

Social Services Europe

ASSESSMENT OF THE NEW EU DIRECTIVE ON PUBLIC PROCUREMENT



TABLE OF CONTENTS

OVERVIEW OF ASSESSMENT

1. INTRODUCTION.....	
2. SPECIAL CHARACTERISTICS OF SOCIAL SERVICES OF GENERAL INTEREST.....	
3. QUALITY OF SOCIAL SERVICES.....	
4. SERVICES IN THE SPECIAL REGIME.....	
5. DISCRETION OF MEMBER STATES TO ORGANISE SOCIAL SERVICE PROVISION.....	
6. RESERVED CONTRACTS FOR SOCIAL AND HEALTH SERVICES.....	
7. SHELTERED WORKSHOPS.....	
8. SOCIAL CLAUSES.....	
9. TIMELINE.....	
10. CONCLUSIONS.....	

Social Services Europe brings together nine Europe-wide networks of not-for-profit providers of social and health care services who each have a track record in providing value-driven services for the most vulnerable in our societies. The network aims to strengthen the profile and position of social services, and promote the role of not-for-profit social service providers in Europe. For more info: www.socialserviceseurope.eu

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OVERVIEW OF ASSESSMENT

- We welcome the recognition of the specificities of SSGI, the provision of a higher threshold as well as the explicit reference to the European Voluntary Quality Framework in recital 11 and the inclusion of key quality criteria in article 76. We regret however that quality of social services has not been made a mandatory element of the MEAT as well as that the formulation of art.76.2 does not make compulsory for Member States to take into account the need to ensure quality and affordability of social services as well as users involvement and that contracting authorities can award social services only on the basis of the cost.
- We are disappointed that reserved contracts in the special regime is time-limited and lacks clarity as to the potential eligible organisations but are hopeful that it will be used to support organisations working in the general or public interest.
- We regret that religious services, services furnished by trade unions, social security services and compulsory social security services are included in the list of services benefitting of the special lighter regime (Annex XVI) because this causes confusion.
- We welcome the extension of reserved markets to sheltered employment of disadvantaged persons.
- We welcome the specific mention of staff qualifications and training as possible award and contract performance criteria, but are disappointed that they cannot be technical specifications.
- We acknowledge the explicit references in the revised Directive to the wide discretion of Member States to organise their social service provision and the alternatives to public procurement, a move which will respects the wide variety of traditions which in exist in Europe to organise and finance social and health services to meet needs.

1. INTRODUCTION

Social Services Europe brings together nine Europe-wide networks of not-for-profit providers of social and health care services who each have a track record in providing value-driven services for the most vulnerable in our societies. The network aims to strengthen the profile and position of social services, and promote the role of not-for-profit social service providers in Europe.

Since 2011, when the EC launched the initiative of modernizing public procurement rules, SSE members have followed the process with an eye in particular on the rules regarding the procurement of social services.

In 2012 we produced a briefing analysing in detail the text proposed by the European Commission as well as the implementation of the current directive on public procurement (2004/18/EC) and its impact on social services. On the basis of such analysis we produced a position paper with some recommendations on how to strengthen the declared aim of the revision to better meet “common societal goals” as well as “ensuring the best possible conditions for the provision of high quality social services”¹. With partners such as the Social Platform we advocated for these recommendations with the relevant decision makers. This briefing examines how the recommendations are taken into account in the [final text](#) and highlights other relevant parts of the text.

2. SPECIFIC CHARACTERISTICS OF SOCIAL SERVICES OF GENERAL INTEREST

The specificity of social services is recognized in the new text of the EU directive, which was not the case in the 2004 directive. Taking into account their limited cross-border dimension (Recital 11), social services are entitled to a special “lighter” regime and they have a higher threshold that means that for service contracts under 750.000 the procurement rules do not apply. This special regime is regulated by **Art. 74 – 76** and **Title II** on “Rules on Public Contracts” does not apply to these services.

