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THE IMPACT OF THE EC PROPOSAL FOR A DIRECTIVE ON PUBLIC PROCUREMENT FOR SOCIAL SERVICES

ANALYTICAL PAPER

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I. Background and introduction

The recent initiatives at European level, the EU 2020 Strategy and the relaunch of the single market, highlight the key role of the public procurement in modernising the European economies and reducing costs for the public sector. Public authorities spend around 18% of EU GDP on supplies, works and services accounting a large part of economic activity. The management of public expenditure is an absolute priority, especially in the context of fiscal consolidation and retrenchment in which most public authorities have to manage public resources. In public purchasing, public authorities have to ensure optimal use of public funds and full compliance with market competition rules. EU public procurement rules govern the way that public money is spent, laying down common tender procedures oriented to remove barriers to participation in cross-border tenders and to ensure equal treatment and transparency.

Public procurement procedures *in the field of social services* are currently laid down in Directive 2004/18/EC that imposes principles and steps that public authorities must follow in awarding public contracts. Following a Green Paper consultation on “modernizing” the EU’s public procurement rules in early 2011 and a report from the European Parliament, the European Commission published a proposal for a new Directive in December 2011. The reform of existing procurement rules is announced by the Commission also in the Single Market Act (SMA) among its twelve key priority actions. The proposal number 17 states that a legislative proposal will be adopted before the end of 2012 “with a view to simplifying and updating the European rules to make the award of contracts more flexible and to enable public contracts to be put to better use in support of other policies”. Public procurement is therefore identified as tool to promote innovation, employment and social inclusion, fair trade and environmental protection, stimulate SMEs in accessing to the single market and open up markets in third countries for European businesses.

The proposal for a new Directive reflects the advocacy work carried out at EU level by different stakeholders in stressing the *specificities of social services* as opposed to other “services of general interest” and the negative impact that tendering has turned out to have on the social services sector. Certain amendments and new provisions set in the proposal are particularly relevant for social service providers, since they simplify their participation in bidding for public contracts.

The paper intends to highlight the main changes contained in the proposal for a new Directive as compared to the existing Directive, underlining areas that need clarifying and explaining concerns in order to follow step by step the legislative procedure and ensure the new legislation is suitable for social sector.

II. What is public procurement?

Public procurement is the process by which governments and public utilities purchase goods, works and services. The organisation of public procurement procedures varies among different Member States since it represents a specific function of the organisation of their public administration. EU public procurement Directives dating from 2004 define common disciplines ensuring that economic operators from across the single market have the possibility to compete for public contracts. Their aim is to enhance the European competition ensuring “best value for money” and under these rules public procurement must follow transparent, open procedures ensuring fair conditions of competition for service providers and suppliers.

III. European regulatory framework

The existing Directive 2004/18/EC governing public procurement procedures in the field of social services apply only if public authorities decide to externalise a social service against a fixed remuneration. Social and health services listed in the Annex IIB are subject only to the general principle of the Treaty on the Functioning of the European Union. Public authorities must ensure transparency publishing tenders and the award criteria and must guarantee that any national or local provider can participate in the procurement process on an equal basis.

An evaluation of the impact of EU public procurement rules in the provision of social services shows that the implementation of Directive has generated misunderstandings in interpreting certain unclear rules, especially those relating to the scope of the provisions. Complexity of procurement rules has also affected in a negative way the quality of social services. Tendering requiring a detailed bid for all the activities covered (in terms of description and price) can drive services towards traditional service models, it does not provide room for innovation and does not take enough into account integration, continuity and quality of services.

IV. What has changed with the proposal for a new Directive?

➲ Lighter requirements for procuring social services

The recognition of the “*specific characteristics*” of social services of general interest and the application of a “*specific regime*” to the regular procurement procedures for social services are one of the most important differences in the proposal for a new Directive as compared

with the existing directive. The explanatory memorandum states that "social, health and education services have specific characteristics which make them inappropriate for the application of the regular procedures for the award of public service contracts". Title III, Chapter I of the proposal Directive, especially dedicated to "social and other specific services", rules how public contracts for social services shall be awarded.

