



# New rules for public procurement in social services ESN Policy analysis

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On 28 March 2014, the European Union issued two new directives on public procurement and on concessions, which aim at the “implementation of environmental, social inclusion and innovation policies.” Within the procurement and concessions market, social services are subject to a simplified regime in terms of the tendering rules.

This analysis is based on a survey conducted by ESN with members from nine countries to assess the implications of the new directives on local authorities.

## Introduction

The European Social Network (ESN) is the independent network for local public social services in Europe. We support the development of effective social policy and social care practice through the exchange of effective knowledge and expertise. ESN member organisations are public authorities who plan, manage, finance and provide social services, as well as regulatory and research organisations. Public authorities may purchase services and goods from different providers and their contracting activities need to comply with European Single Market Rules on public procurement or on the award of concessions.

Social services play an important role in social protection and in empowering people to manage or overcome challenging circumstances in their lives. Depending on the country, public social services may be organised and funded in different ways to which rules of the European Single Market might apply. There has been an ongoing debate about the complexity of the social services sector and the extent to which EU laws should apply to social services<sup>1</sup>. In line with this, the Social Protection Committee developed a [Voluntary European Quality Framework for Social Services](#) on how to set, monitor and evaluate quality standards in social services.

In order to ensure more efficient and simplified procedures and to promote a better quality-price ratio as one of the criteria in awarding public contracts, the European Commission proposed a [revision of its Directive on public procurement](#) and of the [Directive on concession contracts](#) in December 2011. The European Parliament voted on the directives in January 2014 and the Council adopted them in February 2014.

The aim of the new directive on public procurement is to contribute to the “implementation of environmental, social inclusion and innovation policies.”<sup>2</sup> It recognises the specific characteristics of social services and provides a list of "social and other specific services" in respect of which a "light touch regime" will apply. The regime is based on a higher threshold of €750,000 – contracts below this threshold are not relevant for EU internal market rules. Regarding the award criteria, Member States are to decide if a contracting authority cannot award solely on the basis of price: “Member States will have to make sure that contracting authorities may take into account, i.a. all quality and continuity criteria they consider necessary for the services in question. Member States may also eliminate the price as sole award criterion for such services.”<sup>3</sup> The directive on the award of concession contracts provides a definition of concessions in the public sector and establishes certain obligations with respect to the selection and award criteria<sup>4</sup>. The new law aims to “create a common

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<sup>1</sup> European Commission, Debate on Social services of general interest: <http://ec.europa.eu/social/main.jsp?catId=794>

<sup>2</sup> European Commission, Public procurement reform. Fact sheet no 8: Social aspects of the new rules: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/reform/fact-sheets/fact-sheet-08-social\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-08-social_en.pdf)

<sup>3</sup> European Commission (2014), Fact Sheets Revision of public procurement directives, Fact Sheet nr 8. Social Aspects of the new Rules: [http://europa.eu/rapid/press-release\\_MEMO-14-20\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-14-20_en.htm?locale=en).

<sup>4</sup> European Commission (2014), Frequently asked questions on the new Directive on concessions: [http://europa.eu/rapid/press-release\\_MEMO-14-19\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-14-19_en.htm?locale=en).

framework for a major tool of public management in Europe in order to stimulate investment in public services.”<sup>5</sup>

Member States have until April 2016 to implement the new rules into their national law. This analysis provides a first impression from ESN members on the impact of the new directives on public social services. It furthermore highlights their expectations towards the national implementation of the directives. It should be emphasised that the text of the directives is complex and long and it will take some time for ESN members to fully review the implications the directives will have for their work, particularly as these directives are transposed onto national legislation and subsequently applied at local level. Once the new rules have been implemented in national law, ESN members can provide an input in regards to how the directive impacts on their work.

## Methodology of data collection from ESN members

This section describes briefly the approach adopted for gathering data in order to draft this briefing. To begin with, the ESN Secretariat selected a number of local public authorities across a number of European countries representing different social welfare models and forms of services contracting and provision. ESN members from Belgium, Bulgaria, Czech Republic, Germany, France, Finland, Spain, Sweden and the UK were selected. The Secretariat designed a short questionnaire with the aim of gathering information about the perception of local social services departments in regards to the new directives. The questionnaire comprised open questions around their assessment of the directives, their foreseen impact and the concepts of quality and sustainability in social services contracting.

