

REFIT Platform Opinion

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REFIT Platform Opinion on Effectiveness and efficiency of public procurement (youth and social care) by the Dutch Ministry of Health, Welfare and Sports on effectiveness and efficiency of public procurement (youth and social care)

The REFIT Platform has considered the **submission** from the *Dutch Ministry of Health, Welfare and Sports* that refers to issues related to Directive 2014/24 on public procurement (PP) and its “light regime”. The submitter requests that 1) the European Commission evaluates Art. 74 and 76 of Directive 2014/24, which relate to services in the social domain; and that the European Commission investigates whether the services included in Annex XIV have a cross-border dimension; 2) Services with no cross-border dimension should be excluded from the remits of the PP Directive and 3) the European Commission helps Member States reduce the tendering administrative burden by e.g. drawing up guidelines.

The **Stakeholder group** recognizes the concerns raised about the administrative burden caused by tendering and the fact that some social services have a limited cross-border dimension. The Stakeholder group notes however that the Internal Market should be fostered further and a balance should be found between both objectives. The Stakeholder group invites the European Commission to 1) Include the “light procedure” in the upcoming evaluation of the procurement directives; 2) Evaluate whether certain tenders relating to a single individual could be exempted from the tendering process even if exceeding the threshold; 3) further pursue its ongoing initiatives for capacity-building measures and to provide guidance e.g. the planned national workshops.

The **majority of Member States** that contributed to the opinion agrees partially or totally with the recommendations of the Stakeholder group. Most of them agree that an examination of the regime should take place prior to any change. A few Member States welcome actions to organise workshops and revise guidance on social and other specific services. One Member State welcomes every initiative from the Commission and other Member States to reduce the administrative and financial burden for contracting authorities in general within the scope of the Public Procurement Directive and look forward to further guidance on the assessment of whether or not a service should be considered to have a cross-border dimension. Another Member State considers that the current EU legislation does not allow to exempt certain tenders from a tendering process nor to adapt the thresholds.

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1 Submission XII.19.c by the Dutch Ministry of Health, Welfare and Sports on effectiveness and efficiency of public procurement (youth and social care)

Position of the Netherlands with regard to the effectiveness and efficiency of the procurement of services in the Social Domain.

Challenges:

Introduction

The effectiveness and efficiency of the Directive on public procurement (2014/24/EU) with regard to social and other specific services can be increased.

The entering into force of the current Directive on public procurement has brought those services (including services in the field of healthcare) which are above a certain threshold value under the effect of procurement law. The services in question are included in Annex XIV to the Directive. Article 75 of the Directive makes it obligatory for contracting authorities to issue a public notice with regard to public contracts for the services referred to in that annex.

The idea behind this is that, above a certain value, those services may still be of interest to providers from other Member States and must therefore be marketed transparently. Due to the importance of the cultural context and the sensitive nature of these services, the Directive imposes only the observance of basic principles of transparency and equal treatment, as evidenced by consideration 114 to the Directive. This means it is essential to design a procedure which takes account of these principles and that will lead to a considerable administrative burden.

In practice it turns out that the intended cross-border interest does not exist for public contracts in areas of the social domain such as youth care, disabled care and social support. This, in combination with the tender obligation and related, substantial administrative and financial

burden, which results from the Directive, leads to disproportionality. The rules ought, therefore, to be adapted with regard to services in the field of the social domain.

No cross-border dimension

With regard to the services in question there is scarcely a national, let alone a European market. Services in the field of youth care, disabled care and social support are first services, which are performed in the nearby vicinity, at local level and with local partners.

This is illustrated well by the following example. In the period from 1 January 2017 to 30 June 2018, 195 digital public tenders were put out for contracts in the Netherlands in the area of social support. In all cases not one economic operator from outside the Netherlands submitted a tender.

The Directive is based on the idea that these services have a cross-border dimension if their value exceeds the applicable threshold. In practice this threshold does not appear to be an indication of the cross-border nature of these services in terms of the social domain. In the case of public contracts in relation to the social domain, that threshold is almost always exceeded without there being any cross-border interest at all, as illustrated above. This was not taken into account when the Directive was drawn up.

High administrative and financial burden

The obligation to tender these services above the threshold value – despite only a light regime then being applicable – turns out to cause a substantial administrative and financial burden for both contracting authorities and care providers.