According to this special regime, public contracts which satisfy requirements set by this Chapter (articles 74-76) are only subject to certain provisions of the Directive; Title I covering scope, definitions and general principles, and the general principles found in the Treaty on the Functioning of the European Union. Article 76 states that "Members States shall put in place appropriate procedures ensuring the full compliance with the principle of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question". Public authorities can lay down technical specifications at the beginning of the procurement process in the way they consider most appropriate and shall also comply with the article concerning the procedures for the publication of the notice and assure that all the potential interested providers can express their interest in bidding for the contract (Title I).

In addition, Article 74 states that the special regime applies to public contracts for "social and other specific services" listed in Annex XVI and for contracts with a value equal or greater than the threshold indicated in Article 4 (d) – 500,000 euros. Contracts below this amount do not have to apply any of the rules outlined in directive. The higher threshold set down in the proposal is justified in recital 11 of the proposal states that "services to the person" "by their very nature" have a limited cross-border dimension since they are strongly linked to the context in which are provided and that public contracts for such services with a very modest value have no cross-border interest for economic operators situated in other Member States and have no impact on the functioning of EU internal market. Currently, public authorities have to evaluate case by case the potential cross-border interest of the contracts and if it is the case assure sufficient advertisement to all the potential tenders, in compliance with the basic principles of transparency and non-discrimination.

The list of services provided in Annex XVI refers to health and social services, administrative educational, healthcare and cultural services, compulsory social security services, other community, social and personal services, services provided by Trade Unions and religious services. The definition of what services exactly fall under the special regime is however not clear if other parts of the text are examined. The explanatory memorandum (p10) refers to "social, health and education services", whereas recital 11 refers to "services to the person, such as certain social, health and educational services".

➲ *Alternatives to Public Procurement are allowed*

The “sensitivity” of the services covered by Title III, Chapter I also justifies the “wide discretion allowed to Member States” to organize the selection of the service providers in the way they consider most appropriate” (recital 11). In the proposals, contrary to the current directive, alternatives to public procurement are mentioned: “the mere financing of social services or granting licenses and authorizations” and providing services themselves (“in house”).

The European Commission Guide states that a contract is covered by the definitions of public service contract or concession, rather than being “mere financing” if:

- a) the aim of the contract is to meet needs previously defined by the public authority within the framework of its competences;
- b) the nature of the service and the way in which it is to be provided are specified in detail by the public authority;
- c) the contract provides for remuneration of the service (payment of a price or granting of the right to operate the service in return for a fee payable by users);
- d) the public authority takes the initiative of finding a provider to whom to entrust the service;
- e) the contract lays down penalties for failure to meet contractual obligations, in order to guarantee that the service entrusted to the third party is provided properly in such a way as to meet the public authority's requirements (penalties, compensation for damages, etc.).

However this may leave room for interpretation in terms of arrangements that may exhibit some of the above criteria or where they are difficult to evaluate and the guide is not legally binding.

➲ *Increased focus on quality in social services*

The increased emphasis on quality becomes clear through numerous references in the text of the proposal. It reflects the advocacy work carried out by many organizations, including members of Social Services Europe highlighting the importance of quality in the specific area of social services.

The proposal refers to criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee, which encourages public authorities to set up tendering procedures that ensure the respect of quality requirements also in those countries where at national or regional level the relevant legislation in force

does not refer to any quality criteria. The explanatory memorandum states that it aims to make sure “that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee”. This is not different from the Directive in force but an explicit reference to the Quality Framework (VQF) is welcome as it gives the document a higher profile and it the VQF takes into account the main elements of quality.

