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

Single Market for Public Administrations

Procurement Legislation and Enforcement

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Minutes

Meeting of the Commission Government Experts Group on Public Procurement

Brussels, 21st of March 2017

TRANSPOSITION OF THE PUBLIC PROCUREMENT PACKAGE (12)

1. APPROVAL OF THE AGENDA AND OF THE MINUTES OF PREVIOUS MEETING

The agenda is approved without modifications by the Group.

Under this point, AT requests to include a point on "International Procurement" to the next meeting agenda.

Concerning the adoption of the minutes of the meeting of 6th of June 2016, DE, AT and IE indicate that they were unable to find the draft minutes on the WIKI online tool. Commission (hereafter "COM") services clarifies that the minutes are always filed under the meeting they relate to (i.e. in this case, under "EXPP meeting of 6th of June") and not under the present meeting. To avoid any future problems, the link will always be included in the draft agenda.

In these circumstances, it is decided to report the adoption of the minutes till 28th of March (comments to be sent by email to the COM). As no comments were received on 28th of March, the minutes are therefore approved by the EXPP.

2. NATURE OF THE MEETING

The meeting is non-public and reserved to the members of the Group, the observers of the EFTA countries and the representatives of the European Parliament.

3. LIST OF POINTS DISCUSSED

3.1. State of play of the transposition of the three Directives: update by Member States (tour de table) (GROW G3)

COM services inform the members that, on 9 December 2016, COM sent reasoned opinions to the Member States that had not notified full transposition of one or

more of the new Directives. The replies received from the Member States are being examined by COM services in view of the next procedural step (namely referral to the European Court of Justice on the basis of Article 258 and 260(3) TFEU).

The results of this seventh tour de table (5/6 February 2015, 1 July 2015, 7 September 2015, 27 October 2015, 6 June 2016 and 21 March) which is now limited to the Member States that have still not completed the transposition process, are integrated in the attached table ([Annex 1](#)).

Under this point, IT informs of the future adoption of a corrective decree that will not modify the Directives' transposition. RO indicates that the secondary legislation relating to concessions was adopted in October 2016.

AT would like to receive a feedback from the MS that have already implemented the new rules, notably as far as concessions are concerned. In addition, AT would like to be duly informed of bilateral exchanges that might have taken place between IE and COM services on the concessions Directive.

In this respect, the Chair clarifies that the minutes of bilateral meetings are not shared with the Committee. However, all questions/replies given which are considered pertinent are introduced in the WIKI online tool.

3.2. Transposition of the Public Procurement Package: questionnaires on the options - state of play (GROW G3)

COM services thank the Member States that have replied already and those that have sent updated replies. COM services invite the Member States (AT and EL, and partially IE, SI and LV) that have not yet replied to do so.

COM services then present the general trends as they result from the replies received so far (23 replies for Directive 2014/23/EU, 26 replies for Directives 2014/24/EU and 2014/25/EU). The main trends are integrated in the attached table ([Annex 2](#)).

3.3. Commission Implementing Decision on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU on utilities sectors: information (GROW G3)

COM services inform the Group of the adoption, on 10 October 2016, of the concerned implementing decision¹ by the COM (advisory "comitology" procedure which has involved the Advisory Committee on Public Contracts). This decision is essentially an update of Decision 2005/15/EC². Two points have to be noted however:

¹ Commission Implementing Decision (EU) 2016/1804 of 10 October 2016 on the detailed rules for the application of Articles 34 and 35 of Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, OJ L 275 of 12.10.2016, p. 39

² Commission Decision 2005/15/EC of 7 January 2005 on the detailed rules for the application of the procedure provided for in Article 30 of Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 7, 11.1.2005, p. 7.

- There is a change as concerns the email address for Member States' requests: the precise email address is now provided for on DG GROW Public Procurement website. Therefore, no "comitology" procedure is needed anymore to change/adapt such email address.
- Since the material conditions for exemptions under Articles 34-35 of Directive 2014/25/EU are substantially unchanged compared to those of Article 30 of Directive 2004/17/EC and given that Decision (EU) 2016/1804 is a continuation of the previous 2005 Decision, all exemption requests, including those concerning Member States which have not yet implemented Directive 2014/25/EU, should be made in accordance with the new 2016 Decision.

