

**Reflection Paper of the Netherlands and Germany
on single aspects of the Revision of the Public Procurement Directives**

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The current European rules on public procurement procedures are **complex, rigid and bureaucratic**. Moreover, they have recently become significantly **even more fragmented and complicated**: alongside the comprehensive central procedural provisions in the three core public procurement directives, there are over 60 legal acts containing strategic public procurement requirements.

The public procurement procedures based on these rules are **slow**, and the process is **cost-intensive** both for public administration and for companies. The prompt use of funds for important investments is thereby considerably delayed. Furthermore, **companies are discouraged** from applying for public contracts. National efforts to simplify and accelerate public procurement procedures reach their **limits** where EU legislation prescribes the procedure.

Against this background, we **welcome the Commission's initiative** to reform the public procurement directives. This paper outlines – in a non-exhaustive manner – reflections for a **key objective of the EU public procurement reform, namely the simplification and acceleration of the procedures**. The reform offers a unique opportunity to improve the legal framework for EU public procurement for years – if not decades – to come. This goal must be **at the forefront** during the revision, otherwise there is a risk that the legal framework will be more complicated after the reform than before it. Therefore, new provisions must not run counter to these aims and the net administrative burden should be lower for both contracting authorities and companies.

A. With regard to the simplification of public procurement procedures, it is essential to **reduce the depth and density of regulation of the procedural requirements** to the level that is strictly necessary for the implementation of the fundamental principles of public procurement.

I. Ideally, the abstract **level of the WTO Agreement on Government Procurement** should be kept in this respect.

II. At the same time, the application **thresholds** of public procurement law must be increased to at least take general inflation into account.

III. For the consolidation of the legal framework, it is necessary to combine all EU legal provisions containing procurement requirements into **two central legal** acts, whereby the provisions currently contained in **directives** should retain this legal form.

IV. In addition to these overarching measures, we propose the following **further simplification measures**:

1. Establishment of the **negotiated procedure with prior call for competition** as one of **the standard procedures** as well as more and easier cases for the negotiated procedure without prior call for competition; **significant simplification** of the competitive dialogue and the innovation partnership as structured but still rather free forms of the negotiated procedure;

2. Simplification of the provisions on **public-public cooperation**, taking into account that contractual relationships between entities of the public sector should not be subject to public procurement law where the public character is clearly safeguarded; in particular, the **abandonment** of the control criterion for in-house awards and of the requirement of achieving a common objective for horizontal cooperations.
3. Systematic review of the lists of possible means of proof for the fulfilment of selection criteria with regard to **SMEs and start-ups**; in particular, SMEs and start-ups must be able to prove they meet the selection criteria without being limited by the list of evidence for technical ability in Annex XII.
4. Introduction of clear and sufficiently flexible rules for the **rectification of procurement documents, requests to participate and tenders** by contracting authorities and tenderers; facilitation of corrections of errors without material impact.
5. In justified cases, especially with regard to requirements on bidders' compliance with collective bargaining agreements and social and environmental sustainability criteria, consideration should be given to the **relaxation** of the requirement for a **link to the subject matter** of the contract, as long as the principle of non-discrimination is respected.
6. Flexibilisation of the rules on **contract modifications**, in particular by increasing the thresholds for non-substantial changes.
7. Flexibilisation of the rules on **framework agreements**, in particular with regard to the permissible duration, the maximum value and the subsequent addition of participating contracting authorities.
8. Codification and streamlining of the rules determining whether a procurement obligation exists, through a systematic framework covering subsidies with performance elements, public-public cooperation, in-house arrangements and concession-like cases, to reduce legal uncertainty, divergent interpretations and dependence on case law.

B. In order to simplify the EU procurement framework, additional and easier-to-use **digital instruments** can make procedures faster and simpler while enhancing **transparency** and enhancing **non-discrimination**. The revision of the directives should therefore follow a **digital-first, future-proof and interoperable approach** that **reduces administrative burden**. We welcome new digital solutions and reforms that streamline and accelerate procurement procedures, while recognising that a trade-off between reducing regulation and increasing transparency could be considered. In this context, as procurement becomes increasingly digital, and the exchange of data intensifies, data must be treated as **a strategic public resource** and **securely managed within the EU**.

In particular, we consider the following steps helpful:

1. This digital transformation requires a clear framework for data governance, ensuring that available procurement data is recognised as a **strategic public resource** and its **secure EU-based management** is laid down in a dedicated **data chapter**. Such clarity reduces fragmentation and support more consistent digital processes across the EU.
2. As inevitable measures, too complex and time-consuming tools such as **eCertis, European Single Procurement Document (ESPD) and eForms** need to be updated and simplified. In particular, **radically simplifying** the ESPD to a digital yes/no/value principle

with real-time verification as far as possible and EU-wide interoperability for cross-border verification of proof.

3. Furthermore, public procurement procedures should be regulated in an open way that allows for the use of yet unforeseeable **digital innovation, including artificial intelligence (AI) and automation**. As AI becomes more widely used, dialogue between buyers and suppliers becomes even more important to ensure clarity and well-matched expectations. Dialogue-based procedures should therefore be simplified and clarified. The directive should remain **technology-neutral and adaptable**, with technical details not set out in the act itself, but open for adjustment in (guided) practice.
4. Where possible, tools from other areas such as the **Digital Product Passport** or – prospectively – the **digital wallet** should be made fruitful for the procurement procedure and data as well, especially where they are already in use by procuring authorities and companies (such as **eInvoice** and **ViDA**).
5. Ideally, data from and for all digital tools needs to use the **same format and interoperable** to also implement further the **once-only** principle.
6. To ensure **transparency and equal access** to procurement, free and direct access to procurement notices and documents, and bidding, must be guaranteed **across all platforms**, including commercial providers. The obligation under article 53 of Directive 2014/24 should therefore be extended to private platforms, and key terms such as “open”, “direct access” and “free of charge” should be clarified. Subscription-only access and unnecessary technical or administrative barriers should be prohibited to ensure that suppliers can view documents and submit bids without restriction.

C. In the current geopolitical situation and beyond it is of the utmost importance to **mitigate risks for EU and national security, economic security** and vital interests, such as digital and technological sovereignty, in non-defense related public procurement as well. In line with the call for simplification and easy use in practice, public buyers are in need of **simple, clear and easy to apply** public procurement rules compliant with international commitments (GPA and FTA). So far, regarding security interests, the current procurement directives require too complex and burdensome justification for the application of measures or use of exclusion grounds and do not meet this need for simplicity for public buyers.

These changes should enhance the toolkit of contracting authorities, while ensuring the functioning of the internal market:

1. Adding the exclusion ground in article 39 (2) (e) of Directive 2009/81 based on **security risks (both national and economic) by economic operators** to the general public procurement directives.
2. Stating explicitly that contracting authorities can **set selection criteria** based on risks for national or economic security and protecting vital interests, such as digital and technological sovereignty, in line with international commitments.
3. Allowing contracting authorities to control the use of **subcontractors** or the use of certain goods and services by the economic operators or subcontractors, when justified by legitimate security concerns.
4. Introduce provisions regarding requirements for **security of information** as in Directive 2009/81/EC, as well as check to what extent **specific exclusions** from recital 27 and article 13 of Directive 2009/8, such as intelligence activities and covert operations, should be added to the general public procurement directives.
5. Define clearly and enhance the scope and substance of non-military goods and services in Directive 2009/81/EC, in particular with the need for enhanced **civil defence**.

6. **All flexibility and procedural simplification** in the general procurement directives needs to be introduced in Directive 2009/81/EC as well by **close coordination** of the DGs.