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Guidance note on Directive 2012/27/EU on energy efficiency, amending Directives 2009/125/EC and 2010/30/EC, and repealing Directives 2004/8/EC and 2006/32/EC

Article 6: Purchasing by public bodies

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ARTICLE 6: PURCHASING BY PUBLIC BODIES

A. INTRODUCTION

1. Article 6 of Directive 2012/27/EU of 25 October 2012 on energy efficiency¹ (the Energy Efficiency Directive – hereafter also 'the EED' or 'the Directive') requires Member States to ensure that central governments purchase only products, services and buildings with high energy-efficiency performance. The Directive indicates what these items are and what level of performance they must meet by referring to criteria established under a number of EU legislative measures such as the Energy Labelling Directive 2010/30/EU² and the Energy Performance of Buildings Directive (2010/31/EU) (hereafter 'the EPBD')³. This obligation is subject to a number of conditions listed in Article 6(1) and applies only to contracts with a value equal to, or greater than, the thresholds laid down in Article 7 of the Public Procurement Directive (2004/18/EC, hereafter also 'the PPD')⁴.

Article 6 also includes specific provisions on contracts of the armed forces; assistance to regional and local administrative levels; promoting energy performance contracting; and purchasing product packages. The aim of this paper is to assist Member States in the implementation of Article 6 by discussing the following issues:

- the relationship between Article 6 and the Public Procurement Directive and its comparison with other EU legislation in the field of energy efficiency procurement;
- the scope of Article 6 in terms of obligated parties, procurement items and contracts to which it applies;
- the inclusion of the provisions of Article 6 in the procurement process.

This note aims to provide guidance to Member States on how to apply Article 6 of the EED. The note states the views of the Commission services, does not alter the legal effects of the Directive and is without prejudice to the binding interpretation of Article 6 as provided by the Court of Justice.

B. LEGAL AND POLICY CONTEXT

2. The general rules applicable to procurement in sectors other than defence, water, energy, transport and post are set out in the Public Procurement Directive.

¹ Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, OJ L 315/1 of 14 November 2012.

² Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ L 153, 18.6.2010, p. 1

³ Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast), OJ L 153, 18.6.2010, p. 13

⁴ OJ L 134, 30.4.2004, p. 114–240

3. The Public Procurement Directive sets the framework for how procurement should be undertaken with the aim of ensuring principles such as fair competition and getting best value for taxpayers' money. It leaves to specific legislation, such as the EED, any definition of what has to be purchased. The rules included in such specific legislation need, however, to be in line with the rules of the general procurement framework.
4. In the case of the EED the principles of '*acting fairly*' and '*getting value for money*' are ensured by the fact that the minimum requirements the procured items must meet are openly-available/non-proprietary and common and they aim at minimising the life-cycle cost of these items. This is discussed in greater detail in section D of this paper.
5. The body of mandatory EU rules in the field of energy-efficiency procurement is well established. Energy efficiency is factored into the procurement process in different ways:
 - Under the Clean Vehicles Directive (2009/33/EC)⁵ the contracting parties have to take into account the operational lifetime cost of purchased vehicles in a number of ways, including energy consumption and carbon emissions. This has to be done either by setting appropriate technical specifications, or by including these aspects in the award criteria. If the impacts are monetized for inclusion in the purchasing process Member States have to use a defined methodology and standard data as defined in the Directive. In order to assist procurers, the Clean Vehicle Portal⁶ provides a tool to calculate the life-time operational cost.
 - The Energy Services Directive (2006/32/EC)⁷ requires the public sector to apply – as some of several options – the use of energy performance contracting or the purchasing of energy-efficient products, buildings and vehicles based on minimized life-cycle cost analysis. It is left to Member States to define what efficiency levels and methodologies are applied. This Directive was repealed by the entry into force of the EED on 4 December 2012.
 - The Energy Labelling Directive (2010/30/EU)⁸ requires contracting authorities to endeavour to procure only products belonging to the highest efficiency class, where such products are covered by delegated acts under this Directive. This provision will be repealed by the EED on 5 June 2014.
 - The Energy Star Regulation (106/2008/EC)⁹ applies the same approach as Article 6 of the EED, namely that central governments must specify energy-efficiency

