



socialplatform

EASPD conference

**Comment on the triologue
negotiations, success factors and
missed opportunities**

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The biggest civil society alliance fighting for social justice and participatory democracy in Europe

SOCIAL PLATFORM MEMBERS





Agenda

- **Overall assessment of the directive**
- **Award criteria**
- **Special regime**
- **Reserved contracts**
- **Alternatives to public procurement**
- **Technical specifications**
- **Way forward**



Overall assessment of the directive

Overall assessment is positive

- BUT some key provisions are not clear or give room for very different interpretations
- Directive contains opportunities for the social sector, but also some risks depending on the transposition and interpretation
- It is essential to provide guidelines to governments in view of a positive transposition and to involve NGOs at national level

On award criteria (art. 66)

Social Platform advocated for the abolition of the lowest price / lowest cost criterion.

Partly achieved!



Success factor: The Most Economically Advantageous Tender (MEAT) is the main award criterion for all procedures (art. 66.1).

*Art. 66.1: "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".*

How MEAT is defined

*Art. 66.2: "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 67, 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".*

Missed opportunity:

the price or cost is still the main factor on which to define MEAT



On award criteria

BUT

for all kinds of public procurement procedures:

art. 66.2 allows member states to restrict the use of price or cost only to certain types of contracts



On award criteria

BUT

For social, health and other services provided directly to the person:

art. 76.2: "...Member States **may** also provide that the choice of the service provider **shall** be made on the basis of the most economically advantageous tender, taking into account quality and sustainability criteria for social services".

Missed opportunity: MEAT is not the only award criterion, lowest cost is still possible. In the transposition phase member states can decide that MEAT is the only award criterion to be used.



Special regime

Social Platform strongly advocated for the recognition of the specificities of social, health and other services provided directly to the person.



Achieved!

- ❑ **Special threshold: 750.000€ (art. 4)**
- ❑ **Artt. 74 - 76 a: simplified rules**
- ❑ **Annex XVI: list of services**
- ❑ **Recital 11: background**

Special regime – art. 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*.



2. 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”.



Reserved contracts – art. 17

*"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".*



Reserved contracts

Art. 17: second paragraph added by the Council has been deleted



Achieved!





Reserved contracts for social and health services

Art. 76a

*"1. Member States **may** provide that contracting authorities **may** reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74..."*

- ❑ This provision is not compulsory on member states: in the transposition phase they may decide not to transpose it.
- ❑ If the member state decides to transpose it, then the choice is for contracting authorities to reserve contracts or not.



Art. 76 a.2

"2. The organisation referred to in paragraph 1 must fulfil the following cumulative conditions:

*Its objective is the pursuit of a public service mission linked to the delivery of the services referred to in Paragraph 1; **profits are reinvested** with a view to achieving the **organisation's objective**.*

...

- Problematic, it is not said "the social objective" or "societal objective", that usually is enshrined in the statutes of the organisation / social enterprise



Art. 76a.2

*"... Where profits are **distributed or redistributed**, this should be based on **participatory considerations**;
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;
...*

- ❑ The first sentence fully contradicts the previous sentence; it is not clear to what kind of organisations it is applicable
- ❑ "Participatory considerations" is very vague: what does it mean?



Art. 76a.2 and 76a.3

*"... 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**.*

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

These two sentences have to be read in conjunction.

Problematic: This goes against the principle of continuity of social services and other services provided directly to the person.

For which type of provider and what services should this provision be advantageous?



Alternatives to public procurement

Recital 11

Very Positive:

- ❑ Recognition of wide discretion for member states to organise the choice of service providers
- ❑ Stress on specific quality criteria
- ❑ Mention of the voluntary European Quality Framework for Social Services
- ❑ Mention of Protocol 26 and art. 14 TFEU
- ❑ Recognition of alternatives to public procurement:
“mere financing of such services or by granting licences or authorisations to all economic operators”

Technical specifications

*Art. 40: "...For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, those technical specifications shall, **except in duly justified cases**, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users.*

Where mandatory accessibility standards are adopted by a legislative 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..."

Missed opportunity: We lobbied for the deletion of any restriction to fully comply with UNCRPD.





Way forward

- ❑ Transposition phase: Is the Commission going to draft a handbook as for the services directive? Would CSO be involved?
- ❑ Social Platform will work with its members and with the Network for Sustainable Development in public procurement to draft some guidelines in view of a good transposition at national level
- ❑ Is the COM foreseeing to update its Guide “Buying social” and the Guide on EU rules applicable to SGEI?
- ❑ EPSU would like to ask the EP to commission a report on the legal and practical implications of Art. 76a, maybe including a mapping exercise on reserved markets in the field of social services



Thank you for your attention!

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