



The review of the EU public procurement directives

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TOPICS

- INPUTS
- EVALUATION PROCESS
- ISSUES



INPUTS

- ECA
- Letta & Draghi
- EP



Special report 28/2023

Public procurement in the EU – Less competition for contracts awarded for works, goods and services in the 10 years up to 2021

- ❑ Bad timing
- ❑ Limited data
- ❑ Wrong benchmark

HOWEVER

- Indeed we need data
- Lowest price is too often used &
- Professionalisation is **unequal**

Letta & Draghi

This project has received funding from the European Union Horizon 2020 research and innovation programme under the Marie Skłodowska Curie grant agreement No 101019719.

innovation
No 956696.



LETTA wants

- more cross-border
- more sustainability (European social model) and
- a regulation 🤪

DRAGHI asks

- simplification 🤪
- more competition and
- some Buy European (resilience)



The EU own motion report

NB V much changed compared to the draft!!

- Calls, therefore, on the Commission to fully align the public procurement reform with its strategic objectives aimed at reducing bureaucracy and regulatory burdens, simplification, maintaining high social and environmental standards, guaranteeing ambitious local economic development, promoting access for SMEs and boosting the EU's competitiveness and security, preventing social dumping and preserving our economic and industrial sovereignty, in order to address harmful dependencies in respect of certain vital products and services; advises against measures that could compromise any of these principles



EVALUATION PROCESS

- Consultation
- Studies



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SAPIENS
NETWORK



Open Public Consultation (OPC) on the evaluation

- ended: **7th March 2025**
- **12-week internet-based public questionnaire** on 'Have Your Say' web portal, published together with the Call for evidence
- **Closed and open questions**, and the possibility to submit **own documents** (position papers, background documents, etc.)
- Results - **733 replies** - will inform the Evaluation and constitute a dedicated **annex** (i.e. the stakeholder consultation synopsis report)
- A **factual summary report** to be published within 8 weeks of the closure of the OPC (2 May)
https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14427-Public-procurement-directives-evaluation/public-consultation_en



Main Issues

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- Implementation/enforcement issues: inconsistent practices, **increased administrative burdens and costs**
- Rules are **too formalistic** (admin burden, long procedures), **complex, fragmented and inflexible** (negotiations, modifications)
- Overreliance on **lowest price**
- Main barriers for SMEs: administrative burden, unequal access to information, late payments, high financial requirements, **price over quality**, divergent implementation across MSs
- **Digitalisation**: current system not designed “digital”, systems are fragmented, under-utilised and insufficiently standardised
- **Professionalisation** and guidance are key – lack of administrative capacity to implement strategic procurement effectively.



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Studies

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- **Competition** in the EU public procurement markets
- **Cost-benefit** analysis of the quality and efficiency of public procurement procedures
- Small studies on:
 - (1) internal and external **coherence**;
 - (2) **relevance and EU added value**; and
 - (3) **transparency and integrity**



2 further take-aways

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- case law relying on the general principles is undermining legal certainty and placing HUGE burdens on CA/CEs
- legal fragmentation adds to the complexity of the legal framework



ISSUES

- Simplification?
- Integrity
- The external dimension
- How much local?
- SPP
- ETC (IT, data, professionalisation)





SIMPLIFICATION?

- Why do we have public procurement rules?
 - protecting state budget
 - enable challenges
 - fostering the internal market
- Is **more flexibility** a better answer?





INTEGRITY

- Different perceptions (and realities?) in the MSs
- Divergent provision in the 2014 directives
- Limited EU competence on criminal law
- Can it work with simplification?
- More transparency?**
- And competition?





□ The external dimension

- Article 25 Dir 24 - Conditions relating to the GPA and other international agreements **In so far as they are covered** by Annexes 1, 2, 4 and 5 and the General Notes to the EU's Appendix I to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements **treatment no less favourable than** the treatment accorded to the works, supplies, services and economic operators of the Union.
 - **Article 85 Dir 25 (Tenders comprising products originating in 'other' third countries) adds**
 - tender may be rejected where the proportion of the products originating in third countries exceeds 50 % of the total value of the products constituting the tender
 - Preference when price difference does not exceed 3 %

Relevant legislative instruments

- *FSR*
- *Anticoercion*
- *IPI*
- *and NZIA*



FSR – (Regulation (EU) 2022/2560)

