

Efficient and professional public procurement

New EU rules on public procurement were adopted in 2014 – why do we need a new initiative now?

The EU is making an unprecedented effort to stimulate the economy and unlock investment, in particular via the [Investment Plan for Europe](#), a positive fiscal stance in the European Semester and with expansionary monetary policy by the European Central Bank.

These policies need to be underpinned by structural change to foster innovation and growth. It is therefore crucial to focus on improving the functioning of the Single Market and the removal of barriers to investment, at the national and European level.

A substantial part of public investment in our economy is spent through public procurement: €2 trillion yearly representing 14% of EU GDP. Ensuring that this taxpayer money is spent efficiently and effectively is of common European interest.

[EU public procurement legislation](#) requires all public contracts above a certain threshold to be put out for tender respecting the principles of transparency, equal treatment and non-discrimination. These [rules were further simplified in 2014](#) (Directives [2014/23/EC](#), [2014/24/EC](#) and [2014/25/EC](#)), giving public authorities the power to use public procurement to achieve environmental, societal or innovative objectives when buying goods and services. But so far these new opportunities have not been fully used.

With the [initiative presented on 3 October 2017](#), the Commission aims to help public authorities understand and take full advantage of the possibilities of public procurement, might it be funded by the EU or not.

Why should award decisions factor in innovative, green and social criteria and not just the cost?

Value for money is very important when public money is being spent, but the lowest price does not always guarantee the best value. When governments are faced with budget constraints on one side and the need to overcome global challenges on the other, they have to spend public money in a more efficient, sustainable and strategic manner.

Currently applicable public procurement rules reflect the challenges we are facing, such as climate change or social exclusion, and equip public buyers with tools to address them. They allow them to take multiple game-changer factors into account when awarding public contracts, not just the price. For example, insistence on energy-efficient street lighting systems can create a critical mass in demand, bringing down prices and paving the way for the elimination of less efficient incandescent lightbulbs.

Why do we need more competition in public procurement, and how will this initiative help?

Competition helps ensure that taxpayer money is well spent. Competition is increased by applying the principles of EU public procurement legislation – transparent publication of tenders, equal treatment of all bidders and non-discrimination in the assessment of offers. Greater awareness and application of the rules, together with increased use of digital technology to manage procurement will ensure that more procurement is put out to competitive tender, opportunities are more widely publicised and procurement is in the end more cost-efficient.

Collusion in public procurement markets may add up to 20% to the price that would be paid in competitive markets^[1]. That is 20% of taxpayer money that could be spent elsewhere.

But saving money on particular purchases is far from being the whole story for improved public procurement. Progress can also be achieved by procuring higher quality, more resource-efficient or innovative products and services bringing accompanying benefits to citizens.

Does the Commission only want to improve national tenders or foster more pan-European awards?

The Commission wants to improve the conditions for both. Currently, the proportion of public procurement contracts awarded to a bidder from another Member State is low. A recent [Commission study](#) showed that direct cross-border procurement accounted for 3.5% of the total value of contracts during 2009-2015, while indirect cross-border procurement (through their foreign subsidiaries) accounted for above 20%. This means lost opportunities, especially for SMEs, and it means taxpayers are not getting value for money and not getting the best public goods and services.

EU rules also make it easier for contracting authorities from different EU countries to jointly organise their procurement procedures. When public buyers join forces, they can improve the way they purchase goods and services, attract more offers, open new possibilities for innovative procurement and also save money. The Commission will continue promoting the benefits of cooperation and helping national authorities to set up their own system of cooperative procurement. It will focus on exchanging good practices, sharing experiences and explaining how the new tools (e.g. the joint cross-border procurement) work in practice. The Commission stands ready to explain the benefits of cooperation to municipalities and central purchasing bodies, especially in policy areas, such as IT, mobility, sustainable construction or healthcare which have the greatest potential for savings or innovation.

What's in it for SMEs?

When it comes to SMEs, the 2014 framework already makes it easier for small businesses to bid for public tenders. The Commission will continue to work on improving SMEs' access to public procurement markets in the EU and abroad.

The actions outlined in the strategy (professionalisation, digitisation, strategic procurement), together with transparent publication of contract opportunities and awareness raising activities will increase the interest of SMEs to take part in public procurement.

In what respect do public buyers lack the necessary professional skills, and what improvements are needed?

