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NOTE

From:	Trio Presidency
To:	Working Party on Competitiveness and Growth (High Level)
Subject:	Public procurement legal framework as a tool for competitiveness

In view of the discussion at the Working Party on Competitiveness and Growth (High Level) on 29 April 2025, delegations will find in Annex a Trio Presidency note on "Public procurement legal framework as a tool for competitiveness".

ANNEX

Working Party on Competitiveness and Growth (High Level) – Meeting of 29 April 2025

Public procurement legal framework as a tool for competitiveness

Discussion Paper

The European Union's public procurement market is a cornerstone of its economy, with over 250,000 public authorities collectively spending around €2.3 trillion annually on services, works, and supplies. This expenditure represents approximately 15% of the EU's Gross Domestic Product (GDP). The market encompasses a wide range of sectors, including infrastructure, construction, transport and logistics, healthcare, education, social services, catering, IT and communication, energy, waste management, security, and defence. Public procurement is a powerful tool for stimulating jobs, growth and investment, fostering an economy that is more resilient, innovative, resource and energy-efficient, and socially inclusive.

The main EU public procurement legal framework includes three Directives[1] which are based on the Treaty on the Functioning of the European Union (TFEU), in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as on the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Traditionally seen as focused on cost-efficiency, public procurement is increasingly evolving into a vehicle for strategic policy delivery. As a result, a phenomenon of a growing number of public procurement provisions in EU sectoral files can be observed in recent years. Those sectoral files pursue different EU policy objectives and contain provisions on public procurement prescribing "what to buy", as well as modifying "how to buy" public procurement procedures.

The European Court of Auditors (ECA) in its Special report 28/2023 on public procurement in the EU concluded that competition for public contracts awarded in the 10 years up to 2021 had decreased, and recommended the Commission to streamline and clarify the focus of public procurement goals.

In May 2024, the Council adopted conclusions on public procurement in response to the ECA's report, emphasising the need to improve fair and effective competition for EU public procurement contracts. Key points include simplifying and enhancing procurement rules for clarity and efficiency, ensuring high-quality data availability and advanced tools, consulting stakeholders and promoting best practices, and launching an EU-wide strategic action plan to address identified shortcomings and enhance the overall procurement framework.

[1] Directives 2014/24/EU, 2014/25/EU, 2014/23/UE, 2009/81/EC - https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:180203_1

As part of the 2024-2029 political guidelines, the President of the European Commission announced an evaluation of the current regulatory framework and a review of the Public Procurement Directives. The review will aim at further unleashing the potential of public procurement to shape the European economy, create lead markets, and foster the growth and resilience of European businesses, thereby creating quality jobs. The proposed modernisation of the rules will focus on the following areas:

- The strategic role of public procurement through qualitative requirements, notably in terms of sustainability, social aspects, and resilience.
- Preference to be given to European products in public procurement for certain strategic sectors, helping to ensure EU added value for citizens, along with security of supply of strategic technologies, products and services.
- The modernisation and simplification of current mechanisms, particularly considering EU start-ups and innovators, as well as local authorities.

The Letta[2] and Draghi[3] reports, published respectively in April and September of 2024, relied also on the findings of the ECA' s report and perceived public procurement as a tool for addressing some of the identified challenges that the EU is facing. The reports call for a coordinated effort to reform the EU public procurement to better serve social, environmental and innovation objectives, thereby increasing the EU's international competitiveness. However, those reports have not provided clear guidance on prioritisation of the EU public procurement objectives. In line with these recommendations, the Commission initiated in December 2024 a broad evaluation process of EU Public Procurement Directives with a view to adapting them to identified needs.

The new Commission's communications on "A Competitiveness Compass" and "The Clean Industrial Deal" pre-announced several legislative initiatives, such as the Critical Medicines Act (CMA), the Industrial Decarbonization Accelerator Act (IDAA), and the Circular Economy Act (CEA), in order to incentivise innovation, support green industries, promote resilience and enhance international competitiveness of the EU, and apply EU preference in public procurement. Those roadmaps envisage also a revision of the Public Procurement Directives in the fourth quarter of 2026 as one of Commission's flagship initiatives.