The Directive wrongly assumes that the introduction of the obligation to publicise a notice only requires a minimum extra effort by the contracting authorities compared to the regime that used to apply to these categories of services. In practice the giving notice means that contracting authorities obviously have to complete a tender procedure. An important factor in this respect is the obligation for contracting authorities to observe the principles of equal treatment, objectivity and transparency – including in conjunction with tender procedures under the light regime.

If the intention is to realise the desired care optimally from both a content and procedural perspective, such an extensive procedure is then needed that the term 'light procedure' can no longer really be used. For care providers tendering for such a procedure is not straightforward either. A tender procedure for services in relation to the social domain therefore requires huge efforts on the part of both contracting authorities and care providers. This was not taken into account either when drawing up the Directive and is disproportional, given the complete lack of cross-border interest in these services.

The unique nature of care in the social domain

The social domain and the parties that have become active in that field are driven, in the first place, by the wish to provide the best possible care and not by considerations of an economic nature. In this field the focus is not on regular services, but on services which are strongly personal in nature, in which the relationship between the care provider and the client is

extremely important. Often the care is linked strongly to the locality. Under these circumstances, a tendering obligation makes it more difficult for a contracting authority to fulfil its care mission and to take continuity, partnership and cooperation as a starting point, rather than competition. This has a strengthening effect on the administrative burdens and disproportionality of the tendering obligation experienced by contracting authorities and healthcare providers.

Conclusion

It has to be concluded that - due to the lack of a cross-border effect - the Directive fails to fulfil its most important goal with regard to these services. Despite complete transparency about the intended public contracts, there has been absolutely no cross-border interest. At the same time the transparency obligation does imply a considerable administrative and financial burden, which is not conducive to the quality of care. European tender procedures (including those under the light regime) therefore have no added value in this field. After all, the intended effects of fair competition and equal opportunities for all EU economic operators cannot be achieved. They only result in a waste of time and money that can be better spent on providing good quality care to citizens.

An amendment is called for in order to improve the effect of the Directive on public procurement, in the sense that the Directive is no longer applicable to public contracts for these specific services, which fall under the social domain. Given that, it is unclear when the European Commission is going to start its evaluation of the public procurement Directives, such an amendment does not appear to be possible in the short term. That is why the REFIT platform is being called on to advise the European Commission to resolve the problems outlined above and, by doing so, improve care.

Recommendations:

In order to reduce the problems referred to and increase the effectiveness and efficiency of the Directive with regard to social and other specific services, the Netherlands wishes to make the following recommendations.

1. The European Commission ought to evaluate Articles 74 to 76 of Directive 2014/24/EU, which relate to services in the social domain as soon as possible and should also pay special attention to the cross-border phenomenon. What is more, an exhaustive investigation must take place to determine whether the services included in Annex XIV to this Directive in relation to the social domain actually have a cross-border dimension in practice in the Member States when their value exceeds the threshold referred to in the Directive.

2. Based on the evaluation the definition of the services in the field of the social domain, which fall under the effect of the Directive, ought to be amended where necessary. Services in relation to which it has been established that they do not have any cross-border dimension at all ought to be excluded from the Directive's effect.

3. Lastly the European Commission could examine whether it can support the Member States in the meantime with reducing the administrative burden referred to when tendering services in the social domain, for example by drawing up guidelines on the (im)possibilities of reducing the burden which contracting authorities have in terms of mitigating the problems experienced.

2 Policy Context

Public procurement directives, Directive 2014/23/EU, 2014/24/EU, 2014/25/EU, form the new public procurement legislation aimed at simplification and flexibilisation of procurement procedures. The objective of this legislation was also to alleviate the administrative burden for contracting authorities and economic operators. The directives promote the use of e-procurement and facilitate access to procurement for small and medium-sized enterprises and start-ups. The directives also introduce the so-called "light regime" for procurement of social services. These services are considered to have specific characteristics, which make them inappropriate for the application of the regular procedures for the award of public service contracts.

Recital 114 of Directive 2014/24/EU, clearly states that "Certain categories of services continue by their very nature to have a limited cross-border dimension, namely such services that are known as services to the person, such as certain social, health and educational services. Those services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for those services, with a higher threshold than that which applies to other services. Services to the person with values below that threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for cross-border projects."