Recital 114 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. These 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 these services, with a higher threshold than that which applies to other services.* **Article 4d** contains the reference to the threshold of EUR 750 000 for public contracts for social and other specific services listed in Annex XVI.

Members of Social Services Europe have often stressed the specificities of social services as opposed to other “services of general interest”, and highlighted the negative impact that tendering can potentially have on the provision of social services (contracts often do not take enough into account integration, continuity and quality of services). **Recital 114c** also states “*When determining the procedures to be used for the award of contracts for services to the person, Member States should take Article 14 TFEU and Protocol No 26 into account. In so doing, Member States should also pursue the objectives of simplification and of alleviating the administrative burden for contracting authorities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime.*” We welcome the recognition of the specific characteristics of social services of general interest and the application of a “specific” lighter regime to the procurement procedures for social services.

¹ <http://www.socialserviceseurope.eu/publications/item/33-policy-paper-on-the-proposal-for-a-directive-on-public-procurement>

3. QUALITY OF SOCIAL SERVICES

This issue is closely linked to the recognition of the specific nature of social services, as quality is essential for the service to achieve its goal of meeting needs and fundamental rights. Social Services Europe welcomes the reference to the Voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee in recital 11, which underlines the need to guarantee high quality services and refers to key criteria, as well as other references to quality.

According to the 2004 directive, authorities can decide whether to evaluate tenders on the basis of the most economically advantageous tender ("MEAT") or price only. Therefore, in our recommendations we called for the abolition of lowest cost as selection criterion, recommending that MEAT should be the only criterion, taking into account quality criteria.

The new rules state that MEAT is the only criterion. The current **Article 67** says the following: *(1) Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, **contracting authorities shall base the award of public contracts on the most economically advantageous tender.***

Regarding the way MEAT should be determined, **Article 67** continues stating the following: *(2) The most economically advantageous tender from the point of view of the contracting authority shall **be identified on the basis of the price or cost**, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and **may include the best price-quality ratio**, which **shall be assessed on the basis of -criteria including qualitative, environmental and/or social aspects** linked to the subject-matter of the public contract in question.*

This means that MEAT will be determined on the basis of the price or cost but **may** also include the best price-quality ratio using qualitative, environmental and/or social criteria. The decision of taking into account or not qualitative, environmental and/or social aspects is left to public authorities.

To better understand what is meant by MEAT within the directive, it is also important to take into account the following recitals, which reinforce the idea of the freedom of contracting authorities in defining what is to be considered the economically best solution (recital 36aa) and specifying that it is still an option for contracting authorities to carry out the assessment of the MEAT on the basis of the price/cost effectiveness only (recital 37). **Recital 89**: *"The notion of award criteria is central to this Directive, it is therefore important that the relevant provisions are presented in as simple and streamlined a way as possible. This may be obtained by using the terminology "most economically advantageous tender" as the overriding concept since all winning tenders should finally be chosen in accordance with what the individual contracting authority considers to be the economically best solution among those offered. In order to avoid confusion with the award criterion that is currently known as the "most economically advantageous tender" in Directives 2004/17/EC and 2004/18/EC, a different terminology should be used to cover that concept, the "best price-quality ratio"; consequently, it should be interpreted in accordance with the relative jurisprudence under those Directives, except where there is a clearly materially different solution in this Directive.*

Recital 90: *[...] It should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only. It is furthermore appropriate to recall that contracting authorities are free to set adequate quality standards by using technical specifications or contract performance conditions. In order to encourage a greater quality orientation of public procurement, Member States should be permitted to prohibit or restrict use of price only or cost only to assess the most economically advantageous tender where they deem this appropriate.*

This implies that even if the lowest cost criterion has been abolished, the way MEAT is defined in article 67 and in the recitals mentioned above, will *de facto* allow contracting authorities to evaluate tenders on the basis of the cost/price only.

