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Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

SINGLE MARKET FOR PUBLIC ADMINISTRATION

MINUTES

EXPP/2016/01EN

Meeting of the Commission Government Experts Group on Public Procurement

8th of March 2016

MINUTES OF THE MEETING
OF
THE COMMISSION GOVERNMENT EXPERTS GROUP ON PUBLIC PROCUREMENT
OF
8TH OF MARCH 2016

TRANSPOSITION OF THE PUBLIC PROCUREMENT PACKAGE (10)

The meeting is chaired by Alvydas STANCICKAS, Head of Unit GROW G3 "Procurement legislation and enforcement". In addition are also present for the Commission services (hereafter 'COM services'): Nadia COSTACURTA and Claudio ROMANINI (GROW/G3); for point 6 of the agenda: Justyne BALASYNSKA (GROW/G1); for point 7 of the agenda: Cristina MARCUZZO and Bart NEERSCHOLTEN (Research Executive Agency) (point 7b); PLACENCIA PORRERO Inmaculada (EMPL) (point 7c); Jachym HERCHER and Philippe LE QUEMENT (GROW/G4); ; for point 8 of the agenda "Public Procurement in this health sector" Nikita STAMPA, head of Unit GROW/G4, and An BAEYENS (GROW/G4).

1. Adoption of the agenda of the EXPP meeting:

The agenda is adopted by the Committee.

2. Adoption of the minutes of EXPP meeting of 27th of October 2015 (EXPP/2015/07/EN)

The minutes are adopted without modifications.

3. Implementing Regulations and Decisions: state of play

a) European Single Procurement Document (ESPD):

COM services inform of the final and detailed outcome of the written consultation procedure (that ended on 9 October 2015): 13 votes in favour (FR, PL, NL, IT, BG, DK, LT, SL, EL, SK, CY, HU and HR); 10 tacit votes in favour¹ (BE, CZ, EE, FI, EI, LV, MT, PO, RO and ES) and 5 votes against (DE, UK, LU, SE and AT). All in all, qualified majority was reached (in favour 23 Member States accounting for 67.77% of the total population in the EU). The corresponding Commission Implementing Regulation n° (EU) 2016/7 of 5 January 2016 was published on 6 January 2016².

The ESPD online service has been launched: <http://ec.europa.eu/growth/espd>.

¹ The absence of reactions within the delay was considered as a tacit consent in accordance with Article 3(5) of the Comitology Regulation, Regulation EU 182/2011.

² OJEU L 3 of 6.01.2016

ES asks whether the service is already available in all languages. COM services will check and confirm.³

b) Utilities Directive 2014/25/EU: detailed rules for the exemption procedure:

COM services inform that the procedure for the adoption of the Commission Implementing Decision on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU has been launched. As to the substance, the material conditions to benefit from an exemption have remained unchanged in the new Utilities, but some of the procedural rules have been adapted (such as the rules on deadlines, including the possibility to suspend a deadline, or the general framework of the new Directive concerning electronic means of communication). The draft will be submitted to the Member States according to the applicable advisory procedure either through written procedure or at the/a next meeting of the committee (Advisory Committee for Public Contracts), depending on the timetable.

c) Use of new standard forms and ESPD in case of late transposition:

In reply to LT, COM services clarify that the ESPD can only be used under the new Directive when transposed into national law. For standard forms, the situation is more complicated due to the technical implementation process of the forms. However, and without prejudice to the consequences of the corresponding breach of EU law, publication (whatever the used standard form) is always better than not publication at all.

4. State of play on transposition of the Directive: update by Member States (tour de table)

COM services inform of the letter addressed on 7 December 2015 to national authorities by the Director General of DG Internal Market, Industry, Entrepreneurship and SMEs, and which has been transmitted to all EXPP members. COM services thank all members for the good cooperation and active participation.

COM services remind that all adopted national transposition measures have to be notified by your authorities in the dedicated National Implementing Measures database of the Commission.

In addition, and as provided for in the three concerned Directives, Member States are also required to accompany the notification of their transposition measures notification with one or more documents explaining the relationship between the components of the directive concerned and the corresponding parts of national transposition instruments. Explanatory documents can take the form of correlation tables (templates available on the WIKI); such tables facilitate the national transposition process and increase transparency about how EU law is implemented

³ The service including all languages is available since 22 March. The English version is already operational under <http://ec.europa.eu/growth/espd>

at national level. Member should also provide an on-line explanation of how they have transposed rules and how these rules work in practice⁴. In this respect the Chairman explains that the idea is that Member States should provide for some link whereby they would inform citizens and economic operators on the Single Market and therefore Public Procurement rules.

