

# UNIFE statement on the evaluation of EU public procurement directives

March 2025



Every year, over 250.000 public authorities in the European Union spend around 14% of GDP (around €2 trillion per year) on the purchase of services, works and supplies. Public procurement is therefore considered a key element to foster the European economy while also pursuing strategic targets.

This is all the more the case in the rail sector. **Since the vast majority of rail and urban transport operators are public authorities, public procurement is by far the predominant and most common process for rail projects in Europe.**

In this context, **UNIFE – the Association of the European Rail Supply Industry – is pleased to contribute to the public consultation on the evaluation of the 2014 public procurement directives (“the directives”)**. To be in line with the ongoing process, UNIFE has mainly focused here on the current framework and will provide detailed recommendations for the future framework at a later stage.

In general, the implementation of the directives has established a foundation for public tenders in the EU compared to the previous framework. Nevertheless, there are important areas where a revision would provide benefits to all stakeholders and in particular to European rail suppliers, as described below.

## Timing and scope of the revision

UNIFE understands the necessary process of evaluation before drafting a new proposal on a topic as complex and strategic as public procurement. Nevertheless, UNIFE highlights the **need to move forward with the Commission’s proposal during the first half of 2026**. Negotiations will be lengthy, and it is vital to conclude them by the end of the mandate.

UNIFE would also like to stress that **priorisation should be made in the revision process** in order to limit it to a number of key topics and to ensure that what is still relevant and adequate in the existing framework can be maintained. This will speed up negotiations, increase predictability and limit disruptions in already proven procurement practices.

## Architecture and simplification of the framework

UNIFE acknowledges the positive evolution of the 2014 directives when it comes to the overall coherence of the framework. However, it remains **too complex and subject to a wide range of interpretations**.

In the rail sector, there are significant national differences as to how products are purchased and tendered. For example, in the Czech Republic, it is very usual to divide big public contracts into parts to enable the participation of SMEs, while in Italy even construction works are often combined with the delivery of rolling stock in one single public contract.

The transposition of directives at national level has unfortunately led to a diverse understanding of the rules, which tends to be unfavourable to bidders, and to a range of jurisprudence which may or may not be applicable to a specific case in a given Member State. Bidders have to bear burdensome administrative costs to adapt to the different rules, and this can hamper their expansion within the Single Market.

Furthermore, recent legislative acts with a direct impact on public procurement (e.g. Foreign Subsidies Regulation, Net-Zero Industry Act) have added complexity to the overall landscape and they sometimes lack alignment with the existing framework. For example, the provision set in Article 29 (1) of Regulation EU 2022/2560 (Foreign Subsidies Regulation) regarding multi-stage procedures is not synchronised with EU public procurement law and leads to unnecessary red tape.

In this respect, **UNIFE calls to increase coherence and to achieve simplification:**

- ▶ Firstly, the differences between directive 2014/24/EU and directive 2014/25/EU (Utilities) are not justified anymore and sectorial rules complexify the landscape. The directives could be unified and directive 2014/25/EU taken as a basis for all kinds of public procurements, so that the benefits of the Utilities directive – higher competition thresholds, flexibility and broader negotiation rights – apply across all sectors.

- ▶ Secondly, to achieve a more uniform application of the EU public procurement rules, the European Commission should consider and carefully assess having regulations instead of directives.
- ▶ Thirdly, EU legislation related to public procurement needs to be coherent and even more aligned with the core framework.

## Clarity, flexibility and transparency

UNIFE highlights the **insufficient clarity of the rules**. This is notably the case regarding the choice of procedures and procurement techniques, in particular the negotiated procedure (Article 46 of directive 2014/25/EU) which in practice leaves very little room of maneuver to bidders. Similarly, the rules on integrity are highly relevant but should be clarified as, again, the broad interpretation of rules creates challenges for bidders. Last but not least, the evaluation of the tenders and its basis should be clear, transparent and objectively measurable.

UNIFE believes that **certain timelines should be clarified or modified** in order to adequately reflect the complexity of rail projects. In general, extending the time available for tenderers to submit their bid would enable to improve their quality. Furthermore, the unclear timelines for formal complaints and the corresponding risk to be precluded with such formal complaints should be more clearly framed in the directives (start, duration...). Indeed, an increased duration of procurement procedures has been witnessed, for example with “intermediate offers” or even steps post “Best And Final Offer”. This adds further costs and uncertainty for bidders. Last but not least, the current deadline to lodge a formal complaint (2 weeks) is not realistic in view of the complexity of rail tenders.

UNIFE underlines the need for **more procedural flexibility**, while ensuring bidders are given a clear and predictable framework. . This is particularly the case for negotiated procedures, for which real negotiations – and not only related to price – should be held. Furthermore, more flexibility for contract changes during execution phase and for clarification of offers in highly complex bid procedures would be beneficial. The “Højgaard and Züblin” (C-396/14) and “Luxone” (C-403/23) decisions of the EU Court of Justice could be implemented in the legal framework to create more clarity and flexibility regarding changes in the procedure. It is also key that the public procurement directives allow changes to already awarded contracts to better adapt to evolving market conditions and operational realities.

