HOUSE OF COMMONS

President José Manuel Barroso
President of the European Commission
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

7 March 2012

By email: SG-NATIONAL-PARLIAMENTS@ec.europa.eu

Dear Mr President,

EUROPEAN UNION DOCUMENT NO. 18966/11 AND ADDENDA 1 AND 2, RELATING TO A DRAFT DIRECTIVE OF THE EUROPAN PARLIAMENT AND OF THE COUNCIL ON PUBLIC PROCUREMENT, AND NO. 18964/11 AND ADDENDA 1 AND 2, RELATING TO A DRAFT DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON PROCUREMENT BY ENTITIES OPERATING IN THE WATER, ENERGY, TRANSPORT AND POSTAL SERVICES SECTORS

On 6 March, the House of Commons of the United Kingdom Parliament resolved as follows:

2 docs COM

That this House considers that European Union Documents No. 18966/11 and Addenda 1 and 2, relating to the draft Directive of the European Parliament and of the Council on public procurement and No. 18964/11 and Addenda 1 and 2, relating to a Draft Directive of the European Parliament and the Council on procurement by entities operating in the water, energy, transport and postal services sectors, do not comply with the principle of subsidiarity for the reasons set out in Chapters 2 and 3 of the Fifty-seventh Report of the European Scrutiny Committee (HC 428-lii); and, in accordance with Article 6 of Protocol (No. 2) of the Treaty on the Functioning of the European Union on the application of principles of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

I enclose the extracts of the report referred to.

Yours sincerely,

Robert Rogers

Robert Rogers
Clerk of the House & Chief Executive

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Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

concerning

a Draft Directive on procurement by entities operating in the water, energy, transport and postal services sectors[1]

and

a Draft Directive on public procurement[2]

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(2) TEU:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

2. The EU institutions must ensure "constant respect"[3] for the principle of subsidiarity as laid down in Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.[4]

4. By virtue of Article 5 of Protocol (No 2), any draft legislative act should contain a "detailed statement" making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

1. some assessment of the proposal's financial impact;
2. in the case of a Directive, some assessment of the proposal's implications for national and, where necessary, regional legislation; and

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1 SEC 18964/11

2 SEC 18966/11

3 Article 1 of Protocol (No. 2).

4 Article 2 of Protocol (No. 2).

3. qualitative and, wherever possible, quantitative substantiation of the reasons "for concluding that a Union objective can be better achieved at Union level".

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(2) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No. 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity:

> "For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.
>
> "The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
>
> - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
> - actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
> - action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."[5]

Proposed legislation

7. The content of the proposed Directives is set out in detail in the European Scrutiny Committee's Reports.

8. The Reasoned Opinion concentrates on the role of national oversight bodies foreseen in Article 84 and Article 93 of, respectively, the draft Directives on public procurement and procurement by entities.[6]

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5 Article 5.

6 See footnotes 7 and 8.

Legislative objective

9. The Commission says that the evaluation it carried out showed that not all Member States systematically monitor the application of the procurement rules, and it proposes that they should designate a single national authority to be in charge of this. In addition to monitoring, such a body would provide legal advice on the interpretation of the rules and their application to specific cases; issue guidance on questions of general interest and difficulty pertaining to the rules; establish indicator systems to detect conflicts of interest and other irregularities; draw attention to specific violations and systemic problems; examine complaints about the application of the rules in specific cases; monitor the decisions taken by national courts and authorities following a ruling by the European Court of Justice or findings by the European Court of Auditors where funding by the EU is involved; and report to the European Anti-Fraud Office any infringement of procurement procedures in such instances. Member States would also be obliged to empower the body to "seize" the jurisdiction of the courts to review decisions by contracting entities where it has detected a violation in the course of its monitoring and legal advisory work.

Subsidiarity

10. The Commission's explanatory memorandum addresses subsidiarity in the following terms:

> "The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the EU.
>
> "The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason:
>
> "The coordination of procedures for public procurement above certain thresholds has proven an important tool for the achievement of the Internal Market in the field of public purchasing by ensuring effective and equal access to public contracts for economic operators across the Single Market. Experience with Directives 2004/17/EC and 2004/18/EC and the earlier generations of public procurement Directives has shown that European-wide procurement procedures provide transparency and objectivity in public procurement resulting in considerable savings and improved procurement outcomes that benefit Member States' authorities and, ultimately, the European taxpayer.
>
> "This objective could not be sufficiently achieved through action by Member States which would inevitably result in divergent requirements and possibly conflicting "procedural regimes increasing regulatory complexity and causing unwarranted obstacles for cross-border activities.
>
> "The proposal therefore complies with the subsidiarity principle."[7]

Impact assessment

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[7] Page 6.

11. The Commission's impact assessment assesses the impact of the obligation to set up a single national oversight body for procurement on contracting authorities (public purchasers), on SMEs, Member States, stakeholders, and the internal market.[8] It describes the intent of this aspect of the proposal in the following terms:

> "Critical choice: Oblige MS to identify a national authority in charge of implementation, control & monitoring of public procurement which reports annually on performance.
>
> "Headline action(s): — Obligatory designation of central national oversight body by Member States, with clear obligations on monitoring, enforcement and reporting."

12. The impact on public purchasers is assessed as follows:

> "CAEs (especially larger entities) would be subject to monitoring and reporting obligations from the national designated body or intermediary agencies at national level. This would entail some additional burden for CAEs in the form of keeping records and providing them (in the appropriate format) to central oversight bodies or inspectors and general reporting. Clearer (and possibly more consistent) monitoring and controls would on the other hand increase the legal certainty for CAEs, as these would serve as tools for the detection and early resolution or problems before they become litigation issues." (Emphasis added.)

13. The impact on Member States is assessed as follows:

> "This option could be considered to stray into areas previously not covered due to subsidiarity concerns. However, the evaluation has shown that Member States do not consistently monitor and control public procurement policy. This is a significant impediment not only to the correct implementation of provisions stemming from the EU Directives which is a major source of cost and uncertainty in itself. The absence of effective national arrangements also undermines the capacity of national administrations to effectively account for and manage overall public procurement expenditure. Therefore, there is, in addition to the case for enhancing control of the implementation of EU rules, a strong self-interest for Member States to step up the quality of their public procurement administration." (Emphasis added.)

14. Summary of stakeholders views on this option are assessed to be as follows:

> "Whilst the GP [Green Paper] consultation did not ask any explicit questions about national administrative capacity, there is a general view in support of further steps to increase the professionalisation of public procurement. In general, stakeholders are against the introduction of criminal sanctions to address certain violations of public

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8 Pages 81–84.

procurement rules and feel that Member States should be left to determine any detailed measures or additional instruments to tackle organised crime in public procurement." (Emphasis added.)

Aspects of the Regulation which do not comply with the principle of subsidiarity

15. The House of Commons considers that the draft Directives in question fail to comply with the procedural obligations imposed on the Commission by Protocol (No. 2) and the principle of subsidiarity in the following respects:

Effect of Article 84(1)/93(1) on the UK's constitution

16. The Commission failed to consult Member States in the Green Paper, or otherwise, on the possibility of setting up a single national oversight body. This is in clear breach of Article 2 of Protocol (No. 2), which provides that:

> "Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal".

17. Similarly there is no evidence in the explanatory memorandum or impact assessment of the Commission carrying out the requirement under Article 5 of Protocol (No. 2) to prepare a "detailed statement" containing "some assessment [...] in the case of a directive of its implications for the rules to be put in place by Member States, including where necessary the regional legislation" (emphasis added). Indeed, there is recognition by the Commission that this aspect of the proposal "could be considered to stray into areas previously not covered due to subsidiarity concerns".[9]

18. The consequence is that the draft Directive on public procurement (and for reasons of parity by implication the draft Directive on procurement by public entities) is said by the National Assembly for Wales to breach the devolution principle, an inherent part of the UK's constitution, for both Wales and Scotland.[10] Its conclusions are attached to this Reasoned Opinion. Point 7 of those conclusions states that:

> "The proposal also fails to have regard to the principle of devolution in imposing the duties on a single body. It fails to reflect the way in which separate implementing regulations have hitherto been made in Scotland, and the way in which extensive administrative and advisory functions in relation to procurement in Wales are exercised by or on behalf of Welsh Ministers."