2 https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf

3 https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en#paragraph_47059

Sustainability, resilience and EU preference criteria in public procurement and their role in implementing EU policies

Public procurement serves to fulfil the vital societal functions of the state through the national systems and structures that enable society to operate while protecting the economy, culture, and the democratic institutions. These functions include, above all, the safety of the EU population, including protection against natural disasters, effects of climate change, continuity of government and decision-making, democratic processes, social cohesion and economic stability, and internal and external security.

One factor that ultimately influences the success of a public contract is the choice of award criteria, expressing the preferences of the contracting authority to determine the fulfilment of the procurement requirements. According to the Public Procurement Directives, the selection of specific non-price criteria in a specific procedure was left at the discretion of the contracting authorities as it was considered that it is not possible to know all justified preferences and needs of all of the contracting authorities or the specific real situation in which they have to proceed. However, recent pieces of sectoral legislation[4] provide grounds for establishing mandatory non-price procurement criteria to pursue several strategic goals. An example is the Net Zero Industry Act, which includes mandatory non-price criteria in public procurement for clean technologies and renewable energy projects. Other similar initiatives have been pre-announced in the "A Competitiveness Compass" and "The Clean Industrial Deal".

"The Clean Industrial Deal" emphasises the need for integration of non-price criteria into public procurement processes, such as sustainability, resilience, and 'made in Europe'. It should be noted that the 'made in Europe' requirements have not traditionally been a feature of EU public procurement. This approach aims to align public spending with the EU's decarbonisation and competitiveness goals, encouraging the uptake of clean technologies and supporting EU industries. Within these lines, the planned revision of the EU public procurement framework is to allow for European preference criteria in EU public procurement for strategic sectors which are yet to be determined.

In addition, to stimulate demand for clean products made in the EU, the forthcoming IDAA is also expected to introduce sustainability, resilience and 'made in Europe' criteria in public procurement. The initiative will build on the experience of the Net Zero Industry Act. IDAA will propose the development of a voluntary label indicating the carbon intensity of industrial products, starting in 2025 with steel and cement sectors. This labelling initiative aims to inform consumers and encourage manufacturers to invest in decarbonisation efforts, potentially influencing public procurement decisions to favour products with lower carbon emissions.

[4] such as Net-Zero Industry Act (Regulation (EU) 2024/35), Ecodesign Regulation (Regulation (EU) 2024/1781), Directive on Energy Performance of Buildings (Directive (EU) 2024/1275), Energy Efficiency Directive (Directive (EU) 2023/1791)

All these proposals reflect a strategic shift in the EU public procurement policies to support the Union's clean industrial transition and enhance the competitiveness of European industries. competitiveness and resilience of European industries. Thereby, procurement priorities have become intertwined with new industry policies other than creating and maintaining the single market. This shift also entails a trade-off between sustainability, resilience and rising prices in public procurement on the one side, and competition, efficiency and regulatory simplicity on the other side.

Simplification and consolidation of public procurement framework

The 2014 EU public procurement reform aimed to simplify procedures, enhance transparency, and improve access for SMEs, as well as to enable a more strategic use of public procurement to achieve social and public policy objectives. The reform's objective was, *inter alia,* to make the procurement processes streamlined and flexible, reduce the administrative burden within the framework of the EU international commitments in the WTO Government Procurement Agreement (GPA) of 2012 regarding rules of access to public procurement in the EU. The reform included in particular some fundamental procedural rules, alongside with the thresholds to apply. The reform also enabled the EU contracting authorities to pursue through public procurement some broader societal and public EU policy goals, such as sustainability, innovation, and social inclusion. However, due to lack of capacity of the contracting authorities and legal uncertainty, results of the reform are considered insufficient in this regard.

Since 2014, EU public procurement rules have evolved and numerous sectoral EU rules are already adopted. The sectoral legislation contains procurement-related provisions whose main objective is to introduce mandatory requirements for sustainable public procurement in clean technologies, construction (European Green Deal legislation), and emergency legislation (in response to past and future crises).