- EOs shall notify CA/CEs of all foreign financial contributions meeting the threshold both the contract value (at least EUR 250 million) and to the subsidies received at group level (EUR 4 million)
- The declaration is notified to Commission who carries out a **preliminary review** no later than 20 working days
- If it decides to initiate an **in-depth investigation**, it shall inform the EO and the CA/CE
- If subsidies have negatively distorted the competition *either* the EO offers **commitments** “appropriate and sufficient to fully and effectively remedy the distortion” *or* Commission adopts a decision **prohibiting the award** of the contract to the concerned EO
- Commission can also start an investigation *ex officio*, but only with reference to concluded contracts

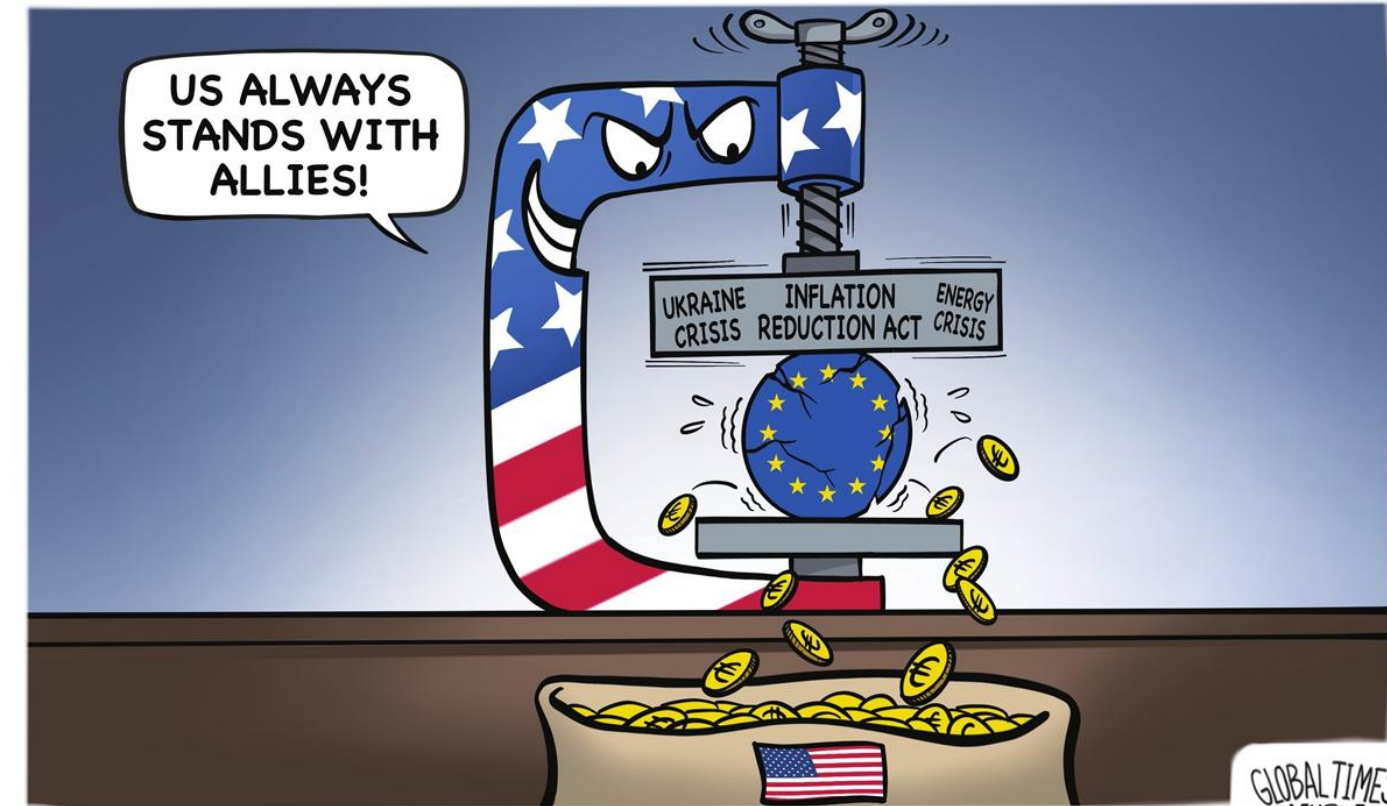
See also European Commission, ‘Communication pursuant to Articles 4(2), 8(1), 15, 17(2) and 25 of Implementing Regulation (EU) 2023/1441 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 etc’ (2023/C 246/02).