19. In the light of the failure to consult Member States, with the consequences on the devolution settlement cited above, the Committee concludes that the Commission has failed to show that the proposal to set up a single oversight body produces clear benefits that cannot be achieved at national level. In its view, the disadvantages for the UK in how it organises public procurement outweigh the benefits claimed by the Commission.

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9 See para 13 (supra).

10 The committee in the Scottish Parliament concerned with these proposals is the Infrastructure and Capital Investment Committee. We understand that it objects to a single oversight body in the UK on similar grounds that responsibility for procurement has been devolved to Scotland.

Effect of Article 84(3)/93(3) the national oversight body being able to seize jurisdiction from the court

20. This aspect of the proposal would require the UK to allow its national oversight body to 'seize' the jurisdiction currently exercisable by national courts to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work (see the final paragraph of Article 84(3)/93(3) of the proposed Directives). This is a judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting authority (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the contracting authority has entered into a contract, as the jurisdiction would enable such a contract to be declared 'ineffective').

21. The various other functions of the oversight body, as they appear from Article 84(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Public Contracts Regulations 2006 (SI 2006/5 as amended) which implements Directive 89/665/EEC (as amended) which addresses remedies for breach of the procurement rules. The latter Directive respected the diversity of legal traditions among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and contracting authorities.

22. The Committee considers that the final paragraph of Article 84(3)/93(3) is unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC.

23. It also considers that this combination of functions is very likely to prevent the oversight body from acting judicially without a suspicion of a conflict of interest, contrary to Article 6(1) ECHR. This undermines one of the principal objectives of these two Directives, which is to increase legal certainty in the award of procurement contracts.

24. We note that this aspect of the Commission's proposal was also not included in the Commission's Green Paper, and so was not consulted upon, contrary to Article 2 of Protocol (No. 2);[11] and that it was not included in the Commission's impact assessment. Indeed, the impact assessment instead emphasises the role of the oversight body in deterring litigation.[12] The consequence is that the proposal lacks any of the information which the Commission is required to produce under Article 5 of Protocol (No. 2): namely, to prepare a detailed statement containing "some assessment [...] in the case of a directive of its implications for the rules to be put in place by Member States" and to be "substantiated by qualitative and, wherever possible, quantitative indicators" which demonstrate why giving a judicial function to the oversight body is necessary to achieve the EU's objective.

25. We therefore conclude that this aspect of the proposal amounts to an unwarranted interference in the domestic legal order of the UK, in which administrative and judicial powers

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11 See paragraph 16 (supra).

12 See paragraph 12 (supra).

have traditionally been exercised separately; and that it also likely to breach the right to a fair trial, contrary to the ECHR and EU Charter on Fundamental Rights. As such, the legal obstacles to implementing this aspect of the proposal outweigh any benefit which the might be claimed to be served.

26. For these reasons we find that it infringes the principle of subsidiarity.

27. The National Assembly for Wales has come to the same conclusion. We understand that the Scottish Parliament has also come to the same conclusion.

Appendix: Report by the Constitutional and Legislative Affairs Committee of the National Assembly for Wales

Constitutional and Legislative Affairs Committee

Subsidiarity Report

Proposal for a Directive of the European Parliament and of the Council on Public Procurement

This report is laid following consideration by the Committee under Standing Order 21.8 of aspects of the proposed directive drawn to its attention by the Procurement Task and Finish Group of the Enterprise and Business Committee. The report will form the basis of representations to be made to the relevant committees of the House of Commons and the House of Lords under Standing Order 21.9.

Legal Context

1. The principle of subsidiarity is enshrined in Article 5 of the Treaty on European Union:

> *"Article 5*
>
> *(ex Article 5 TEC)*
>
> *1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*
>
> *2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the*

objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. EN C 83/18 Official Journal of the European Union."

2. Its application is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, the relevant part of which for our purpose is the first paragraph of Article 6:

> *"Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. <u>It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.</u>"* [Our emphasis.]

Commission Proposals

3. On the 20th December 2011, the Commission published its proposal for a new Directive on Public Procurement. This proposal has been the subject of detailed consideration by the Procurement Task and Finish Group of the National Assembly's Enterprise and Business Committee. As part of that consideration, the Group considered the Explanatory Memorandum prepared by the UK Government for the Parliamentary Committees on European issues. In its consideration of subsidiarity, the Memorandum stated as follows:

"SUBSIDIARITY

29. The Government is concerned that aspects of the proposal for national oversight bodies may infringe the principles of subsidiarity and/or proportionality. These proposals, which had not been foreshadowed in the Commission's Green Paper or otherwise consulted on, would require the UK to allow its national oversight body to 'seize' the jurisdiction currently exercisable by British courts of law to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work (see the final paragraph of article 84(3) of the proposed directive). This is a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting authority (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the contracting authority has entered into a contract, as the jurisdiction would enable such a contract to be declared 'ineffective').

30. The various other functions of the oversight body, as they appear from article 84(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Public Contracts Regulations 2006 (SI 2006/5 as amended) which implements Directive 89/665/EEC (as amended) which addresses remedies for breach of the procurement rules. The latter directive respected the diversity of legal traditions among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and contracting authorities.

31. The new proposal seems to the Government to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body and in requiring that this body be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 89/665/EEC. In this respect, the proposal may call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member states structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU."

4. The 'national oversight body' would be set up under Articles 84–86 of the draft Directive. Article 84, which sets out the proposed function, is annexed to this report for ease of reference. From our perspective the crucial wording appears in the very first sentence "Member States shall appoint a **single** independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body')." The Commission proposal contains the following explanation –

> "National oversight bodies: *The evaluation has shown that not all Member States are consistently and systematically monitoring the implementation and functioning of the public procurement rules. This compromises the efficient and uniform application of European Union law. The proposal provides therefore that Member States designate a single national authority in charge of monitoring, implementation and control of public procurement. Only a single body with overarching tasks will ensure an overview of main implementation difficulties and will be able to suggest appropriate remedies to more structural problems. It will be in the position to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and the improvement of the procurement procedures."*

5. The normal distinction between Directives and Regulations in terms of European legislation is that the former specify what is to be done, leaving the Member States with discretion as to how that is done. Regulations on the other hand are directly applicable, even if some implementing legislation, such as enforcement arrangements, is left to the Member States. In this case, the Directive purports to tell the Member States how the oversight requirements are to be met, and in particular by specifying that it is to be done by a single body.

6. The UK Government has already identified that such an approach would breach the principle of subsidiarity by requiring an administrative body to carry out functions that would normally be carried out by the courts in the UK.

We agree with that assessment and support the objection to the requirement for a national oversight body because it breaches the principle of subsidiarity in that way.

7. The proposal also fails to have regard to the principle of devolution in imposing the duties on a single body. It fails to reflect the way in which separate implementing regulations have hitherto been made in Scotland, and the way in which extensive administrative and advisory functions in relation to procurement in Wales are exercised by or on behalf of Welsh Ministers. This should be contrasted with Article 87 which deals with the provision of assistance to contracting authorities and businesses. Article 87.4 provides specifically –

"For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure due coordination between those bodies and structures."

8. Article 84 does not currently provide the degree of flexibility provided by Article 87. Witnesses to the Task and Finish Group had mixed views on the desirability of the proposed new arrangements. In general, representatives of public bodies have regarded this as an additional degree of bureaucracy, whilst the construction sector skills council considered that a national oversight body in Wales might be helpful to monitor application of the regulations.

