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Better Regulation in EU Public Procurement Law

Introduction

The European Commission recently stated that “better regulation matters”.¹ This is perhaps a somewhat surprising statement, but over the last years, the Commission has clearly realised that adopting regulation at EU level – or in other words ‘regulation from Brussels’ – is regularly received with criticism: the principle of subsidiarity is not respected, rules are too complicated, there are too many exceptions, etc.² At the same time, the Commission tries to reduce the volume of secondary legislation, and as discussed in the introduction to this volume, it has proposed notably fewer new proposals in recent years. Also in the field of EU public procurement law however, one may raise pertinent questions on the quality thereof.

In this contribution, I would like to set out some personal views on the Better Regulation programme (BR) and EU public procurement law. Below, this contribution starts off by providing some insight into the relevance of this particular field. Hereafter, I will briefly explain the legal framework and key elements. Next, I shall try to assess the most obvious shortcomings of the regulation in this specific domain. In the penultimate section, I mention some solutions and deal with outstanding problems, summing up the key challenges ahead. The final section concludes.

¹ Communication from the Commission to the European Parliament, the European Council and the Council, ‘Better Regulation: Delivering better results for a stronger Union’, COM(2016) 615 final, p. 2.

² See e.g. W.J.M. Voermans, ‘Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?’ (2) 2009 *Erasmus Law Review*, p. 59.

Public Procurement: What is it all about?

For the purposes of this contribution, EU public procurement law can be summarised in accordance with the definition in Article 1 Directive 2014/24/EU:

“1. (...) rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

2. Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.”

The key elements are (1) the acquisition of works, services and/or supplies, by (2) contracting authorities (essentially: the public sector and bodies governed by public law) with a pecuniary interest, with (3) an estimated value above the thresholds. Public procurement law affects a substantial share of world trade, amounting to more than EUR 1.3 trillion per year.³ In the European Union, the public purchase of goods, services and works has been estimated to be worth of approximately 14% - 16% of GDP.⁴ In some countries, the share of public procurement in terms of the GDP is even higher. In the Netherlands, for example, the central and sub-central authorities engage in buying at an estimated figure of EUR 73.3 billion per year.

³ See <http://ec.europa.eu/growth/single-market/public-procurement_en> Included are public procurement commitments under the World Trade Organization's Agreement on Public Procurement (GPA). Not the entire value of public procurement is therefore included. The WTO has a slightly different estimate: 1.7 trillion; https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

⁴ The websites <<http://ec.europa.eu/trade/policy/accessing-markets/public-procurement>> and <<http://ec.europa.eu/growth/single-market/public-procurement>> mention slightly different figures, but the range is the same. At WTO level public procurement is accounting for 15-20% of global GDP and the economies of many countries around the world fall inside this range.

Aims, key principles and legal framework of public procurement

From the outset, it must be emphasised that public procurement in the EU Member States does not have one objective, but depends on the various Member State objectives. At the EU level, the following policy objectives are widely accepted:⁵

- Ensure wider uptake of innovative, green, and social procurement;
- Professionalise public buyers;
- Increase access to procurement markets;
- Improve transparency, integrity and data;
- Boost the digital transformation of procurement;
- Promote that authorities are buying together.

In public procurement law, these aims stand next to what may be called its original objective: to establish an internal market for public procurement through harmonisation. In order to achieve these aims, there are rules that basically result from the principles of public procurement. In turn, these principles originate in the Treaty on the Functioning of the European Union (TFEU). They are:

1. Equal treatment

Within the framework of public procurement, all potential interested parties and bidders for public contracts and concessions must be treated equally and without any distinction. Without doubt, this is the most important principle in public procurement. It is codified in Article 18 of Directive 2014/24/EU, and reference is made in the first recital of the Directive. This principle does not mean that different situations or economic operators cannot be treated differently, but from the perspective of the contracting authority all parties in a same position must be treated equally.

⁵ <https://ec.europa.eu/info/policies/public-procurement_en#objectives>.

2. Non-discrimination

Contracting authorities should not make any difference between the potential bidders on the basis of nationality, gender, etc. Indirect discrimination particularly deserves attention, and over the years, direct discrimination is becoming increasingly the exception. This principle can also be found in Article 18 of Directive 2014/24/EU.⁶

3. Transparency

The principle of transparency provides that the contracting authority should maintain a significant sufficient level of transparency before, during and after the public procurement process. It results from the previous two principles. A contracting authority should not only respect the principle of transparency before the procedure and on the moment of announcement of the contract notice, but also during the procedure and even after the contracting. The principle is codified in Article 18 of Directive 2014/24/EU, and further developed by the Court of Justice. The latter e.g. held in its *Telaustria* judgment:⁷

“That obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed.”

