Summary

The European Union has adopted modernised public procurement rules on 11 February 2014. These modernised rules have four main objectives: simplification, flexibility, legal certainty and increased transparency, notably in the award of services concessions, which were previously left outside the scope of the directives.

The approval of the new procurement package follows an extensive public consultation which began in December 2011 in response to criticisms that the European procurement regime was expensive, rigid, and favoured larger firms over SMEs.

Overall, these new rules are a welcome step forward that should encourage a faster and less costly procurement process. The new rules on services concessions are also a major step towards the harmonisation of procedures throughout Europe, which is aimed at encouraging intra-European trade.

The new package

On 11 February 2014, the European Council formally approved a new procurement package. This package is made up of two procurement directives, a Classical Directive (replacing the previous classical directive 2004/18/EC) and a Utilities Directive (replacing the previous utilities directive 2004/17/EC). In addition, a new Concessions Directive is also part of the package. The Remedies Directive will remain in force unchanged.

Classical Directive

The Classical Directive, as was the case with the previous classical directive, establishes the rules for public procurement contracts entered into by contracting authorities above the thresholds set at the World Trade Organisation level. The definition of the contracting authorities remains globally unchanged.
Key provisions

> Clarification of the rules governing the **assignment of contracts** resulting from the *Pressetext* case (see our previous newsletter on this topic): changes in contractor as a result of a review clause in the initial contract or due to M&A operations or insolvency proceedings are now clearly allowed (provided that the legal successor fulfils the initial qualitative selection criteria). This is a welcome development and is in line with the interpretation of the *Pressetext* case prevailing, in particular, in the French, Italian, Portuguese and Spanish markets. Clarification is also welcome in Belgium, where there were competing views as to how national rules should be constructed in light of the *Pressetext* case.

> Clarification of the rules on **changes to existing contracts**, notably the introduction of rules allowing for changes that were contemplated from the outset or have become necessary in the course of the contract performance. In addition, contracts may be modified without a new procurement procedure, where the value of the modification is below the relevant thresholds and only brings no more than a 10 to 15 per cent increase in the initial contract value (depending on contract type). This is in line with French case law and with Polish law and will be a welcome development both for contracting authorities in general and for sponsors acting on long term PPP projects. The Directive should bring more flexibility and legal certainty, notably in Belgium, Germany, Italy, Portugal and Spain.

> A higher level of **protection of confidential information** provided by bidders (in particular in competitive dialogue, innovation partnerships and negotiated procedures) is ensured. This could also be a welcome development for sponsors on PPP projects, which were sometimes worried about “cherry picking” by contracting authorities. The new rules could be a first step towards solving this issue.

> All **loans** now clearly fall outside the scope of the Directive. This is in line with the current practice in some Member States, such as Portugal, but had been a debated issue over the last 10 years in several other Member States, such as France, Germany and Spain. This provision could also bring changes to practices on the Belgian and Polish markets, where all loans are currently subject to the procurement rules (except for loans aiming at budget deficit financing in Belgium).

> Access to the **competitive negotiated procedure and competitive dialogue** is made easier: complexity or the necessity to negotiate the sharing of risks are now sufficient to use such procedures. This is in line with French and Spanish market practice and might be a way to raise the number of competitive negotiated procedures or competitive dialogue in other countries such as Belgium, Poland or Portugal. It is a key improvement in terms of legal certainty, especially in PPP projects.

> A new **innovation partnerships procedure** providing more freedom to negotiate. This is a welcome development which will favour innovation.
> Additional grounds for exclusion at selection stage (including poor performance on previous contracts, participation in cartels, violation of certain environmental or labour law rules, or conviction for certain offences - including when committed by parent companies) and “self-cleaning” measures for suppliers who have rectified bad practices. “Self-cleaning” was generally accepted in Germany but the new Directive puts this practice on a sound legal basis.