UNIFE acknowledges the **laudable objective of digitalisation**, however with mixed results. E-procurement and electronic communication made to some extent procedures simpler, enabling in particular increased participation in cross-border procurement for companies that were looking to expand. However, too many different platforms are being used throughout the EU and each of those platforms has different requirements for registration, maintenance and use and requirement of different formats of documents. Furthermore, the European Single Procurement Document (ESPD) rather complicates the procedures instead of simplifying them. Progress has been achieved regarding transparency of public procurement through the Tenders Electronic Daily (TED) as well as the monitoring of the quality of the data published.

## Competition in the EU public procurement market

UNIFE agrees that more intra-EU competition can be seen since the implementation of the 2014 directives and generally deems **the level of competition in the EU public procurement market adequate**, especially for significant and complex projects. For smaller players, this increase in competition is partially explained by easier cross-border bidding and the digitalisation of processes. Ongoing standardization through technological innovation (e.g. FRMCS) will have a positive impact on the intra-EU competition.

The rules tend to ensure the **equal treatment of bidders from other EU countries** in all stages of the process, and have facilitated bidding on public contracts from abroad. However, it has been witnessed that some Member States still show a preference for local players and in some cases, entering the markets requires collaboration with local companies.

As mentioned before, UNIFE stresses that the **directives represent a significant bureaucratic burden for bidders, in particular for SMEs** which have limited resources. Many tenders require the submission of bid bonds, performance

guarantees, and similar financial commitments, as well as upfront cash flow advances. This situation adversely affects not only SMEs but also medium/large companies in the sector, making EU procurement unattractive in some cases.

In this respect, UNIFE highlights the **risks linked to increasing contractual requirements**. While the practice of single bidding can be linked to unrelated factors, it can also be the sign of bad procurement practices. The administrative burden, requested guarantees combined with severe penalties, might discourage bidders from submitting an offer. It has even been witnessed that complex and strategic rail tenders have led to no bid at all, which is extremely worrying and needs careful monitoring. Indeed:

- ▶ contracting authorities can use the current directives to shift all risks towards the industry – even those that are in their own sphere or that cannot be influenced by manufacturers.
- ▶ mandatorily shifting non-calculable/imponderable risks (inflation, liability without fault, etc.) and insurance against them over the product life, by their incalculable nature, increase the price above reasonable levels. This should be explicitly forbidden in the directives.
- ▶ absorbing the risk of changes in technical regulations and standards over several years is often made mandatory in the contracts. This requires manufacturers to predict – and adequately price – upcoming technical evolution (cf. updates of the Technical Specifications for Interoperability), which is not possible. A serious offer both with a view to schedule and to price can only be made on the basis of the regulations and standards in force at the time of the offer submission.

## Access of third country bidders to the EU public procurement market and European preference

UNIFE firmly believes that **the upcoming revision of the public procurement framework provides a unique opportunity to provide legal clarifications and achieve a level-playing field with third country bidders, in conjunction and coordination with other instruments (e.g. Foreign Subsidies Regulation)**.

The Kolin case of the European Union Court of Justice (C-652/22) provided important guidelines on the treatment of bidders from countries outside of the EU/EEA which are not a party to the WTO Agreement on Government Procurement (GPA) or other trade agreements with the EU (“Foreign Bidders”). While the ruling confirmed that Foreign Bidders can neither claim equal treatment nor effectively invoke the provisions of the directives, the decision however leaves contracting authorities with a lot of uncertainties. It is essential to **provide clarity and certainty to contracting authorities on how Foreign Bidders should be treated, with the objective to shield EU companies from unfair competition**.

In this respect, it should be recalled that there are currently **strong rail market access imbalances** (e.g. China’s rail market has an accessibility rate of 13%<sup>1</sup>). In this context, the EU directives should prioritise promoting reciprocity in market access in relation to the treatment of Foreign Bidders. It should be reminded that subcontracting or equity investment in companies are common practices to circumvent existing rules and compete in the European market, and these practices should be adequately addressed.

As highlighted in the Draghi and Letta reports, and already announced by the European Commission, supporting European preference and implementing real reciprocity in public procurement is key to improve European actors’ competitiveness. In this respect it should be acknowledged that rail supply is a strategic sector for Europe’s competitiveness and security (technology-intensity e.g. with telecommunications and signaling, connection with public services).

While Article 85 of directive 2014/25/EU already provides the possibility for contracting authorities to disqualify bidders if the proportion of the products originating in third countries (i.e. countries outside the EU/EEA and where no bilateral or multilateral agreement on public procurement is in place) exceeds 50% of the total value of the products constituting the tender, it would be important to provide **clarifications and guidelines on the methodology on assessing the European value of a product**, especially for complex products as rail rolling stock.

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<sup>1</sup> *World Rail Market Study*, UNIFE/Bain & Company, 2024.