The criterion of quality in awarding public services contracts has not been made compulsory, as Social Services Europe members had called for, and contracts can still be awarded to the “lowest cost” tender (“lowest price” in the existing Directive). The proposal states: “contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service” [our emphasis]. The other option available to contracting authorities is the “Most Economically Advantageous Tender”, or MEAT, which would be made up of various criteria, including price. Another proposal that was not taken on board was to fix a minimum percentage or weighting of independently verified quality criteria in award criteria for social services or all services under MEAT.

Recital 37 points out that quality requirements can be set at different stages of a procurement procedure, with the lowest costs authorities are “free to set adequate quality standards by using technical specifications or contract performance conditions”. Public contracts awarded on the basis of price alone could still take into account quality criteria if have been laid down in the technical specifications.

➲ *Social clauses*

As stated by the Commission in the guide “Buying Social”, socially responsible public procurement is possible through “social clauses” in the current directive, allowing authorities to take into account social aspects such as, decent work, compliance with labour rights, social inclusion of disadvantaged people including people with disabilities and accessibility , known as “horizontal objectives”. With the Guide, the Commission aims to encourage and motivate Member States and public authorities to promote socially responsible public procurement. However, but for some stakeholders this is not enough and they call for horizontal objectives to have the same value as the functional objective of what is purchased.

The possibility to include environmental production characteristics in the technical specifications is new as compared to the current directive but social "production characteristics" (such as working conditions or the qualification and experience of the staff assigned to performing the contract) may only be used as contract award criteria. Article 66, paragraph 2, lists criteria that qualify as technical specifications and include quality, technical merit, aesthetic and functional characteristics, accessibility, design for all environmental characteristics and innovative character.

An important clause has been introduced in Article 40 relating to technical specifications. In the existing directive article 23 states that "whenever possible technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users", Article 40 states clearly that "for all procurement intended for use by persons it is necessary that contracting authorities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users" [our emphases]. In describing a final product's characteristics (whether works, supplies or services) contracting authorities shall ensure that goods or services allow access for people with disabilities.

The last consideration about social clauses concerns contract performance conditions. While in Article 7 there is only a general reference to "social and environmental considerations", Recital 43 states that amongst requirements applicable during the performance of the contract may be the recruitment of long-term job-seekers, the involvement of people experiencing particular difficulty in achieving integration, the implementation of training measures for unemployed or young people or the recruitment of more disadvantaged people than required under national legislation.

⌚ Articles on sheltered workshop and reserved contracts

Article 17 of the proposal permits Member States "to reserve the right to participate in public procurement procedures to sheltered workshop and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment provided that more than 30% of the employees are disabled or disadvantaged workers".

The proposal confirms the importance given to reserved contracts in facilitating the inclusion of people with disabilities into the labour market and introduces two new elements. The first element refers to the extension of reserved contracts to other categories other than people with disabilities, namely disadvantaged people such as people furthest from labour market,

people experiencing poverty and social exclusion. The second element concerns the percentage of disabled or disadvantaged workers employees in those workshops, programmes or economic operators. While in the current legislation this percentage is set to 50% in the proposal it has been reduced to 30% permitting a wider field of service providers to participate in reserved contracts. In this way also non-profit organisations employing persons from other disadvantaged groups may benefit from participating in reserved contract schemes. Article 19 of Directive 2004/18/EC refers only to sheltered workshops and employment programmes where most of the employees concerned are people with disabilities.

➲ *Other relevant issues*

Grounds for exclusion of providers

Article 55, paragraph 3, provides that economic operators can be excluded from participation in public contracts by contracting authorities due past violations of environmental or social obligations, including rules on accessibility for disabled persons, but this is not binding. If on the one side the exclusion of such economic operators is positive for requiring the compliance with the EU legislation and with UN Convention on the rights for persons with disabilities; on the other side there is a concern. Some problems may rise due to failure to implement EU legislation concerning social and environmental obligations at national or regional level. Even if bidders comply with national law, they might not be completely in compliance with EU legislation and according to the proposal they could be subject to exclusion from a tendering process.