The Committee has therefore concluded that even if a national oversight body were to be established for the purposes of reporting under Article 84.2, Member States should be able to take account of their own constitutional structures. Such arrangements could be made by inserting into Article 84 the degree of flexibility provided for in Article 87. That would at least mitigate the degree to which Article 84 breaches the principle of subsidiarity.

Constitutional and Legislative Affairs Committee February 2012

ANNEXE

"Article 84

Public oversight

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation. All contracting authorities shall be subject to such oversight.

2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.

The annual report shall include the following:

(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;

(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;

(c) information on the monitoring and follow-up of breaches to procurement rules affecting the budget of the Union in accordance with paragraphs 3 to 5 of the present article;

(d) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.

3. The oversight body shall be responsible for the following tasks:

(a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;

(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;

(c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;

(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public

procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.

6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts.

7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.

The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2."

2 Procurement by public entities

(33585) 18964/11 + ADDs 1–2 COM(11) 895	Draft Directive on procurement by entities operating in the water, energy, transport and postal services sectors

Legal base	Articles 53(1), 62 and 114 TFEU; co-decision; QMV
Document originated	20 December 2011
Deposited in Parliament	23 December 2011
Department	Cabinet Office
Basis of consideration	EM of 16 January 2012
Previous Committee Report	None
Discussion in Council	May 2012
Committee's assessment	Legally and politically important
Committee's decision	Not cleared; further information requested; recommended for debate on the Reasoned Opinion

Background

2.1 According to the Commission, procurement by public bodies ("contracting authorities") and utilities ("contracting entities") plays an important role in the EU's overall economic performance, and is a key element in the Europe 2020 strategy. It also notes that, although the two main legal instruments in this area — Directive 2004/17/EC (which coordinates the procurement procedures of entities in the water, energy, transport and postal services sectors which have been granted special or exclusive rights) and Directive 2004/18/EC (which coordinates procedures for award of public works contracts, public supply contracts and public service contracts) — seek to ensure that economic operators from across the Single Market can compete freely for such contracts, one of the twelve key priorities in its Communication in April 2011 on the Single Market Act included the need to revise and modernise that framework in order to make this process more flexible.

The current proposal

2.2 The Commission also produced in January 2011 a Green Paper on the modernisation of EU public procurement policy, and it has since carried out an evaluation exercise on how the existing rules were working. In the light of the conclusions drawn from these two exercises, it has now put forward two proposals, one[1] addressing the issues covered by Directive 2004/18/EC, whilst this document deals with procurement by entities operating in the water, energy, transport and postal services sectors, and would thus replace Directive 2004/17/EC.

2.3 The Commission says that, whilst recognising the need to maintain the present broad approach to procurement by utilities, the proposal nevertheless aims to increase the efficiency of spending by simplifying the existing rules and making them more flexible, and to allow

1 (33586) 18966/11 + ADDs 1–2: see chapter 3 of this Report.

procurement to better support common goals, such as the protection of the environment, energy efficiency, combating climate change, and promoting innovation, employment and social inclusion. It seeks to do so by addressing the following five areas.

Simplification of procurement procedures

Clarification of the scope of the Directive

2.4 The Commission says that a number of definitions which determine the scope of the Directive have been revised in the light of experience, whilst it has endeavoured to retain aspects which have been developed over the years and are thus familiar. It proposes:

- that, since a public utility is subject to the Directive only to the extent that it has been granted special or exclusive rights, it should be made clear that activities which are exercised pursuant to rights which have been granted following a procedure in which adequate publicity has been ensured and on the basis of objective criteria (notably pursuant to EU legislation) are outside its scope;
- the removal of the current distinction under which non-priority (Part B) services[2] unlikely to attract cross-border interest are subject to only certain provisions of the Directive (covering technical specifications, and contract award notices);
- the removal of the oil and gas exploration sector from the scope of the Directive on the grounds that it is subject to such competitive pressures that the procurement discipline this provides is no longer necessary.

A toolbox approach

2.5 Member States would be able to give purchasers more choice over which procedure to use in addition to three basic forms provided for under the current Directive (open restricted, and negotiated), also permit them to make use of six specific techniques and tools, which have been improved and clarified to facilitate e-procurement — framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement.

The promotion of e-procurement

2.6 The Commission says that the use of e-procurement can deliver significant savings, and that, in order to help Member States to achieve the necessary change, it is proposing the mandatory transmission of notices in electronic form, the mandatory electronic availability of procurement documents and that the switch to fully electronic communication should take place within two years. The proposal would also streamline and improve dynamic purchasing systems, and provide for the use of electronic catalogues.

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2 These currently include hotel, rail and water transport, legal and recreational services.

The modernisation of procedures

2.7 The proposal would introduce a more flexible approach by shortening time limits for participation and the submission of offers so as to allow for quicker and more streamlined procurement; by making the distinction between the selection of tenderers and award stages of the contract more flexible; and by enabling the quality of the staff assigned to the contract to be taken into account where relevant at the award stage. In addition, the procedure for the exemption of contracts awarded by utilities operating in sufficiently competitive markets has been simplified and streamlined.

Strategic use of public procurement in response to new challenges

2.8 The Commission says that the draft Directive is aimed at enabling utilities to procure goods and services, in line with Europe 2020 strategic goals, through, for instance, fostering innovation and respecting the environment. It would enable them:

- to take into account in awarding contracts the life-cycle costs of what is being purchased, covering all the stages of the existence of a product or works, or provision of a service (including not only direct costs, but also external environmental costs where these can be monetised and verified);
- to refer in the technical specifications and in the award criteria to all those factors which are directly related to the specific production or provision of the good or service purchased;
- to require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they also accept equivalent labels (for example, European eco-labels); and
- to exclude economic operators from a procedure, if they have identified infringements of obligations established by EU law in the field of social, labour or environmental law, or of international law provisions.

2.9 The Commission notes that, although social, health and education services are currently covered by the "Part B" services rules, they have only a limited cross-border dimension, and are provided in a context which varies widely between Member States. In view of this, it says that Member States should have a very large discretion to organise service providers in these areas, and the proposal would introduce a specific regime for contracts above a threshold of €1 million, which would impose only the basic principles of transparency and equal treatment. Also, in order to enable utilities to buy innovative goods and products, the proposal includes provisions for a new procedure for their development and subsequent purchase.

Better access to the market for SMEs and start-ups

2.10 The Commission observes that small and medium sized enterprises (SMEs) have a huge potential for job creation, and that easy access to procurement markets can help to unlock this potential, whilst at the same time enabling contracting entities to broaden their supplier base. It

says that the proposal seeks to build on the European Code of Best Practice[3] it published in 2008 by providing concrete measures to remove barriers for market access to SMEs. These include:

- providing better access to framework agreements for SMEs and other suppliers, through limiting their duration to four years, so that the market is reopened to competition at reasonable intervals; and
- enabling Member States to allow subcontractors (which are often SMEs) to request direct payment from contracting authorities.

Sound procedures

2.11 The Commission says that the financial interests at stake and the interaction between the public and private sectors make procurement a risk for unsound business practices. It therefore proposes improved safeguards against conflicts of interest, illicit conduct (such as improperly influencing procurement decisions, or conspiring with others to manipulate the outcome), and the granting of unfair advantages.

Governance

2.12 The Commission says that the evaluation carried out showed that not all Member States systematically monitor the application of the procurement rules, and it proposes that they should designate a single national authority to be in charge of this. In addition to monitoring, such a body would provide legal advice on the interpretation of the rules and their application to specific cases; issue guidance on questions of general interest or difficulty pertaining to the rules; establish indicator systems to detect irregularities; draw attention to specific violations and systemic problems; examine complaints about the application of the rules in specific cases; monitor the decisions taken by national courts and authorities following a ruling by the European Court of Justice or findings by the European Court of Auditors where funding by the EU is involved; and report to the European Anti-Fraud Office any infringement of procurement procedures in such instances. Member States would also be obliged to empower the body to "seize" the jurisdiction of the courts to review decisions by contracting entities where it has detected a violation in the course of its monitoring and legal advisory work.