## Directives' assessment

The EU public procurement rules have an impact on the ways public authorities purchase goods and services with the aim of guaranteeing equal access and fair competition for providers within the EU internal market. According to our members, the new rules bring some new developments and clarifications to the complex situation of EU and national public procurement legislation. However, until the directives are transposed at national level and implemented at local level, it will be difficult to clarify possible overlaps with current national legislation. It was emphasised that the overall impact of the directives for public social services at local level will depend on the transposition at national level, after which they will be able to adapt their procedures to the changes introduced and take advantage of the new tools.

### *Directive on public procurement*

ESN members welcome the emphasis on social and environmental issues enshrined in the new directive, particularly the recognition of the special characteristics of social services and the establishment of the “light touch regime” with a threshold of 750 000 Euros. Social

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<sup>5</sup> Commissioner Michel Barnier welcomes European Parliament vote on the Directives on public procurement and concessions (15/01/2014): [http://europa.eu/rapid/press-release\\_MEMO-14-18\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-14-18_en.htm?locale=en)

services which cost less than this amount are considered not to have cross-border interest and do not fall under the directive. However, members noted that most of their contracts are of higher value.

One ESN member also highlighted that “overregulation” should be avoided during the implementation of the directives. Such “overregulation” could lead to a limitation of the ‘margin of appreciation’ of the contracting authorities. Article 58 (1) states that contracting authorities may only impose the selection criteria referred to in paragraphs 2, 3 and 4 (such as the enrollment in trade registers or a minimum yearly turnover,) on economic operators as requirements for participation in the tender. In addition, Article 61 and Article 62 regulate that contracting authorities shall not require means of proof other than those referred to in Articles 61 and 62.

### *Directive on Concessions*

According to the EU’s FAQ on the directive on concession contracts,<sup>6</sup> a concession is a “kind of partnership between the public sector and a (usually) private company that has shown its added value in a specific area, for example developing infrastructure.” Regional and local public authorities in Spain, Bulgaria, France and Germany generally welcomed the adoption of the directive on the award of concession contracts, because it gives greater recognition to common service provision structures in public social services that are not based upon public procurement. Examples are personal budgets or other service provision relationships between financier, service provider and service user models. These models promote choice and control for service users, the development of services that match service users’ needs and greater quality driven by service user choice amongst service providers.

Nevertheless, questions were also raised about the legitimacy of these methods for the provision of social services that are not based upon public procurement in EU state aid rules. The “Altmark” judgment of the European Court of Justice established criteria that do not prohibit state aid for Services of General Economic Interest if four cumulative conditions are met. These conditions<sup>7</sup> are:

- (1) The clear definition of public service obligations
- (2) Objective, transparent and established in advance parameters for calculating the compensation
- (3) That compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;
- (4) Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of

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<sup>6</sup> European Commission, Concessions. Definition of a concession:  
[http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/reform/fact-sheets/fact-sheet-12-concession-definition\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-12-concession-definition_en.pdf)

<sup>7</sup> European Commission, Services of general economic interest (public services):  
[http://ec.europa.eu/competition/state\\_aid/overview/public\\_services\\_en.html](http://ec.europa.eu/competition/state_aid/overview/public_services_en.html).

compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

However, meeting the conditions of the “Altmark” criteria in order not to fall under state aid is difficult, particularly where there has been no public procurement. Models of public social service provision, such as service user choice models, often do not include a public procurement procedure. Moreover, the emphasis on other contracting criteria such as continuity and quality in the public procurement directives also raises questions about the compatibility with the fourth “Altmark” criteria under the state aid rules. Therefore, a clarification for other social service provision models, as alternative models to EU public procurement, would be necessary.

### *National legislative frameworks*

National legislation differs and public authorities have different responsibilities across countries. In some countries, important national characteristics have been acknowledged in the directives, such as in-house service providers or staff-led mutual spin-offs. Public service mutuals are organisations that have left the public sector but continue delivering public services.<sup>8</sup> Mutuals can be co-operatives or social enterprises. Another national characteristic could be the existence of innovative public-private partnerships or the participation of NGO’s in the delivery of social services.

In the past, national legislators who transposed European law into national legislation often produced a juxtaposition of relevant rules. Although national legislators transpose the EU rules into their national law, some national legislations occasionally have been stricter than the European legislator if they found that approach useful (e.g. in Belgium, Czech Republic). As examples, the national legislator might see benefits in being clearer on the definitions of “abnormally low tender” or the conditions under which procedures may be applied.

