



EUROPEAN COMMISSION

Brussels, 13.7.2018
C(2018) 4418 final

Dear President,

The Commission would like to thank the Camera dei Deputati for its Opinion on the Communication 'Making public procurement work in and for Europe' {COM(2017) 572 final}, on the Communication 'Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects' {COM(2017) 573 final} and on the Commission Recommendation on the professionalisation of public procurement {C(2017) 6654 final}.

These initiatives form part of a broader package of ambitious measures designed to promote efficiency in public procurement, as part of the Commission's efforts to strengthen the Single Market and stimulate investment across Europe. Public procurement represents about 14% of the European Union Gross Domestic Product, and therefore constitutes a large and important part of European public expenditure. It is a powerful strategic tool available to public authorities to invest in high-quality public services for their citizens, promote sustainable growth, innovation and the competitiveness of European businesses. In recent years, the European Union has adopted a new legal framework, offering more flexibility and transparency, and many Member States have taken steps to radically improve their procurement policies and systems. However, very important challenges still remain to be tackled.

The package includes a general Communication presenting a policy strategy framework setting clear priorities to improve procurement practice within the European Union and to incentivise contracting authorities to procure in a sustainable manner, while making full use of digital technologies to simplify and accelerate procedures. The Commission also presented a Communication on a mechanism which aims at providing clarity and guidance to public authorities whenever they need to launch and manage public procurement procedures for particularly large and complex projects. Furthermore, the Commission supports the idea that a skilful, prepared and motivated procurement workforce is crucial in order to improve efficiency in procurement. This is why it adopted a Recommendation including strategies on how to professionalise public buyers.

*Mr Roberto FICO
President of the Camera dei Deputati,
Palazzo Montecitorio - Piazza Montecitorio
IT - 00100 - Roma (Italia)*

The Commission welcomes the Camera dei Deputati's broad support for the aims of the two Communications and the Recommendation, and takes well note of its remarks on the initiatives. The Commission fully supports and welcomes Italy's efforts to reform its public procurement system in the last few years. The timely transposition of the 2014 public procurement Directives through the 2016 Code of public contracts, as well as the development and implementation of a comprehensive national strategy on public procurement are important milestones towards a more efficient and transparent use of public procurement. The Commission is confident that the Italian authorities will ensure the complete and correct implementation of the Code and of the strategy, as they will offer crucial tools for Italy to tackle procurement challenges, and to fully support the objectives of the Commission's public procurement package and future Commission actions in this field.

Large infrastructure projects, in particular, often require complex procurement procedures. Many of these projects often take longer time and/or more money to complete than initially expected. Technical and legal uncertainty about the procurement process is one of the aggravating factors. The Commission's ex-ante mechanism will help to provide clarity and certainty, while supporting the exchange of good practices between contracting authorities.

Strategic procurement supporting sustainability and innovation is also underused. Competition is not always driving the procurement process and procurement remains to a certain extent a complex and burdensome exercise. At the same time, digitalisation in this field is happening slowly, which does not help the collection and analysis of the already scarce and confused data. To respond to such challenges, European and national authorities must ensure that public buyers are equipped with the necessary skills, tools and structures in order to make the most of the procurement process. The Commission Recommendation suggests the steps to be taken in order to achieve this result.

As concerns the state of play of the measures announced in the public procurement package, the Commission has already activated the ex-ante voluntary mechanism. Member States may already send questions on specific issues related to procurement aspects of the project to the mechanism's helpdesk, or notify a procurement plan to the notification mechanism for assessment. The information exchange mechanism, with its accessible database and the discussion platform for stakeholders, is in the process of being set up and is expected to be made available in the next few months.

Furthermore, the Commission is taking further steps in the field of professionalisation of public buyers, which are further detailed in the attached Annex.

The Commission would also like to stress that, in the context of the ex-ante mechanism, it will work towards providing a high degree of legal certainty and ensuring the correct application of European Union law. However, this is without prejudice to any binding legal interpretation or assessment, as explained in the Communication.