⁵ Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ L 120, 15.5.2009, p. 5–12

⁶ <http://www.cleanvehicle.eu/>

⁷ Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC, OJ L 114, 27.4.2006, p. 64–85

⁸ Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ L 153, 18.6.2010, p. 1

⁹ Regulation (EC) No 106/2008 of the European Parliament and of the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment (recast version), OJ L 39, 13.2.2008, p. 1–7

requirements for public supply contracts of office equipment that are not less efficient than those set out under the Energy Star Programme.

Article 6 of the EED, therefore, does not introduce a new approach to EU rules on energy-efficiency procurement, but merely extends the scope of the obligation to additional items.

C. SCOPE OF THE OBLIGATION

C1. Central government

6. In line with the definition provided by Article 2(9) of the EED, '*central government*' means '*all administrative departments whose competence extends over the whole territory of a Member State*'.
7. In putting this definition into practice Member States can draw on;
 - Annex IV of the Public Procurement Directive (2004/18/EC), which includes a list of central government bodies in all Member States;
 - The data on public accounts which Eurostat collects on the basis of Council Regulation 479/2009/EC on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community¹⁰.

The Guidance to Council Regulation 479/2009/EC, ESA95¹¹ (European system of national and regional accounts), defines central government in point S.1311 as: '*[...] All administrative departments of the State and other central agencies whose competence extends normally over the whole economic territory, except for the administration of social security funds. Included in sub-sector S.1311 are those non-profit institutions which are controlled and mainly financed by central government and whose competence extends over the whole economic territory*'.

8. This definition differs from that used in the EED in that the latter does not refer explicitly to 'central agencies' and does not exclude 'administrative departments for the administration of social security funds'. Member States could therefore, in principle, use the lists of central government bodies specified for the purposes of Council Regulation 479/2009/EC¹² as a possible reference for establishing which institutions fall under the scope of Article 6 of the EED, while taking into account the differences mentioned above.
9. The Commission guidance on Council Regulation 479/2009/EC clarifies that central government is those non-profit institutions which are controlled and mainly financed by central government and whose competence extends over the whole economic territory. Thus central government is not limited to ministries, but includes the entities which are directly dependent on them in terms of authority (*i.e.* are not fully autonomous) and financing. Council Regulation 479/2009/EC and the accompanying guidance provide possible criteria

¹⁰ OJ L 145, 10.6.2009, p.1

¹¹ <http://circa.europa.eu/irc/dsis/nfaccount/info/data/esa95/en/een00081.htm>.

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:145:0001:0009:en:PDF>.

for Member States to establish the scope of central government within the context of the EED, but are in no way binding as the EED does not include references to that Regulation nor to Annex IV of the Public Procurement Directive in the context of defining ‘central government’.

10. When establishing the scope of the obligation, Member States should take into account Recital 17 of the EED which provides that *'[...] The obligation to renovate floor area of central government buildings should apply to the administrative departments whose competence extends over the whole territory of a Member State. When in a given Member State and for a given competence no such relevant administrative department exists that covers the whole territory, the obligation should apply to those administrative departments whose competences cover collectively the whole territory'*. This recital takes into account the federal structure of some Member States and is relevant to those Member States where for certain competences (such as health or education) there are no central/national government authorities which would exert control or would be the main provider of financing.

C2. Procurement items covered

11. The procurement items covered by laws listed in Annex III of the EED are set out below. The list, with the exception of tyres and buildings, is not fixed and exhaustive as implementing measures covering additional items will be proposed in the future.