Nevertheless, European legislation and its national implementation should acknowledge the various relationships between financiers, planners, case-managers, service providers and service users in each country.

## **Impact**

### *Selection of tenderers*

A positive element identified was the introduction of more flexibility in the procurement procedure, which allows public purchasers greater ability to negotiate with suppliers (Article 30). They see more flexibility in their choice of tenderers whether they are businesses (notably small and medium-sized companies), social enterprises, and or public-private partnerships. It is felt that the new directives put competitors more at an equal footing with each other.

The directive provides the possibility for public authorities to take important elements as award criteria into account, such as quality, continuity and accessibility. The flexibility in the

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<sup>8</sup> UK Government, Take part. Start a public service mutual: <https://www.gov.uk/government/get-involved/take-part/start-a-public-service-mutual>

award criteria should help ESN member organisations procure products and services according to local needs and interests. A greater emphasis on environmental and social issues in public procurement, including a consideration of the life-cycle costs (Article 68) rather than the up-front costs, gives public authorities greater opportunities to purchase services that are more sustainable because of having introduced other considerations besides price.

Specific criteria, such as the employment of certain groups, the use of sustainable building materials, or the contracting of a social business, might contribute to address local needs and goals. Members in Finland and Spain welcomed the possibility of reserving contracts for social enterprises or the inclusion of social clauses (Recital 93, 99). They approve of the possibility for special preconditions in contracts –for example, the condition that a set percentage of the contracted workforce must come from a certain group, such as young jobseekers or the long-term unemployed. This enables public authorities to embed in contracts a certain conditionality which may help them achieve specific economic, policy and social goals.

If service contracting is embedded in a fully public framework, the service is not necessarily subject to public procurement. In specific cases, like sheltered workshops in the UK, staff members of the public authority may be involved in service delivery because of their positions as public employees. ESN members welcome this acknowledgement, as public authorities provide services in many countries.

Our members see advantages in the introduction of the “Innovation Partnership” (Article 31), which means that public authorities can launch a call for tender that encourages bidders to develop innovative solutions. Through this process, the contracting authority can “establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase” (recital 49). The Finnish directors of social services highlighted that the Innovation Partnership is the most promising part of the directive, as it provides greater flexibility and the possibility of developing new innovative services and products in times of budget pressures and higher demand.

ESN members also welcomed the possibility to use past performance shortcomings of service providers as grounds for exclusion in subsequent tenders.

### *Procedures*

There are four public procurement procedures and the new legislation gives more flexibility to public authorities regarding the choice of procedure (Articles 26 ff.). Specifically, the possibility to conduct offer-based negotiations has become more important and is seen as positive by ESN members. Negotiations between procurers and tenderers are seen as a useful tool and will allow the elimination of bidders throughout the process.

Public authorities can open negotiations, but are not obliged to do so. If they opt to open a negotiation, then they may do so also at later stage of the procurement process. In practice, many contracting authorities already procure without actually negotiating. Public authorities also retain the right to ask for further documents at a later stage of the process. If authorities

ask for further documents in the process, they cannot close a contract unless they have these documents. It has been noted that the deadlines have been shortened and there is no obligation to give a qualitative response to rejected tenders unless it has been explicitly asked for. This eases the work of public authorities. In general, there will be an increased reliance on national data bases and approved lists of contractors. It has been applauded that the new rules give more guidance on how to deal with abnormally low tenders. In terms of keeping records in case of judicial challenges, authorities must at any stage of the procedure ensure that they archive records in an appropriate way (e.g. written minutes, audio files).

### *E-procurement*

The directive further stresses the role of electronic means of information and communication. ESN members hope that this will make the process of procuring easier and more efficient. It is expected that this electronic process and the encouragement to contracting authorities will open up opportunities for SMEs to tender. ESN members appreciate the contribution of technology to the Europeanisation of procurement markets, thus reducing cross-border barriers for tenderers from abroad. This means publishing tenders through e-channels, which is expected to lead to a higher number of tenderers from across Europe. The Dynamic Purchasing System, a completely digital process for “commonly used purchases generally available on the market”,<sup>9</sup> has been refined and simplified. If used, it will provide a useful tool for procurement, for which appropriate software will be needed.

