ensure procurement-related provisions in sectoral legislation are reviewed by DG GROW, national experts and data experts early in the process.
3. Develop an EU decision-making framework to define when reporting is needed (balancing various interests i.e., administrative burden, benefits, costs) what data is collected, and how quality is ensured, and provide guidelines to ensure a coherent approach to data.
4. For changes to eForms the new directive should include procedural rules on planned changes to eForms to reflect considerations (i.e., costs, administrative burden, proportionality, benefits, alternative data sources) that need to be taken into account in the implementing regulation. Inspiration can be drawn from article 83(5) of the Construction Products Regulation, which introduces a structural impact assessment before making technical or data-related changes. Also, the directives should include the switch to the examination procedure for stronger oversight and accountability. This ensures that technical changes to eForms are only made after approval from Member States.

IV. Future proof directives: new technologies

Current directives prescribe tools (e.g. ESPD) that may be outdated due to new technologies. Furthermore, the use of AI can lead to less differentiation on seller and purchaser side. When suppliers use AI (i.e., standard language, reduced authenticity, overstated capability) to draft tenders, it may be difficult for purchasers to determine supplier's suitability and unique value. The current CPV codes[6] stem from 2007 and contain outdated language. Choosing the wrong CPV code is a common problem and can lead to missed opportunities and incorrect bids.

Proposal:

The new directives should be adaptive to new technologies through technology neutral and principle-based requirements rather than prescribing tools.

1. Details concerning technical solutions and processes should be placed in implementing regulations rather than at the directive level.
2. With AI, more contact and dialogue between parties needs to be facilitated in the procurement process. Current procedures, such as the competitive dialogue or competitive procedure with negotiation, could be leveraged to encourage negotiations to ensure supply and demand meet and expectations can be managed. These procedures are not used frequently because of interpretation issues. Simplify these procedures by, amongst others, removing the word 'complex' and provide clear guidance on the use in the recital. Other procedures should be assessed accordingly to foster dialogues between parties.
3. Update the current CPV codes to reflect current procurement practices.

V. Access to procurement: regulation of commercial platform providers

Commercial tender platforms often restrict access to procurement notices and documents. Despite the legal requirements in Art. 53 and Recital 57 of the 2014/24 EC Directive mandating free access, private systems require registration and subscriptions (to view tenders and place bids).[7]

Proposal

To remedy the issues of open access to public procurement:

1. Extend the obligation under Article 53 of open access to commercial providers.
2. Clarify recital 57 by what 'open', 'full', 'direct access', 'free of charge', 'tendering platform' means. Also, it should be clarified that supplies should be able to access the platform to view the procurement documents and to place a bid using multiple accounts or identities within the same organisation, without facing unnecessary barriers (i.e., paywalls, technical barriers, administrative barriers).
3. Clarify and prohibit subscription-only-access and underly that contract award notices should be fully accessible.

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governs how Member States control the Commission implementing powers. Article 4 and 5 define two procedures: in the advisory procedures the Commission is not bound by the opinion of a committee of national experts, in the examination procedure it is.

[6] Regulation (EC) No. 213/2008.

[7] Example of subscriptions modules in Mercell: Module Business Plus offers access to procurement documents for EUR 295 per month.