The Commission will be in the lead for all of the above-mentioned initiatives once launched but it counts on the full cooperation of all Member States for a successful implementation. As to the more specific comments in the Opinion, the Commission would like to refer to the attached Annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Camera dei Deputati and looks forward to continuing the dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Elzbieta Bienkowska
Member of the Commission*

Annex

The Commission has carefully considered the comments in the Camera dei Deputati's Opinion and is pleased to offer the following clarifications.

On point a) concerning the request to broaden the scope of the ex-ante assessment system, as indicated in the Communication,¹ the thresholds were set up to focus the mechanism on the most important infrastructure projects in and for the European Union and, at the same time, ensure a broad geographical coverage. As rightly pointed out in the Opinion, the Commission is available to consider requests from Member States regarding large projects of a high value which do not necessarily exceed the thresholds, when it considers that they have a high importance (e.g. in a cross-border perspective or projects of common interest)². In this case, the Commission will assess the admissibility of the project.

Setting higher thresholds with the possibility to consider important projects of lower value is in the Commission's view a better solution than lowering overall the thresholds. In this second situation, for example, a smaller Member State would still be excluded from using the mechanism, as under the current proposal projects of significant lower value could still be treated.

On point b) concerning the request to reduce the time-frame for issuing a reply, it is worth recalling that the ex-ante mechanism is two-fold. Member States may request clarifications from the helpdesk 'function' of the mechanism on specific issues emerging during the development of the project. In that case, the Commission's services will endeavour to reply within one month, unless further information is needed for the assessment. The three-month time-frame applies when the Member State is at a more advanced stage of preparation of the procurement plan of the project, and notifies it to the Commission, requesting an assessment.

Considering the potential complexity and the size of such requests, shortening the timeframe to assess the notification may not allow the Commission's services enough time to carry out a diligent analysis of the elements notified and deliver a high quality assessment.

Regarding point c) the Camera dei Deputati requests to clarify unequivocally the legal value of the Commission's assessments in the ex-ante mechanism. As stated in the Communication³, the views expressed in the assessments are those of the Commission's services, exclusively assessing the compatibility with European Union procurement legislation and they are neither legally binding on the recipients nor on the Commission itself. They are without prejudice to the interpretation of the relevant rules by the Court of Justice of the European Union.

¹ See Communication C(2017)573, footnote 14.

² See *ibidem*, page 4.

³ See *ibidem*, footnote 10.

Concerning point d), it is not possible for the Commission to shield a project that fully complies with its assessment from any future infringement procedure for violation of European Union law for two main reasons. Firstly, it is important to recall that the role of the Commission is to monitor and ensure compliance with European Union law. The Commission and its services are not competent to interpret European Union law in a binding way. This task is the responsibility of the Court of Justice of the European Union, and no assurance given by the Commission on a certain issue may interfere with the right of the Court to later examine the same or similar issues.

Secondly, the applicable Union legislation entrusts the contracting authorities and entities in the Member States with the task of ensuring compliance with Union law when conducting public procurement. While the objective of the ex-ante mechanisms is to facilitate that task, the ex-ante mechanism cannot replace the fundamental role of the national contracting authorities and the obligations imposed upon them by the Union legislation in this respect.

Finally, the ex-ante mechanism's assessment by the Commission is in any event based on the information provided by the national authorities or the promoter of the project. While trusting that it is in the interest of the relevant Member State authorities to provide accurate and complete information, that information may turn out to be incomplete, incorrect, or the project may eventually not be carried out according to the information, which in turn may limit the value of the assessment itself.

The Commission intends to publish in the information exchange mechanism an anonymised version of questions and answers received under the helpdesk. The Commission will also invite the authorities requesting assessments under the notification procedure to provide documents linked to the project for the information exchange mechanism, as appropriate and when available. All confidential and commercially sensitive information will be treated accordingly and removed in cooperation with the relevant authorities⁴.