It is important to clarify that article 67 does not need to apply to procedures under the special regime, as only the general principles in part one apply, but it provides guidance when contracting authorities use the MEAT approach. In the special regime the need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services are explicitly mentioned, which is positive and new compared to the 2004 text, but they still remain optional for contracting authorities (**article 76.2** says *'Member States shall ensure that 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. Member States may also provide that the choice of the service provider shall be made on the basis of the tender presenting the best price-quality ratio, taking into account quality and sustainability criteria for social services'*). However it does not provide any obligation for Member States, as opposed to what we called for. Thus, unfortunately, everything will depend on how Member States will transpose the new directive.

4. SERVICES IN THE SPECIAL REGIME

Annex XVI of the new text of the directive lists “social and other specific services” for which the special regime applies. The list refers to health and social services, administrative, educational, healthcare and cultural services, compulsory social security services, other community, social and personal services, services provided by Trade Unions and religious services.² Recital 114 refers to “services to the person, such as certain social, health and educational services”, while the explanatory memorandum refers to “social, health and education services”.

In the briefing published in 2011, Social Services Europe called for all the references to social services in Annex XVI to be replaced with an open list that refers to only social services and eliminate non-economic services (e.g. social security services, religious services, trade union services) in order to rectify the lack of consistency and legal clarity in the text proposed by the Commission.

However, religious services, services furnished by trade unions, social security services and compulsory social security services are still included in services listed in Annex XVI of the new EU directive. Such services are not usually operated on a market, are not “economic”, and so are not put out for tendering and so this could be confusing. However, the Commission has stated that in case a contracting authority wished to contract such a service only the special regime would apply. In addition, a footnote has been added regarding compulsory social security services stating the following: *“These services are not covered by the present Directive where they are organised as noneconomic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as noneconomic services of general interest”*. In addition **recital 5** specifies that *“nothing in the Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than public contracts within the meaning of Article 2(7). The provision of services based on law or regulations, or employment contracts, should not be covered. In some Member States, this might for example be the case for certain administrative and government services such as executive and legislative services or the provision of certain services to the community, such as foreign affairs services or justice services or **compulsory social security services**”*. In addition **Article 5** (subject-matter and scope) clarifies that the Directive does not affect the way in which the Member States organise their social security systems

² See details of CVP codes here: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0213:EN:NOT>

5. DISCRETION OF MEMBER STATES TO ORGANISE SOCIAL SERVICE PROVISION

It is important to note that member states are not always obliged to use public procurement in social service provision. According to Recitals 4 and 114 of the directive, **member states are free to choose how to organise their social service provision, but some obligations do apply.**

Recital 4: *“The Union rules on public procurement are not intended to cover all forms of disbursement of public money, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract. It should be clarified that such acquisitions of works, supplies or services should be subject to this directive whether they are implemented through purchase, leasing or other contractual forms...Furthermore, the mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not usually fall under the public procurement rules. Similarly, situations where all operators fulfilling certain conditions are entitled to perform a given task, without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement but simple authorization schemes (for instance licenses for medicines or medical services)”.*

Recital 114 describes in more detail the limits of the discretion: *“Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.”*

There is also discretion for contracting authorities regarding how the procurement procedures are organised: **Article 76.1:** *“Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.”*

Therefore in principle, local authorities which use partnership models for social service provision (based on grants and subsidies), can continue to do so as these are outside the scope of the directive if they can be classified as “mere financing” or are not classified as a public contract. Examples of such models are the “recueil d’initiatives” in France (where local authorities assess local needs, highlight general priorities based on these needs, and develop partnerships with organisations with initiatives responding to these needs), or the “co-progettazione” in Italy (where policies and services are developed through public/private partnerships, based on general priorities highlighted by the public authority - see Lombardia n. 9/1353). In addition, accreditation and service user choice models such as those found in Sweden and Germany fall out of the scope of the directive.