Energy labelling implementing regulations under Directive 2010/30/EU

12. Implementing measures of the Energy Labelling Directive are delegated acts within the meaning of Article 290 TFEU and are adopted by the Commission if the European Parliament and the Council do not raise objections.
13. In the case of the products mentioned below, Member States will have to purchase only those products that belong to the highest energy efficiency class possible in the light of the need to ensure sufficient competition:
 - Household dishwashers (Regulation 1059/2010/EU);
 - Household refrigerating appliances (Regulation 1060/2010/EU);
 - Household washing machines (Regulation 1061/2010/EU);
 - Televisions (Regulation 1062/2010/EU);
 - Air conditioners (Regulation 626/2011/EU);
 - Household tumble driers (Regulation 392/2012/EU);
 - Electrical lamps and luminaires (Regulation 874/2012/EU).
14. In line with Article 6(4) of the EED, when purchasing a product package covered as a whole by a delegated act adopted under Directive 2010/30/ EU, Member States will be allowed to require that the aggregate energy efficiency takes priority over the energy efficiency of individual products within that package, by purchasing the product package that belongs to the highest energy efficiency class.
15. Currently there are no labelling rules for product packages. Energy labelling implementing measures for product packages are expected in the near future for heaters and lighting systems. As an hypothetical example, procurers purchasing a lighting system package

including lamps, controls, ballasts and luminaires might be able to request that the lamps need to have only a category 'B', provided that the whole package reaches the highest category (A+ and above).

Ecodesign implementing measures under Directive 2009/125/EC

16. Implementing measures under the Ecodesign Directive¹³ are currently dealt with under the 'Comitology' procedure and are adopted by the Commission after a vote of a regulatory committee composed of Member State representatives and further to the scrutiny of the European Parliament and the Council.
17. For products covered by an Ecodesign implementing measure central governments may only purchase products that comply with energy efficiency benchmarks specified in that implementing measure. This requirement is applicable only to products that are not covered by implementing measures of the Energy Labelling Directive. In addition this requirement is applicable only to Ecodesign implementing regulations adopted after the entry into force of the EED. Thus far this list includes Commission Regulation (EU) No 1194/2012 setting ecodesign requirements for directional lamps, for light emitting diode lamps and related equipment and Commission Regulation (EU) No 617/2013 –setting ecodesign requirements for computers and computer servers.

Energy Star

18. Energy Star specifications are included in Annex C of the EU-US Energy Star Agreement¹⁴. It should be noted that, since Energy Star is a voluntary label, the EED does not require that the procured office equipment be Energy Star-labelled, but merely that it is not less efficient than the levels indicated under the relevant Energy Star specifications. New product specifications are to be added in the course of 2013.
19. The adoption of Ecodesign implementing measures for products that fall under the Energy Star Agreement is planned for 2013. The question then arises as to which of the two rules should be used by Member States as the basis for public procurement. Since the EED does not address it specifically, this issue will need to be tackled in product-specific Ecodesign implementing measures or through a horizontal Ecodesign implementing measure r addressing this specific issue.

Tyres

20. Central governments will only be able to purchase tyres that achieve the highest fuel energy efficiency class, as defined by Regulation 1222/2009/EC¹⁵ on the labelling of tyres with respect to fuel efficiency and other essential parameters. Annex III of the EED indicates that this requirement should not prevent public bodies from purchasing tyres with the highest wet

¹³ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast), OJ L 285, 31.10.2009, p. 10

¹⁴ Agreement between the Government of the United States of America and the European Union on the coordination of energy-efficiency labelling programmes for office equipment, OJ L 63/7 of 6.3.2013.

¹⁵ Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters , OJ L 342, 22.12.2009, p. 46–58

grip class or external rolling noise class where justified by safety or public health reasons. Article 6 of the EED does not apply to tyre types excluded from the scope of Regulation 1222/2009/EC by virtue of Article 2 of that Regulation (e.g. re-treaded tyres).