The Public Procurement format of the Working Party on Competitiveness and Growth of the Council of the EU has been monitoring the sectoral legislation with public procurement rules since 2022, and has identified more than 50 EU legal acts (Directives and Regulations) already adopted, while eight additional proposals still in negotiation[5]. The new Commission's plans also include several sectoral initiatives modifying public procurement legislation, in order to pursue newly adopted or modified important EU policy goals.

Since 2016, the public procurement in the EU Member States is awarded according to nationally implemented rules aligned with the EU Public Procurement Directives. The rules has been amended several times in order to improve their performance and to adapt to new sectoral procurement provisions. SMEs, in particular, have difficulty adapting to change.

The correlation between the decline in competition and the legislative changes and crises that the EU has faced has not been sufficiently examined.

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Public procurement rules in EU sectoral legislation have been rarely coordinated, and as a result the application of procurement procedures has become increasingly complex, which may discourage economic operators from participating in these procedures. It is often difficult to determine how sectoral legislation should be applied together with the main body of the EU and national legislation on public procurement.

Questions for discussion (we ask delegations to limit their interventions to 3 minutes):

1. *How should criteria related to sustainability and resilience be integrated into public procurement in the context of the EU industrial policy?*

2. *How and in what cases should we ensure European preference?*

3. *Which elements of the public procurement framework should be simplified in the first place to lower administrative burden for contracting authorities and contribute to increasing competition among economic operators?*

Annex I

Preliminary takeaways from the open public consultation on the evaluation of the Public Procurement Directives

A Call for Evidence and public consultation, providing an opportunity for stakeholders to express opinions, submit relevant evidence, and position papers was open from 13 December 2024 to 7 March 2025. Annex I compiles preliminary takeaways from the open public consultation.

- **Respondent information.** The Open Public Consultation (OPC) received 733 replies. Most replies came from public authorities (199, 27.1%) and from companies, businesses, and their associations (269, 37%). Other respondents included NGOs (71, 9.7%), trade unions (55, 7.5%), EU citizens (53, 7.2%), academic/research institutions (34, 4.6%), and consumer organisations (1, 0.1%). A significant number of responses came from Germany (193, 26.3%), Belgium (102, 13.9%), France (75, 10.2%) and Spain (43, 5.9%).
- **Flexibility and simplicity.** Many respondents feel that the Directives did not simplify the procurement process (54% vs. 18% who think they did) and do not provide sufficient flexibility (49% vs. 31% who think they do). Some respondents point to procedures and the ESPD as aspects of the public procurement process that should be addressed in the light of simplification goals.
- **Coherence.** While the Directives are seen as coherent amongst themselves, they aren't considered consistent with related sectoral legislation (by 37% vs. 11%). Some respondents suggest consolidating sectoral files to simplify procurement.
- **eProcurement benefits.** Respondents consider that eProcurement has reduced administrative burdens and sped up procurement; businesses view this more positively than public authorities. About 37% of respondents believe that the Directives made it easier to bid on public contracts from abroad (e.g., through eProcurement). In line with it, 49% think that such rules on eProcurement are still relevant and adequate to facilitate market access. Some respondents consider that the level of digitalisation across Member States remains uneven and that TED remains underutilised.
- **Competition.** 38% of respondents feel the EU public procurement market lacks competition (vs. 11% who think that it is too high), and 46% say that the Directives have not improved it. Additionally, awards based solely on price are seen as too frequent by 49% of respondents, with 57% of business associations and 40% of companies considering it as a bad procurement practice. Single bidding and direct awards are also seen as too frequent but are often attributed to market factors rather than poor public procurement practices.
- **Strategic challenges.** Most respondents consider the rules on environmental (39%) and socially responsible (43%) procurement relevant and adequate, but 42% consider that the use of MEAT criteria is not relevant.

- **Resilience.** The Directives are perceived as not fit for purpose to enhance EU strategic autonomy by 49% of respondents; not fit to handle urgent needs by 42% of respondents; and not fit to tackle supply shortages by 44% of respondents.