Anticoercion instrument

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Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries

- **COERCION:** to deter and counteract economic coercion by 3rd countries i.e. they interfere in the legitimate sovereign choices of the Union or a MS by **applying or threatening to apply measures affecting trade** or investment in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a MS
- Measures include the exclusion from EU procurements of goods, services or suppliers from the third country concerned or the imposition of a score adjustment



IPI

Regulation (EU) 2022/1031 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries

- ★ Commission is charged with investigating - of its own motion or after “substantiated complaint” - whether specific measures or practices exist limiting market access
- ★ If an acceptable *modus vivendi* is not achieved, based on a balance of all relevant interests, including the EU's broader interests and those of EU EOs, Commission may adopt an IPI measure.
- ★ July Commission report <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025DC0430>

Regulation (EU) 2024/1735: NZIA

Art. 25: resilience contribution (about 15% in award criteria) will be applied if there is a third-country dependence of more than 50% for a specific strategic net-zero technology (or for its components) (only be considered if the Commission has first assessed the level of dependence of each technology from a particular third country)



Case C-652/22 *Kolin İnşaat Turizm Sanayi ve Ticaret &* Case C-266/22 *CRRC Qingdao Sifang*

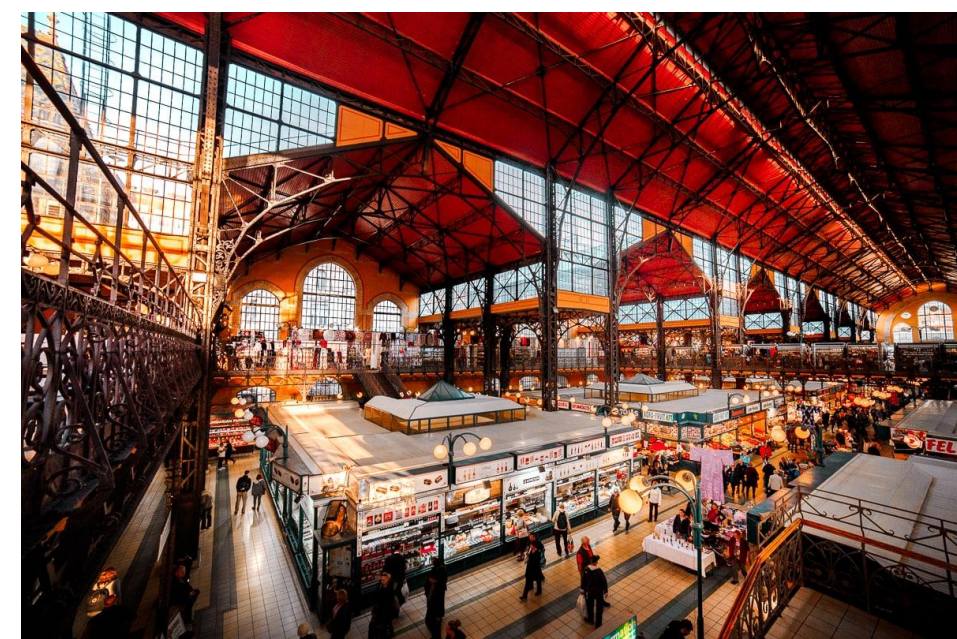
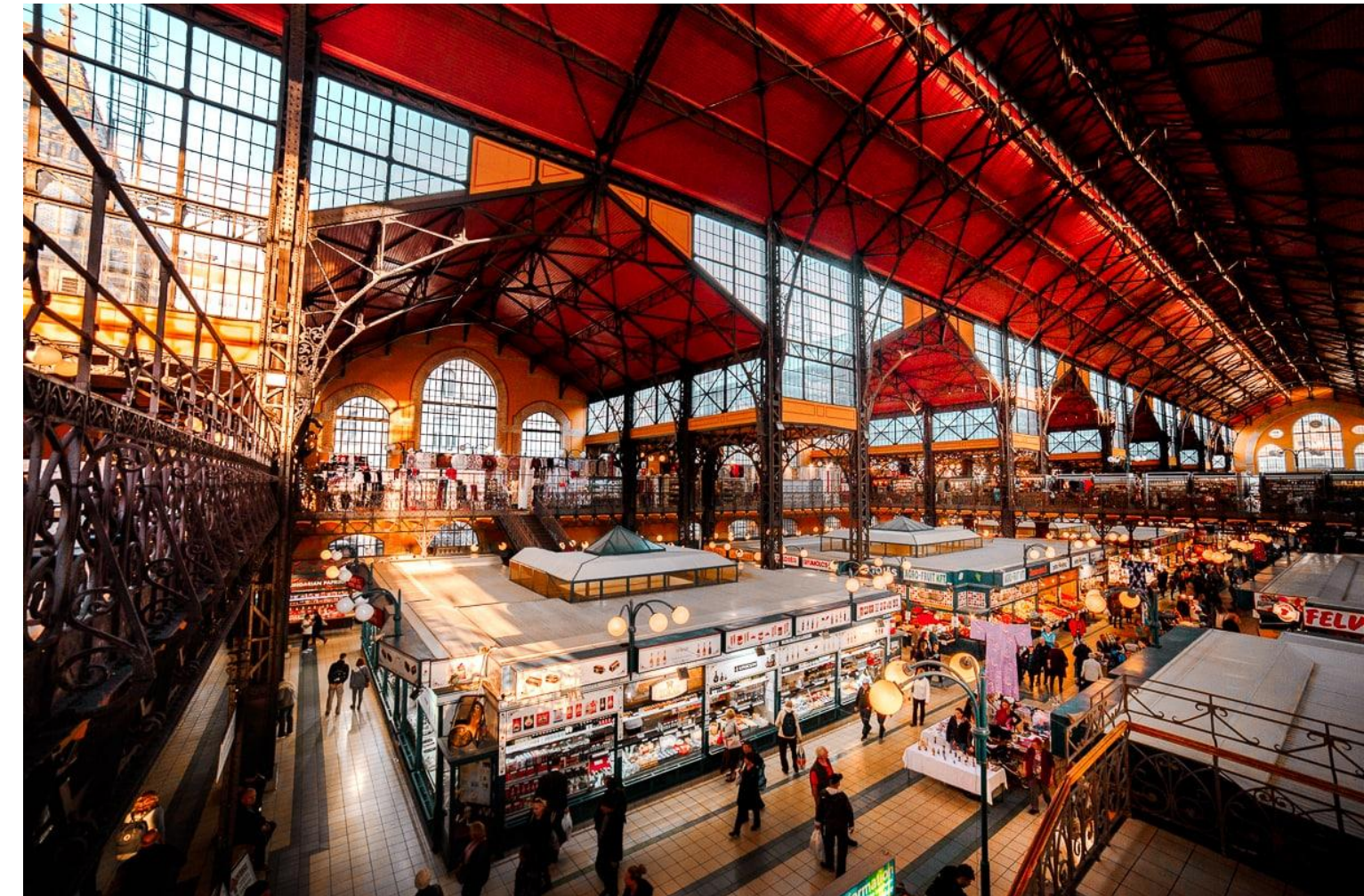