## Most Economically Advantageous Tender (MEAT) and non-price award criteria

UNIFE believes that the EU public procurement framework should also be more effectively used to enhance the strategic role of public procurement to achieve EU policy objectives. Although the 2014 directives theoretically enable this shift, the provisions are rarely or never applied as such in practice.

In particular, despite increased possibilities for contracting authorities to get better value for money when procuring works, goods and services, **price-driven tenders largely remain the prevailing trend in the rail sector**. In Germany for example, 92% of the public tenders in the rail sector were awarded solely based on the lowest initial price between 2013-2020<sup>2</sup>. The Most Economically Advantageous Tender (MEAT) principle understood as Best-Price Quality Ratio (BPQR) is rarely used in rail procurement. In terms of environmental and social criteria, there is typically a minimum threshold required to participate but once this threshold is met, there is no further evaluation and the process tends to be more bureaucratic than a real value-adding evaluation criterion.

**This situation can be explained by several factors.** Firstly, it is often due to a misconception that MEAT equals least expensive, and this is due to the unclarity in the directives themselves. Secondly, despite a trend of increased professionalization of public buyers, many contracting authorities face various constraints (e.g. budget, recruitment, concerns on integrity). Lastly, the directives do not provide sufficient incentives to adopt that approach, and its benefits for contracting authorities are not communicated clearly enough.

UNIFE would also like to highlight the **negative effects of the misconception and insufficient application of the MEAT in rail procurement**. In practice, this leads to enterprises vying for low-price solutions, which tends to decrease quality. The rules also effectively prevent innovation instead of encouraging it, as economic operators try to avoid development costs and as innovative solutions in tenders are often undervalued. Last but not least, it leads to procurement of products from certain third countries which do not abide by the same rules, thereby creating unfair competition with EU bidders. This contradicts the strategic policy-driven objectives of the directives.

Applying the MEAT principle through non-price criteria would benefit above all the railway operating community and end users. In this respect, **strengthened provisions, as well as guidance and training of public bodies by the European Commission, would be needed to adequately support and accompany the shift of the procurement mindset.**

## Innovation and Intellectual Property Rights (IPRs)

UNIFE strongly believes that innovation should be encouraged through non-price criteria in public procurement, however the challenge faced by bidders today goes beyond mere award criteria.

European Rail Suppliers have **major concerns on the lack of rules on intellectual property rights (IPRs) in the 2014 directives, which leaves bidders unprotected**. In the current situation, contracting authorities tend to mandatorily request to own the IPRs of procured rail products. Investing resources into a development and then not being able to exploit such development contradicts entrepreneurial behaviour and discourages innovation for bidders. In this sense, the strict rules on negotiated procedures without prior competition push contracting authorities to require as many IPRs as possible.

Consequently, **UNIFE calls on additional and solid provisions protecting the IPRs of bidders** (including during the tendering process); furthermore, the rules regarding negotiated procedures without publication shall be updated to reflect specific conditions of innovations and shall make it easier for contracting authorities to use them.

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<sup>2</sup> Report *Modern public tendering (MEAT): Cornerstone for the rail mobility revolution*, VDB, 2023.

## Specificities of the rail sector and supply industry value chain

Rail projects going through public procurement procedures are often complex, of significant value, and concern products with a long life-cycle (i.e. 30-40 years for rolling stock and even longer for infrastructure).

This also accounts for the **complexity of finished products (e.g. a tramway or a high-speed train) and of the value chain, which often encompasses dozens of suppliers**. In practice, it is essential that these specificities are fully understood and adequately reflected in the future legal framework on public procurement, in particular when considering:

- ▶ European preference. Any obligation that would apply to support the upstream side should be cascaded down until the final customer, i.e. the contracting authority. This is absolutely crucial to avoid further constraints and costs (which are already surging) that would have to be borne by rolling stock manufacturers without any compensation, especially in a context where pressure is high to scale-up manufacturing while reducing costs of the railway system.
- ▶ improvements related to supply chain management. For example, potential obligations related to early payments to sub-contractors and suppliers should be matched by similar obligations by the contracting authorities to the main contractors. Indeed, there is currently a trend towards (full) payment only after final acceptance of the trains, whereas a project represents a multi-year contract durations and delivery times.
- ▶ IPRs' transfer – a bidder cannot transfer IPRs that come from its suppliers and that they will not sell.

## Private procurement

In the current EU directives, private procurement is not addressed except for very specific cases of special and exclusive rights. However, in the rail sector, both freight and passenger transport feature privately-owned operators, as well as companies or banks (e.g. Paribas) buying and leasing rolling stock.

This situation creates **risks of circumvention with the rules applying to public entities in the framework of the EU directives, but also issues related to fair competition of bidders** when it comes to the Foreign Subsidies Regulation (since privately-owned rail operators are not abiding by these rules). Yet, no matter the nature of the rail operator, rail is critical infrastructure and has strong links with Military Mobility. Therefore, critical aspects such as participation of Foreign Bidders, European preference or non-price criteria, should be considered also for private procurement – especially when private operators have public shareholders.

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