Services

21. Given that the EED does not define ‘Service contracts’, the relevant definitions of the PPD should be used as a reference point. ‘Public service contracts’ are defined in Article 1(2)(d) of the PPD and listed in Annex II of that Directive. This is necessary in order to differentiate ‘public service contracts’ from ‘public works contracts’, which are not included in the scope of Article 6 of the EED.
22. Central governments will have to require in their tenders for service contracts that service providers only use products that comply with the requirements referred to in points (a) to (d) of Annex III of the EED, when providing the services in question. This requirement will apply only to new products purchased by service providers partially or wholly for the purpose of providing the service in question. As an example, a procurement entity purchasing IT services will not have to request that the service providers upgrade all of their equipment to Energy Star levels, but only that the new equipment they will purchase for the purposes of the service in question meets those levels.
23. The contract documents (such as contract notices, contract documents or additional documents) need to specify how bidders are to provide evidence of meeting this requirement. They will need to take account of the fact that this will work differently under different contracting routes – for instance, whilst it may be possible to identify purchases made specifically for the provision of a particular defined service, it may be more difficult initially to do so for outcome-based specifications, especially those that are established by negotiation. In the latter case, a possible option could be a binding statement of intent at an early stage from bidders, followed by the expected greater detail as part of any final bid. The contract documents would need to specify the means by which this obligation will be verified. These means will need to be proportionate to the nature of the service in question. The evidence requested from contractors could include samples, descriptions and photographs of the products purchased for the service in question or certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products purchased and used by the service provider.

Buildings

24. In purchasing or making new rental agreements for buildings, central governments will in general have to choose only buildings which comply with the minimum efficiency requirements that the Member State in question has set under the EPBD.
25. Article 6 and Annex III of the EED indicate that the purchased or rented buildings have to meet the minimum energy performance requirements set under with Article 4 of the EPBD. This EPBD provision requires Member States to set *inter alia* minimum requirements for buildings and building elements.
26. Where a Member State has chosen to transpose the EPBD by applying minimum requirements only to the elements of the renovated building as permitted under Article 7 of the EPBD, it

will need to be verified whether the whole building meets the minimum requirements. Annex III of the EED indicates that compliance with Article 6 and Annex III (f) of the EED should be verified by means of the energy performance certificates referred to in Article 11 of the EPBD. This provides that the energy performance certificates should include the energy performance of a building and reference values such as minimum energy performance requirements in order to be able to compare and assess the energy performance. Therefore, irrespective of how Articles 4 and 7 of the EPBD have been transposed, energy performance certificates that comply with the requirements of Article 11 of the EPBD ought to provide Member States with the means of meeting the requirements of Article 6 and Annex III (f) of the EED.

27. There is no contradiction between minimum efficiency requirements applied to building elements under Article 7 of the EPBD and the establishment of the energy performance of the building as a whole. Article 4 of the EPBD requires Member States to set minimum energy performance requirements for buildings or building units as well as for building elements. Article 7 of the EPBD indicates that Member States should take the necessary measures to ensure that, when buildings undergo major renovation, the energy performance of the building or the renovated part thereof is upgraded in order to meet minimum energy performance requirements set in accordance with Article 4 in so far as this is technically, functionally and economically feasible. It specifies that those requirements should be applied to the renovated building or building unit as a whole and, additionally or alternatively, those requirements may be applied to the renovated building elements.
28. Annex III point (f) of the EED lists certain exemptions. One is when central governments purchase or rent a building in order to undertake deep renovation or demolition. Although '*deep renovations*' are not defined in the Directive, Recital 16 refers to them as renovations '*which lead to a refurbishment that reduces both the delivered and the final energy consumption of a building by a significant percentage compared with the pre-renovation levels leading to a very high energy performance*'. This implies that such renovations must at least to go beyond the minimum efficiency requirements set under the EPBD.

C3. Thresholds

29. The obligations laid down in Article 6 of the EED are applicable to contracts above the thresholds listed in Article 7 of the Public Procurement Directive. The thresholds now in force were established by Regulation 1251/2011/EU¹⁶. For all supplies contracts contracted by central government not operating in the field of defence and for all contracts and design contests concerning services listed in Annex II, part A of the PPD the threshold is 130 000 euros. For all contracts concerning services listed in Annex II B of the PPD the threshold is 200 000 euros. Services are covered by Annex III of the EED, and in that context, the relevant categories in Annex II, part A of the PPD include, among other, maintenance and repair services, computer and related services, building-cleaning services and property management services.