The results of this fifth tour de table (5/6 February 2015, 1 July 2015, 7 September 2015 and 27 October 2015) are integrated in the attached table (Annex 1).

In conclusion, the Chairman takes note of the delay in the transposition that is announced by several Member States. He stresses the need for all to do their best on this file due to its political importance. He also insists on the importance of concordance tables.

5. Transposition of the Public Procurement Package: questionnaires on the options

COM services thank the Member States that have replied already and invite those who have not yet done so to reply. In case of change in the replies already transmitted, EXPP members are invited to send updated versions of the questionnaires in track changes (due to the compilation of the replies).

In reply to BE, the Chairman explains that the COM services will provide general information to the European Parliament on the use of the options by the Member States. The European Parliament which follows the implementation process is interested in the trends. No formal reporting is required right now.

COM services then present the general trends as they result from the replies received so far (14 replies for Directive 2014/23/EU, 17 replies for Directive 2014/24/EU and 14 replies for Directive 2014/25/EU):

Concessions Directive 2014/23/EU:

- using to the full extent the exclusions laid down in the Concessions Directive;
- applying the Directive to below-threshold procurement;
- introduction of general e-procurement obligations;
- use of environmental, social or innovation-related award criteria;
- use of the new rules on modifications.

Classical Directive 2014/24/EU:

- exclusions (services and public-public cooperation) are transposed to their full extent;
- application of the rules of the Directive below the thresholds, but with some simplification;
- (additional) flexibility for contracting authorities (CAs): the negotiated procedure without publication is made available to CAs; CAs have the possibility to examine bids before checking absence of exclusion grounds and

⁴ Single Market Governance Communication (COM(2012) 259 final of 8.6.2012, point 1.2

the possibility to request EOs to submit, supplement, clarify or complete info and doc;

- Central Purchasing Bodies (CPBs): all MS provide for the possibility to acquire supplies, services from a CPB offering wholesale services and intermediary services; no general trend towards a compulsory recourse to specific CPBs.
- division into lots: compulsory in six Member States;
- e-procurement: no obligation to use e-catalogues: no general postponement of e-procurement deadlines;
- exclusion grounds: 13 Member States make it mandatory to exclude an economic operator (EO) in breach of its obligations relating to the payment of taxes or social security obligations, where this can be demonstrated by any appropriate means (i.e. also in the absence of a final decision or judgment);
- reserved contracts: this possibility is used by all Member States except one;
- award criteria: no obligation for CAs to use specific award criteria;
- subcontracting: there is a mixed use of possibilities/obligations;
- abnormally low tenders: 10 Member States do not establish definition criteria;
- modification of contracts: provisions transposed to their full extent by 11 Member States;
- simplified regime for social services: no general trend to oblige CAs to use Best Price Quality Ratio criteria.

Utilities Directive 2014/25/EU:

- in general, same trends as for Directive 2014/24/EU;
- as for the specificities of Directive 2014/25/EU: the utilities-specific exclusions (exemption of contracts awarded to an affiliated undertaking and joint venture, exploration for oil and natural gas and the exclusion of certain postal services) are also used to their full extent; as for the activities exposed to competition, contracting entities may submit the corresponding exemption request to COM in all Member States that except one.

6. Professionalization: update by the COM services of the questionnaire

The questionnaire has not been finalized yet: it is currently being redrafted to take into account the information resulting from a recent study led by DG REGIO on professionalization.

7. AOB

a) RegioStars Awards

COM services inform the Committee of the *RegioStars Awards* competition, whose Category 5 relates to innovation in the public sector, in particular innovative methods in the management of the Structural Funds, e.g. e-procurement, e-government solutions, participatory governance approaches, or open data,

transparency, new delivery mechanisms, e.g. demand side innovation support via innovation procurement, innovative project selection methods, etc. The deadline to participate is 15 April 2016⁵.

b) Digital Whistleblower (DIGIWHIST) project

This point was put on the agenda at the request of AT.

