



EJTN ADMINISTRATIVE LAW
PROJECT
Public Procurement Seminar
[AD/2021/04]

Cross Border Public Procurement

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There are two main forms of cross-border procurement:

- **Direct cross-border procurement:** corresponding to contracts won from awarding authorities located in a Member State different from where the bidding firm is located.
- **Indirect cross-border procurement:** corresponding to contracts won from awarding authorities located in the same Member State as the bidding firm but where this firm's ultimate owner is from a different Member State.
 - Indirect cross-border contracts were much more significant, albeit with wide variations across different forms of indirect cross-border tendering:
 - through affiliates of multi-national corporations in the Member State of the contracting authority
 - through acting as subcontractors
 - through consortia participation
 - through acting as wholesalers/distributors

Cross-border interest in public contracts

- C-507/03 *Commission v Ireland* [2007]
- C-412/04 *Commission v Italy* [2008]
- C-220/06, *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado*, [2007]

Cross Border interest in concessions

- *C-507/03, Commission v. Ireland (An Post)*
- *C-147 & 148/06, SECAP*
- *C-260/04 Commission v Italy*
- *C-324/07 Coditel Brabant*
- *C-231/03 Coname*
- *C-347/06 ASM Brescia*

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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

- 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)

Legal Barriers to Cross-Border Procurement

- Certification and qualification
- ESPD and e-Cert
- Standards and Specifications
- Cross-border interest
 - Below thresholds

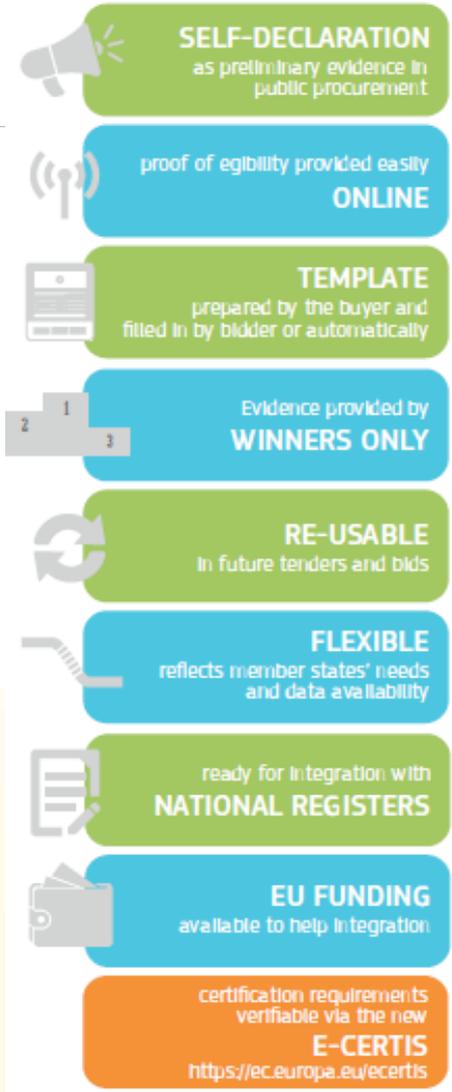
The European Single Procurement Document

- Economic operators, especially **SMEs**, find that a **major obstacle** to their participation in public procurement is the **administrative burden** resulting from the need to produce a **considerable number of supporting documents** related to **exclusion** and **selection** criteria.
- A **reduction of the documentary evidence** required is therefore one of the key measures that **promotes SMEs' participation**.
- Directive 2014/24/EU [Article 59] has introduced the **European Single Procurement Document (ESPD)**.
- The actual ESPD form was published as a [Commission Regulation 2016/7](#) in January 2016.

What is the ESPD?

- The **ESPD** is a **self-declaration** form replacing the various **different forms used in the past** for proving that a bidder fulfils the **exclusion and selection criteria**.
- ESPD is available in all EU languages and used as a **preliminary evidence** of fulfilment of the conditions required in public procurement procedures across the EU.
- **Full evidence** will have to be provided by the **tender winners** unless:
 - The contracting authority has the possibility of obtaining the supporting documentation directly by accessing a national database in any MS that is available free of charge; or
 - the contracting authority already possesses the supporting documentation.
- The ESPD brings significant **simplification of access** to cross-border tendering opportunities and facilitates the **wider access of the SMEs** to public procurement.
- As of **October 2018** the ESPD shall be provided **exclusively in electronic form (e-ESPD)**

KEY FEATURES



Source: European Commission

Benefits of cross-border procurement

- Increased competition and better choice in terms of quality and price
- Ability to fulfil contracts even with absence or limited availability of suppliers at national level

Direct cross-border procurement remains very low

- 2% of the number of awards and
- 3.5% of the value of awards.

Indirect cross-border procurement is 20% of both number and value of awards,

Cross-border procurement remains very low by comparison to the levels of import penetration in the EU.

The 2017 Soft Law Package

- 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)

Thank you!



With financial support from the Justice
Programme of the European Union