



Brussels, 16 May 2024
(OR. en)

9963/24

MAP 19
RC 16
MI 506
COMPET 557
FIN 451

NOTE

From: General Secretariat of the Council
On: 24 May 2024
To: Council

No. prev. doc.: ST 9561/24

Subject: Draft Council Conclusions on the European Court of Auditors' Special Report Nr 28/2023:
Public Procurement in the EU: Less Competition for Contracts Awarded for Works, Goods, and Services in the 10 Years up to 2021
- Approval

1. On 4 December 2023, the European Court of Auditors published its Special Report No 28/2023 entitled 'Public procurement in the EU: Less Competition for Contracts Awarded for Works, Goods, and Services in the 10 years up to 2021'¹.
2. The Working Party on Competitiveness and Growth (Public Procurement) has been assigned to examine the Special Report² in accordance with the provisions laid down in the Council conclusions on the procedure for examining Special Reports drawn up by the Court of Auditors³.

¹ ST 16507/23: The report is available in 24 EU languages, and can be accessed on: [Special report 28/2023: Public procurement in the EU | European Court of Auditors \(europa.eu\)](https://ec.europa.eu/eua/press_corner/news/2023/sr282023_en).

² ST 16836/23

³ ST 7515/00 + COR 1

3. On 5 March 2024, the Presidency submitted the draft Council conclusions on the Special Report to the Working Party⁴.
 4. The draft Council conclusions were discussed at three meetings of the Working Party, held on 11 March, 8 and 19 April 2024. In a written consultation between 30 April – 3 May 2024, the members of the Working Party endorsed the text of the draft Council conclusions.
 5. At their meeting on 15 May 2024, the Permanent Representatives Committee confirmed the agreement on the text⁵, and recommended that the Council approve the Council conclusions on ECA's Special Report, as set out in the Annex to this Note.
-

⁴ ST 5968/24

⁵ ST 9561/24

Draft Council Conclusions on the European Court of Auditors' Special Report No. 28/2023

Improve a fair and effective competition for EU public procurement contracts awarded for works, goods and services

THE COUNCIL OF THE EUROPEAN UNION:

RECALLING the Council Conclusions of 9 June 2022 on the Development of Sustainable Public Procurement⁶, in which the Council deemed as essential a gradual and harmonised approach when introducing strategic public procurement provisions in order to achieve the environmental and climate EU objectives, while considering a framework at EU and national level intended to improve the competitiveness and the resilience of the EU economy;

RECALLING the Conclusions of the European Council of 26 and 27 October 2023, which call, in particular, for "developing the EU's competitive advantage in digital and clean technologies, including through a focus on innovation, research, education and skills; and reducing key critical dependencies, and diversifying supply chains through strategic partnerships"⁷;

CONSIDERING the Commission's Work Programme for 2024, entitled "Delivering today and preparing for tomorrow"⁸;

WELCOMING the exchange of views by the Ministers for Economic Affairs at the informal Competitiveness Council in Genk on 9 February 2024, which reaffirmed the importance of strategic public procurement (green, social, and innovative procurement) for the strengthening of the EU's sustainable and inclusive competitiveness;

⁶ ST 9373/22;

⁷ EUCO 14/23, 27.10.2023;

⁸ COM(2023) 638 Final, 17.10.2023;

RECALLING that public procurement represents 14% of the EU's GDP and it can play, therefore, a major role in achieving the key strategic objectives of the European Union, in particular, the need to improve the resilience and the sustainability of the EU economy;

EMPHASISING that joint and redoubled efforts are absolutely essential and urgent to achieve public investments that promote the Union's innovation, security of supply, and strategic autonomy, while preserving an open economy; and RECALLING the essential role which public procurement should play in achieving the green transition towards a more circular, climate neutral, less polluting, and socially responsible economy, while RECOGNISING that the enforcement of the public procurement rules and enhancing competition in public procurement is a shared responsibility between the Commission and the Member States;

Welcomes the Report's conclusions and recommendations of the European Court of Auditors (ECA):

1. WELCOMES the publication of the Special Report No 28/2023 of the European Court of Auditors (ECA) entitled 'Public Procurement in the EU: Less Competition for Contracts Awarded for Works, Goods, and Services in the 10 Years up to 2021';
2. TAKES NOTE of the Report's conclusions and recommendations, and TAKES INTO ACCOUNT the post-2021 initiatives taken by the Commission as listed in its replies, including the *Big Buyers Initiative*⁹, to promote a wider uptake of strategic public procurement and the *Public Procurement Data Space*¹⁰ (PPDS) to enable more targeted and transparent public spending, improve access to calls for tenders for companies and boost data-driven policymaking;