Research Executive Agency (REA) services clarify the service provided by REA is operational. The [Digiwhist](#) project falls under a DG CNECT research programme. It started one year ago and benefits from a €3 million grant. It aims at creating a database enhancing credibility and transparency, rather than a whistleblowing process. More than 35 districts are within the scope of the project.

AT is concerned by a possible overlap with the statistical collection by DG GROW and with excessive work required from the Member States (the sheet received from the contractor contains lots of data, some of which are wrong).

COM services clarify that the scope of the project is different than what is done by DG GROW. The project should not result in any major additional burden for Member States (checking the data should not take more than a few hours). COM services will contact the project managers to stress that they have to send high quality fiches to Member States. COM services assured the Member States that they should contribute only to fiches of sufficient quality – if a fiche they receive is not well prepared, they should return it to the contractor to be reworked. COM services emphasized that the project will be to the benefit of all Member States and that their assistance is greatly appreciated.

To ensure an organised approach to the fiches, COM services informed that it would send the draft contractors' fiches to the members of the EXPP and ESWG.

c) European Accessibility Act (EAA)

The point has been put on the agenda at the request of AT supported by DE.

COM services (EMPL) present the COM proposal of European Accessibility Act (EAA)⁶.

The interventions of AT, DE, UK, FI and SK put questions to clarify concerns as regards several aspects of the proposal and in particular its link to the Public Procurement Directives: the scope of the proposal (all contracts falling under Directives 2014/23, 2014/24 and 2014/25), the reference not only to technical specifications but also to award criteria, the extension of the scope of the Public Procurement remedies Directives, the possible introduced bureaucratic burden for public authorities and problems for SMEs, and the compatibility of the EAA with the use of the lowest price criterion. COM services (EMPL) clarified the compatibility of

⁵ http://ec.europa.eu/regional_policy/en/region-stars-awards

⁶ <http://ec.europa.eu/social/main.jsp?catId=1202&langId=en>

the EAA with the PP Directives and explain that accessibility obligations are already contained therein. The EAA further describes the notion of accessibility used in the PP Directives. In addition the harmonisation of those accessibility requirements will improve the functioning of the internal market and bring savings.

The Chairman first stresses the institutional perspective, namely: the proposal is being discussed in the Council Social Working Group. COM services (GROW) take note of the concerns expressed by the EXPP members and will transmit them to Unit GROW/G1 in charge of the EEA.

COM services (EMPL) explain that the scope respects Public Procurement Directives (procurement intended for use by all natural persons); the proposed functional accessibility requirements correspond to the notion of "design for all users"; as for the award criteria, contracting authorities have in the Public Procurement Directives the possibility of using accessibility as an award criterion. In terms of enforcement, the EAA only complements Public Procurement Directives.

d) The next meeting is scheduled for 6th of June 2016.

8. Public procurement in health sector:

Presentations by two national experts with experience in public procurement in the health sector:

After a general introduction by COM services, Mr Charles-Edouard ESCURAT (RESAH Deputy Director) gave a very interesting presentation on *RESAH, the French CPB dedicated to Healthcare Sector*, initially set up for the hospitals of Ile de France. He also informed the audience about the PHARE project that has been set up by the French Ministry of Health. The main objective of this project is to provide support and training on public procurement for hospitals all over France.

Thereafter, Mr Gunnar GOBLIRSCH (Stockholm County Council) explained how the public procurement process that was been followed in order to procure the medical technology equipment for the new *Karolinska Hospital NKS* in Stockholm (Sweden) in an innovative way.

Tour de table:

Several Member States (DE, NL, LU) explicitly expressed their gratitude to COM for having organised a specific afternoon dedicated to the health sector.

In several Member States (BG, IE, NO, FR, LV, LU, HU, AT, UK, SI) there are specific CPBs either at national or regional level, in some Member States directly organised by Ministry of Health (CY, MT, RO). In certain Member States the use of CPB is made compulsory whilst in others it is not in order to maintain a healthy competition.

In other Member States (ES, HR, FR) joint public procurement is taking place, sometimes with the support of joint purchasing associations (DE, LT) or procurement hubs (NHS-UK). Contracting authorities from AT and DE have already

organised joint public procurement procedures for the purchase of medicinal products.

The use of an electronic platform is recommended by several Member States (HR, PT and RO) as it opens up even further the competition.

Several Member States provide support and/or training in procurement in the health sector are provided for (FR, SV, NO, LV, LU, UK).
