

II REACHING THE TARGETS

Part II details the main elements of the EED, providing a background for each of the subject areas, the requirements of the EED and recommendations for effective implementation and monitoring. Because many subject areas are covered by more than one article, each is treated separately here. Part II starts by reviewing Energy Efficiency Obligations, then follows with the public sector and energy audits, and ends with a discussion of supply side efficiency and demand response.

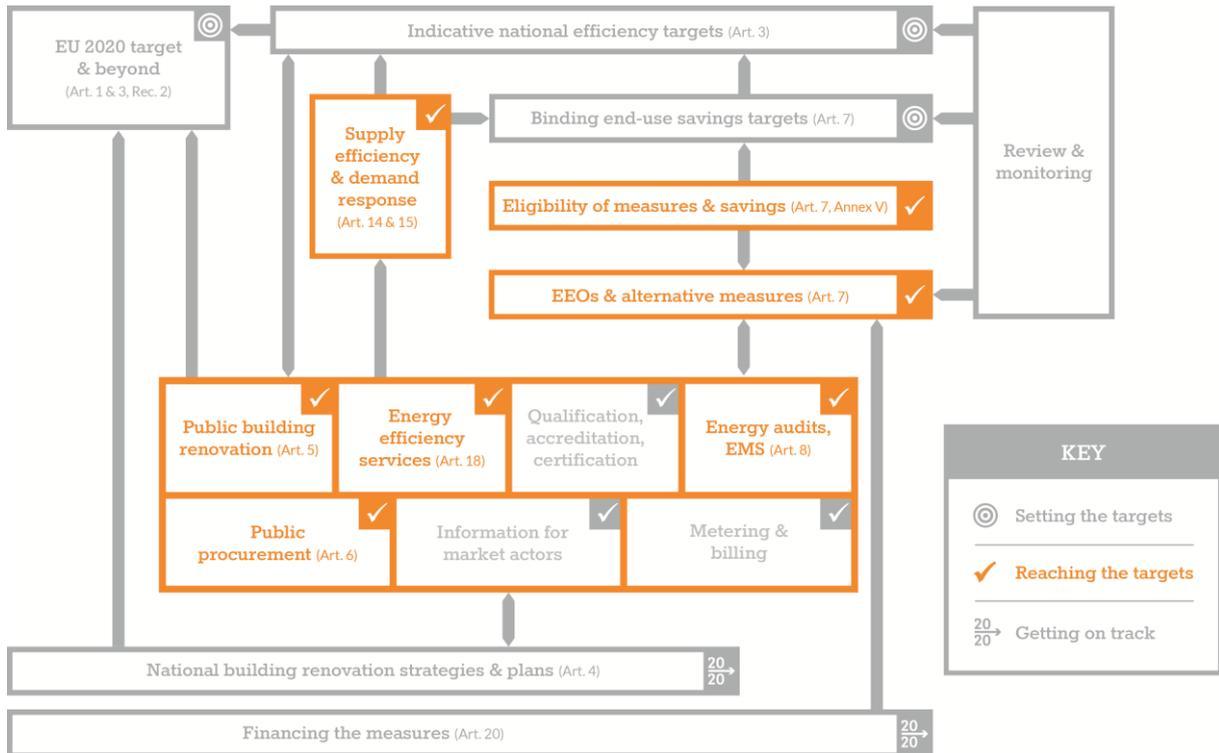


Figure 16 – Guidebook Overview Map: Reaching targets and objectives

II.4 Energy efficiency in public procurement (Article 6)

