



# Innovation and Better Synergies of Public Procurement with other Policies

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# EU Public Procurement Framework

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**Utilities  
Directive  
2014/25/EU**

**Public Sector  
Directive  
2014/24/EU**

**Concessions  
Directive  
2014/23/EU**

**Defence  
Directive  
2009/81/EC**

# The Traction of EU Public Procurement Law

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**Contracting  
Authorities /  
Entities**

**Material  
Coverage**

**Public Contracts**

**Advertisement and Publicity**

**Contract Specifications**

**Selection & Qualification**

**Award procedures**

**Award criteria**

# Objectives of the 2014 EU Procurement Reforms

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- Simplicity (codification, modernisation and exhaustive harmonisation)
- Strategic (EU 2020 Growth Strategy, ESFI)
- Access for SMEs (dimensional / sub-dimensional)
- Flexibility (Innovation, Green, Sustainable, Socio-economic, SGEI)
- Governance (probity, professionalisation of procurers)

# Strategic Procurement

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- Available tools
  
- Pre Procurement Engagement
  - Market consultation and pre-commercial procurement
  - Joint and cross-border procurement
  - Division into lots / disaggregation
  
- Selection and Qualification
  - Financial and economic standing
  - Technical specifications, functional and performance-based specifications

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- Award procedures
    - Competitive dialogue, negotiations, frameworks, Innovation Partnership
  
  - Award criteria
    - BPQR and MEAT for environmental and social criteria and innovative characteristics
    - LCC
  
  - Post procurement Engagement
    - Contract Performance
    - Social and environmental considerations

# Barriers and Obstacles to Strategic Public Procurement

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- Specifications
  - Standards (efficacy of CPV)
  
- Qualification
  - Economic standing of SMEs (risk ratio)
  
- Award criteria
  - Cost based criteria (lowest price)
  - MEAT and now BPQR
  - LCC (methodology)

# The 2017 Soft Law Package

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- Communication on Making Public Procurement work in and for Europe
  - The priorities for action
  
- Communication on voluntary ex-ante assessment of the procurement aspects for large infrastructure projects
  - Compliance
  
- Resolution on Professionalisation of Public Procurement
  
- Previous Guidance
  - *Strategic use of public procurement in promoting green, social and innovation policies (2015)*
  - *Supporting social responsibility in the economy through public procurement (2016)*
  - *Europe 2020, A strategy for smart, sustainable and inclusive growth, (2010)*



# Critical assessment of EU procurement implementation initiatives

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## Increase of strategic public procurement

- Voluntary *ex-ante* assessment mechanism for large infrastructure projects;
- Updated guidance on green and social procurement and innovation procurement
- Cooperative and joint cross-border public procurement, including innovation by large buyers
- Exchange good practices regarding strategic procurement, including key sectors (construction, healthcare, IT)

## Procurer Professionalisation

- European competence framework for public procurement with the essential skills and competences
- Network of National Innovation Procurement Centres

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## **SME access to procurement markets**

- align third-country legal practice with EU acquis
- access to justice for SME disputes in public procurement

## **Digital transformation of procurement**

- Extend the scope of the e-Certis
- European Single Procurement Document
- e-Invoicing

# Soft Law - Discretion

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- Harmonisation vs uniformity
  - Exhaustiveness - coverage
  - Tractability – externalisation
  - Competition – decoupling in contestable markets
  - Rule of reason
  
- Flexibility
  - Contracting Authorities – in house, affiliation, public partnerships
  - Award criteria – BPQR / MEAT, LCC
  
- Selection & Qualification – capacity, standing, exclusions
  
- Procedural autonomy – Remedies

# Drivers of Discretion

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- Policy

- Ordo approach = horizontal policies  
environment, employment, SMES, industrial

- Preference

- priority, protection

# Boundaries of Discretion

## ■ Legal Principles

EU Public Procurement Directives	EU Treaties
<ul style="list-style-type: none"><li>■ Transparency</li><li>■ Accountability</li><li>■ Objectivity</li></ul>	<ul style="list-style-type: none"><li>■ Free Movement of goods</li><li>■ Right of establishment</li><li>■ Right to provide services</li><li>■ Non-discrimination</li><li>■ Equal treatment</li></ul>

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- Standards = equivalence
  - Materiality – contractual relevance
  - Primacy – via direct effect towards uniformity
  - Judicial activism – porosity cured
  - Doctrinal interpretation = rule of reason –  
Effectiveness, Functionality, Objectivity, Procedural equality
  - Regulatory standardisation - convergence

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- Price vs cost – conceptual foundation of strategic procurement
  - Soft Law crucial in assisting effectiveness of acquis
  - To buy or not to buy

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