



The new legal framework for SSGI

Concetta Cultrera
European Commission

The current legal framework

- When do EU Public Procurement rules apply?

when public authorities outsource the provision of social services against remuneration

public services contract \neq concessions (see Guide, Q&A 200)

Cross-border interest (see Q&A 201)

Directive's threshold

The current legal framework

- Social services are Annex II-B services : only two articles of the Directive 2004/18/EC apply to them (see Q&A 200)
 - ✓ **Technical specifications**
 - ✓ **Publication of the results of the award procedure**
 - **Wider discretion for public authorities !**

The current legal framework

- The principles of transparency and non-discrimination
 - ✓ Adequate advertisement
 - ✓ Treatment of all potential bidders in a non-discriminatory and impartial way

(see Q&A 202)



The new directive: social services get a particular procurement regime

Title III

Particular procurement regimes

I. CHAPTER I

Social and other specific services

Why such a special treatment?

Recital 11:

Certain categories of services continue by their very nature to have a limited cross-border dimension, [...]. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions.

The contents of the particular regime

- A **threshold of 750 000 €** below which the Directive does not apply

Recital 11: Services to the person with values below this 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 transborder projects.

The contents of the particular regime

- A wider discretion in the definition of the procedure

Recital 11: Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only 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, such as the criteria set out in the **voluntary European Quality Framework for Social Services** of the European Union's Social Protection Committee



The contents of the particular regime

Article 75

Publication of notices

1. **Contracting authorities intending to award a public contract** for the services referred to in Article 74 **shall make known their intention** by any of the following means:
 - (a) by means of a **contract notice**, [...]; or
 - (b) by means of a **prior information notice**, [...].

The contents of the particular regime

Article 75

Publication of notices

[...]

2. **Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice, [...].**



The contents of the particular regime

Article 76

Principles of awarding contracts

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.**

The contents of the particular regime

Article 76

Principles of awarding contracts

[...]

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.** 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.



The contents of the particular regime

Article 76a on reserved contracts

Possibility to reserve contracts for health, social and cultural services to non-profit actors

- 4 cumulative criteria:
 - objective is the **pursuit of a public service mission** linked to the delivery of a health, social or cultural services;
 - **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**;
 - 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 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**.
- Maximum duration of the contract : 3 years



The contents of the particular regime

Recital 11:

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.

The contents of the particular regime

On "mere financing", see also Recital 3:

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**. [...] 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.

The contents of the particular regime

Recital 11:

Member States and/or public authorities remain **free [...]** 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.

The contents of the particular regime

- Article 11 on *Contracts between entities within the public sector* is also particularly relevant for social services as often their provision is the result of the cooperation among various public authorities and other entities which pursue a public interest



Conclusions on the particular regime applying to social services

- **Simplification**
- **Clarification**
- **Protection of the specificities of social services**

Other "social" issues

- **Article 17** on reserved contracts
- **Social considerations** can be better reflected in the procedure
 - **Article 9 TFEU** - In **defining and implementing its policies and activities**, the Union shall take into account requirements linked to the **promotion of a high level of employment**, the **guarantee of adequate social protection**, the **fight against social exclusion**, and a high level of education, training and protection of human health
 - **Europe 2020 Strategy** – **inclusive growth**