In later judgments, the Court extended the principle to other phases of the public procurement process. Its importance cannot be underestimated in a situation where the contracting authority is dominant in the public procurement process.

⁶ For an analysis of the first two principles, see R. Nielsen, ‘Discrimination and Equality in Public Procurement’, paper available at <<http://arbetsratt.juridicum.su.se/filer/pdf/klaw46/discrimination.procurement.pdf>>.

⁷ Judgment of 7 December 2000 in Case C-324/98, *Telaustria Verlags GmbH*, par. 64.

4. Proportionality

The proportionality principle means that, to achieve the aims of public procurement, the EU will only take the action it needs to, and nothing more. The principle is enshrined in Article 5 TFEU, which states: “The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” A contracting authority must always balance the necessity and proportionality of requirements, conditions, demands, technical specifications, etc. in public procurement procedures with the aims it intends to realise. Article 18 of Directive 2014/24/EU confirms the application of the proportionality principle in public procurement. Even decisions by the contracting authority, such as in the field of exclusion of economic operators, must be in proportion to the goal that the contracting authority aims to realise. In The Netherlands, the application of the principle of proportionality in public procurement is further regulated in Article 1.10 Aanbestedingswet 2012 and the *Gids Proportionaliteit*. This Proportionality Guide intends in particular to ensure that all requirements imposed by a contracting authority are proportionate to the object and scope of the public contract. The Dutch Public Procurement Act (*Aanbestedingswet 2012*) states that the Proportionality Guide is to be considered as a mandatory guideline.⁸ The latter elaborates on the application of the principle of proportionality and how it should be applied in procurement procedures. Accordingly, the application of the Proportionality Guide should strengthen the position of small and medium-sized enterprises during tender procedures. Contracting authorities may only deviate from the detailed provisions on proportionality if this is properly motivated in the tender documents (“*comply or explain*”).⁹

5. Mutual recognition

For the establishment of one internal market, the principle of mutual recognition is important. Mutual recognition promotes economic integration and increased trade between the Member States. On top of the previous principles, contracting authorities must guarantee a

⁸ Article 1.10 par. 3 Aanbestedingswet 2012.

⁹ Article 1.10 par. 4 Aanbestedingswet 2012.

level playing field among economic operators from different countries. In this respect, contracting authorities must accept that, although conditions might not be identical, certificates, awards, etc. from other member states are all equivalent. Even though at certain points the requirements for a certificate might differ, the contracting authority cannot impose a (national) certificate as condition for award of a contract.

6. Effective competition

Effective competition will exist if in the period between the notice of the contract and the actual bid several economic operators had effective and equal access to the tender documents, and if the tender documentation enables several economic operators to make a bid. In my view, effective competition is an aim of public procurement, because without competition, it simply does not work: a best price quality ratio can only be reached if effective competition regarding the public contract or concession actually takes place. Effective competition is thus a condition which must be tested in any and all public procurement procedures.

These general principles have mostly been recognised in the case law of the European Court of Justice. Later on, they have all been enshrined in EU secondary law. The overall volume of regulation of public procurement underwent a steep increase in the last 40 years. During this period, the Union (and the Economic Community that preceded it) adopted six generations of directives in the field of public contracts. In 2014, the EU adopted for the very first time a directive on public concessions. This extensive body of secondary law is nowadays related to substance, as well as to enforcement and remedies. Outside the general scope of public procurement regulation, there is separate legislation on defence and security procurement (Directive 2009/81/EC). Yet, these particular procurement rules are very specific, and cover only a limited part of the procurement volume and can thus be left aside. Within the framework of this contribution, we may also omit a discussion of the differences between the directives between the first generation of 1971, and the latest generation of 2014. For sure this would be interesting, as the changes in the public procurement

directives are numerous. For reasons of space however, the focus lies on the most recent generation of 2014, when the Directives 2014/23/EU (Concession Directive), 2014/24/EU (General Directive) and 2014/25/EU (Special Sector Directive) were adopted. These measures all had to be transposed in national legislation by 18 April 2016.¹⁰

Possibilities of Better Regulation

Before answering the question “What are the possibilities for better regulation in EU law?” with regard to this specific domain, it is first necessary to define what better regulation in the field of public procurement entails. Let us proceed from the European Commission’s own definition:¹¹

“‘Better regulation’ means designing EU policies and laws so that they achieve their objectives at minimum cost. Better regulation is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of subsidiarity and proportionality i.e. acting only where necessary at EU level and in a way that does not go beyond what is needed to resolve the problem. Better regulation also provides the means to mainstream sustainable development into the Union's policies.”

