

EUROPEAN COMMISSION

Brussels, 20.11.2012
C(2012) 8150 final

Dear Mr. Cash,

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

The Commission would like to take this opportunity to react to some of the observations made by the House of Commons, notably on the procedural obligations resulting from Protocol No. 2.

As regards the absence of consultation of Member States on the possibility of setting up a single oversight body, the Commission is of the view that the obligation established in Article 2 of Protocol No. 2 to "consult widely" before proposing legislative acts does not mean that the consultation has to cover each and every aspect of the envisaged proposal. On the basis of the replies received to the consultation, the Commission might well identify other elements which have to be included in the future legislative proposals. This was precisely the case here, as the issue of governance only arose during the evaluation of the results of the consultation on the Green paper, when it became clear that not all Member States were consistently and systematically monitoring the implementation and functioning of the public procurement rules.

As regards the assessment of the implications for the rules to be put in place by Member States, including, where necessary, regional legislation, the Explanatory memorandum to the proposal states that "it is not foreseen that requirements concerning oversight bodies and knowledge centers will generate overall additional financial burden for Member States. If some costs are expected to re-organise or fine tune the activities of existing mechanisms and structures, they will be neutralised by a reduction of litigation costs (both for contracting authorities and business), costs related to delays in the attribution of contracts, due to misapplication of public procurement rules or to the bad preparation of procurement procedures, as well as costs related to the fact that advice to contracting authorities is currently provided in a fragmented and inefficient manner".

Furthermore, the Commission has estimated a yearly labour cost of €272,656 for every 10 people, by multiplying the average monthly labour cost of €2,272.13 (calculated at average EUROSTAT cost of labour in the 27 Member States for 2006) (see point 5.5.4.3 "Impact on Member States", footnote 95). As for the impact on regional legislation, the

*Mr William Cash MP
Chairman
European Scrutiny Committee
House of Commons
Palace of Westminster
UK – LONDON SW1A 0AA*

Commission has considered that the problems identified in the implementation and the application of the EU rules would be better monitored by a single national body. According to the proposal, its function could however be limited to coordination tasks, such as monitoring or oversight, and support structures or mechanisms existing at national level could be used to carry out the required tasks (see recital 52 of the proposal on public procurement).

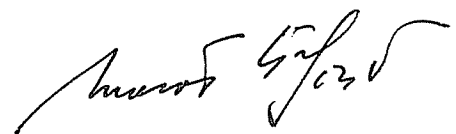
The House of Commons is of the opinion that the proposals of the Commission are unjustifiably intrusive in requiring judicial and non-judicial functions to be combined within a single body and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions provided for under the corresponding EU Directives on remedies in public procurement. The House of Commons also considers that the combination of functions is very likely to prevent the oversight body from acting judicially without suspicion of a conflict of interest, contrary to Article 6(1) ECHR.

The Commission would like to stress that the evaluation of the results of the consultation on the Green paper has shown that not all Member States are consistently and systematically monitoring the implementation and functioning of the public procurement rules and that the efficient and uniform application of EU law is therefore compromised. The Commission is thus of the opinion that a single body with overarching tasks would, in particular, be able to suggest appropriate remedies to more structural problems and to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice.

In this context, the Commission has noted that the issue of the necessary improvement of the implementation and enforcement of EU public procurement law at national level was debated in the Competitiveness Council of 30 May.

I hope that these clarifications address the concerns expressed by the House of Commons and I look forward to continuing our political dialogue in the future.

Yours faithfully,



*Maroš Šefčovič
Vice-President*