2.13 In addition, Member States would be required to provide support to contracting entities, in the form of legal and economic advice, guidance, training and assistance, which it sees as being particularly relevant where contracting authorities do not have the internal expertise to deal with complex projects. It adds that these requirements should not generate an additional financial burden for Member States, as they would be able to use the existing mechanisms and structures to fulfil the functions in question.

The Government's view

2.14 In his Explanatory Memorandum of 16 January 2012, the Minister for the Cabinet Office (Mr Francis Maude) says that the Government welcomes the publication of this proposal to revise the existing rules applying to utilities under Directive 2004/17/EC, adding that the UK's response to the Commission's Green paper supported the aim of simplifying and modernising

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[3] SEC(08) 2193.

the procurement rules, so as to make the award of contracts more flexible for the benefit of purchasers, SMEs and other suppliers. In particular, it:

- welcomes the decision to remove the oil and gas exploration sector from the scope of the Directive (although it points out that in the UK this sector has already been exempted from the utilities procurement regime by virtue of the mechanisms under Directive 2004/17/EC);
- regards it as helpful that the exemption mechanism has been simplified and streamlined under this new proposal, as this will allow future applications for exemptions to be addressed expeditiously;
- welcomes the clarification that rights, which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of these rights was based on objective criteria, do not constitute special or exclusive rights, regarding this as an important modification which should help private sector utilities to be clear about whether or not they are within the scope of the rules;
- is in favour of clarifying how social and environmental matters can be taken into account, and — subject to careful examination of the detail during the negotiations — regards as helpful the provisions concerning life cycle costs and enabling account to be taken of various factors related to the production process as long as these are linked to the subject matter of the contract;
- welcomes the introduction of a procedure designed to encourage innovation; and
- welcomes measures, such as shortening the duration of framework agreements, designed to provide better access for SMEs.

2.15 On the other hand, the Government does have concerns about the removal of the distinction between Part A and Part B services, noting that this will mean that some services, such as Legal Services, will become subject to the full rules. It suggests that, although the Commission has stated that the current distinction is no longer valid, it has not made a clear cut case that such services should be subject to the full rules, and nor is it convinced about the benefits of the approach now proposed for social services. Also, although the Government is in favour of sound procedures, it generally considers that these issues are best dealt with at the Member State level, rather than being explicitly covered in the Directive, and it takes a similar view concerning the provision of legal, training, advisory and various other functions to authorities and suppliers.

2.16 However, the Minster says that the Government's main concerns relate to the proposed requirement for national oversight bodies to be able to "seize" the jurisdiction of the Courts, which he notes had not been foreshadowed in the Commission's Green Paper or otherwise subject to consultation, but which he considers may infringe the principles of subsidiarity and/or proportionality. He describes this as a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting entity (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the utility has entered into a contract, as the jurisdiction would enable such a contract to be declared "ineffective").

2.17 He further notes that the various other functions of the oversight body appear to be primarily administrative or regulatory, thus requiring the UK to combine in a single body a mixture of judicial and other functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court as regards the legislation implementing in the UK of the Directive (92/13/EEC) which addresses remedies for breach of the procurement rules. He adds that the Directive in question respected the diversity of legal traditions within the EU by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and utilities.

2.18 By contrast, the Minister says that the new proposal seems to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC. He also says that the proposal may in this respect call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member States structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.

2.19 The Minister also says that this concern gives rise to a lesser, but related, issue under the European Convention on Human Rights (ECHR). In particular, he believes that the current drafting of this aspect of the proposal fails to lay a clear foundation for the UK to implement it in a way which avoids a risk of infringing article 6(1) of the ECHR (the right to a fair hearing in the determination of civil rights and obligations), and would appear to oblige the UK to allow the oversight body to seize jurisdiction, even where the nature of its previous advisory relationship with the contracting entity over the procurement in question may prevent it from acting judicially without a suspicion of bias, bearing in mind that the rights of suppliers as well as the contracting entity may be affected by the exercise of this jurisdiction.

2.20 The Minister's Explanatory Memorandum is accompanied by an Impact Assessment. This notes that the public bodies ("contracting authorities") in the UK comprise central government, local authorities, and other organisations, such as NHS authorities and educational establishments, and that, whilst the utilities ("contracting entities") covered by the proposal are in the energy, water, transport and postal services sectors, power generation, energy supply and generation, and oil and gas exploration in the UK have already been exempted from Directive 2004/17/EC because they operate in competitive markets.

2.21 The Assessment also points out that, between 2005 and 2009, the value of contracts awarded by UK public purchaser and utilities was some €420 billion, covering a wide range of works, supplies and services provided by a large number of economic operators, with some 216,000 different operators supplying central government in 2010–12, including all sizes of firm.[4] It notes that the main costs arsing from the proposal relate to the bidding process, some of which would have been incurred regardless insofar as public purchasers follow a competitive

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4 The Assessment also notes that, between 2006 and 2006, SMEs at EU level won 34% by value, and 60% by number, of contracts covered by Directive 2004/17/EC.

process in order to obtain the best price: but, based on the Commission's estimates at EU level, it suggests that the additional cost within the UK would be £480 million a year. In addition, it puts the annual costs arising from the full application of the Directive to Part B services at about £14 million. However, it says that these costs would be significantly outweighed by the benefits, estimated at around £4.15 billion a year, from the improved performance of economic operators and better value for taxpayers' money which would result from the more transparent competition resulting from the proposals. In addition, it points out that the proposed simplification of the rules would reduce costs for both public purchasers and economic operators, although it has not proved possible at this stage to quantify these.

Conclusion

2.22 **Like the Government, we support the over-arching objective of this and the two related procurement proposals[5] to simplify and modernise EU procurement rules. So there is much in the contents of this proposal that we welcome.**

2.23 **However, we also share the Government's concerns with the removal of the distinction between Part A and Part B services, and with the national oversight body being able to seize the jurisdiction of the courts.**

2.24 **On the latter, we fully agree with the Minister that this aspect of the proposal is unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC. We also agree that this combination of functions may prevent the oversight body from acting judicially without a suspicion of bias, contrary to Article 6(1) ECHR.**

2.25 **We note that this aspect of the Commission's proposal was not included in the Commission's Green Paper, and so was not consulted upon; and that it was not included in the Commission's impact assessment, and so is not substantiated by qualitative and quantitative indicators which demonstrate why giving a judicial function to the oversight body is necessary to achieve the EU's objective. We therefore conclude that this aspect of the proposal amounts to an unwarranted interference in the domestic legal order of the UK, in which administrative and judicial powers have traditionally been exercised separately, and so infringes the principle of subsidiarity.**

2.26 **Accordingly, we recommend that the House adopt the draft Reasoned Opinion in the annex to this chapter, which relates to this and the proposed Directive on public procurement.[6] The Reasoned Opinion is to be sent to the Presidents of the Commission, Council and European Parliament on or before 8 March.**

2.27 **Meanwhile, the draft Directive remains under scrutiny pending a further update on the negotiations.**

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5 Reported in the subsequent two chapters of this week's Report.

6 (33586) 18966/11: see chapter 3.

Annex: Draft Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality

concerning

a Draft Directive on procurement by entities operating in the water, energy, transport and postal services sectors[7]

and

a Draft Directive on public procurement[8]

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(2) TEU:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

2. The EU institutions must ensure "constant respect"[9] for the principle of subsidiarity as laid down in Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.[10]

4. By virtue of Article 5 of Protocol (No. 2), any draft legislative act should contain a "detailed statement" making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

1. some assessment of the proposal's financial impact;

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7 (33585) 18964/11: see chapter 2.

8 (33585) 18966/11: see chapter 3.

