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CHAMBER OF DEPUTIES

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RESOLUTION

of the European Affairs Committee
at its 27th meeting held on 5 April 2012

on the proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in water, energy, transport and postal services – document No 18964/11, COM(2011) 895 final

The European Affairs Committee, having heard the information given by Mgr. Jan Sixta, Deputy Minister for Regional Development, and the intelligence report from Marek Benda, Member of the Chamber, and following a debate,

endorses the opinion that is the subject of this resolution.

Josef Šenfeld.
Committee Verifier

Marek Benda Jan Bauer
Rapporteur Committee Chair

Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in water, energy, transport and postal services

**COM(2011) 895 final, Council of Ministers ref. No 18964/11
Interinstitutional file: 2011/0439 (COD)**

- **Legal basis:**
Article 53(1), Article 62 and Article 114 of the Treaty on the Functioning of the European Union.
- **Date sent to Chamber of Deputies via the European Affairs Committee (VEZ):**
10 January 2011
- **Date of discussion by European Affairs Committee:**
19 January 2012 (1st round)
- **Procedure:**
Co-decision.
- **Preliminary government opinion (under Section 109a(1) of the Rules of Procedure of the Chamber of Deputies):**
Dated 27 March 2012, submitted to the European Affairs Committee on 30 March 2012 via the ISAP [Information System for the Approximation of Law].
- **Assessment under the subsidiarity principle:**
The proposal complies with the subsidiarity principle.
- **Grounds and subject-matter:**
Although there has been European legislation, albeit only partial, on public procurement since the 1970s, when the now obsolete Directive 71/305/EEC on public works contracts was adopted, it was not until 2004 that the first generation of public-procurement directives emerged. According to the Commission, Directives 2004/17/EC¹ and 2004/18/EC², which are still core elements of the European Union public procurement legislative framework, have achieved their objectives to a large extent and have resulted in greater transparency and higher levels of competition. In the light of the Europe 2020 strategy, which made public procurement a key market instrument to be used to ensure the most efficient use of funds, the Commission notes the need to revise and modernise the

¹ Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal sectors.

² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

existing public-procurement legislation. It therefore launched a broad public consultation based on the *Green Paper on the modernisation of EU public procurement policy*, subtitled *Towards a more efficient European Procurement Market*³, of January 2011, aimed at identifying specific measures and ideas from stakeholders on how to improve public procurement in certain thematic areas.

Since most stakeholders were in favour of a review of current public procurement policy, the Commission drew up a comprehensive set of proposals which were published in December 2011. As well as the proposal for a general Directive on procurement and the specific sectoral Directives, constituting a second generation of public-procurement Directives, part of this wider initiative is a separate proposal for a Directive regulating the granting of concessions, i.e. the problems that have so far been regulated only partially at EU level. The whole package pursues two interrelated objectives:

- to increase the efficiency of public spending by a more rigorous application of the "most economically advantageous tender" criterion. This implies a simplification and flexibilisation of the existing public procurement rules; streamlined, more efficient procedures will benefit all economic operators and give SMEs easier access to contracts;
- allow procurers to make better use of procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.

The proposed initiative thus aims to implement one of the twelve comprehensive reforms put forward by the Commission in April 2011 in its communication "*The Single Market Act: Twelve levers to boost growth and confidence*"⁴.

- **Content and impact:**

As set out above, the proposed review targets two procurement Directives – the general Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors ("the sectoral Directive"). It should be stressed here that, if both proposals are adopted, the existing legislation will be repealed and replaced by new legislation.

The proposal for a sectoral Directive consists largely of provisions contained in the general public-procurement Directive, except that in some cases they are adapted to the specificities of "sector-specific" procurement and the needs of sectoral contracting authorities or purchasers. The specific provisions put forward in this draft legislation to simplify and flexibilise the existing public procurement rules aim first and foremost to **clarify the scope of the Directive** (e.g. by exempting contracts for exploring oil and gas or for public passenger transport services by rail or metro) and to **revise the definitions of certain key notions** (body governed by public law, public works and service contracts, mixed contracts) to reflect current developments and bring them into line with **the case-law of the Court of Justice of the EU**. Where the basic thresholds are concerned, the **limits laid down are slightly reduced**: EUR 400 000 for supply, service and design contests and EUR 5 000 00 for works contracts.

³ COM(2011) 15 final.

⁴ COM(2011) 206 final.