However:

1. The notion of “mere financing” of services is not entirely clear. Does “mere financing” cover most of the partnership models which still exist in most EU countries for organising social service provision? The European Commission Guide on the application of public procurement rules does not define mere financing further, but it refers to scenarios which are **not** mere financing and which fall under the scope of the PP directive (see SSE briefing on public procurement for more), including situations where *“the aim of the contract is to meet needs previously defined by the public authority within the framework of its competences”*. In both the French and Italian models referred to above, the public authority highlights its general priorities/needs as a basis for the partnership. Important to consider is the level of detail of the priorities (general/open to initiatives versus detailed/requiring specific services). That said, the European Commission Guide has no legal value.

The important thing is to understand if service providers receive grants for initiatives they put forward based on emerging needs, or if public authorities buy a pre-defined social service. In the first case, then a subsidy can be granted without the need to put out the service for competition. In the second case, EU public procurement rules apply. The Commission has also said that if the full cost of a service is not met by the authority it does not need to be put out to tender. However, this is not in legislation or official texts.

2. Moreover, even if the certain models are outside the scope of the public procurement directive, they are still subject to other EU legislation, including state aid legislation, which aims to prevent unfair competition. There is a lighter regime for social services in and there is a threshold below which the rules do not apply.

6. RESERVED CONTRACTS FOR SOCIAL AND HEALTH SERVICES

Within the special regime a new article was introduced very late in the negotiation process, **article 77** “reserved contracts for certain services”. It is understood that the original intention of one member state was to be able to favour cooperative-type organisations made up of former public sector workers. The Social Platform wrote a letter to the negotiators expressing concern at the text and in the end the scope was widened and moved to article 77 from the main body of the text.

Whilst at first glance the article would seem to provide an opportunity for not-for-profit organisations to be favoured when contracting authorities seek a provider of the services in the annex, the definition of the organisation that would qualify for a reserved contract doesn't correspond to any existing definition of cooperatives or social enterprises, and could be open to many organisations that would not normally qualify as such structures. In this article much is left open and is necessary for the member state to define in the transposition of the legislation which could work in favour of not-for-profit structures, not really favour such structures at all, or make it difficult for any structure to qualify.

In article 77.2 part (b) it states: *profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations.*

“profits are reinvested” – how much is not defined, considering that it must not mean all profits, (whilst not-for-profits reinvest all), because the next part of the text states “where profits are distributed or redistributed...” It is not clear whether “distributed or redistributed” refers to external or internal distribution. This redistribution shall also be based on “participatory considerations”, another term that does not carry a specific meaning in itself.

Part (c) *the structures of management or ownership of the organisation performing the contract shall be based on employee ownership or participatory principles, or shall require the active participation of employees, users or stakeholders.*

There are numerous very open options here in order to fulfil the criteria, none of which are clear from the text

Part (d) *the organisation shall not have been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.*

And **3.** The maximum duration of the contract shall not be longer than three years.

An organisation can only be awarded a contract for a maximum of three years and couldn't be awarded a contract under a reserved contract procedure twice, which raises concerns about continuity. However, it could be possible that before the end of that contract the contracting authority launches another more open procedure whereby the same organisation could reapply to run the service.

5. *Notwithstanding the provisions of Article 94, the Commission shall assess the effects of this Article and report to the European Parliament and the Council by three years later than the date provided for in Article 92(1).*

It may be possible to push for this article to be amended, for example to allow repeat contracts under this scheme and without a time limitation, as with any other type of contract.

Even though this article specifies cases where reserved markets are possible, according to EU law reserved markets for specifically not-for-profit organisations are also allowed, based on case law rulings. The European Commission, in paragraph 209 of its *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*³ wrote:

“Individual contracting authorities cannot decide themselves to limit a tender procedure to non-profit service providers. The Public Procurement Directive is based on the principles of equal treatment and non-discrimination of economic operators. The Directive does not, therefore, allow contracts to be reserved for specific categories of undertaking, such as non-profit organisations, regardless of the type of services involved.

