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# Call for Evidence – European Public Procurement Directives

Bitkom welcomes the opportunity to share its perspective on the EU's public procurement directives, which are a key pillar of a well-functioning single market. Overall the directives are in general fit for purpose, they provide an adequate baseline for the core elements of procurements in the EU. Therefore, the upcoming revision should focus on reducing regulatory burdens for all participants, harmonising the single market, fostering investment and innovation, strengthening competition, and sustainable procurement.

With this position paper we would like to elaborate on our comments made in the questionnaire and add new and central aspects to the discussion on the revision of the public procurement directives.

## 1. Intercommunal Cooperation and inhouse-procurement

From an industry perspective, it has become clear that the extent of intercommunal cooperation without a public tendering process is **excessively broad and it increased over the past years**. This disadvantages private companies that could otherwise undertake these tasks more economical instead of public sector entities. This result in the risk that **intercommunal cooperation may be more costly than those tenders awarded through competitive public tendering**. Therefore, the rules governing the admissibility of intercommunal cooperation in the public procurement directive (see Article 12 of Directive 2014/24/EU) **should be reassessed with the aim of narrowing the scope of this exception**.

## 2. Fragmented rules across the European member states and Gold-Plating

Public procurement practices are currently not harmonized across the EU, reducing economies of scale, impeding Member States' access to innovation, and hindering companies, especially SMEs, to apply. This also creates confusion and administrative burden on national agencies. To address these challenges, the European Commission should advance harmonization efforts and implement measures that foster open and competitive procurement markets. Public procurement policies should be coherent across key strategic areas, including cybersecurity, cloud computing, and sustainability.

For a functioning single market, it is essential that the revised procurement directives **will be implanted in the individual member states one-to-one**. The opposite, Gold-plating, is a widely known phenomenon in Germany where 16 different «Landesvergabegesetze» exist. These additional laws and regulations create burdens for bidding companies, especially SMEs and startups due to fragmentation and unstandardized procedural rules.

## 3. «Buy European-approach» for individual tenders

Commission President Ursula von der Leyen announced a »buy-European-approach". However, particularly in procurement procedures in the area of digitalisation, a **geographical restriction of bidders contradicts the reality of global providers**. A fundamental geographical exclusion of bidders is not necessary and not feasible for subcontractors. A more targeted approach could be achieved through an exclusion in specific award procedures based on factual, non-price criteria (e.g. security and sustainability-related criteria). In case of technologies critical to European and national security, factual, non-price criteria should also be applied on a detailed component level. This proposal could build upon already existing regulatory provisions, esp. in the security and defence sector, which are better suited to specifically select or exclude applicants or bidders (e.g. in Germany the IT-SiG 2.0, KRITIS).

In the described way it can be ensured, that the most secure and innovative technologies are procured to drive digitalization, resilience, security, and sustainability in the EU's economy and public sector.

In addition, Judgment of the Court in Case C-652/22 must be considered: In the absence of an international agreement on public procurement concluded between the European Union and a third country, economic operators in that third country cannot rely on the provisions of the relevant directive on that matter in order to claim participation in a procedure for the award of a public contract in the European Union on the same footing as tenderers from Member States or third countries bound by such an agreement. Furthermore, having regard to the exclusive competence of the European Union in the area of the common commercial policy, national authorities are not entitled to apply to economic operators in third countries which have not concluded such an international agreement with the European Union, national provisions transposing the rules contained in that directive.

## 4. Social and environmental impact of public procurement

Strengthening social and environmental aspects when awarding public contracts and moving away from lowest price would be welcomed. The public sector should take a pioneering role and create sustainable demand for resource-saving products and services. **The focus must be on the effectiveness and practicability** of these measures. It is therefore important that the possibilities for taking sustainability aspects into account is feasible and that concrete and **harmonized implementation aids are provided** for procurement practice and suppliers. It is important for tenders to be comparable and therefore to be based on internationally recognized **sustainability standards, certificates and audits**. Therefore the EU should put forward policies that strengthen the Single Market by encouraging **Member States to prioritize harmonization, introducing modernized procurement practices** that account for new ways of procuring services effectively, and avoiding restrictive national policies that could create barriers to adopting innovative and secure solutions. An agreement on suitable standards and the development of corresponding recommendations for action should be developed in cooperation with the providers of products and services for the public sector. In this context, the German digital economy has already good experience in strengthening social sustainability in procurement. The digital economy developed recommendations jointly with the Competence Centre for procurement at the Procurement Office of the Federal Ministry of the Interior, the so called **«Verpflichtungserklärung Soziale Nachhaltigkeit»**. **It has established itself as an effective and practical instrument for strengthening social sustainability in procurement in Germany.**<sup>1</sup>

## 5. Supporting the procurement and use of refurbished and remanufactured products

We would welcome a **revision of the procurements with regard for procuring refurbished products, particularly in the IT sector. Refurbishment and product-as-a-service models extend the life of a product, which can significantly reduce the environmental impact of a product.** These should play an essential role when law makers and public procurement entities speak about sustainability. Public contracting authorities should consider the possibility of procuring refurbished products, if they fulfil the specified environmental criteria.