9 Article 1 of Protocol (No. 2).

10 Article 2 of Protocol (No. 2).

2. in the case of a Directive, some assessment of the proposal's implications for national and, where necessary, regional legislation; and

3. qualitative and, wherever possible, quantitative substantiation of the reasons "for concluding that a Union objective can be better achieved at Union level".

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(2) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No. 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity:

> "For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.
>
> "The following guidelines should be used in examining whether the abovementioned condition is fulfilled:
>
> - the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
> - actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests;
> - action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States."[11]

Proposed legislation

7. The content of the proposed Directives is set out in detail in the European Scrutiny Committee's Report.[12]

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11 Article 5.

12 See chapters 2 and 3 of this Report.

8. The draft Reasoned Opinion concentrates on the role of national oversight bodies foreseen in Article 84 and Article 93 of, respectively, the draft Directives on public procurement and procurement by entities.[13]

Legislative objective

9. The Commission says that the evaluation it carried out showed that not all Member States systematically monitor the application of the procurement rules, and it proposes that they should designate a single national authority to be in charge of this. In addition to monitoring, such a body would provide legal advice on the interpretation of the rules and their application to specific cases; issue guidance on questions of general interest and difficulty pertaining to the rules; establish indicator systems to detect conflicts of interest and other irregularities; draw attention to specific violations and systemic problems; examine complaints about the application of the rules in specific cases; monitor the decisions taken by national courts and authorities following a ruling by the European Court of Justice or findings by the European Court of Auditors where funding by the EU is involved; and report to the European Anti-Fraud Office any infringement of procurement procedures in such instances. Member States would also be obliged to empower the body to "seize" the jurisdiction of the courts to review decisions by contracting entities where it has detected a violation in the course of its monitoring and legal advisory work.

Subsidiarity

10. The Commission's explanatory memorandum addresses subsidiarity in the following terms:

> "The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the EU.
>
> "The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason:
>
> "The coordination of procedures for public procurement above certain thresholds has proven an important tool for the achievement of the Internal Market in the field of public purchasing by ensuring effective and equal access to public contracts for economic operators across the Single Market. Experience with Directives 2004/17/EC and 2004/18/EC and the earlier generations of public procurement Directives has shown that European-wide procurement procedures provide transparency and objectivity in public procurement resulting in considerable savings and improved procurement outcomes that benefit Member States' authorities and, ultimately, the European taxpayer.
>
> "This objective could not be sufficiently achieved through action by Member States which would inevitably result in divergent requirements and possibly conflicting "procedural regimes increasing regulatory complexity and causing unwarranted obstacles for cross-border activities.

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13 See footnotes 8 and 9.

"The proposal therefore complies with the subsidiarity principle."[14]

Impact assessment

11. The Commission's impact assessment assesses the impact of the obligation to set up a single national oversight body for procurement on contracting authorities (public purchasers), on SMEs, Member States, stakeholders, and the internal market.[15] It describes the intent of this aspect of the proposal in the following terms:

> "Critical choice: Oblige MS to identify a national authority in charge of implementation, control & monitoring of public procurement which reports annually on performance.
>
> "Headline action(s): — Obligatory designation of central national oversight body by Member States, with clear obligations on monitoring, enforcement and reporting."

12. The impact on public purchasers is assessed as follows:

> "CAEs (especially larger entities) would be subject to monitoring and reporting obligations from the national designated body or intermediary agencies at national level. This would entail some additional burden for CAEs in the form of keeping records and providing them (in the appropriate format) to central oversight bodies or inspectors and general reporting. Clearer (and possibly more consistent) monitoring and controls would on the other hand increase the legal certainty for CAEs, as these would serve as tools for the detection and early resolution or problems before they become litigation issues." (Emphasis added.)

13. The impact on Member States is assessed as follows:

> "This option could be considered to stray into areas previously not covered due to subsidiarity concerns. However, the evaluation has shown that Member States do not consistently monitor and control public procurement policy. This is a significant impediment not only to the correct implementation of provisions stemming from the EU Directives which is a major source of cost and uncertainty in itself. The absence of effective national arrangements also undermines the capacity of national administrations to effectively account for and manage overall public procurement expenditure. Therefore, there is, in addition to the case for enhancing control of the implementation of EU rules, a strong self-interest for Member States to step up the quality of their public procurement administration." (Emphasis added.)

14. Summary of stakeholders views on this option are assessed to be as follows:

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[14] p. 6.

[15] pp. 81–84.

> "Whilst the GP [Green Paper] consultation did not ask any explicit questions about national administrative capacity, there is a general view in support of further steps to increase the professionalisation of public procurement. In general, stakeholders are against the introduction of criminal sanctions to address certain violations of public procurement rules and feel that Member States should be left to determine any detailed measures or additional instruments to tackle organised crime in public procurement." (Emphasis added.)

Aspects of the Regulation which do not comply with the principle of subsidiarity

15. The House of Commons considers that the draft Directives in question fail to comply with the procedural obligations imposed on the Commission by Protocol (No. 2) and the principle of subsidiarity in the following respects:

Effect of Article 84(1)/93(1) on the UK's constitution

16. The Commission failed to consult Member States in the Green Paper, or otherwise, on the possibility of setting up a single national oversight body. This is in clear breach of Article 2 of Protocol (No. 2), which provides that:

> "Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal".

17. Similarly there is no evidence in the explanatory memorandum or impact assessment of the Commission carrying out the requirement under Article 5 of Protocol (No. 2) to prepare a "detailed statement" containing "some assessment [...] in the case of a directive of its implications for the rules to be put in place by Member States, including where necessary the regional legislation" (emphasis added). Indeed, there is recognition by the Commission that this aspect of the proposal "could be considered to stray into areas previously not covered due to subsidiarity concerns".[16]

18. The consequence is that the draft Directive on public procurement (and for reasons of parity by implication the draft Directive on procurement by public entities) is said by the National Assembly for Wales to breach the devolution principle, an inherent part of the UK's constitution, for both Wales and Scotland.[17] Its conclusions are attached to this draft Reasoned Opinion.[18] Point 7 of those conclusions states that:

> "The proposal also fails to have regard to the principle of devolution in imposing the duties on a single body. It fails to reflect the way in which separate implementing regulations have hitherto been made in Scotland, and the way in which extensive administrative and advisory functions in relation to procurement in Wales are exercised by or on behalf of Welsh Ministers."

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16 See para 13 (supra).

17 The committee in the Scottish Parliament concerned with these proposals is the Infrastructure and Capital Investment Committee. We understand that it objects to a single oversight body in the UK on similar grounds that responsibility for procurement has been devolved to Scotland.

18 See the Appendix at p. 20 of this Report.

19. In the light of the failure to consult Member States, with the consequences on the devolution settlement cited above, the Committee concludes that the Commission has failed to show that the proposal to set up a single oversight body produces clear benefits that cannot be achieved at national level. In its view, the disadvantages for the UK in how it organises public procurement outweigh the benefits claimed by the Commission.

Effect of Article 84(3)/93(3) the national oversight body being able to seize jurisdiction from the court

20. This aspect of the proposal would require the UK to allow its national oversight body to "seize" the jurisdiction currently exercisable by national courts to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work (see the final paragraph of Article 84(3)/93(3) of the proposed Directives). This is a judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting authority (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the contracting authority has entered into a contract, as the jurisdiction would enable such a contract to be declared "ineffective").

21. The various other functions of the oversight body, as they appear from Article 84(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Public Contracts Regulations 2006 (SI 2006/5 as amended) which implements Directive 89/665/EEC (as amended) which addresses remedies for breach of the procurement rules. The latter Directive respected the diversity of legal traditions among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and contracting authorities.

22. The Committee considers that the final paragraph of Article 84(3)/93(3) is unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC.