For the procurement of social services above the threshold of EUR 750 000 (Directive 2014/24/EU), EUR 1 000 000 (Directive 2014/25/EU), directives impose only the observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers. However, Member States have a wide discretion to organise the choice of the service providers in the way they consider most appropriate.

The European Commission has foreseen several actions in support of the Member States as regards the "light regime":

-The Commission services have discussed the "light regime" for social services at the Government Expert group on Public Procurement on 10th December 2018, where all Member States were invited to present their experience and good practices;

- The Commission services will organise in 2019 a series of national workshops on the use of socially responsible public procurement in several Member States. The workshops have the aim of raising awareness on the correct use of certain provisions of the 2014 Directives with a potential for the integration of social considerations in public tenders. Potential workshop topics include the use of the "light regime" in the field of social services;

- The Commission is revising and updating its guidance on socially responsible public procurement. The new edition will include suggestions on how to apply rules related to the “light regime”. This guidance is expected to be available in the course of 2019.

It should be noted, however, that the effectiveness of these actions strongly depends on a correct and efficient transposition of EU rules into national legislation.

3 Opinion of the REFIT Platform

3.1 Considerations of the REFIT Platform Stakeholder group

This recommendation does not intend to look into the scope of the Public Procurement Directive but aims at treating the regulatory burden that it may entail. In that respect, the Stakeholder Group shares the concern expressed in the submission that a high number of tenders and the particularities of social or healthcare service provision can lead in practice to disproportionate administrative costs for local and regional authorities. Reducing administrative burden is key to the efficiency of any regulation and thus remains a key goal of EU policy-making in general and to the Refit platform in particular.

The Stakeholder Group therefore recommends the European Commission to incorporate the “light procedure” expected to address the particular concerns of social services provision in the upcoming evaluation of the procurement directives (as foreseen in article 77, sub 5 and article 92). A more thorough analysis of the new regulation’s impact should provide better insight, especially with respect to possible further streamlining, clarification and simplification of the notification procedure.

In connection with recommendation 3 from the submission, the Stakeholder Group recommends the Commission to evaluate whether certain tenders relating to a single individual could be exempted from the tendering process despite exceeding the threshold. This would both reduce administrative burdens and ensure consistency with the General Data Protection Regulation (GDPR), which today creates complications with this type of tenders.

In the shorter term, the Stakeholder Group supports the Commission’s initiatives for capacity-building measures and providing adequate guidance, e.g. through national workshops mentioned above, with the aim of taking feedback from the field into account. Other measures could help better defining the concrete need for notification, including e.g. adapting the threshold’s level or adding other criteria pertaining to the nature of the services to be provided, the existence of a competitive market for such services or the likelihood of seeing such a market emerge at some point in the future.

3.2 Considerations of the REFIT Platform Government group

Twelve Member States contributed to this opinion.

Ten out of the twelve contributing Member States agree partially or totally with the recommendations of the Stakeholder group. Most of them agree that an examination of the regime should take place prior to any change. Two of them welcome actions to organise workshops and revise guidance on social and other specific services. One Member State welcomes every initiative from the Commission and other Member States to reduce the administrative and financial burden for contracting authorities in general within the scope of the Public Procurement Directive and look forward to further guidance on the assessment of whether or not a service should be considered to have a cross-border dimension. However, one Member State considers that the current EU legislation does not allow to exempt certain tenders from a tendering process nor to adapt the thresholds.

One Member State supports the Dutch submission and adds that the Stakeholder group has failed to take in proper consideration the definition of social services.

Member State 2

One source of concern expressed by the Dutch Ministry is the following: *(1) ... What is more, an exhaustive investigation must take place to determine whether the services included in Annex XIV to this Directive in relation to the social domain actually have a cross-border dimension in practice in the Member States when their value exceeds the threshold referred to in the Directive. (2) Based on the evaluation of the definition of the services in the field of the social domain (...).*” considerations of the REFIT platform Stakeholder group do not seem to take into consideration the definition of social services (the list of services mentioned in Annex XIX), unless it is the following sentence: *“In connection with recommendation 3 from the submission, the Stakeholder Group recommends the Commission to evaluate whether certain tenders relating to a single individual could be exempted from the tendering process despite exceeding the threshold”*, but in that case the reference in the beginning *“In connection with recommendation 3...”* is unclear.

It appears that MS2 can support the Dutch approach and proposals.

