

The Future of Public Procurement: The Impact of the ECA's special report 28/2023

Written by Gracia Vara Arribas

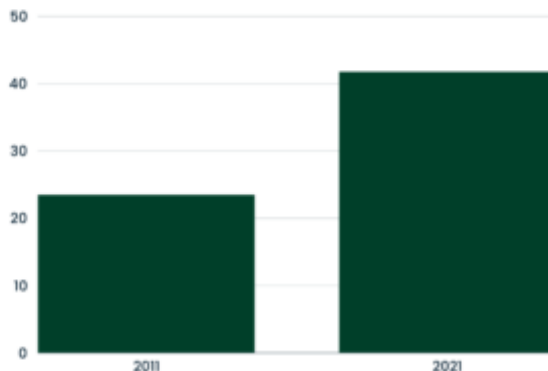
and Albert Sesé Hernández

The European Court of Auditors (ECA) has recently published the special report 28/2023, on public procurement in the EU. In it, the Court makes quite a severe, wide-ranging critique of the state of competition for public procurements in the EU and its perceived lack of achievement of the 2014 reform objectives during the period from 2011 to 2021. In this blog we summarise the main conclusions, the answer by the Commission so far, and the potential impacts it may have according to the most recently published articles by the academia.

The report's main findings and recommendations

The report, titled "*Less competition for contracts awarded for works, goods and services in the 10 years up to 2021*", concludes that:

- Competition for public contracts has decreased, mainly due to a high level of direct contract awards, a significant increase in single bidding and a limited level of direct cross-border procurement Namely, in 2021 direct awards accounted for 15.8% of all procurement procedures, despite their exceptional nature under the 2014 directives. Furthermore, single bidding has almost doubled, rising from 23.5% (2011) to 41.8% (2021).



Single bidding has almost doubled from 2011 to 2021

Thirdly, direct cross-border procurement has not increased significantly since the establishment of the single market in 1992, rising only from 2 to 5%.

- The 2014 directives are considered to have had no demonstrable effect: on the one hand, procurement procedures are not simpler and more efficient. Award procedures are now longer, increasing from 62.5 days in 2011 to 96.4 days in 2021. Measures such as the European Single Procurement Documents and eForms are considered to not have contributed significantly to simplification. SME participation is also deemed to not have increased significantly, despite the facilitation of the division into lots of contracts by the 2014 reform. Thirdly, strategic (e.g. environmental, social and innovative) aspects are considered only rarely, as contracts are still awarded mainly in favour of the lowest bid.
- Additionally, the ECA considers that some of the 2014 reform's goals may contradict what is deemed as the overarching objective of ensuring competition, as is the case with the possibility of direct awards, which simplifies the procedure but restricts the number of bidders, and the division of contracts into lots, which enables SME participation but may decrease competition by large companies.

Further to the above empirical analysis, the report interestingly identifies the following factors as the current barriers to competition in public procurement:

- The design of procurement procedures is key, given that restrictive selection criteria or technical requirements may limit the number of competing companies or products, leading to single bidding. Tailor-made technical specifications may particularly distort competition by favouring a particular company.
- Market concentration results in less competition, as is the case when only a limited number of companies compete in a specific market. This is considered to be a trend across all industrial sectors and leads both to single bidding as well as to a high level of both negotiated procedures and awards without a call for bids.
- Inflexible and lengthy procurement procedures, as well as payment delays, deter participation by bidders who lack administrative capacity, especially SMEs with limited staff and know-how. Language barriers for foreign bidders and the variety of public procurement platforms for

contracting authorities are also identified as barriers to competition.

Additionally, the report identifies a series of shortcomings in the Commission's monitoring of public procurement which limit its effectiveness and transparency.