- 3rd country EOs have not right to participate to PP under EU law
- MSs cannot allow/forbit their participation by general rules
- CAs and CEs may decide to allow their participation
- If so the may provide for ‘score adjustments’
- rules on EU remedies do not apply

https://single-market-economy.ec.europa.eu/single-market/public-procurement/communications-and-guidance-documents_en



How much local?

- Resilience has become a big concern, but ...
- What is 'local'?
- Short supply chains?
- Buying European - selected items (e.g. medicines)?
- An exception for food/agricultural products?



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SPP

About 60 v. diverse sectoral measures (directives, but also regulations) with PP measures, e.g.:

- Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation
- Regulation (EU) 2023/1542 concerning batteries and waste batteries
- Directive (EU) 2023/2413 - promotion of energy from renewable sources
- Regulation (EU) 2024/1781 ecodesign requirements for sustainable products
- Directive (EU) 2024/1760 CSDDD
- Regulation (EU) 2024/3110 - harmonised rules for the marketing of construction products



SPP under attack

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- Simplification drive
- Emphasis on competition
- US pressure





What to do next?

1. You cannot have it all:
 - ❖ some are mutually reinforcing, but some are mutually exclusive (simplification/fight against corruption/transparency/competition)
 - ❖ MSs have v different needs and priorities
2. Flexibility for MSs and CA/CEs is needed
3. It must be protected from interferences from the CJEU





THANK YOU

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