¹⁶ Commission Regulation (EU) No 1251/2011 of 30 November 2011 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the awards of contract, OJ L 319, 2.12.2011, p. 43–44

30. Since the purchasing of existing buildings is not covered by the PPD, no contract thresholds apply in this case. Central government bodies can only purchase, or make new rental agreements for buildings that comply at least with the minimum efficiency requirements referred to in Article 4(1) of the EPBD, irrespective of the value of the building purchased or of the rental contract.

D. THE PROCUREMENT PROCESS

31. The principle of Article 6 of the EED is simple – when central governments purchase products, buildings and services, they must ensure high energy efficiency and they must comply with the standards listed in Annex III. These are mandatory minimum requirements and, in line with Article 1(2) of the EED, Member States can go further as long as this is compatible with EU law and more stringent national measures are notified to the Commission. Therefore, in the procurement process, these requirements should in principle be part of technical specifications or any other document defining the subject matter of the contract.
32. The obligations imposed under Article 6 of the EED are to a certain extent conditional. They must be consistent with cost-effectiveness, economical feasibility, wider sustainability, technical suitability and sufficient competition. These terms aim to anchor the specific legislation in the core principles of the PPD, namely '*getting value for money*' and ensuring fair competition. Therefore, as long as the 'conditionalities' are met, Member States must purchase the most energy efficient products, services and buildings available. In order to determine whether the conditionalities are met, Member States should establish a transparent and evidence-based methodology, rather than deciding on a case-by-case basis, so as to ensure that the principles of '*acting fairly*' and '*getting value for money laid out on the general procurement legislation are respected*'. In general these five 'conditionalities' are factored into the legal acts listed in Annex III of the EED. There could be however cases where purchasing products/services/buildings as specified in Annex III will not satisfy all of the 'conditionalities'. The sections below provide guidance in which instances this may be the case and how it could be verified.

D1. The conditionalities

Cost-effectiveness and economical feasibility

33. In the context of energy efficiency, cost-effectiveness in principle means cost-effectiveness over the life-cycle of the product, service or building in question, and relates the costs of a measure to the impact that has been achieved in terms of energy efficiency (*i.e.* Euro purchase cost per amount of energy saved) and performance of the product/service/building.. Cost-effectiveness in the context of public procurement can, however, also be understood in a wider way so as to include considerations which are not linked with direct benefits to the procuring entity, e.g. societal costs associated with greenhouse gas emissions or air pollutants. An example of the consideration of such societal costs is the EPBD, which allows Member States to use the macroeconomic approach when setting the cost optimal level of energy efficiency of buildings and includes the cost of CO₂ emissions in calculations. Another example is the Clean Vehicles Directive, where external costs related to CO₂, NO_x, non-

methane hydrocarbons and particulate matter are considered in calculating the life-cycle cost of vehicles purchased by public authorities.