23. It also considers that this combination of functions is very likely to prevent the oversight body from acting judicially without a suspicion of a conflict of interest, contrary to Article 6(1) ECHR. This undermines one of the principal objectives of these two Directives, which is to increase legal certainty in the award of procurement contracts.

24. We note that this aspect of the Commission's proposal was also not included in the Commission's Green Paper, and so was not consulted upon, contrary to Article 2 of Protocol (No. 2);[19] and that it was not included in the Commission's impact assessment. Indeed, the impact assessment instead emphasises the role of the oversight body in deterring litigation.[20] The consequence is that the proposal lacks any of the information which the Commission is required to produce under Article 5 of Protocol (No. 2): namely, to prepare a detailed statement containing "some assessment [...] in the case of a directive of its implications for the rules to be

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19 See para 16 (supra).

20 See para 12 (supra).

put in place by Member States" and to be "substantiated by qualitative and, wherever possible, quantitative indicators" which demonstrate why giving a judicial function to the oversight body is necessary to achieve the EU's objective.

25. We therefore conclude that this aspect of the proposal amounts to an unwarranted interference in the domestic legal order of the UK, in which administrative and judicial powers have traditionally been exercised separately; and that it also likely to breach the right to a fair trial, contrary to the ECHR and EU Charter on Fundamental Rights. As such, the legal obstacles to implementing this aspect of the proposal outweigh any benefit which the might be claimed to be served.

26. For these reasons we find that it infringes the principle of subsidiarity.

27. The National Assembly for Wales has come to the same conclusion. We understand that the Scottish Parliament has also come to the same conclusion.

Appendix: Report by the Constitutional and Legislative Affairs Committee of the National Assembly for Wales

Constitutional and Legislative Affairs Committee

Subsidiarity Report

Proposal for a Directive of the European Parliament and of the Council on Public Procurement

This report is laid following consideration by the Committee under Standing Order 21.8 of aspects of the proposed directive drawn to its attention by the Procurement Task and Finish Group of the Enterprise and Business Committee. The report will form the basis of representations to be made to the relevant committees of the House of Commons and the House of Lords under Standing Order 21.9.

Legal Context

1. The principle of subsidiarity is enshrined in Article 5 of the Treaty on European Union:

"Article 5

(ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. EN C 83/18 Official Journal of the European Union."

2. Its application is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, the relevant part of which for our purpose is the first paragraph of Article 6:

"Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers." [Our emphasis.]

Commission Proposals

3. On the 20th December 2011, the Commission published its proposal for a new Directive on Public Procurement. This proposal has been the subject of detailed

consideration by the Procurement Task and Finish Group of the National Assembly's Enterprise and Business Committee. As part of that consideration, the Group considered the Explanatory Memorandum prepared by the UK Government for the Parliamentary Committees on European issues. In its consideration of subsidiarity, the Memorandum stated as follows:

"SUBSIDIARITY

29. The Government is concerned that aspects of the proposal for national oversight bodies may infringe the principles of subsidiarity and/or proportionality. These proposals, which had not been foreshadowed in the Commission's Green Paper or otherwise consulted on, would require the UK to allow its national oversight body to 'seize' the jurisdiction currently exercisable by British courts of law to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work (see the final paragraph of article 84(3) of the proposed directive). This is a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting authority (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the contracting authority has entered into a contract, as the jurisdiction would enable such a contract to be declared 'ineffective').

30. The various other functions of the oversight body, as they appear from article 84(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Public Contracts Regulations 2006 (SI 2006/5 as amended) which implements Directive 89/665/EEC (as amended) which addresses remedies for breach of the procurement rules. The latter directive respected the diversity of legal traditions among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and contracting authorities.

31. The new proposal seems to the Government to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body and in requiring that this body be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 89/665/EEC. In this respect, the proposal may call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member

states structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU."

4. The 'national oversight body' would be set up under Articles 84–86 of the draft Directive. Article 84, which sets out the proposed function, is annexed to this report for ease of reference. From our perspective the crucial wording appears in the very first sentence "Member States shall appoint a **single** independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body')." The Commission proposal contains the following explanation –

"National oversight bodies: *The evaluation has shown that not all Member States are consistently and systematically monitoring the implementation and functioning of the public procurement rules. This compromises the efficient and uniform application of European Union law. The proposal provides therefore that Member States designate a single national authority in charge of monitoring, implementation and control of public procurement. Only a single body with overarching tasks will ensure an overview of main implementation difficulties and will be able to suggest appropriate remedies to more structural problems. It will be in the position to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and the improvement of the procurement procedures."*

5. The normal distinction between Directives and Regulations in terms of European legislation is that the former specify what is to be done, leaving the Member States with discretion as to how that is done. Regulations on the other hand are directly applicable, even if some implementing legislation, such as enforcement arrangements, is left to the Member States. In this case, the Directive purports to tell the Member States how the oversight requirements are to be met, and in particular by specifying that it is to be done by a single body.

6. The UK Government has already identified that such an approach would breach the principle of subsidiarity by requiring an administrative body to carry out functions that would normally be carried out by the courts in the UK.

We agree with that assessment and support the objection to the requirement for a national oversight body because it breaches the principle of subsidiarity in that way.

7. The proposal also fails to have regard to the principle of devolution in imposing the duties on a single body. It fails to reflect the way in which separate implementing regulations

have hitherto been made in Scotland, and the way in which extensive administrative and advisory functions in relation to procurement in Wales are exercised by or on behalf of Welsh Ministers. This should be contrasted with Article 87 which deals with the provision of assistance to contracting authorities and businesses. Article 87.4 provides specifically –

> *"For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure due coordination between those bodies and structures."*

8. Article 84 does not currently provide the degree of flexibility provided by Article 87. Witnesses to the Task and Finish Group had mixed views on the desirability of the proposed new arrangements. In general, representatives of public bodies have regarded this as an additional degree of bureaucracy, whilst the construction sector skills council considered that a national oversight body in Wales might be helpful to monitor application of the regulations.

The Committee has therefore concluded that even if a national oversight body were to be established for the purposes of reporting under Article 84.2, Member States should be able to take account of their own constitutional structures. Such arrangements could be made by inserting into Article 84 the degree of flexibility provided for in Article 87. That would at least mitigate the degree to which Article 84 breaches the principle of subsidiarity.

Constitutional and Legislative Affairs Committee February 2012

ANNEX

"Article 84

Public oversight

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation. All contracting authorities shall be subject to such oversight.

2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.

The annual report shall include the following:

(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;

(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;

(c) information on the monitoring and follow-up of breaches to procurement rules affecting the budget of the Union in accordance with paragraphs 3 to 5 of the present article;

(d) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.

3. The oversight body shall be responsible for the following tasks:

(a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;

(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;

(c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;

(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role of the Commission as guardian of

the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.

6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts.

7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.

The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2."

3 Public procurement

(33586) 18966/11 + ADDs 1–2 COM(11) 896	Draft Directive on public procurement

Legal base	Articles 53(1), 62 and 114 TFEU; co-decision; QMV
Document originated	20 December 2012
Deposited in Parliament	23 December 2012
Department	Cabinet Office
Basis of consideration	EM of 16 January 2012
Previous Committee Report	None
Discussion in Council	May 2012
Committee's assessment	Legally and politically important
Committee's decision	Not cleared; further information requested; recommended for debate on the Reasoned Opinion

Background

1.1 Expenditure by public bodies ("contracting authorities") and utilities ("contracting entities") on works, goods and services within the EU now amounts to more than €1 trillion a year, and in 2009 accounted for about 19% of the Union's GDP. It therefore plays an important role in the EU's overall economic performance, and is a key element in the Europe 2020 strategy. However, the Commission has noted that, although the two main legal instruments in this area — Directive 2004/17/EC (which coordinates the procurement procedures of entities in the water, energy, transport and postal services sectors which have been granted special or exclusive rights) and Directive 2004/18/EC (which coordinates procedures for award of public works contracts, public supply contracts and public service contracts) — seek to ensure that economic operators from across the Single Market can compete freely for such contracts, one of the twelve key priorities in its Communication in April 2011 on the Single Market Act included the need to revise and modernise that framework in order to make this process more flexible.