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

7. SHELTERED WORKSHOPS

Article 20, “Reserved Contracts” says the following: *Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons or provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.*

This is particularly relevant for providers that supply services or products to public authorities. The addition of disadvantaged persons is new as compared to the 2004 directive, which only allowed for reserved markets for sheltered workshops for people with disabilities. The type of eligible organisation has also been extended to include *economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons.*

8. SOCIAL CLAUSES³

In its recommendations Social Services Europe called for social production characteristics (such as working conditions or the qualification and experience of the staff assigned to performing the contract) to be permissible in the technical specifications. The technical specifications define the characteristics required of a product or a service in order that they fulfil the use for which is intended. These characteristics may include environmental performance, design, conformity assessment, performance, safety, dimensions, quality assurance, and production methods, on the condition that they relate to the subject of the contract. The tenderer's offer is valid if he/she manages to prove that it meets the requirements defined by the technical specifications. The non-compliant bids to the technical specifications shall be rejected. Therefore it is important that technical specifications are clear and correct in order not to receive receiving inadequate offers.

The possibility to include environmental production characteristics in the technical specifications is new but social “production characteristics” may only be used as contract award criteria, when choosing between proposals. Article 67, paragraph 2, lists criteria that qualify as technical specifications and include *“quality, technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character”* and *“organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff employed can significantly impact the level of performance of the contract”.*

³Social and labour standards that contractors have to fulfil in order to tender for public contracts

As regarding the technical specifications Article 42.1 states that “for all procurement which is intended for use by natural persons, whether general public or staff of the contracting authorities, the technical specifications shall, except in duly justified cases, be drawn up so to take into account accessibility criteria for persons with disabilities or design for all users. Where mandatory accessibility requirements are adopted by a legal act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto”. In describing a final product’s characteristics (whether works, supplies or services) contracting authorities shall (again – our emphasis) ensure that goods or services allow access for people with disabilities. However, this is not obligatory for contracts under the special regime as it falls under the second section of the legislation, but contracting authorities could require it.

The last consideration about social clauses concerns contract performance conditions. Such conditions refer to specific obligations pursuing social objectives that the tender has to comply with in performing the contract, as for instance, the obligation to recruit unemployed people, to implement training measures or to promote equal opportunities for disabled people; to take a number higher than any quota obligation prescribed by national legislation.

In the text the Article 70 states that “Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract within the meaning of Article 67.3 and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation related, environmental, social or employment-related considerations”.

Recital 99 helps to identify what could be the subject of the contract performance conditions: “protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question [...]such conditions may refer, amongst other things, to the employment of long-term job seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such social requirements which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users”.

SSE welcomes the extensive references to social clauses into articles related to contract performance conditions but expresses concern that contracting authorities in laying down technical specifications are not obliged to take into account accessibility criteria for people with disabilities or design for all users. It is still only a recommendation, ‘shall’, but recital 3 states “When implementing this Directive, the United Nations Convention on the Rights of Persons with Disabilities should be taken into account, in particular in connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions”.

9. TIMELINE

15 January 2014	The Directive was approved in the European Parliament plenary meeting in January
5 February 2014	The Commission met the Member States to discuss the implementation phase

Member States have two years to implement the new provisions and show their commitment to make strategic use of public procurement for social and environmental policy goals as well to make tangible steps towards the promotion of a stronger social Europe improving access to and quality employment in the healthcare and social sector. Much will depend on how Member States decide to transpose the directive, thus we hope the European institutions and the Member States will work together on correct implementation of the new procurement rules, once the new directive will enter into force, and to make use of all the possibilities to promote quality social services. When possible and appropriate, we will work to involve representatives of social service providers in discussions on the transposition of the lighter regime at national level.

10. CONCLUSIONS

- We welcome the recognition of the specificities of SSGI, the provision of a higher threshold as well as the explicit reference to the European Voluntary Quality Framework in recital 11 and the inclusion of key quality criteria in article 76. We regret however that quality of social services has not been made a mandatory element of the MEAT as well as that the formulation of art.76.2 does not make it compulsory for Member States to take into account the need to ensure quality and affordability of social services as well as users involvement, and that contracting authorities can award social services only on the basis of the cost.
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