**Other changes**

> New rules on prequalification, which include a restriction on the turnover requirements that can be imposed as a measure of financial strength and provision for “self-certification” by bidders.
> Shorter timescales for expressions of interest and tender submissions, which have been reduced by about a third.
> Other clarificatory and procedural provisions, including reducing the documentation burden at selection stage, and clarifying the role of central purchasing bodies, dynamic purchasing systems and joint procurement.
> To facilitate access of SMEs to public procurement, Member States may make the division of projects into separate lots mandatory. This was already the case in France, in Italy and Germany. Contracting authorities may also limit the number of lots that can be awarded to a single bidder, in line with French, Italian and Spanish case law.
> Mandatory use of e-procurement as a general rule, requiring contracting authorities to make procurement documents freely available by electronic means from the date of publication of the notice. Mandatory e-procurement already exists in Member States such as Portugal.
> Revised rules for social and environmental aspects in order to reinforce social and environmental standards.
> Award decisions will remain based on the “most economically advantageous tender”, which will now be determined on the basis of price/cost-effectiveness or the best quality-price ratio. A life-cycle costing approach is encouraged, so as to favor sustainable development.
> Specific provisions on potential conflicts of interest between staff of the authority and contractors.
> Legal services in relation to judicial proceedings or potential judicial proceedings now fall outside the scope of the directive.
> Public passenger transport services by rail or metro are now clearly excluded from the scope of the Directive as they are governed by the specific “PSO” regulation (regulation on public passenger transport services by rail and by road).
> The exemption for in-house entities resulting from ECJ case law is now codified and slightly modified. It now also clearly applies to contracts awarded by the in-house entity to its parent entity or to sister entities, in line with French market practice. Moreover, the Directive introduces the
so-called “80/20 rule” which is taken from the Utilities Directive and according to which an in-house entity may carry out up to 20 per cent of its activities for market participants other than its controlling contracting authority. This is an extension of the definition of in-house entities as applied in Germany and Poland, and will bring more flexibility in both markets. Furthermore, the clear admissibility of “horizontal” in-house procurement between sisters companies should put an end to controversies on the German market. This clarification of the in-house concept is also welcome in Spain.

> The “public-public cooperation” exemption is codified and clarified, mainly in accordance with the ECJ ruling in the Stadtreinigung Hamburg case. This was of particular importance for the French, German, Italian and Portuguese local public sector, due to the number of local public authorities, and the ever increasing cooperation between them. It is also a welcome provision in Spain, where it should bring more flexibility as well as in Belgium (where no specific provisions exist on this issue) and in Poland, where the use of public-public cooperation was limited to services contracts awarded to certain categories of contracting authorities.

> More detailed provisions relating to cross-border joint procurement and related choice of law issues. This will make cross-border PPP projects easier in the future, and could be key for the development of rail or of the so called “sea highways” in Europe.

Utilities Directive

The Utilities Directive relates to contracts entered into by the so-called “utilities” (known as “contracting entities”) for the pursuit of specific activities (mostly energy and mining, transport, water and postal services), above thresholds set in the Directive. The “utilities” notably include undertakings which operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

The new Utilities Directive contains most of the changes in the Classical Directive and also introduces some changes which are specific to utilities, including:

> Simplified definition of a “utility”.
> Exclusion of the exploration of oil and gas from the Directive on the grounds that the sector is already subject to high competitive pressure.
> Clarification on the concept of special and exclusive rights: an entity, if a private body, is not a “contracting entity” if it has won the exclusive right to provide a given service in a given geographic area following a procedure based on objective criteria for which adequate transparency has been ensured.
> Simplification of the procedure for determining whether activities are directly exposed to competition, such that they should no longer be covered by the Directive.
Concessions Directive

The main change in the new procurement package is the introduction of a new directive entirely dedicated to concessions.

The Concessions Directive applies to the award of works or services concessions to economic operators by contracting authorities (or by contracting entities when acting within a scope similar to that of the Utilities Directive).

The Directive confirms that Member States are free to decide how to manage the provision of services to the public, but it creates a specific awarding regime for projects entrusted to the private sector.

A new “light touch” regime for works and services concessions projects has therefore been introduced stipulating certain minimum requirements (such as the publication of tender notices in the OJEU, a maximum duration of concessions and a legal review procedure). This is a major change for services concessions, which were previously not covered by the directives (though many Member States, and notably France, Italy, Poland and Portugal, already had rules governing the awards of such contracts). In Germany and Belgium, only certain procedural obligations arising out of the principles of equal treatment and transparency applied. However, they were subject to only limited legal review in Germany, whereas the Directive will be fully enforceable before national courts.

The Concessions Directive provides for the coordination of national procedures, in a manner which is globally in line with the Portuguese and French procedures.

The main features of the new regime are as follows:

- A clearer definition of concession (building on the case law), based on the risks transferred to the contractor (demand, supply or operating risks).
- Concessions contracts with a value of at least €5,186,000 must be advertised in the OJEU.
- Contracting authorities must now predefine award criteria.
- There are no restrictions on the possibility to use a negotiated procedure.
- Rules governing the maximum duration of the concession based on the amounts of investments and return on investment.
- Rules on changes to existing concessions, which are globally in line with the rules under the Classical Directive.
- Grounds for exclusion at selection stage.
- The water sector (including the disposal or treatment of sewage provided it is connected to the production, transport or distribution of drinking water) is one of the sectors specifically excluded from the Directive.
Non-economic services of general interest fall outside the scope of the Directive.

**Implementation by Member States**

The publication of the new Directives in the OJEU is expected shortly. The Directives will then enter into force within the following 20 working days. Member States will have to transpose them into national law within 24 months of the OJEU publication (with up to a further 30 months to introduce mandatory e-procurement).

It should be noted that the Concessions Directive shall not apply to the award of concessions tendered or awarded before the date of entry into force of this Directive.
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