34. Economical feasibility relates to the upfront price and the running costs of the product/service/building and the ability of the procurement entity to bear this cost. As energy efficiency measures always lead to a decrease of running costs as regards energy cost, in this context the principle of economical feasibility relates only to the ability of the procurement entity to bear the upfront price and other running cost like maintenance or spare parts.. It needs to be underlined that Article 6 and the EED more broadly aim at minimising the life-cycle cost irrespective of the upfront price.
35. Life-cycle cost-effectiveness underpins the items listed in Annex III of the EED, be it minimum requirements under the EPBD or Energy Star specifications for office equipment. Under the EPBD, minimum requirements for buildings have to be set with a view to achieving cost-optimal levels, whereas minimising life-cycle cost compared to market average is one of the criteria for setting Energy Star specifications.
36. However there could be a situation where it is not cost-effective or economically feasible to buy the most energy-efficient product, for example in relation to benchmarks for certain products under the Ecodesign Directive and the highest efficiency classes for certain products under the Energy Labelling Directive. Ecodesign benchmarks aim to identify best-performing products on the market, and the Energy Labelling Directive allows for the setting of empty top energy classes corresponding to not-yet available or not sufficiently available technology. This may limit the number of products available on the market which can meet the top requirements, until new more efficient models appear corresponding to this top tier. In these two cases manufacturers may charge premiums which exceed the savings resulting from lower operational cost or make the purchase of the product economically not feasible.
37. In the context of Article 6 of the EED, cost-effectiveness does not mean the cheapest product on the market from a life-cycle cost standpoint. For example, in the case of products the least-life cycle cost level corresponds to minimum requirements set under the Ecodesign Directive. In this case purchasing a product with a least life-cycle cost would mean purchasing the least efficient product on the market. Central governments have an obligation to ‘pull’ the market through procurement towards greater efficiency even if this does not result in purchasing the products with the least life-cycle cost. This leading role is emphasised by Recital 15 of the EED.
38. However if public procurers discover that the life-cycle cost of all products belonging to an efficiency category required to be purchased under Article 6 of the EED is significantly higher than the life-cycle cost of less efficient products, they should have the possibility to purchase these less efficient products, provided this is done on the basis of a structured (*i.e.* not *ad hoc*), evidence-based and transparent approach.

Wider sustainability

39. Wider sustainability is not contradictory with greater energy-efficiency. On the contrary, in most cases there are synergies between the two elements. In addition in the case of items covered by Annex III of the EED, energy consumption in the use phase usually has the greatest environmental impacts.

40. In those rare instances where there is a conflict between greater energy efficiency and reduced environmental impact, public procurers will need to weigh those impacts on the basis of a transparent and evidence-based approach in order to be able to purchase products/buildings/services which are less efficient than those whose efficiency corresponds to the levels indicated in Annex III of the EED. This would have to be established on the basis of appropriate data and tools such as Ecoindicators¹⁷. It is, however, difficult to put on the same scale energy, materials, air emissions and other environmental impacts. One possible option is to normalise by dividing each impact category by the whole amount of this category (e.g. air emissions) in a given year in the EU or the individual Member State, and then compare in which environmental category the impact of the product is greater. Such assessments are imperfect but they can help identify those cases where higher energy efficiency could lead to an overall negative environmental impact.
41. In those cases where it is found on the basis of well-established tools and data that the global environmental impact of all products belonging to an energy efficiency category required to be purchased under Article 6 of the EED is significantly worse than the global environmental impact of less energy efficient products, public procurers should have the possibility to purchase these less energy efficient products.

Sufficient competition

42. Under the EED an issue could arise where for a given product there is a limited offer on the market. This may again apply in particular to benchmarks under the Ecodesign Directive and top energy classes under the Energy Labelling Directive. Available databases such as 'Top ten' (www.topten.eu) can assist procurers in estimating the number of products on offer for a given category. It should be noted however that in the 'Concordia Bus Finland' case (C-513/99) the European Court of Justice found that *'[...] the fact that one of the criteria adopted by the contracting authority to identify the economically most advantageous tender could be satisfied only by a small number of undertakings, one of which was an undertaking belonging to the contracting authority, is not in itself such as to constitute a breach of the principle of equal treatment'* (paragraph 85).

D2. Conclusion

43. In an instance where a procuring entity would have reasonable doubts that the most efficient products/services/buildings available on the market and meeting the criteria listed in Annex III of the EED do not meet one or more of the conditionalities included in Article 6, the obligation to purchase those items does not apply. The entity will have to demonstrate in a transparent and evidence based way that the conditionality is not met. The manner in which this has to be shown should be set out in the national legislation transposing Article 6 of the EED, or in other publicly available official documentation.

¹⁷ ILCD handbook. Analysis of existing Environmental Impact Assessment methodologies for use in Life Cycle Assessment'; JRC-IES, 2010.