Consequently, the report calls on the Commission to, on the one hand, clarify and prioritise public procurement objectives and, on the other, deepen the root cause analysis and put forward measures to overcome key obstacles to competition in public procurement. Specifically, the ECA makes the following recommendations to the Commission, among others:

- Clarify and prioritise public procurement objectives. Specifically, the ECA questions whether strategic policy objectives could be achieved through further regulation of the specifications for works, goods and services, instead of through strategic requirements for public procurement procedures. This is particularly relevant given the flagship nature of strategic procurement under the 2014 reform.
- Adopt measures to remove barriers to competition, such as lowering administrative burdens, promoting effective procedures, especially when it comes to selecting and awarding criteria, bolstering administrative capacity, encouraging the sharing of best practices, easing cross-border procurement by centralising member state-specific data and using artificial intelligence to get around language barriers, and increasing the appeal of public contracts to companies, particularly SMEs. The ECA considers that these measures could take the form of an EU-wide action plan.

A summary of the report and the full version is available on the ECA's website.

The Commission's reply and the foreseeable impact of the report

As to the foreseeable impact of these recommendations, the Commission's reply to the report delivered on November 28, 2023, provides insight into the next steps that it may adopt to tackle the above challenges.

While the Commission shows serious disagreement, in methodological terms, with some of the ECA's findings, particularly concerning the level of procurement competition, the implementation of strategic aspects and the shortcomings in the Commission's monitoring function, among others, it accepts all the recommendations put forward by the ECA.

In this regard, it highlights that strategic public procurement, as a tool to ensure the sustainability, resilience and security of supply in the EU, must be fully consistent with the strategy of a competitive internal market. Thus, the Commission announces that it may consider whether initiatives on strategic policy objectives, which add specific requirements to procurement procedures, should be consolidated and aligned in a single EU legal text.

Furthermore, concerning the obstacles to competition in procurement, the Commission recognises the urgent need to identify the measures, regulatory or otherwise, required to make public procurement simpler and more efficient. Consequently, the Commission undertakes to explore whether further actions, including legislation, may be required to combine the objectives of simplification with the strategic goals of the EU.

It is noteworthy that, while the Commission acknowledges the prime importance of efficiency and simplicity of public procurement procedures, it shows its commitment to strategic public procurement, which it identifies as an autonomous, and not merely incidental, goal which public procurement must help achieve. Hence, the increase in efficiency and simplicity of public procurement is identified as a means to achieve the ultimate goal *"to drive the green transition and ensure the resilience and sustainability of our economy"*.

Finally, the Commission disagrees with the ECA's suggestion that the above changes should be done through an EU-wide action plan, as it considers that, to address those concerns, stock should be taken first of initiatives taken at the national level. Instead, any appropriate changes could be done through EU legislation, as mentioned.

The Commission's reply can be accessed [here](#).

Reception of the report by the experts

The report has garnered strong interest from public procurement experts and we expect that it will lead to commentary by academia.

For example, Professor Pedro Telles finds the report unsurprising and sees it as confirmation that the current regulatory framework is not able to achieve a single market for procurement. Hence, he suggests a major regulatory overhaul, including either a regulation doing away with the financial thresholds or simply coming to terms with the fact that direct regulation of procurement to achieve a single market is not feasible so we should simply rely on the four freedoms and other legislative approaches less concerned with the procedural aspects of procurement.

However, reliance on the fundamental freedoms alone to ensure non-discrimination in public procurement to achieve the single market has been ruled out by others as unrealistic, among others due to the difficulties by operators to enforce their rights under the treaty provisions without a legislative framework (as has been explained, for example, by Professor Sue Arrowsmith in her work "The Law of Public and Utilities Procurement").

Thus, it remains unclear how or whether the ECA's report will impact the future of public procurement

regulation, especially given the Commission's major disagreement with several of its findings.

More on this topic

If you'd like to deepen your knowledge of what the future holds for the internal market of public procurement, stay tuned for our upcoming round-table event "The Future of Public Procurement: The Impact of the European Court of Auditors' special report 28/2023" :