The current proposal

1.2 The Commission also produced in January 2011 a Green Paper on the modernisation of EU public procurement policy, and it has since carried out an evaluation exercise on how the existing rules were working. In the light of the conclusions drawn from these two exercises, it has now put forward two proposals, one[1] addressing the issues covered by Directive 2004/17/EC, whilst this document deals with the more general rules governing public procurement, and would thus replace Directive 2004/18/EC.

1.3 The Commission says that, whilst recognising the need to maintain the present broad approach to procurement, the proposal nevertheless aims to increase the efficiency of spending

1 (33585) 18964/11 + ADDs 1–2: see chapter 2 of this Report.

by simplifying the existing rules and making them more flexible, and to allow procurement to better support common goals, such as the protection of the environment, energy efficiency, combating climate change, and promoting innovation, employment and social inclusion. It seeks to do so by addressing the following five areas.

Simplification of procurement procedures

Clarification of the scope of the Directive

1.4 The Commission says that the basic concept of "procurement" has been newly introduced in order to better determine the scope and purpose of procurement law, and to facilitate the application of various thresholds. Also, certain definitions[2] which determine the scope of the Directive have been revised in the light of the case law of the Court of Justice, whilst at the same time an attempt has been made to retain aspects which have been developed over the years and are thus familiar. However, the Commission proposes that current distinction under which non-priority (Part B) services[3] unlikely to attract cross-border interest are subject to only certain provisions of the Directive (covering technical specifications, and contract award notices) should be removed.

A toolbox approach

1.5 Member States would be able to give purchasers more choice over which procedure to use in addition to three basic forms provided for under the current Directive (open restricted, and negotiated), and also permit them to make use of six specific techniques and tools, which have been improved and clarified to facilitate e-procurement — framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement.

Lighter regime for sub-central contracting authorities

1.6 In line with the World Trade Organisation (WTO) Government Procurement Agreement, there would be a simplified regime for purchases by local and regional authorities under which they would be able to use a prior information notice as a means of calling for competition, in which case they would not have to publish a separate contract notice before initiating the procurement procedure. Also, they would be able to set certain time limits in a more flexible way by mutual agreement with participants.

The promotion of e-procurement

1.7 The Commission says that the use of e-procurement can deliver significant savings, and that, in order to help Member States to achieve the necessary change, it is proposing the mandatory transmission of notices in electronic form, the mandatory electronic availability of procurement documents and that the switch to fully electronic communication should take place within two years. The proposal would also streamline and improve dynamic purchasing systems, and provide for the use of electronic catalogues.

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2 Such as "body governed by public law", "public works" and "service contracts" and "mixed contracts".

3 These currently include hotel, rail and water transport, legal and recreational services.

The modernisation of procedures

1.8 The proposal would introduce a more flexible approach by shortening time limits for participation and the submission of offers so as to allow for quicker and more streamlined procurement; by making the distinction between the selection of tenderers and award stages of the contract more flexible; and by enabling the quality of the staff assigned to the contract to be taken into account, where relevant, at the award stage. In addition, contracting authorities will be able to exclude suppliers which have performed persistently or significantly badly in the past, but will also be able to accept those who would otherwise have been excluded from bidding because of convictions for bribery and certain other offences, if they have taken "self-cleaning" measures to remedy the consequences of their actions.

Strategic use of public procurement in response to new challenges

1.9 The Commission says that the draft Directive is aimed at enabling contracting authorities to procure goods and services, in line with Europe 2020 strategic goals, through, for instance, fostering innovation and respecting the environment. It would enable them:

- to take into account in the awarding of contracts the life-cycle costs of what is being purchased, covering all the stages of the existence of a product or works, or provision of a service (including not only direct costs, but also external environmental costs where these can be monetised and verified);
- to refer in the technical specifications and in the award criteria to all those factors which are directly related to the specific production or provision of the good or service purchased;
- to take into account innovative character in assessing the most economically advantageous tender, so long as it is linked to the subject matter of the contract;
- to require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they also accept equivalent labels (for example, European eco-labels); and
- to exclude economic operators from a procedure, if they have identified infringements of obligations established by EU law in the field of social, labour or environmental law, or of international law provisions.

1.10 The Commission notes that, although social, health and education services are currently covered by the "Part B" services rules, they have only a limited cross-border dimension, and are provided in a context which varies widely between Member States. In view of this, it says that Member States should have a very large discretion to organise service providers in these areas, and the proposal would introduce a specific regime for contracts above a threshold of €500,000[4] which would impose only the basic principles of transparency and equal treatment. Also, in order to enable contracting authorities to buy innovative goods and products, the proposal includes provisions for a new procedure for their development and subsequent purchase.

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4 According to the Commission, contracts below this threshold typically have no cross-border interest.

Better access to the market for SMEs and start-ups

1.11 The Commission observes that small and medium sized enterprises (SMEs) have a huge potential for job creation, and that easy access to procurement markets can help to unlock this potential, whilst at the same time enabling contracting authorities to broaden their supplier base. It says that the proposal seeks to build on the European Code of Best Practice[5] it published in 2008 by providing concrete measures to remove barriers for market access to SMEs. These include:

- a general simplification of information requirements, enabling self-declarations to be accepted as *prima facie* evidence for evaluating the capacity and capability of tenderers, with provision of documentary evidence being facilitated by the European Procurement Passport, a standardised document which would serve as proof that there are no grounds for mandatory exclusion;
- inviting contracting authorities to divide contracts above certain values into "lots" enabling smaller firms to bid (and requiring a specific explanation where there is no such division);
- a limitation on participation requirements so as to avoid unjustified involvement of SMEs, with turnover requirements being limited to three times the estimated contract value; and
- enabling Member States to allow subcontractors (which are often SMEs) to request direct payment from contracting authorities.

Sound procedures

1.12 The Commission says that the financial interests at stake and the interaction between the public and private sectors make procurement a risk for unsound business practices. It therefore proposes improved safeguards against conflicts of interest, illicit conduct (such as improperly influencing procurement decisions, or conspiring with others to manipulate the outcome), and the granting of unfair advantages to any market participants who have advised the contracting authority or been involved in the preparation of the procedure.

Governance

1.13 The Commission says that the evaluation carried out showed that not all Member States systematically monitor the application of the procurement rules, and it proposes that they should designate a single national authority to be in charge of this. In addition to monitoring, such a body would provide legal advice on the interpretation of the rules and their application to specific cases; issue guidance on questions of general interest and difficulty pertaining to the rules; establish indicator systems to detect conflicts of interest and other irregularities; draw attention to specific violations and systemic problems; examine complaints about the application of the rules in specific cases; monitor the decisions taken by national courts and authorities following a ruling by the European Court of Justice or findings by the European Court of Auditors where funding by the EU is involved; and report to the European Anti-Fraud Office

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5 SEC(08) 2193.

any infringement of procurement procedures in such instances. Member States would also be obliged to empower the body to "seize" the jurisdiction of the courts to review decisions by contracting entities where it has detected a violation in the course of its monitoring and legal advisory work.

1.14 In addition, Member States would be required to provide support to contracting entities, in the form of legal and economic advice, guidance, training and assistance, which it sees as being particularly relevant where contracting authorities do not have the internal expertise to deal with complex projects. It adds that these requirements should not generate an additional financial burden for Member States, as they would be able to use the existing mechanisms and structures to fulfil the functions in question.

The Government's view

1.15 In his Explanatory Memorandum of 16 January 2012, the Minister for the Cabinet Office (Mr Francis Maude) says that the Government welcomes the publication of this proposal to revise the existing public procurement rules under Directive 2004/18/EC, adding that the UK's response to the Commission's Green paper supported the aim of simplifying and modernising the procurement rules, so as to make the award of contracts more flexible for the benefit of purchasers, SMEs and other suppliers.