## **Quality and sustainability in contracting services**

ESN members welcome the possibility to consider quality, sustainability, accessibility of services or continuity in the procurement process. These criteria are crucial in the provision of social services as they contribute to meeting the needs of services users. The directives give more possibilities to work with providers that address local needs or problems and have the local knowledge. The procurement rules on social services are part of a special “lighter” procurement regime (Art. 74-77) and “contracting authorities may take into account the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation” (Article 76). The new directives include a cross-cutting 'social clause', which calls for the implementation of social and labour law and/or international conventions, which often call for a stricter adherence to social norms. A Belgian ESN member welcomes the mandatory subscription to social and ethical criteria set out in several ILO Conventions<sup>10</sup> (tenderers need to subscribe to that), which comprises a comprehensive range of requirements for service deliverers. Public authorities are thus under the obligation to ensure compliance with

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<sup>9</sup> Public procurement in Europe Cost and effectiveness, A study on procurement regulation. Prepared for the European Commission, March 2011, p. 23.

<sup>10</sup> The concrete ILO Conventions comprise the following: Forced Labour Convention, Freedom of Association and Protection of the Right to Organise Convention, Right to Organise and Collective Bargaining Convention, Abolition of Forced Labour Convention, Equal Remuneration Convention, Minimum Age Convention, Worst Forms of Child Labour Convention.

the above requirements, which include, as examples, provisions on the right to organise and to prohibit forced labour.

### *Costs versus quality*

According to ESN members, the relationship between cost and quality is crucial when contracting services. For the moment, most public authorities can still award services only on the basis of costs, but ESN members often prefer to have quality criteria included. Public authorities would like to take these criteria into account, but concede that it is difficult to reconcile price and quality considerations.

The explicit integration of these criteria into the European texts is welcomed by ESN members, although doubts remain on how strong the real impact will be on the ground. Many ESN members in countries like France, Sweden or Spain already award contracts on the basis of additional criteria to price or encourage tenderers to include “social” aspects in their proposals; for instance, some regional governments in Spain have created a Framework Agreement for services. They also include social clauses in contracts and reserve an amount of contracts for social organisations/NGOs. A Belgian member stated that the consideration of service quality has grown in Belgium. Our Bulgarian member specified for example, that the time factor forms part of the specific credentials of social services, as the contracting out of social services often require “maximum clarity and speed”. The final decision-making between the proposals mostly equals a balancing act. Negotiation procedures help public authorities to liaise with tenderers and take additional information into account. Overall, these negotiations contribute to the identification of effective and efficient practices.

We would also like to underline that there are also other models of social service provision, that although do not underlie public procurement; promote quality and efficiency of service delivery. For example, in Sweden, legislation on *free choice* guarantees that profit and non-profit service providers have to fulfill certain basic criteria to provide services (mainly homecare). After a needs’ assessment is carried out by the local authority, service users can choose between a number of providers. The cost for services is the same, no matter the provider, which makes them to compete solely on the basis of quality.

## **Conclusion**

In general, ESN members welcome the possibility to consider quality, sustainability, accessibility of services or continuity in the procurement process. They point out that they make use of ‘social clauses’ if possible and where appropriate. ESN members welcome the new directives because they bring some clarifications and provide more flexibility in the procurement procedure. Overall, they see the two directives as a “step in the right direction”, but consider them a gradual reform rather than a structural change.

There seem to be fundamental questions in regards to their transposition onto national legislation and particularly implementation at local level. The concerns reflect the acknowledgement of national, regional and local models of social service provision and certain award criteria, such as quality and sustainability in national legislation. For that reason, ESN members call for the integration of quality criteria, even if their national context

can vary considerably. Local authorities should be supported to balance quality and price to guarantee sustainable services in the transposition process. Finally, further clarification in regards to other social service provision models, as alternative models to EU public procurement, would be necessary.

**ESN would like to thank the following ESN members for their contribution:**

Association of Flemish Directors of Social Services (Belgium)

Municipality of Sofia (Bulgaria)

Czech Union of Towns and Municipalities (Czech Republic)

Association of Directors of Social Services in Finland (Finland)

National Association of Directors of Social Care and Health Departments (France)

German Association for Public and Private Welfare (Germany)

Association of Directors of Swedish Social Welfare Services (Sweden)

Autonomous Community of Galicia (Spain)

Association of Directors of Adult Social Services (UK)

**Further reading**

[DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC](#)

[DIRECTIVE 2014/23/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts](#)

[Public procurement reform, European Commission](#)

[Public procurement in Europe Cost and effectiveness, A study on procurement regulation. Prepared for the European Commission, March 2011](#)