Member State 4

MS4 agrees with the submission by the Dutch Ministry of Health, Welfare and Sport on the effectiveness and efficiency of the Public Procurement Directive (2014/24 / EU) as regards social and other specific services. Also in the MS4, these services do not show a cross-border character, and a large part of social services is provided just on a local level and with local partners. If it would be obligation to tender these services, despite light regime, it would also entail considerable administrative and financial burdens for both the contracting authorities and the care providers in the Czech Republic.

MS4 agrees with opinion of the REFIT Platform and its proposal to support the Commission's

initiative to organize national workshops in order to get feedback from Member States and also to develop a more in-depth impact assessment of the regulation to provide a better overview, especially as regards possible further simplification or clarification of the process.

The Social Services Act in MS4 is still not fully compatible with law of the European Union. Social services in the MS4 are viewed as services of general economic interest and therefore competition rules and rules of public support are applied to them. At present time, the Ministry of Labour and Social Affairs is working on a draft amendment to the Social Services Act, which harmonises The Social Services Act with EU law.

However, not all kinds of social services, as defined by The Social Services Act, fully comply with the SGEI model as perceived by EU law. In particular, social prevention services that are provided to clients free of charge, as well as some other social services (with specific and rare target groups which outweigh the normal cost of a particular type of social service, especially on the basis of above-standard staffing), are problematic. The conditions for registration of social services are relatively strict and the demand for registered social services in the MS4 is still higher than the current offer. These are, therefore, the main reasons why it is problematic to apply public procurement in social services on a wide scale, although public procurement is already an integral part of the social service provider financing system at this time. Public contracts awarded to local and regional authorities are increasingly common in addition to traditional forms of subsidy. This situation was also positively contributed by the possibility to finance social services in the form of public contracts within the so-called individual projects of regions funded by the European Social Fund. Cities and municipalities have also more recently used the possibility of ordering certain capacities of social services that provide services for their citizens. Social service providers have the choice of choosing a "traditional" form of subsidy for social service financing or using the option of awarding a public contract.

Nevertheless, MS4 welcome the Commission's intention to organise national workshops and updating guidance on the use of socially responsible public procurement to foster implementation of this strategic approach to public procurement.

Member State 5

MS5 supports view of the Stakeholder group on the point that further clarification and discussion on the matter of excluding specific CPV-codes from the scope of the Light-regime. It should though, as a first step, be clarified which specific CPV-codes are targeted in the proposal.

Member State 6

MS6 partially supports the suggestions and welcomes every initiative from the Commission and other Member States to reduce the administrative and financial burden for contracting authorities in general within the scope of the Public Procurement Directive.

The Directive 2014/24/EU has been implemented since 2016 in the Member States therefore there was only a short time period to gain practical experiences. Procedure of procurements of

social services and other special services has been regulated in MS legislation for many years.

While not denying the probably usefulness of evaluating the cross-border-dimension regarding tendering services in the social domain, it must be kept in mind that promoting cross-border procurement is a main issue of the Directive but not the only interest pursued by it. Also and particularly the difficulties of assessing the existence of cross-border-markets (at this time and in future) must be taken into account. The main rule, according to our national procurement 2(2) legislation, is that procurement of the services in question must be notified also below the EU threshold values. The purpose of the national notifying requirement is to exploit the opportunities with competition and to counteract corruption.

Therefore, reasoned conclusions about changes in the definition of services that should fall within the scope of the Directive appear to be difficult to establish. This also applies to other exemptions not covered by the Directive, not only to social services. In any case, the proposed assessment should be complemented by examining the actual amount of the administrative burden referred to in the recommendation and why the rules on light administration in the Directive are not sufficient to reduce the burden.

Member State 7

MS7 has no comments to make on the opinion.

Member State 8

The actions to organise workshops and revise guidance on social and other specific services, are welcomed by the MS8, and are in line with the MS8's interests.

Member State 9

This issue was one of the major revisions brought about by Directive 2014/24/EC. Formerly, EU Public Procurement rules listed social and / or exempt goods and services in annex A and B. This was replaced after the four years' negotiation with the light regime. This regime provides a very light structure for public bodies to approach the market to ascertain the cost of providing much needed public services. It is the MS9 Government policy that contracting authorities should seek value for money when purchasing goods service or works. Therefore, MS9 would not be in favour of a change prior to an examination of the regime by the EU Commission.