⁹ The 'Big Buyers' Initiative, 2018: See : <https://bit.ly/3IEFIQK>;

¹⁰ Communication from the Commission: Public Procurement: A data to improve public spending, boost data-driven policy-making, and improve access to tenders for SMEs: C(2023) 1696 (OJ C 98I , 16.3.2023, p. 1–11);

3. ACKNOWLEDGES the main criticisms in the Report, namely:

- The decrease of competition in public procurement over the last 10 years, particularly in view of the large proportion of direct awards in some Member States and single bidder procedures;
- On the basis of the data available, the lack of significant overall improvement in the achievement of the main objectives, pursued by the 2014 Directives¹¹ in the reference period covered by the Report: contrary to the objectives of the Procurement Reform 2014, ECA noticed a low proportion of contracts awarded to SMEs, and an insufficient use of strategic public procurement, while there are variations existing at national level;
- The low level of direct cross-border procurement;
- The shortcomings in the Commission's and the Member States' monitoring of developments in the public procurement market;

Towards streamlining of the rules and improving the procurement system: Launching an in-depth analysis of the existing framework:

4. EMPHASISES the need for the Commission and the Member States to work in effective partnership with parity of esteem, keep ensuring proper enforcement of the obligations under the existing Directives, and consult the relevant stakeholders to prevent the emergence of possible barriers, identify and overcome the main obstacles to sustainable procurement and fair and effective competition;

¹¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1–64); Current consolidated version: 01/01/2024;
Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65–242); Current consolidated version: 01/01/2024;
Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243–374); Current consolidated version: 01/01/2024;

5. In the context of ECA's Special Report and the present state of implementation of the EU legal framework on public procurement, INVITES the Commission to examine further the root causes for the decrease of competition in the EU public procurement; STRESSES that in this analysis of the root causes, the significant differences in the performance of the competition indicators among Member States, regions and economic sectors, should be taken into account, as implementing practices may differ significantly and may call for specific targeted actions;
6. UNDERLINES the need to avoid unnecessary administrative burden for public buyers and economic operators, including SMEs and micro-entreprises; CONSIDERS in this respect that the complexity of the legislation relating to public procurement may hinder the participation of certain economic operators in public procurement;
7. REQUESTS from the Commission to undertake, without delay, an in-depth analysis of the existing legislative framework on public procurement (including Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU) to assess whether a revision is necessary during the 2024-2029 term in light of the major commitments that the EU made in order to achieve its sustainable development objectives by 2030; INSISTING, however, that in addition to carrying out the in-depth analysis, it is essential to achieve a better understanding of the root-causes behind the decrease in competition in public procurement;

8. STRESSES that the in-depth analysis should consider the need for the procurement's legal framework to ensure that contracting authorities and contracting entities can take resilience, security of supply, and fair competition in due account to ensure the Union's critical need for strategic autonomy, while preserving an open economy with regard to the need to build a robust economic base, notably by reducing the Union's dependencies in the most sensitive industrial ecosystems; STRESSES also that, due consideration should be given to the need for clear rules regarding the treatment of products and economic operators from third countries;
9. HIGHLIGHTS that the current geopolitical situation poses a particular threat to the security of the Member States; STRESSES that the in-depth analysis should give due consideration to the necessity for public buyers to strengthen the existing tools at their disposal to limit risks to security, and CONSIDERS that inspiration for those tools can be found, *inter alia*, in Directive 2009/81/EC; when security issues are at stake, UNDERLINES that Directive 2009/81/EC already allows for some degree of flexibility that should be taken into account in the in-depth analysis for procurement falling within the scope of Directives 2014/23/EU, 2014/24/EU, and 2014/25/EU;
10. CONSIDERS that a thorough examination is needed in this analysis on the interplay between the Directives and the multiplicity of specific sectoral legal acts containing procurement provisions; REQUESTS from the Commission to examine in its in-depth analysis the need for streamlining and alignment of these initiatives in the interest of finding a balance among the different objectives, greater legal certainty, overall coherence, and, where appropriate, the reduction of regulatory burden and costs;

