



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposals for a directive on public procurement {COM(2011) 896 final} and for a directive on procurement by entities operating in the water, energy, transport and postal services sectors {COM(2011) 895 final}, and apologizes for the long delay in replying.

The Opinion of the Bundesrat was read and analysed with great interest. The Commission takes note of the positions expressed concerning, inter alia, the definition and scope of public procurement, in particular with regard to services provided by lawyers and notaries and to public-public cooperation, the use of means of electronic communication and the rules on governance.

In this regard, the observations of the Commission are as follows:

Concerning the scope of the two directives, the proposals are based on the newly introduced concept of "procurement" which appears also in the titles of the proposed directives. Procurement is defined as "the purchase or other forms of acquisition of works, supplies or services chosen by the contracting authorities"; the proposals specify in this context that "an entirety of works, supplies and/or services ... constitutes a single procurement ... if the contracts are part of a single contract" (see Article 1 (2) of the proposals). In the view of the Commission, this definition does not result in an extension of the scope of the Procurement Directives (Directives 2004/17/EC and 2004/18/EC). It rather clarifies the basic rule that is already expressed in the current directives (see, for instance, Article 3 and Article 1(2)(b) of Directive 2004/18/EC) and according to which contracts related to the same project, fulfilling one economic and technical function, have to be awarded together. The new presentation is intended to facilitate the uniform application of the directive and to prevent circumvention of the European Union rules on public procurement.

Based on the results of the evaluation of the economic impact and effectiveness of the EU public procurement legislation, the Commission concluded that the traditional distinction between so-called priority and non-priority services is no longer justified and should be abolished. The proposals provide, therefore, for the full application of the procurement procedures to a number of services that are currently only subject to a restricted set of rules. The Commission is pleased to note that the Bundesrat has no fundamental objections against this decision. However, in the view of the Commission, this should also entail that contracts for legal services provided by lawyers and notaries become subject to the same rules as other public service contracts. The results of the evaluation show that legal services have a particularly high percentage of cross-border trade,

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exceeding considerably the cross-border relevance of some priority services. Under these circumstances, it would not be justified to withdraw these services from cross-border competition within the Internal Market. With regard to services provided by notaries, the European Court of Justice has only recently confirmed that the activities of notaries are not connected with the exercise of official authority and can therefore not be exempted from the application of the rules and principles governing the Internal Market (judgments of 24 May 2011 in Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08).

The proposals include provisions on public-public cooperation which are largely modelled on the case-law of the European Court of Justice. In the past, the Court's judgments have been interpreted divergently between Member States and even between contracting authorities. Together with the increasing complexity of the case-law, this has led to considerable legal uncertainty. In the view of the Commission it is therefore necessary to remedy this situation by defining clearly in which cases public contracts concluded between contracting authorities are not subject to the application of public procurement rules.

As for the proposed switch to mandatory electronic communication in public procurement, the Commission is aware that the time-frame provided in the proposal is ambitious. Nevertheless, the work done so far in the field of electronic procurement shows that such an ambitious goal is achievable and at the same time necessary to reap the full benefits of e-procurement in due time. The experiences of Member States having already made this transition show that mandatory electronic procurement has no negative incidence on the participation of small and medium-sized enterprises; on the contrary, electronic systems can make it easier for such enterprises to get regular information about procurement opportunities and to submit complete and correct tenders or requests to participate.

The Commission takes note of the concerns expressed by the Bundesrat with regard to the proposed rules on governance and in particular the establishment of a single independent oversight body. However, in view of the results of the Green Paper consultation on the modernisation of EU public procurement policy and of the findings of the evaluation, the Commission is of the opinion that a better enforcement and implementation of the rules through increased monitoring at national level would greatly enhance the functioning of the Internal Market and contribute to establishing a level playing field for economic operators across Europe.

As you may be aware, the issue of the structures required to fulfil the tasks which are considered necessary is currently under discussion in Council and Parliament. In these negotiations due account will be taken of the position of the Bundesrat which is shared by several other Member States.

The Commission hopes that these clarifications address the observations made by the Bundesrat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

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Vice-President*