On point e) regarding the costs related to the creation and management of the information exchange mechanism, the Commission confirms that these will be borne by the Commission itself. There is no plan to ask Member States to participate to such costs.

On point f), the Commission very much welcomes national ex-ante procurement assessment/support mechanisms, e.g. in Italy, where the National Anti-Corruption Authority (ANAC) can be required to trigger the so-called collaborative oversight procedure, and supports the decision of some Member States to create them. These mechanisms offer contracting authorities, notably those that are small and not always equipped with the necessary resources, invaluable help in correctly setting up a procurement procedure. National mechanisms also have the advantage of being tailored to the characteristics of the national system and specificities. Furthermore, while the ex-ante mechanism of the Commission focuses exclusively on providing the national

⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents applies to all documents drawn up or received by the Commission and in its possession.

authorities with the Commission' views on compliance with European Union rules on public procurement, national authorities have the task to verify, besides the compliance with the European Union rules, also compliance with national rules. The mechanism therefore offers, as suggested in the Opinion, an additional layer of screening to the contracting authority or entity/promoter.

The assessment by the National Anti-Corruption Authority is based on a procedure which is similar to the Commission's ex-ante mechanism, yet it has a broader scope and applies to a wider range of different procedures, and can therefore cover a much wider range of procurement procedures. Nevertheless, the considerations made above regarding the complementarity of the two systems also apply to the 'collaborative oversight procedure' which can be triggered by the National Anti-Corruption Authority.

Concerning point g), the Commission is already developing concrete initiatives to promote professionalisation of public administrations dealing with public procurement. On 7 December 2017, the Commission launched an 'e-competence centre'⁵, a webpage gathering all information made available by the Commission services related to public procurement. The content will soon be available in all EU languages and will feature a repository of good practices. The Commission is also envisaging, among other initiatives, the creation of the European Competency Framework that will list the minimum skills and competencies any procurement officer in the European Union must possess. Such competency framework intends to be a practical tool facilitating initial and vocational training, recruitment and human resources management, as well as administrative capacity management in public procurement. Finally, the Commission is currently developing a series of guidance and key recommendations in a number of different areas of procurement (innovation, socially responsible procurement, access for small and medium-sized enterprises, defence) and preparing training initiatives for targeted audiences (e.g. public buyers, central purchasing bodies, the judiciary, auditors etc.) or on targeted topics (e.g. socially responsible procurement) related to procurement.

Lastly on point h), the Commission fully agrees with the Camera dei Deputati concerning the need to invest resources and technical expertise to hasten and intensify the digitalisation of the whole public procurement system. The Commission supports the complete digitalisation of the procurement process, which had already been proposed in the 2013 Communication, through different measures, which also focus on resources and technical skills, such as:

- i) funding Member States' initiatives (through Structural funds and the Connecting Europe Facility);*
- ii) the use of common tools such as the Official Journal of the European Union's data model, allowing Member States to develop their own European Single Procurement Document in electronic format and ensure interoperability between national systems;*

⁵ 'Support tools for public buyers' can be found here: https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers_en.

iii) forums and discussion seminars with the relevant national administrations for an improved transition to electronic procurement. These include, for instance, the e-procurement forum (the Multi-stakeholder expert group on public procurement) and the forum on electronic invoicing (the European Multi-stakeholder forum on electronic invoicing), playing a crucial role for the diffusion of best practices and the development of common orientations in these fields. Most notably, these activities contributed to the development of a contract register at national level in Italy, which will promote transparency in public procurement; and

iv) the creation of online simplification tools within the European Union and the European Economic Area member countries⁶.

v) the checks the Commission carries out on national legislation to verify proper transposition of the provisions on e-procurement of the public procurement Directives, and the proposals to adjust the existing European rules to current technologies (e.g. new standard forms for contract notices).

The Commission will continue to closely cooperate with the competent national authorities thanks to the existing constructive dialogue and their active participation to the above-mentioned European initiatives.

⁶ See e.g. eCertis: <https://ec.europa.eu/tools/ecertis/search>.