In some EU member states (e.g. France, Spain), there are already requirements for the consideration of reusable / recycled / refurbished IT products when awarding public contracts. Where the public sector has already been legally obliged to purchase such

<sup>1</sup> The Declaration of commitment to compliance with labour and social standards in public procurement of ICT is available in 22 languages. You can find it at the following website of the EU: [https://ec.europa.eu/info/policies/public-procurement/tools-public-buyers/sector-specific-tools\\_en](https://ec.europa.eu/info/policies/public-procurement/tools-public-buyers/sector-specific-tools_en)

products, awarding regularly express concerns about compliance with cybersecurity standards when using reusable / recycled / refurbished / remanufactured IT products. It is therefore important that when procuring IT products, in addition to social and environmental criteria, **security requirements are also taken into account**. Procurement practice should always have a clear understanding and an up-to-date formulation of at least minimum, preferably state-of-the-art, -security requirements. We therefore recommend corresponding recommendations when drawing up the revised directives (e.g. the French cyber security authority ANSSI has also issued corresponding recommendations on the use of the use of refurbished products).

## 6. Online marketplaces and further Europeanization of public procurement

### Online marketplaces

The German «Vergabetransformationspaket» provided for the creation of online marketplaces in the sub-threshold range through which up to 50,000 euro public authorities could procure via direct orders. To foster the European internal market, it would be **beneficial to leverage this idea on the European level**. The new option of awarding contracts directly via these online marketplaces has the potential to significantly increase the access to services, especially for smaller procurement organizations, to create central procurement channels and reduce bureaucracy.

### European-wide procurement cooperation

Besides allowing public buyers to procure via online marketplaces it would reduce bureaucracy and foster European cooperation if **national public procurement authorities could procure in cooperation with other member state's public authorities**. This would not only reduce bureaucracy it would also benefit economies of scale and support SMEs and startups.

### Digital by default

Also, a **digital by default and once-only approach** in public tenders would increase participation and competition. An **European-wide pre-qualification platform** would additionally reduce administrative burden and create transparency for all parties involved.

## 7. Make public procurement innovation-ready

The intention of the Commission regarding a simplification of the rules on public procurement especially with a view to startups and innovators have to be welcomed. This does not only benefit startups and their growth it also increases digital innovation and sovereignty of the whole European society.

### Simplifying innovation procurement via direct awards

In our opinion, the innovative character of a solution should be at the forefront here and be defined by the **use of new technologies and the goal of modernisation and digitalisation**. In order to prevent abuse of the possibility of direct awards, appropriate units should be involved in the procedural process at the various levels, which can assess and ensure the character of innovation. In addition, it should be

ensured that **planned market exploration covers the entire market** and not just the market of startups. To date, public procurement law has not stipulated a requirement for a market investigation.

#### Defining KPIs and create a databasis

The already existing innovation partnership instrument aims to make it easier for public authorities to procure innovative solutions and therefore to prefer these. However, it is **not known to what extent the instrument is actually utilized** and whether the associated objectives have been achieved and innovations have been supported. The first step to be able to say so, or not, would be to collect data, on the utilization of these instruments, on money spent for these solutions etc., the second step would be to analyze the data, and the third step would possibly be to make data-based adjustments to the existing regulations so that the goals that have been set can be achieved via these instruments. This **monitoring should take place at European level** in co-operation with the member states.

#### Procuring agile methods

Agile methods for software development are a key pillar of digitalisation, which require a different design of procurement procedures than it is usually the case. It is already possible under the current legal framework to award software development contracts using Scrum, for example. In practice, however, such agile procedures are rare due to the complexity, and particularly the **lack of experience in the design of the tender documents**, the examination of the economic viability of the tenders and the organisation of the procedure. More assistance should be provided to the awarding authorities here and, if necessary, appropriate templates should be made available, particularly with regard to the suitability and award criteria, but also the specifications and the contractual bases. It should also be suggested that an **inter-agency exchange of best practice on successfully implemented (agile) procurement** procedures be established - possibly together with industry representatives.

## 8. The future of framework contracts

#### Lots' limitations

In general, we are in favour of making the principle of awarding lots more flexible. It should be considered whether, in addition to economic and technical reasons, time-related reasons can also justify an overall award in individual cases. The means of **limiting lots should be rejected in the commercial business of product or manufacturer-specific tenders** because it leads to extreme distortions of competition and tactical bids to the detriment of the most economical bidder and, not least, the client.

#### Maximum limits

The specification of maximum limits causes considerable difficulties in practice. If the flexibility of framework agreements is to be maintained and awarding authorities are not to be deprived of this vital means of survival, it should be made clear that the **planned call-off quantity must be carefully estimated, but that a fixed maximum quantity must not be a constraint**. This applies in particular to products whose distribution is associated with very low marginal costs, e.g. in the retail business or for software in general. In order to maintain the flexibility of the

framework agreement as an important procurement instrument, the contracting authorities should be provided with practical solutions and assistance in this regard and, if necessary, appropriate clarifications on how to deal with the specification of maximum limits should be included.

#### Clarification on authorized parties

On the contracting authority's side, only those users who have been sufficiently specified as authorised recipients in the contract notice or the request for confirmation of interest can draw on a framework agreement. In practice, **uncertainties regarding the admissibility** or legally compliant structuring of the grouped designation of authorised parties and their right to call off are repeatedly observed. Clarification should be provided here in order to ensure the necessary legal certainty.

#### Price adjustments

In order to avoid further exacerbating the existing risk of price fixing and to keep companies competitive while holding a framework contract, it is advisable to **incentivize price adjustment clauses as part of the revision**<sup>2</sup>.

<sup>2</sup> [221121 Bitkom Positionspapier Preisanpassungen.pdf](#) Bitkom published a position paper on that topic in 2022.

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