Procurement requires expertise, especially in the procurement of innovation solutions. However, many public buyers still do not have the necessary business skills, technical knowledge or procedural understanding. This can lead to a lack of compliance with rules and has negative consequences for both businesses and taxpayers. Tackling the resulting inefficiencies is essential – the cost saving potential is estimated at billions of euros every year.

In the context of the so-called “European semester” the Commission has formulated [country-specific recommendations](#) in the area. The new guidance encourages EU countries to take steps to make sure buyers have the right skill, knowledge and high level of integrity. The Commission will facilitate the exchange of good practices and innovative approaches. Specifically for those procurers in charge of large infrastructure projects, the ex-ante notification system and help desk for large infrastructure projects will contribute to their effort. To this end, the Commission will:

- **raise awareness** of the need for professionalisation in all Member States, facilitate exchange of best practices at EU level and launch a European Competence Framework for procurement listing the necessary competences and skills,
- **provide guidance on strategic aspects** (e.g. moving from lowest price criteria to use qualitative criteria such ‘best price quality ratio’, uptake of innovation, green and social procurement criteria) through e-competence center ,guidance, e-library of good practice and targeted training schemes.
- **monitor closely the progress** made in this area.

What are you doing to improve access to third country markets?

The European Union stands for free and progressive trade and for an inclusive and rules based globalisation process. Reciprocity in access to procurement markets is a key element of the several trade and investment negotiations in which the EU is currently engaged with the aim of opening up new markets for EU investors and thus ensuring a level-playing field.

The EU is constantly working to improve access for companies to third countries’ procurement markets by negotiating ambitious agreements on procurement and by encouraging new parties to join the multilateral [WTO Agreement on government procurement](#). In addition, the Commission promotes the adoption of international standards and regulatory convergence.

Finally, in January 2016 the Commission tabled a revised [proposal for an International Procurement Instrument](#) which aims at opening up procurement

markets of third countries for EU companies. There is an urgent need to unlock the current stalemate in the Council with regard to this instrument.

How will you increase transparency of public procurement? Are you addressing corruption?

Improving openness and transparency of public procurement is one of the main aims of the 2014 legislation on public procurement. The directives provide Member States with tools to fight corruption and malpractice such as stronger provisions on the detection, prevention and tackling of conflicts of interest; or the extension of exclusion grounds in respect of bidders. Enforcing these measures is a responsibility of Member States. Moreover, the introduction of mandatory e-Procurement by 2018 should substantially contribute to increased transparency. The Commission will work on raising awareness of the new possibilities at all levels of government.

Transparency of public procurement can also be ensured by better publication of existing and new procurement data. It is crucial that citizens are able to see who is buying what, how, and for how much. Furthermore, data on procurement can also be used to fight collusion as well as identify possible cases of misconduct. The Commission is strongly promoting the establishment of publicly accessible contract registers to provide transparency on procurement.

In addition, in order to improve transparency in public procurement for EU-funded projects, the European Commission and the NGO Transparency International are currently promoting the use of [Integrity Pacts](#). They are legally-binding agreements under which independent third parties oversee the public procurement process to ensure that it is carried out in a fair and transparent manner.

If contracts are not awarded to the lowest bid, how do you make sure procurement is not manipulated?

The assessment criteria have to be clearly defined, justifiable in the context of the procurement and applicable to the service, product or works procured. This allows authorities to support innovation or address environmental challenges but they must have the right skills and knowledge to handle more complex procedures.

The weighting of factors must in fact be transparent, objective and non-discriminatory and authorities must be able to justify the collateral benefits they expect to see when other criteria are met. For example, tenderers for a cleaning contract might be asked to submit a mobility plan for the workforce. Such a plan could be taken into account in the award of the contract. This requires that Member States develop ambitious and effective professionalisation strategies so that public procurement procedures are performed in accordance with the highest standards.

It also requires effective ex-post controls to ensure the integrity of the process. When economic operators believe a procurement procedure has been run without proper application of the EU Public Procurement Directives, they have

the possibility of seeking rapid and effective redress.

How will the ex-ante assessment help manage large scale projects more efficiently? Will it help reduce delays and budget overruns?

Public authorities will have the option to use the mechanism on a voluntary basis to raise questions with the Commission and receive an assessment of a project's compatibility with the EU public procurement legislation before taking important steps, e.g. launching a call for tender for the main project works, signing an international agreement or deciding to use a negotiated procedure without prior publication. This saves time and avoids potentially costly mistakes. While there are many factors that can cause a project to overrun, the ex-ante assessment helps to greatly reduce the risk of legal challenges or costs resulting from poor choice of procedures.