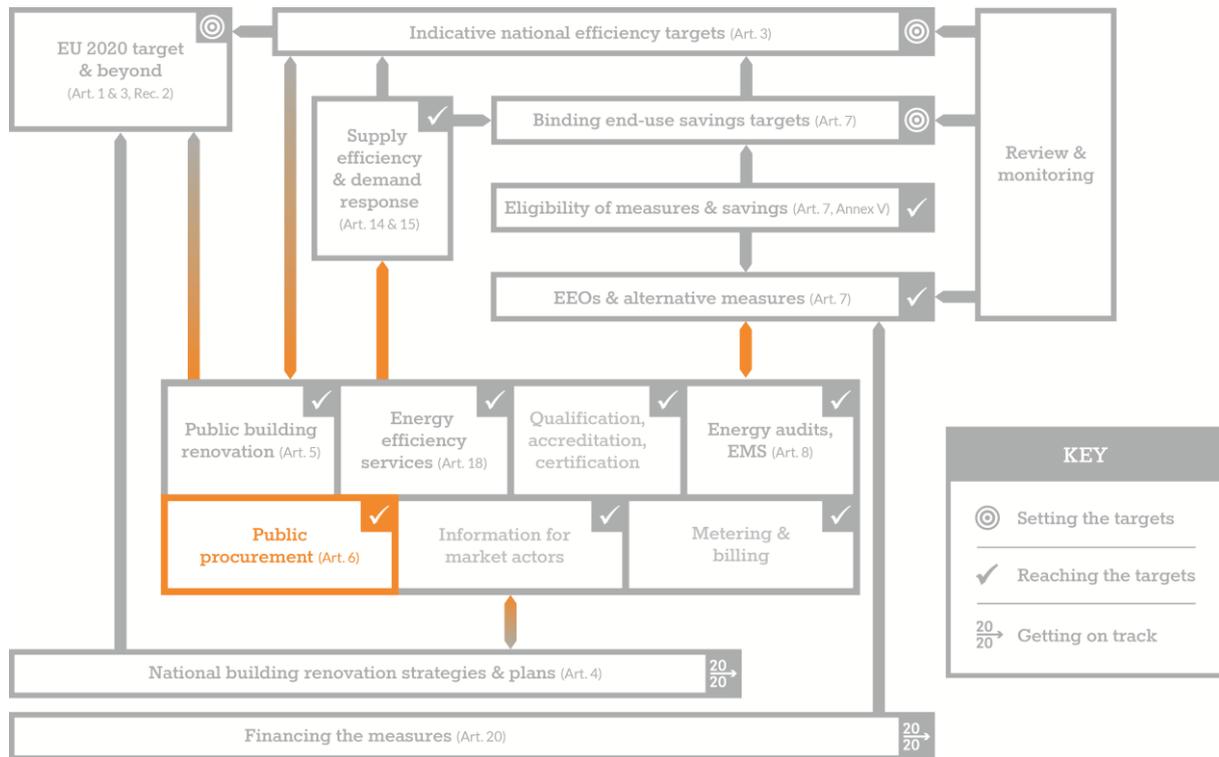


Figure 21 – Guidebook Overview Map: Public procurement

II.4.1 Summary

Public procurement can be summarised as the purchase of products, services¹, works or buildings by a public sector organisation or body². To ensure transparency, non-discrimination, equal treatment of all competitors and that the best offer is selected, public administration has to follow some procedural rules (at EU level, these are established for MSs in the Public Procurement Directives 2004/17/EC and 2004/18/EC). In some cases, general rules may also exist that ensure products, services and buildings purchased correspond to certain standards, like high energy-efficiency performance rules in the EED.

The choice public authorities make when purchasing products, services and buildings is an important policy instrument to promote energy efficiency and achieve energy savings.

Article 6 and Annex III of the EED establish some requirements for the public sector to purchase high performing energy-efficiency products, services and buildings.

Article 6 requires central governments³ to set an example through the purchase of products, services and buildings with high energy-efficiency performance insofar that it is consistent with cost-effectiveness, economical feasibility, wider sustainability, technical suitability and sufficient competition. The Article also encourages MSs to apply these public purchase requirements to other public bodies, including at the regional and local levels.

¹ For definitions of public contracts, public supply contracts and public service contracts see Article 1.2 of the Public Procurement Directive (2004/18/EC).

² Article 6 and Annex III of the EED do not mention the purchase of work. Therefore, it is not discussed further in this document. Purchase of buildings, although covered by the EED, is not part of the public procurement directives 2004/17/EC and 2004/18/EC.