11. HIGHLIGHTS that the in-depth analysis could result in establishing a diagnosis, launching a regulatory impact assessment and, based on its conclusions, possibly proposing new rules that promote sustainable procurement and fair and effective competition while achieving, as far as possible, the removal of excessive and unnecessary administrative barriers and streamlining the present regulatory provisions but UNDERLINES the importance for public buyers to retain flexibility in determining the nature and inclusion of strategic considerations in their procedures;
12. STRESSES that the legal framework should, in parallel, aim to facilitate the access to public procurement, particularly for SMEs, especially micro-enterprises;
13. INVITES, in this respect, the Commission to present the actions or measures that have been taken and will be taken following the latest Council Conclusions on the development of sustainable public procurement¹², as well as the French Presidency Report¹³ on the identified bottlenecks in the implementation of the public procurement Directives;
14. HIGHLIGHTS the role that the Commission's expert groups¹⁴ can play regarding the functioning and development of a modern, accessible and simplified public procurement legal framework which supports a sustainable and resilient internal market;

¹² OJ, 2022/C 236/02, 20.6.2022;

¹³ ST 9679/24;

¹⁴ In particular, the Expert Group on Public Procurement, the Network of First Instance Review Bodies and the Multi-stakeholder Expert Group on eProcurement;

Availability of high-quality data and advanced tools

15. SUPPORTS ECA's recommendation to use the available relevant information in the best possible way; CONSIDERS that it is essential to have comprehensive and high-quality data because it enables the development of fact based policies; INVITES, therefore, the Commission and the Member States to work together more closely in order to identify the relevant datasets required to inform an in-depth analysis and to improve the quality and readability of the collected data; and, according to availability, to publish relevant and regular information on sustainable public procurement;
16. WELCOMES in this context the European Commission's initiative on the European Public Procurement Data Space (PPDS), which could potentially improve the quality and exploitation of public procurement data through advanced tools, such as artificial intelligence technologies; CALLS to focus on an efficient methodology for the assessment and analysis of available data in relation to procurement, in particular in respect of the Single Market Scoreboard public procurement indicators, and CALLS for the Commission to use all available data to understand the procurement practices of public buyers, bearing in mind that the composition and content of the data are not harmonized across the EU; STRESSES the need to expedite the public procurement procedures by using technical tools in order to facilitate prompt publication of public procurement notices in Tenders Electronic Daily;
17. URGES the Commission and the Member States to work together to develop those tools in the best possible way also through the appropriate networks between national authorities and the Commission;

**Consulting stakeholders, promoting best practices, ensuring professionalisation, and
launching an EU-Wide Strategic Action Plan for Public Procurement**

18. OBSERVES that the share of contracts awarded to the lowest price bid represents a large part of all contracts awarded in most Member States; WARNS, however, against giving too much importance to the lowest price as the sole award criterion as an indicator for measuring the quality of procurement procedures; POINTS OUT that the use of the lowest price as the sole award criterion does not necessarily have a negative impact on quality if buyers have adequately determined their technical specifications in advance in their tender documents, but that it is up to the Member States to determine to what extent contracting authorities and contracting entities may or may not use price only or cost only as the sole award criterion; ASKS, therefore, the Commission to support and develop capacity building in order to promote the implementation of strategic procurement and relevant selection and award criteria linked to the subject matter of the contract to ensure high quality public services, sustainability and value for money;
19. NOTES that the strengthening of competition and strategic dimensions depends to a large extent on the way in which the contracting authorities and the contracting entities design and manage their contracts and their capacity and competence in these fields; therefore, INVITES the Commission and the Member States to take or scale up initiatives to increase the professionalisation of those authorities and entities, considering the European skills framework for public procurement professionals ProcurCompEU¹⁵ tool; but CONSIDERS that competency and training are also essential for economic operators, particularly SMEs and especially micro-enterprises;

¹⁵ ProcurCompEU, the European competency framework for public procurement professionals: [ECF_Flyer.indd \(europa.eu\)](#)

20. ENCOURAGES the Commission and the Member States to collaborate more efficiently and support in sharing and disseminating best practices, and by engaging with all stakeholders, such as buyers and sellers, to build the necessary competences and capacities;
 21. CALLS further for greater transparency, integrity, and accountability of public spending in order to fight collusion and corruption, and help to achieve better value for money;
 22. While RECOGNISING that there is no one-size-fits-all solution to address the above challenges, URGES the Commission to adopt an EU-Wide Strategic Action Plan for Public Procurement which would address the future steps at EU level, where appropriate in cooperation with Member States; CALLS ON the Commission and the Member States to start all this work without delay, and SEEKS the completion of the EU-Wide Strategic Action Plan within a reasonable timeframe to guide and inform a programme of review and reform of the EU procurement landscape to address issues and concerns raised in these Council Conclusions;
 23. INVITES the Commission to regularly present at Council level the progress made on the initiatives, measures, and actions referred to in these Conclusions.
-