

A multi-pronged strategy for better regulation

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Summary

- Multi-pronged strategy:
 1. A single directive
 2. *Real* simplification
 3. Policy coherence
 4. Smarter remedies

Why?

- Combination of complexity/uncertainty and strict remedies leads to:
 - Resource costs for procuring entities, including from litigation
 - “Over-compliance”
 - purchasers are concerned more with complying with technical rules than value for money, and make the procedure unnecessarily bureaucratic
 - Barriers for SMEs
 - Deterrence to good suppliers

Why?

- Reform can preserve benefits of directives but reduce costs

1. A single directive

- Single Procurement Directive to replace:
 - Public Procurement Directive 2014/24
 - Utilities Directive 2014/25
 - Concessions Directive 2014/23
 - Defence and Security Directive 2009/81
- Single Remedies Directive with remedies for all regimes

1. A single directive

- Some key reasons for a single directive on procedures:
 - Rules of the directives are now very similar *in substance* on most key issues e.g. on procedures involving negotiation, framework agreements
 - Much litigation concerns the boundaries between directives

1. A single directive

- Single directive on procedures should be based on Utilities Directive

2. *Real* simplification

- Law is too difficult to apply, and litigation excessive, because of:
 - Complexity of material
 - Volume of material
 - Low quality of legislation (poor drafting, inconsistency between different directives etc)
 - Low quality and unpredictable nature of ECJ decisions
 - Uncertainty (because of above and because some issues not dealt with)

2. *Real* simplification

- Reduce volume and complexity by removing unnecessary detail e.g.

Art.67(3) Directive 2014/24

“Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in:

(a) the specific process of production, provision or trading of those works, supplies or services; or

(b) a specific process for another stage of their life cycle,
even where such factors do not form part of their material substance”
(emphasis added).

3. Policy coherence

- Purpose of the directives is not clear:
 - E.g. laying down how to get “value for money” is not the purpose of the directives
 - E.g. balance between “commercial” and environmental considerations

See Arrowsmith, “The Purpose of the EU Public Procurement Directives: Ends, Means, and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies. (2011/12) 14 Cambridge Yearbook of European Legal Studies, 1-47

3. Policy coherence

- No clear conception of when Member States can regulate their contracting authorities *more strictly* than required by the directive
 - Early directives had clear conception – states could give CAs *less flexibility* than the directives allowed
 - 2014 directive (and some recent case law) – no clear conception, or debate
 - Sometimes specified
 - e.g. Member States cannot deny CAs use of competitive procedures
 - Member States can require use of discretionary exclusions
 - Mostly not specified

4. Smarter remedies

- Supplier remedies should be required only when manifest error of fact or commercial judgment or application of the law (negligence)
 - E.g remedy for not advertising a contract only when it is clear the law required an advertisement
 - Currently cannot require fault: Case C-314/09, *Stadt Graz v Strabag*
- Burden of showing manifest error/negligence should be on the supplier?

4. Smarter remedies

- Remedy should not be required when the breach is not likely to have had an impact on the supplier's position
 - Burden should be on the procuring entity to show impact not likely?

4. Smarter remedies

- May need other approaches to interpretative function of litigation e.g. national advisory body (Commission could still bring ECJ proceedings)

4. Smarter remedies

- A role for attestation?

= independent accreditation that a procuring entity follows the EU procurement rules in its policies *and* practices; formerly an option for utilities

- Could be an additional enforcement system, that would make limited supplier remedies more acceptable
- Could be:
 - Mandatory for all regulated entities alongside reduced supplier remedies *or*
 - Option for regulated entities/Member States that would entail more limited supplier remedies regime