1.16 The Government therefore welcomes many of the simplification proposals, which it says include a number proposed by the UK, notably reduced timescales, allowing greater freedom to use the competitive negotiated procedure, improving dynamic purchasing systems, enabling the quality of staff to be taken into account at the award stage, allowing past performance of economic operators to be taken into account, and allowing contractors to take into account self-cleaning measures taken by contractors convicted for bribery who would currently be automatically excluded from bidding. It adds that, if these measures can be maintained through the negotiating process, there will be less need for various thresholds to be raised, pointing out that the Commission has in any case indicated that these will be reviewed (a process which the UK hopes can be completed before the projected date of 2017).

1.17 In addition, the Government:

- supports the greater use of e-procurement as likely to increase SME access and the level of cross-border procurement;
- welcomes the encouragement of advanced electronic communication, subject to certain safeguards ensuring that this does not hinder cross-border bidding;
- is in favour of clarifying how social and environmental matters can be taken into account, and — subject to careful examination of the detail during the negotiations — regards as helpful the provisions concerning life cycle costs and enabling account to be taken of various factors related to the production process as long as these are linked to the subject matter of the contract;
- welcomes the introduction of a procedure designed to encourage innovation;
- welcomes the more general measures designed to provide better access for SMEs.

1.18 On the other hand, the Government does have concerns about the removal of the distinction between Part A and Part B services, noting that this will mean that some areas, such as Legal Services, will become subject to the full rules. It suggests that, although the Commission has stated that the current distinction is no longer valid, it has not made a clear cut case that such services should be subject to the full rules, and nor is it convinced about the benefits of the approach now proposed for social services. Also, although the Government is in favour of sound procedures, it generally considers that these issues are best dealt with at the Member State level, rather than being explicitly covered in the Directives, and it takes a similar view concerning the provision of legal, training, advisory and various other functions to authorities and suppliers.

1.19 However, the Government's main concerns relate to the proposed requirement for national oversight bodies to be able to "seize" the jurisdiction of the Courts, which the Minister notes had not been foreshadowed in the Commission's Green Paper or otherwise subject to consultation, but which he considers may infringe the principles of subsidiarity and/or proportionality. He describes this as a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting entity (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the utility has entered into a contract, as the jurisdiction would enable such a contract to be declared "ineffective").

1.20 He further notes that the various other functions of the oversight body appear to be primarily administrative or regulatory, thus requiring the UK to combine in a single body a mixture of judicial and other functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court as regards the legislation implementing in the UK the Directive (92/13/EEC) which addresses remedies for breach of the procurement rules. He adds that the Directive in question respected the diversity of legal traditions within the EU by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and utilities.

1.21 By contrast, the Minister says that the new proposal seems to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC. He also says that the proposal may in this respect call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member States structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.

1.22 The Minister also says that this concern gives rise to a lesser, but related, issue under the European Convention on Human Rights (ECHR). In particular, he believes that the current drafting of this aspect of the proposal fails to lay a clear foundation for the UK to implement it in a way which avoids a risk of infringing article 6(1) of the ECHR (the right to a fair hearing in the determination of civil rights and obligations), and would appear to oblige the UK to allow the oversight body to seize jurisdiction, even where the nature of its previous advisory relationship with the contracting entity over the procurement in question may prevent it from acting

judicially without a suspicion of bias, bearing in mind that the rights of suppliers as well as the contracting entity may be affected by the exercise of this jurisdiction.

1.23 The Minister's Explanatory Memorandum is accompanied by an Impact Assessment. This notes that the public bodies ("contracting authorities") in the UK comprise central government, local authorities, and other organisations, such as NHS authorities and educational establishments, and that, whilst the utilities ("contracting entities") covered by the proposal replacing Directive 2004/17/EC are in the energy, water, transport and postal services sectors (power generation, energy supply and generation, and oil and gas exploration in the UK having already been exempted from that Directive because they operate in competitive markets).

1.24 The Assessment also points out that, between 2005 and 2009, the value of contracts awarded by UK public purchaser and utilities was some €420 billion, covering a wide range of works, supplies and services provided by a large number of economic operators, with some 216,000 different operators supplying central government in 2010–12, including all sizes of firm.[6] It notes that the main costs arsing from the proposal relate to the bidding process, some of which would have been incurred regardless insofar as public purchasers follow a competitive process in order to obtain the best price: but, based on the Commission's estimates at EU level, it suggests that the additional cost within the UK would be £480 million a year. In addition, it puts the annual costs arising from the full application of the Directive to Part B services at about £14 million. However, it says that these costs would be significantly outweighed by the benefits, estimated at around £4.15 billion a year, from the improved performance of economic operators and better value for taxpayers' money which would result from the more transparent competition resulting from the proposals. In addition, it points out that the proposed simplification of the rules would reduce costs for both public purchasers and economic operators, although it has not proved possible at this stage to quantify these.

Letter from the National Assembly for Wales

1.25 We have also received from the Chairman of the Constitutional and Legislative Affairs Committee of the National Assembly for Wales a letter of 23 February 2012. He says that his Committee shares concerns over whether the proposal that the national oversight body should exercise functions normally carried out by the courts in the UK complies with the principle of subsidiarity, and would therefore support an objection to the requirement for such a body because it would breach that principle in this way. He adds that his Committee is also concerned that the proposal fails to have regard to the principle of devolution, in that, even if such a body were to be established, it should enable Member States to take into account their own constitutional arrangements by incorporating the degree of flexibility in this respect provided for elsewhere[7] in the proposal).

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6 The Assessment also notes that, between 2006 and 2006, SMEs at EU level won 34% by value, and 60% by number, of contracts covered by Directive 2004/17/EC.

7 For example, Article 87 enables Member States to appoint a single body or several bodies or administrative structures to provide assistance to contracting authorities and businesses.

Conclusion

1.26 **Like the Government, we support the over-arching objective of this and the two related procurement proposals[8] to simplify and modernise EU procurement rules. So there is much in the contents of this proposal that we welcome.**

1.27 **However, we also share the Government's concerns with the removal of the distinction between Part A and Part B services, and with the national oversight body being able to seize the jurisdiction of the courts.**

1.28 **On the latter, we fully agree with the Minister that this aspect of the proposal is unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC. We also agree that this combination of functions may prevent the oversight body from acting judicially without a suspicion of bias, contrary to Article 6(1) ECHR.**

1.29 **We note that this aspect of the Commission's proposal was not included in the Commission's Green Paper, and so was not consulted upon; and that it was not included in the Commission's impact assessment, and so is not substantiated by qualitative and quantitative indicators which demonstrate why giving a judicial function to the oversight body is necessary to achieve the EU's objective. We therefore conclude that this aspect of the proposal amounts to an unwarranted interference in the domestic legal order of the UK, in which administrative and judicial powers have traditionally been exercised separately, and so infringes the principle of subsidiarity.**

1.30 **Accordingly, we recommend that the House adopt the draft Reasoned Opinion in the annex to chapter 2, which relates to both this and the proposed Directive on procurement by public entities.[9] The Reasoned Opinion is to be sent to the Presidents of the Commission, Council and European Parliament on or before 8 March.**

1.31 **As requested, the Committee has appended to its Reasoned Opinion the conclusions of the Constitutional and Legislative Affairs Committee of the National Assembly for Wales. It would be grateful if the Government would also respond to them.**

1.32 **Meanwhile, the draft Directive remains under scrutiny pending a further update on the negotiations.**

Annex: Draft Reasoned Opinion of the House of Commons

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[Text of the draft Reasoned Opinion appears at p. 13]

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8 Reported in the preceding and subsequent chapters of this week's Report.

9 (33585) 18964/11: see chapter 2.