Obviously, this is a very general definition of better regulation at EU level. For public procurement, the definition must be linked to the aims and principles of this field of law. Crucial is that public procurement is ultimately enhanced, in terms of both effectiveness and results. New regulation must therefore be more effective and providing results compared to previous generations. Tentatively, the following key elements may be considered when determining whether new public procurement rules are considered to constitute ‘better regulation’:

¹⁰ The Netherlands ran slightly late in transposition and modified the Aanbestedingswet 2012 as per 1 July 2019.

¹¹ See <<https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-better-regulation-commission.pdf>>.

1. Transparency

The legislative process for secondary EU legislation in the field of public procurement should be transparent, as well as the public procurement procedure itself. In this respect, there is definitely room for improvement. It is clear that too many changes in the latest generation of directives were introduced through amendments in the procedure, and that there has hardly been any reference to the views expressed by the Member States in the legislative process. In the 2014 generation, the European Parliament introduced more than 1000 amendments, sometimes badly prepared. In the *Parking Brixen* case,¹² the Court introduced as a clear condition for quasi in-house procurement that no private capital should be involved (presumably to avoid distortions of the market and state aid). However, the attempted codification in Article 12 Directive 2014/24/EU reads:

“1. A public contract awarded by a contracting authority to a legal person governed by private or public law shall fall outside the scope of this Directive where all of the following conditions are fulfilled:

- (a) (...);
- (b) (...); and
- (c) there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.”

This exception is entirely new, and was not part of the Commission proposal. Yet, any explanation on its meaning is lacking. This hardly amounts to (the creation of) a transparent new rule in public procurement. In Dutch legislation it is furthermore a strange provision: there are no national legislative provisions that require non-controlling or non-blocking forms of private capital participation.

¹² Judgment of 13 October 2005 in Case C-458/03, *Parking Brixen*, par 67.

2. Accessibility

Public procurement rules should be accessible for users and practitioners. Accessibility is at least suboptimal at the present moment: not all judgments of the Court in the field of public procurement law are translated into all EU languages, and the directives are difficult to interpret. Although it is certainly an improvement that a part of the case law of the Court has meanwhile been codified, some provisions, for instance Article 12 of Directive 2014/24/EU, are still not accessible and even deviate in several respects from prior case law. Another example is Article 72 on the modification of contracts during their term. This is a difficult and cascade-like provision, leaving several issues unaddressed, which will certainly give rise to preliminary reference questions.

3. Simplicity

To a certain extent, BR in the field of public procurement law also amounts to (a need for) more simplicity. Rules in public procurement have sometimes become a bit like an Emmenthal cheese, with a clear substantive law part, but also significant holes used by contracting authorities to escape from the demands of effective and transparent procurement. As an example may be mentioned the introduction of life-cycle costing. Article 68 paragraph 1 of Directive 2014/24/EU reads:

“1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works:

(a) (...)

(b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.”

The introduction of life-cycle costing is an improvement, but the provision under (b) makes the use of this award criterion unnecessary complicated for the average contracting authority.

4. Low (financial) contracting burden

Public procurement is essentially about contracting. A decreased burden for contracting authorities and economic operators will be beneficial for both. One of the criticisms regarding public procurement legislation pertains to the administrative burden for contracting authorities and economic operators. In most discussions, this is translated into a financial burden for the economic operator. Although in most of these discussions, parties tend to forget that an investment is also needed in private commercial activities, the burden in public procurement might be significantly higher. An alleged burden on both sides certainly has a disadvantage, because the cost of contracting will ultimately be passed on to taxpayers, or calculated in the cost of works, services or supplies. For the public sector, prices will presumably go up: the time and money invested in obtaining the bid will have to be earned back. Contracting authorities will increase their staffing in order to organise properly public procurement. Apart from these arguments, economic operators might not be prepared to tender, or avoid participating in tenders if the return on investment (including the tendering costs) is not sufficient. This will reduce in the long term competition. Especially in periods of economic growth, certain economic operators (operating in higher market segments) tend to withdraw from the public markets. The chartered accountants in the Netherlands may be mentioned as an example. In the past, the 'Big Four' audited the public sector. That however left behind the market of auditing the books of smaller public entities, as result of a combination of increased requirements together with competition aspects.

5. Availability of remedies: effective review

Ultimately, in a public procurement procedure, there is one winner.¹³ All other economic operators will face a loss: they made an investment without receiving any payback. The question arises how these losing economic operators are protected against unlawful act or even wrongful assessments of their bids. Directives 89/665/EEC and 92/13/EEC (the Remedies

¹³ With the exception of framework contracts; see Recital 61 of Directive 2014/24/EU and Article 33 Directive 2014/24/EU.