Abnormally low bids

As compared to the existing directive, the new proposal (Article 69) requires operators to explain price and costing in certain situations, including when the bid is 50% lower than average price) When it comes to “other reasons” they may request explanations but are not bound in do it. Indeed contracting authorities must reject the tender where they establish that it is abnormally low because it does not comply with specified obligations relating to social and labour or environmental law (Art 69 4 para 2). In addition authorities could be bound to do it for “other reasons”.

Governance

The proposal provides that Member States set up an independent oversight body to monitor the implementation of public procurement processes and ensuring correct application of the directive. The competent authority should publish an annual report illustrating the

implementation and application of rules laid down in the Directive and including among other things, a global overview of the implementation of sustainable procurement policies (Art. 84). Given organisations report implementation problems this can be seen as a positive step.

V. What needs to be further clarified in the proposal?

- The definition of social services that fall under the special regime set by Title III, Chapter I of the Directive is unclear. In the Annex XVI and in the text there is no clear difference between “social services” and “other community, social and personal services”. In addition, “social security services” appears to be a misnomer, social security schemes not currently falling under procurement rules. This lack of consistency and legal clarity could be settled changing all the references to social services with an open list that refers to only social services.
- The recognition of alternatives to public procurement in providing social services may leave room for misunderstandings since there is currently no explanation in case law or legislation about when procurement rules must be applied. The only reference is in the European Commission Guide that is not legally binding. One option would be to incorporate this text into the legislation as it is. Another would be to propose a new wording that ensures that contracting authorities have “wide discretion” to decide when to finance a service by a grant or through a procurement procedure.
- The possibility for public authorities to take into account quality requirements when drafting technical specifications and when evaluating tender proposals is not strong enough and is still not mandatory. To strengthen this element in all relevant parts of the directive, references to the possibility to award contracts based on price alone should be removed. Some concerns are also about the term “Most Economically Advantageous Tender”, as it is not clear in the way it sounds that it would include other criteria than cost. The Network for Sustainable Public Procurement (NSPP) is discussing alternative terms, such as using “best value”.
- Regarding reserved contracts, article 17 permits public authorities to limit a tendering procedure to economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers. Non-profit organisations, for instance, may benefit from participating in reserved contract schemes. Social

organisations are suggesting to include in the a specific reference to non-profit sector based on the European Commission Guide pointing out that “national law regulating a particular activity might, in exceptional cases, provide for restricted access to certain services for the benefit of non-profit organisations. In this case public authorities would be authorised to limit participation in a tender procedure to such non-profit organisations, if the national law is compatible with European law. Nevertheless, such a national law would restrict the working of Articles 49 and 56 of the TFEU, on the freedom of establishment and the free movement of services, and would have to be justified on a case-by-case basis. On the basis of the case law of the Court of Justice, such a restriction could be justified, in particular, if it is necessary and proportionate in view of the attainment of certain social objectives pursued by the national social security system”.

- About grounds for exclusion of providers from participation in public contracts, article 55, paragraph 3, refers to “grave professional misconduct” as exclusion criterion. However, the definition of which situations can lead to this qualification is not clear. To clarify this concept one option would be to introduce in the text some criteria of non-compliance with certain social and environmental obligations that can qualify a “grave professional misconduct”.

VI. Conclusion

The proposal for a new Directive represents a step forward in the process of modernisation of EU's public procurements rules. Moreover, it is a substantial step in the good direction in recognising and taking into account the specificities of social services, and to smoothening the risks and disadvantages of applying procurement rules to this sector. Consequently, the representatives of the Social Service Providers at European level (Social Services Europe and its member organisations) will undertake efforts to defend the Commission's proposal towards MEPs. It is envisaged that the European Parliament will vote on this proposal during the second half of 2012, and the Directive should enter into force before the end of this year.