Having access to a mechanism which allows clarifying public procurement issues is expected to give confidence both to public investors to go ahead with the plan, and, equally important, to private investors to join in the realisation of the projects.

The Commission will set up a helpdesk that can answer specific questions at an early stage related to projects with an estimated value over €250 million.

For projects with a total estimated value above €500 million, once the relevant authorities or entities have advanced with the preparation of the necessary tender documentation, they can ask the Commission to check the complete procurement plan for compatibility with the EU procurement legislation. It is also foreseen that Member States can submit projects considered to be of "high importance", according to some criteria, below €500 million.

In addition, a Member State can request the Commission to use the mechanism for any lower value infrastructure projects it considers to be of high importance for itself and/or the EU as a whole, for instance, for [projects of common interest](#) (PCI) in the field of the Trans-European Networks.

The proposed mechanism can help clarify issues such as:

- the applicable EU legal framework governing the project: classic procurement or utilities directives; concessions directive, etc.
- conditions for exclusions from the directives;
- procurement procedures to be used and their specific features;
- selection and award criteria;
- how to implement joint cross-border procurement under Article 39 of Directive 2014/24/EU.

It will supplement, not replace, the existing national mechanisms for ex-ante checks or support. Member State authorities are responsible for the national dimension of public procurement, and any project will have to respect national laws.

The mechanism is intended for all types of infrastructure projects, in particular the transport and energy sectors, ICT and non-residential

construction. The mechanism is voluntary, the Commission's services' advice is non-binding, and information will be handled subject to strict confidentiality requirements.

Won't the assessment mechanism for infrastructure projects just delay the building of projects that Europe badly needs?

Quite the contrary. Presently, too much time is already spent in finding out whether a large scale investment project conforms or not to the procurement rules. Under the proposed mechanism, the Commission will deliver its opinion within a timeframe which should not generally exceed three months following the notification of the project. It will provide much increased certainty for the actors in a limited amount of time.

What is "innovative procurement" and what are you proposing to encourage it?

Innovative procurement or public procurement of innovation refers to:

- **driving the process of innovation:** public buyers obtain products, services or processes which do not yet exist by partnering with innovative businesses to deliver a custom made solution; and/or
- **buying the outcomes of innovation:** instead of renewing or replicating existing contracts, public buyers choose a product, service or process which is new in the market or simply new to them.

Procuring innovation is inherently more risky than buying existing products and services. Where there are environmental or societal benefits to be gained, such risk might be justified. Public buyers can mitigate risks by involving the appropriate legal expertise in the process or employing staff that has experience working with innovative products and services. Applying cooperative procurement solutions, such as recourse to a central purchasing body, can also help individual public buyers to achieve their policy objectives in the context of innovation and exchange of good practice helps authorities learn from successes elsewhere. Sharing experience?

The Commission encourages Member States to be ambitious and to make innovative procurement their priority. To support this approach, new guidance, to be finalised during the first quarter 2018 after an extensive consultation of stakeholders, will clarify the issues public buyers might be faced with and explain the tools they can use. Feedback from stakeholders will help identify the problems and the potential solutions to them.

Further information

[\[1\]](#) See Anderson and Kovacic, 'Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets', PPLR, 18 (2009): 67.

[ESMA publishes latest updates to MiFIDII/MiFIR investor protection Q&As](#)

The new Q&As cover the topics of *client categorisation, post-sale reporting, recording of telephone conversations and electronic communications, best execution, and information on costs and charges.*

The overall MiFID II Q&A provide clarifications on the following topics:

- Best execution;
- Suitability and appropriateness;
- Recording of telephone conversations and electronic communications;
- Post-sale reporting;
- Record keeping;
- Investment advice on an independent basis;
- Inducements (research);
- Information on charges and costs;
- Underwriting and placement of a financial instrument; and
- Client categorisation.

MiFID II applies from 3 January 2018 and will strengthen the protection of investors by both introducing new requirements and reinforcing existing ones. The purpose of this Q&A is to promote common supervisory approaches and practices in the application of MiFID II/ MiFIR for investor protection topics.

ESMA will continue to develop this Q&A on investor protection topics under MiFID II in the coming months, both adding questions and answers to the topics already covered and introducing new sections for other MiFID II investor protection areas not yet addressed in this Q&A.

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