³ "Central government" is defined in Article 2.9 of the EED as "all administrative departments whose competence extends over the whole territory of a Member State."

Annex III provides more details on what should be considered as high energy-efficiency performance for some products, as well as in the case of services and buildings. It seems that for products not covered by Annex III, "energy-efficiency performance" would not be mandatory, although MSs are free to request it, as this chapter shows.

Two elements related to energy-efficiency performance criteria and the public sector should be underlined:

- Energy-efficiency performance requirements applied by the public sector set an example for the private sector. If private companies also apply energy efficiency criteria when purchasing products, services and buildings, at the end important energy savings can be achieved.
- By setting public procurement requirements correctly, the government can act as a "launching customer", driving innovation in energy efficiency design.

As the EED public procurement provisions do not capture all the potential benefits, one must keep in mind that MSs can go beyond the EED requirements.

The Coalition recommends the following measures regarding public procurement:

- Description, preferably in law, of additional criteria referring to energy efficiency in public procurement in a sufficient level of detail to avoid misunderstandings in their implementation;
- Guidance, preferably in law, on stages of public procurement procedure at which energy efficiency should be assessed;
- All levels of administration (at national, regional and local level) to apply energy efficiency public procurement requirements; and
- MSs to apply standards higher than requested under the EED public procurement provisions, including requesting "high energy-efficiency performance" for products not covered by Annex III.

Please note that an agreement on the reform of the Public Procurement Directives was reached by the European Parliament, European Commission and Council in September 2013. Because the European Parliament has not yet held its final plenary vote on the agreement (scheduled for the end of 2013), only later editions of the Guidebook will reflect the updated legislation.

II.4.2 Background

Public procurement rules concern purchase of products, services, works and buildings⁴ by the public sector. In 2009, the public sector spent over €2,200 billion on goods, services and works – around 19% of EU GDP⁵. Much of this is spent in sectors with high environmental impacts, such as transport, buildings and food.

At EU level Public Procurement Directives, 2004/17/EC and 2004/18/EC ("PP Directives")⁶ establish rules for MSs of *how* to purchase (procedures for the public sector to follow when purchasing), while *what* to purchase (i.e. additional conditions for compliance for purchased products, services and buildings such as products'

Useful provisions of Public Procurement Directive 2004/18/EC

- Technical specifications: Annex VI.1(a) and (b)
- Award of contracts: Article 44.1
- Exclusion and selection criteria: Articles 45–52
- Award/evaluation criteria: Article 53

⁴ See footnote 29 on previous page.

⁵ [European Commission Staff Working Paper, 'Impact assessment accompanying the document'. Proposal for a Directive of the European Parliament and of the Council on Public Procurement and the Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal sectors, 20.12.2011, SEC\(2011\) 1585 final, p. 11.](#)

⁶ In December 2011 the European Commission adopted proposals for the revision of PP Directives 2004/17/EC and 2004/18/EC (COM(2011)895 final and COM(2011)896 final). The legislative process is ongoing.

energy-efficiency performance) is described in sectoral legislation like the EED.

The rules established in the PP Directives list the steps of the procedure that must be followed for purchases over a certain value depending on the type of contract⁷.

A contracting authority must first establish the technical specifications for a public contract that it will award through the public procurement process. Technical specifications define the characteristics required of a product or a service, thereby allowing potential contractors to prepare an offer that meets the needs of the contracting authority. Following the receipt of offers, the suitability of the economic operators is considered (falling under exclusion criteria, economic and financial standing, professional and technical knowledge or ability). The winning offer is either the cheapest offer or the highest scoring offer following evaluation against a range of criteria that the authority has established.

Although the PP Directives 2004/17/EC and 2004/18/EC do not apply to building contracts⁸, it is supposed that in these cases MSs follow similar rules.

II.4.3 EED provisions

Provisions in the EED address a specific aspect of public procurement: energy efficiency standards applied to products, services (in particular concerning new products for activities carried out within a service contract) and buildings purchased.

