



## EUROPEAN COMMISSION

Brussels, 2.8.2013  
C(2013) 5117 final

Dear President,

The Commission would like to thank the Camera Deputaților for its Opinion on the proposals for a directive on procurement by entities operating in the water, energy, transport and postal services sectors {COM(2011) 895 final}, for a directive on public procurement {COM(2011) 896 final}, and for a directive on the award of concessions {COM(2011) 897 final} and apologizes for the long delay in replying.

Several aspects of the proposals have been touched upon in this opinion, on which the Commission would like to offer some further explanations.

As concerns your observations on the proposal for a directive on procurement by entities operating in the water, energy, transport and postal services sectors, the Commission has taken due note of the concerns expressed about the implementation difficulties which might result from the proposed definition of "mixed procurement" and from the proposed methods for calculating thresholds. The Commission would like to inform the Camera Deputaților that the relevant provisions should, in principle, be clarified in the context of the current ordinary legislative procedure.

As regards the proposal for a directive on public procurement, the Camera Deputaților expressed concerns about the thresholds laid down in Article 4, and in particular requested to raise the threshold for procedures organised by local and regional authorities from EUR 200.000 to EUR 500.000 (as for the social and other specific services listed in Annex XVI).

The Commission would like to stress that public procurement Directives aim at implementing the fundamental principles of the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Therefore, these Directives do not infringe in any way Article 4 (2) of the TEU on the respect by the Union of the national identities, inherent in Member States' fundamental structures, political and constitutional, inclusive of regional and local self-government. It should also be noted in this context that these Directives do not oblige Member States and their competent authorities (whether central, governmental, regional or local) to contract out or externalise the provision of services that they wish to provide themselves or to organise by other means than public contracts.

Mr Valeriu Ștefan ZGONEA  
President of the  
Camera Deputaților  
Palace of the Parliament  
Str. Izvor nr. 2-4, sector 5  
RO – 050563 BUCHAREST

*The Commission would also like to draw the attention to the fact that the European Union is bound by the Government Procurement Agreement of the WTO, which precisely provides for a threshold of 200.000 Special Drawing Rights (corresponding to 200.000 €, as results from Regulation (EU) No. 1251/2011 of 30 November 2011, EUOJ L319 of 2 December 2011, p.43) for sub-central government authorities, i.e. for regional and local authorities. Finally, the Commission duly takes note of the suggestion to put in place a mechanism for exchanging information on procurement by batches.*

*In addition, the Commission takes note of the observations on the establishment of knowledge centres and their possible negative effects. As indicated in the explanatory memorandum to the proposal, the Commission considers that knowledge centres will lead to a reduction of litigation costs (both for contracting authorities and business), costs related to delays in the attribution of contracts, due to misapplication of public procurement rules or to bad preparation of procurement procedures, as well as costs related to the fact that advice to contracting authorities is currently provided in a fragmented and inefficient manner.*

*As for the proposal for a directive of the European Parliament and of the Council on the award of concession contracts {COM(2011) 897 final}, it is important to recall its main objective, which is to ensure legal certainty for contracting authorities and bidders. Such legal certainty is not achieved by the current legal framework, which appears partly incomplete. This results, on the one hand, in a lack of appropriate judicial guarantees for both contracting authorities and bidders, and on the other hand, in barriers to market entry and an uneven playing field for economic operators.*

*The proposal aims at clarifying the obligations derived from the application of the EU fundamental freedoms in the field of public procurement, especially the free movement of services and the right of establishment. Secondary legislation already exists for public contracts, and partially for works concessions. The remaining loophole concerns the award of service concessions.*

*Until now, Member States have not uniformly interpreted or sufficiently implemented the relevant Treaty provisions. The ensuing lack of legal certainty and foreclosure of markets is unlikely to be eliminated without intervention at the appropriate level. However, even if Member States were to take legislative action at national level to establish a legal framework based on the Treaty principles of transparency and equal treatment, at least two problems would remain unsolved: the risk of legal uncertainty flowing from possibly diverging interpretations of those principles under national law, and the risk of wide disparities among legislations in different Member States, resulting from the lack of precision of applicable EU standards.*

*Legal uncertainty affects both the definition of a concession and the applicable legal regime. The Commission considers that the case-law of the Court of Justice of the EU is not sufficient by itself to provide the required legal certainty for operators in their day-to-day activities. To date, the Court has only rendered 26 judgments on concessions, 18 of which concerned the definition of such contracts. Moreover, this limited case-law of the Court is not yet stabilised. As an example, it is difficult to reconcile two recent judgments, Oymanns (C-300/07) and Eurawasser (C-206/08), concerning the level of risk to be transferred to the concessionaire.*

*Furthermore, the precise content of the obligations of transparency and non-discrimination arising from the Treaty remains unclear. Although the Court made an attempt to clarify the content of the principle of transparency, referring in a couple of judgments to the notion of "adequate advertisement", the specific obligations resulting therefrom have never been concretely defined.*

Similarly, the case law does not specify the concrete procedural requirements for respecting the principle of equal treatment.

Therefore, it is for the European Parliament and the Council of the EU, in their capacity as European legislators, to define such a framework, instead of leaving this task for the Court, whose judgments are by nature linked to specific factual situations and therefore cannot fully remedy the absence of comprehensive secondary legislation.

With regard to the observations concerning Article 21 of the proposal on research and development services, it should be pointed out that the enumeration of the Common Procurement Vocabulary (CPV) reference numbers falling in the scope of this article serves the purposes of legal certainty and transparency. Removing references to CPVs from the above mentioned provision, as requested in the Opinion, would leave room to national authorities to interpret its scope in a diverging manner, undermining the objective of the directive which is to ensure clarity and legal certainty. This is particularly important for services with a potential for cross-border trade such as research and development services, as referred to in the article. It should be noted that the same provision exists in the currently applicable legislation; furthermore it is maintained in the proposal for Directive reforming the current Directive 2004/18/EC.

After a long series of trilogue negotiations, the European Parliament, the Council and the Commission have reached a political agreement during the trilogue of 25 June 2013 on the reform of public procurement directives as well as on the new directive on concessions. Final agreements on both texts are expected to be reached after the summer under the Lithuanian presidency.

The Commission hopes that these clarifications address the concerns expressed by the Camera Deputilor and looks forward to continuing our political dialogue in the future.

Yours faithfully,

Maroš Šefčovič  
Vice-President