Directives) harmonised the national laws in this field. Yet, this harmonisation did not mean that remedies cannot be improved.¹⁴ First of all, in practice there is a certain tension between review of procedures and bids by courts or regulatory bodies on the one hand, and a margin of appreciation of the contracting authority on the other. Particularly in the field of quality – when the best price/quality ratio has been selected as award criterion – there must be room for contracting authorities to make an independent assessment that contains, at least to a certain extent, elements of subjectivity. We here encounter a difficult tension, since objectivity and transparency should be the foundations of all evaluations of selections or bids. Secondly, there is a tension between transparency on the one hand and protection of confidential information of economic operators on the other. Effective remedies are only possible if bids are ultimately reviewed by an independent body. Often, the review body will not have the expertise to assess the contents, but at least formal aspects and accessible parts of a bid (financing, technical requirements, etc.) can be reviewed.

6. Codification

One of the important arguments for the sixth generation of public procurement directives is the extensive case law on public procurement. The Court of Justice of the EU has handed down many judgements with regard to the five previous generations of directives in the field. For example, with regard to quasi in-house and in-house procurement, these judgments have over the years created a patchwork of rules and particular conditions for relying on the exception for quasi in-house and in-house procurement. Some of these judgements are related to other subjects as well, and difficult to find.¹⁵ More importantly, some of these have been interpreted slightly differently later. For example, the judgments on a significant cross-border interest seem to differ from each other. The latest important judgment in the *Tecnoedi*

¹⁴ See also in this respect: Report from the European Commission to the European Parliament and Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EC as amended by Directive 2007/66/EC, COM (2017) 28 final.

¹⁵ See for example the Judgment of 11 January 2005 in Case C-26/03, *Stadt Halle*.

case underscores that it is still important to examine several judgements at the time.¹⁶ In other words, a positive aspect of the sixth generation, and in this respect a factor leading to better regulation, is the increase of legal certainty through codification, as pointed out in the second recital of Directive 2014/24/EU (“There is also a need to clarify basic notions and concepts to ensure legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.”).

7. Secondary aims: limitation and coordination

It almost goes without saying that over the last 15 years, the emphasis on green procurement and procurement involving environmental aspects, has increased. The Court already opened the possibility for contracting authorities to include other aspects than price and quality in the assessment of bids in the *Beentjes* case.¹⁷ It took quite some time before the Court of Justice unequivocally acknowledged in the *Max Havelaar* case¹⁸ that protection of the environment and promotion of sustainable development can be realised through public procurement as well. This emphasis is clearly visible in, for example, recital 91 of Directive 2014/24/EU:

“This Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.”

In my view, this forms an improvement to the extent that there exists always a suspicion that, with the serious differences in ambition between the Member States, green procurement might be abused to protect national interests and jeopardise the entry of economic operators from other Member States. From the BR point of view, a down side is that in the directive, there are too many provisions, which are not clearly linked. For instance, Articles 18, 62, 67

¹⁶ Judgment of 6 October 2016 in Case C-318/15, *Tecnoedi Costruzioni*, par. 22.

¹⁷ Judgment of 20 September 1988 in Case 31/87, *Gebroeders Beentjes*.

¹⁸ CJEU 10 May 2012, case C-368/10, *European Commission v Kingdom of the Netherlands*, ECLI:EU:C:2012:284.

and 68 (award criteria) and 70 (performance conditions) all individually relate to green procurement, yet none of these provisions have been visibly interlinked. Therefore, a clear overall picture with regard to green procurement is missing. A reduced number of rules and more coordinated approach would likely result in better regulation.

8. More is not better: reduction of rules

It is regrettable that the public procurement directives from generation to generation seem to explode *qua* number of provisions. This leads to a diminished accessibility of the field. In particular, one should question whether public procurement really needs so many detailed rules. In my view, the EU should be more reluctant, and emphasise the general principles of public procurement more. I would therefore recommend reducing the number of rules, but clarify the general principles. National legislators could within their own jurisdictions work out the rules in greater detail, possibly adding their own, yet not losing their way when attempting to navigate the very formal rules at European level. Not only is “more” not automatically “better”, but we also witness an increasing complexity between, on the one hand, the rules in the first and second generation, and the fifth and sixth generation on the other. One could question whether for example Article 26 (choice of procedures) and Article 58 (exclusion grounds) of Directive 2014/24/EU should be so complicated.