An important aim of the proposal is to **generalise e-procurement**, i.e. use of electronic communications and transaction processing. This procurement method, whose advantages have been fully exploited to date only by a few Member States such as Portugal, can deliver significant savings and improved procurement outcomes while reducing waste and error. To this end, the proposal provides for specific measures such as mandatory electronic availability of procurement documents and the switch to fully electronic communication. To reduce more effectively the administrative obstacles making procurement procedures more difficult both for contracting authorities and for tenderers, **the time limits for the submission of offers** are to be shortened (this reduction is less substantial than in the general procurement Directive, however). A further basic change is that **a new proportionality principle** is added to **the fundamental principles of procurement** (equality, non-discrimination and transparency). The question remains, however, as to how this principle will be applied in practice. We cannot agree to its application at all stages of public procurement and in cases where it is not directly related to procurement. Where the application of the assessment criteria is concerned, however, Member States are allowed to apply only the "**most economically advantageous tender**" **criterion** to certain types of contract.

In keeping with the aims of the Europe 2020 strategy, the proposal puts forward a new approach based on **more consistent consideration of social and environmental criteria**. The proposal thus gives purchasers the option of basing their award decisions on life-cycle costing of the products, services or works to be purchased⁵, to refer in the technical specifications and in the award criteria to all factors directly linked to the production process, or to require works, supplies or services to bear specific labels certifying environmental, social or other characteristics. Since **contracts for social services** by their nature have very little cross-border interest, the proposal provides **a specific regime** for contracts for those services, **with a higher threshold of EUR 1 000 000** and imposing only the respect of basic principles of transparency and equal treatment. The proposal also provides for **a new form of procedure for innovative procurement: the innovation partnership**, essentially in the form of a negotiated procedure with the publication of a competitive dialogue procedure. It applies to cases in which the contracting authority, in cooperation with a third party, develops a new innovative product never yet placed on the market. Whether or not the Member States transpose this into national law is left to their discretion, however.

The proposal for a review of the procurement Directive further **strengthens the existing safeguards against the risks arising from unsound business practices such as conflict of interest, favouritism and corruption**, which often influence the course and outcome of a procurement procedure. In addition, **national legislation must be simplified** to ensure that a single national authority designated by the Member State itself will in practice be in charge of the monitoring, implementation and control of procurement law. Precisely this measure is seen by many as the most problematical point of the proposal, since the organisation of State authority or the national supervisory system falls within the exclusive competence of the Member States. It would therefore have to be regulated by national measures in accordance with constitutional provisions. It is worth adding that, for

⁵ The life cycle covers all stages of the existence of a product or works or provision of a service, from raw material acquisition or generation of resources until disposal, clearance and finalisation.. The costs to be taken into account include monetised external environmental costs.

this reason, certain national parliamentary chambers have already adopted reasoned opinions to the effect that the subsidiarity principle is not being observed⁶.

- **Opinion of the Czech Government:**

The Czech Republic wholly supports the proposal and welcomes the proposed amendments to the procurement procedures. There are, however, some uncertainties which will need to be resolved during the further discussions within the Council. It has strong reservations concerning, in particular, the general introduction of the proportionality principle and the simplification of national legislation, including the reorganisation of the powers of the competent authorities. The Czech Republic would also prefer conflicts of interest not to be addressed through a public-procurement Directive.

- **Envisaged timetable in the EU institutions:**

In the European Parliament the debate on this proposal was assigned to the Committee on the Internal Market and Consumer Protection (IMCO). Its first reading in Plenary, provisionally scheduled for 10 December 2012, is awaited.

Only the general public-procurement Directive is currently being debated by a Competitiveness Council working group. The sectoral Directive will be dealt with subsequently in accordance with the programme of the Presidency. Its content will depend on the final version of the general Directive.

- **Conclusion:**

The European Affairs Committee

1. **takes note of the submitted proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in water, energy, transport and postal services;**
2. **takes the view that** the question of conflicts of interest is sufficiently sensitive from a national perspective to require regulation at Member State level;
3. **considers** that the organisation of State authority is a matter solely for the individual Member States and that, for this reason, the establishment of a supervisory system should be regulated at national level in accordance with the constitutional provisions of each Member State;
4. **requests that the Government inform it of the course of the discussions on the proposal for a Directive.**

Josef Šenfeld
Committee Verifier

Marek Benda
Rapporteur

Jan Bauer
Committee Chair

⁶ On 28 March 2012 the Swedish parliament (the *Riksdag*) and the UK House of Commons adopted reasoned opinions.