The link between PP Directives and the EED is very strong. To be effective, energy efficiency standards must be applied at the right stage of the public procurement procedure.

The main public procurement requirements of the EED are as follows:

- According to Article 6, products, services and buildings purchased by central governments (though MSs should also encourage other public bodies to purchase such products) should be of high energy-efficiency performance;
- Annex III provides details on what is to be considered the high energy-efficiency performance for some particular products as well as in the case of services and buildings:
 - the highest energy efficiency class possible under the Energy Labelling Directive (2010/30/EU) considering the need to ensure sufficient competition;
 - compliance with Ecodesign benchmarks⁹ for some new products under the Ecodesign Directive (2009/125/EU), provided that the specific product is not covered by the rules of the Energy Labelling Directive;
 - compliance with energy efficiency requirements as demanding as those of the EU-US Energy Star Agreement;
 - compliance with the criterion of the highest fuel energy efficiency class as defined in the Regulation on the labelling of tyres (1222/2009) with respect to fuel efficiency and other essential parameters;
 - purchase by service providers for the purpose of providing the service under the service contract of products complying with all of the above mentioned requirements; and

⁷ For the exact thresholds, see Article 7 of the PP Directive 2004/18/EC and Article 16 of the PP Directive 2004/17/EC. See also Article 9.1 of the PP Directive 2004/18/EC and Article 17 of the PP Directive 2004/17/EC ("The calculation of the estimated value of a public contract shall be based on the total amount payable, net of VAT, as estimated by the contracting authority. This calculation shall take account of the estimated total amount, including any form of option and any renewals of the contract. Where the contracting authority provides for prizes or payments to candidates or tenderers it shall take them into account when calculating the estimated value of the contract.").

⁸ For a definition of a building contract, see Article 101.1 of the EU Financial Regulation 966/2012 and Article 121.1 of the Commission Delegated Regulation 1268/2012.

⁹ Indicative benchmarks are included in annexes to implementing measures and indicate the best available technology on the market for a regulated product at the time of entry into force of the implementing measure. These are not to be confused with the ecodesign minimum efficiency requirements.

- purchasing or making new rental agreements¹⁰ only for buildings which comply with the minimum efficiency requirements that the MS has set under the EPBD (see chapter II.3). As stated in Article 9.1(b) of the EPBD, all new buildings occupied and owned by public authorities after 31 December 2018 must be nearly zero-energy.

“High energy-efficiency performance” is thus defined for many products and for buildings in EED Annex III by a reference to standards established by EU energy efficiency law.

When a product is not defined in EU laws mentioned in Annex III, a “high energy-efficiency performance” criterion could apply only if an MS decides to apply measures more stringent than the EED requirements¹¹. In such a case, having national ambitious standards of what “high energy-efficiency performance” is would be very helpful.

The EED obligation to purchase products with high energy-efficiency performance is also subject to additional conditions of cost-effectiveness, economical feasibility, wider sustainability, technical suitability and sufficient competition.

These terms are not defined in the EED so it is extremely important that they are described at national level with a sufficient level of detail to avoid any misinterpretation. The main elements which should be underlined are:

- *cost-effectiveness*: comprising the up-front price of a product, operational costs of its use and indirect costs, such the costs of treatment of any health impact caused by carbon dioxide emitted by the electricity used by the product over its lifetime. Cost-effectiveness should always prevail over economical feasibility;
- *economical feasibility*: concerns the financial ability to purchase a more energy efficient product. National authorities have to plan their investments in advance in order to purchase a quality energy efficient product that is inexpensive to use and low-cost for society;
- *wider sustainability*: a contradiction between high energy-efficiency performance and other environmental criteria (for example, the toxicity of a product) is possible; however, there might be a risk of an abusive use of this criterion allowing the avoidance of applying the high energy-efficiency requirement;
- *technical suitability*: a purchased product should function with the equipment already in use. Any contradiction between the technical suitability and energy efficiency must be treated cautiously to avoid abusive use of this criterion; and
- *sufficient competition*: contracting authorities do not have to desist from seeking ambitious levels of performance merely because there are few contractors able to supply such products, as case law of the EU Court of Justice shows¹².