9. No gold-plating

Gold-plating is the well-known pejorative term to characterise the process whereby an EU directive is given an additional remit or level of depth when being transposed into the national laws. Some Member States, e.g. the Netherlands, seem to engage in such gold-plating in public procurement. The pertinent directives have now been transposed into the national laws of most EU member states, and more national legislators have been seizing the opportunity to add their own rules. From the perspective of economic operators, this process should be profoundly regretted. It jeopardises the functioning of the internal market, as it ultimately leads to different procedures and requirements for contracts with an estimated

value above the thresholds. The force of the directives should be that economic operators in the EU can as much as possible participate under harmonised conditions. Being able to more or less expect the same rules creates more efficiency and accessibility of the markets across Member States. Overall, one of the most important objectives must be the creation of one internal market for public spending.

The Challenges Ahead

Within the Member States, EU regulation is presently used for different purposes. There are those who place an emphasis on public procurement and the economic / financial result. Tenders are accordingly awarded for the lowest price. Others emphasise that public procurement should lead to less corruption, and that regulation should only result in a transparent market for public spending. Public procurement rules can however also be used to improve the quality of the public sector and create an environmental and social impact. The EU legislator maintains an own agenda and tries to strike compromises in the discussions between them. The most important challenge will be to reach find a good balance between these competing aims. The risk here is that ultimately proposals from the Commission will be watered down to 'grey', instead of 'better' regulation, lacking clear objectives. Therefore, I would dare to call on the EU legislator to reach out for a more concise approach in the field concerned, and restrict itself with regard to the aims and objectives to be pursued (in contrast to the present six aims). But, I do realise this is a tall order in the contemporary EU context.

The second challenge in my view is the most difficult one: is it possible to abolish rules? This is always a difficult question, since the legislator considers the establishing of rules as its natural power and the best solution to organise public procurement. There are however various rules that create unnecessary difficulties. One could imagine that the principles of subsidiarity and proportionality are sufficient for imposing a duty to find a reasonable balance between the various aims and rules. In practice though, striking this balance is much more complicated. For example, the Dutch

Proportionality Guide (in total 69 pages) and the Guidelines on Services and Supplies (in total 51 pages) seem superfluous from that perspective. Leave these matters up to case law, or so I would argue, since application of the principle of proportionality calls for a case-by-case approach rather than general rules. In public procurement, the proportionality principle ensures that all requirements imposed by a contracting authority are proportionate to the object and scope of the public contract. Yet also certain hobbies by member states might be suitable for abolishment. For instance, the concept of “maatschappelijke meerwaarde” (societal added value) in Article 1:4 of the Dutch *Aanbestedingswet* 2012, and an obligation to divide public procurement assignments in lots in Article 1:5 there do not seem to contribute to better regulation at all. Not only at the national level can certain rules be abolished though, for EU directives also contain provisions that unnecessary complicate public procurement. One could mention for example self-cleansing (remedial measures) as a possibility to escape from exclusion in tenders, some of the rules in Article 12 of Directive 2014/24/EU on the quasi in-house and in-house procurement, in particular the rules on participation of private capital, and the exception from the full regime for social and other services in Article 38 of Directive 2014/24. Public procurement can easily do without these rules.

Conclusions

Unfortunately, for over six generations, in approximately 40 years of public procurement rules, the trend in the legislation is unfortunately not one towards better regulation. Unless one considers more rules and increased complexity as fitting within the BR programme, there is instead a tendency towards less transparency and a more extensive set of rules. The process itself must definitely become more transparent, as too many changes in the process have been enacted without public explanations. Ultimately, this will only lead to more case law of the European Court of Justice, and probably further divergences between the Member States – a development that the sixth generation of public procurement consciously tries to avoid. Therefore, BR in public procurement law should align with the foundations of the public procurement rules: the regulation of the acquisition of works, services and/or supplies. This regulation must be accessible, transparent, and display a certain degree

of simplicity. BR could certainly help to improve the quality of the public procurement. In particular, rules with many exceptions could be considered for abolition. Overall, it will make public procurement regulation more user-friendly for contracting authorities as well as economic operators. Most probably, the cost of contracting will be reduced at the same time, which is equally beneficial for both.

We should not forget that public procurement rules ultimately aim to govern a purchasing process, and that in these commercial or business transactions, less rules may well amount to better regulation. Moreover, users and practitioners in this field need to be able to assess their rights and obligations quickly. In particular in the public procurement process – where deadlines are short, and parties risk exclusion at considerable commercial disadvantage – such assessments must be easier than in other areas of the law where time is less critical. Therefore, indeed: better regulation matters and less might be better!