Member State 10

MS10 has been in contact with other Member States who experience also difficulties with this Directive. MS10 considers youth and social or elderly care services as important sectors with unique needs and sees lack of cross-border interest. MS10 looks forward to the revision of this

piece of legislation by the European Commission. In this sense, MS10 urges the Commission to start the Evaluation.

Member State 12 considers the following:

MS12 supports the suggestion that the Commission evaluate services in the social domain and the suggestion to amend the Directive in order to exclude those services where there is no cross-border interest. MS12 would ask for a specification of which services should be evaluated, since the list of services falling under the “light regime” is very diverse (e.g. prison-related services, hotel and restaurant services, health, social and related services etc.). Since any amendment would take a significant amount of time, MS12 also supports the idea that the Commission provide guidance on how to reduce administrative burden when applying the “light regime” (e.g. more sparse procurement documents, using a prior information notice in order to gain flexibility on the timeframe and see who would even be interested in competing in the procurement procedure).

There is, however, no legal option to exempt certain tenders from a tendering process, as suggested by the Stakeholder group. The other measures suggested by the Stakeholder group such as adapting the threshold’s level etc. would also contravene the public procurement Directives, while adding other criteria would complicate the procurement process.

Member State 15

MS15 partially supports the suggestions.

In MS15’s view, there is no need to modify the Public Procurement Directive regarding procurement of services of Social Domain at the time being. There was only a short time period to gain practical experiences because the Directive has been implemented only since 2016 in the Member States and not even by all of them. MS15 understands that this recommendation for evaluations does not primarily intends to change the rules but eventual it is apparently aiming at modifications. While not denying the probably usefulness of evaluating the cross-border-dimension regarding tendering services in the social domain, it must be kept in mind that promoting cross-border procurement is a main issue of the Directive but not the only interest pursued by it. Also and particularly the difficulties of assessing the existence of cross-border-markets (at this time and in future) must be taken into account.

Therefore justified conclusions regarding amendments of the definition of services which should fall under the Directive seem to be difficult as well. That counts especially for total exemptions from the Directive’s effect based on cross-border-issues only. In any case, the proposed evaluation should be complemented by an investigation of the actual amount of the administrative burden referred to by the recommendation and why the Directive’s rules related to the “light regime” are not sufficient to lessen supposed burdens.

Member State 17

MS17, there is no reliable and easily accessible information on the number of foreign bidders in procurement of social services and other special services. It is therefore not possible to, based upon that kind of information, assess the extent of the cross-border interest for such procurements in Sweden. In our opinion, one should be careful to draw too far-reaching conclusions as to whether the market for social services and other specific services lacks a cross-border interest only on the basis of the number of foreign bidders in these procurements. It cannot be ruled out that the lack of foreign bidders depends on other factors. As recommended in the submission, a thorough investigation of the phenomena would be of great interest.

Furthermore, the procedure of procurements of social services and other special services has been regulated in MS legislation for many years. Compared to the previous legislation, the implementation of Directive 2014/24/EU, and the obligation of public notification of procurements of these services above the threshold value, have not caused any significant additional administrative and financial burden for contracting authorities. The main rule, according to the MS17's national procurement legislation, is that procurement of the services in question must be notified also below the threshold values. The purpose of the national notifying requirement is to counteract corruption and to exploit the opportunities with competition.

In MS17, however, the Government has started a process to simplify the regulatory framework for both procurement under the thresholds and procurement of social services and other special services. An independent expert recently completed a committee of inquiry submitting a proposal for new regulation in this area. According to the report, simplification is achieved through fewer and more flexible rules, and not through a more detailed regulation.

The Government has not yet taken a position on the proposal, but the issue is currently under preparation by the Ministry of Finance.

In accordance with this ambition, MS17 welcomes every initiative from the Commission and other Member States to reduce the administrative and financial burden for contracting authorities in general within the scope of the Public Procurement Directive. MS17 is also looking forward to further guidance on the assessment of whether or not a service should be considered to have a cross-border interest.

Member State 18

MS18 supports the opinion of the Stakeholder group. During the possible evaluation of the Directive the particular concerns of social services as well as the amount of thresholds should be taken into consideration. On the other hand, the Commission's initiatives aimed at better understanding social procurement in practice should be appreciated.