Article 6 and Annex III of the EED give flexibility to MSs as to the exact implementation of its requirements. Therefore,

- Guidance is needed for additional conditions not defined in the EED to avoid misinterpretation.
- Most importantly, the EED requirements (including the ones on public procurement) are minimum requirements, meaning MSs may maintain or introduce more stringent measures as long as they are compatible with EU law (Article 1.2). Applying more stringent energy-efficiency performance requirements (for example requiring “high energy-efficiency performance” of products not covered by Annex III) could be of interest to MSs. This provision could allow them to achieve much more than savings in the public sector by setting an example for and encouraging the private sector to save energy through its purchases. MSs could end up obtaining important savings towards meeting the overall 20% energy savings target.

¹⁰ For buildings, Annex III widens the scope of Article 6 and mentions rental agreements in addition to purchases.

¹¹ Purchase of these products would also be subject to additional criteria described further in this chapter.

¹² Case C-513/99, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne, [2002] ECR I-07213, paragraph 85.

II.4.4 Recommendations

Good practice recommendations

- 1. Encourage MSs to describe, preferably in law, additional criteria referring to energy efficiency in public procurement in a sufficient level of detail to avoid misunderstandings in their implementation.**

Transposition of the EED public procurement provisions should be done in a way which would help to avoid misunderstandings about certain terms, in particular additional criteria (see chapter above), or the way and at what stage energy efficiency criteria should be implemented in the procurement procedures (see below).

- 2. Encourage MSs to provide guidance, preferably in law, on stages of public procurement procedure at which energy efficiency should be assessed.**

A contracting authority shall determine Annex III energy efficiency requirements prior to drafting the technical specifications. These could be minimum requirements if energy efficiency requirements are also assessed at the award stage. At the stage of technical specifications, a contracting authority should also assess whether the energy-efficiency performance requirements are consistent with the additional conditions of Article 6 and Annex III (cost-effectiveness, technical suitability, etc.).

In addition, energy efficiency could be included at the award stage, when the contracting authority has opted to evaluate offers on the basis of the "most economically advantageous tender" (only the price is taken into account when assessment is based on the lowest price). There are two possible ways of doing this:

- Awarding higher scores to better energy performing products within a given energy-efficiency performance class (some A products can perform better than others) where the minimum requirements specify an energy-efficiency performance class. Submitted offers should include a technical fiche as provided by the Energy Labelling Directive; or
- Awarding higher scores to products with better energy efficiency than the minimum requested by a contracting authority in technical specifications.

These rules should also apply in relation to new products purchased by service providers for providing the services.

MSs could apply requirements higher than the minimum requested under the EED already at the stage of Technical Specifications.

- 3. Ask all levels of national administration, including at regional and local level, to apply energy efficiency public procurement requirements.**
- 4. Encourage MSs to apply standards higher than requested under the EED public procurement provisions, including requesting "high energy-efficiency" performance for products not covered by Annex III.**

Good practices in practice

The Municipality of Rotterdam (Netherlands) identified the need to make cost, resource and energy savings in its €2 billion worth of real estate. It also had high CO₂ reduction targets. Public swimming pools were identified as key facilities for potential improvement. Rotterdam had the additional objective of improving the swimming conditions for users.

Due to the uncertainty regarding the potential of energy savings, an Energy Performance Contract (EPC) was awarded using the competitive dialogue procedure.

In 2010, as a pilot initiative, the City of Rotterdam tendered a ten-year EPC covering nine pools with payments based on actual energy savings delivered (this approach reflects austerity measures and the commitment to reduce CO₂ emissions by 50%).

The award of the contract was based on the energy savings offered by the bidders and on the maintenance costs. The contract involved guaranteed energy savings, building conditions (maintenance) and improvement in user comfort, all subject to penalties. The contractor guaranteed annual energy savings of 34% and was subject to a financial bonus for energy savings over 34% each year and penalties if savings are not achieved.