3.4. Short debrief and discussion on the meeting with public procurement experts in the health sector of 19 September 2016 (GROW G4)

As a follow-up to the EXPP meeting of March 2016, COM services debrief the Group on the meeting with public procurement experts in the health sector of 19 September 2016. The main key conclusions of the meeting were:

- there is a need for larger health sector public procurers network, at national, European and international level;
- due to the complexity of public procurement particularly in the health sector, professionalization is a necessity;
- a shift from lowest price to best price quality ratio criteria requires support from the national government authorities in the health sector and from the hospital management;
- there is a huge interest in cross-border joint public procurement. A European support and the development of a common contract model (accompanied by a factsheet clarifying who does what) would be needed to make joint cross-border public procurement procedures effective. With regard to this point, AT stresses that the national authorisation schemes for medicinal products constitute a major obstacle to health procurement.

As a follow-up of this meeting, COM services have set up an online community wiki for public procurers in the health sector (open on request to all public procurers in the health sector). The next meeting for public procurement experts in the health sector will take place on 26 April 2017.

COM services brief the Group of the workshop which was organised by the MT Presidency on 1 and 2 March 2017, on structured cooperation – improving access to innovative technologies for rare diseases. The issue of cross-border cooperation in public procurement was discussed. There is a need for networking and cooperation between public procurers from different Member States, not only with a view to increasing the bargaining power, but also in terms of pooling expertise and recourses; and there is also a need for recognition of the professionalization of the health procurement workforce.

Finally, in the context of the European Semester, the issue of public procurement in the health sector has been brought up in eight reports (Czech Republic, Germany, Cyprus, Austria, Latvia Slovakia and Slovenia).

3.5. Update on Single Market Strategy data policy initiatives: eForms and contract registers: information (GROW G4)

COM services inform the Group of the state of play of the works on the e-forms (new standard forms). The corresponding implementing act should be adopted by the end of 2017. The deadline for the implementation by Member States has to be discussed with the member States themselves. The e-forms will also apply to the Defence Directive.

SI and LU request a sufficient implementation deadline; for LU, not before 2020.

COM services inform the Group of the state of play as regards contract registers which fall under the Single Market Strategy on data: an EXEP sub-group was established; seminars were held to exchange experiences between Member States; the Connecting Europe Facility should be available for funding to improve or create solutions.

Under this point, AT (supported by NL, MT, PL, FI, DK, DE, SL) stresses that only technical and IT-related issues should be discussed by the working groups of the Multi-Stakeholders Expert Group on e-Procurement (EXEP) and that legal issues have to be discussed by the EXPP. UK, based on participation in the subgroup, confirms that this is already the case.

DK expresses concerns as regards the confidentiality of data.

Finally, COM services indicate that TED data is available as open data and that the 2016 data will be available soon.

3.6. Recommendation on Professionalisation of Public Procurement: information and discussion (GROW G1)

COM services present the draft Recommendation on professionalisation of Public Procurement, highlighting that it is meant as a non-binding instrument. The aim is to raise awareness on the need to professionalize public procurement, without proposing a one-size-fit-all; in addition a toolbox providing guidance to the MS and facilitating exchange of good practices will be created. The draft recommendation is the result of a consultation process that has involved Member States (through workshops, experts groups...). After the additional workshop that will take place in Zagreb on 28 April 2017, the recommendation will be presented at the Single Market Forum closing event in Malta, on 19 June 2017. It is then expected to be adopted in September or October 2017.

As for the ideas of having a group dedicated to professionalisation and of developing a European competence framework it results from the discussion:

DE welcomes the initiative to discuss the recommendation in EXPP and stresses the need to consult the Member States before adopting the recommendation, as not enough Member States representatives at ministerial level attended the first workshops in Warsaw and Amsterdam.

AT stresses the importance of the topic which is political and constitutes a real high level issue. As such, it should therefore be discussed at this Group and not in any other sub-group.

3.7. Defence Directive: "Defence package" adopted by the Commission on 30 November 2016: information and discussion (GROW G3)

COM services make a presentation of the "Defence package" (Annex 4) adopted by the COM on 30 November 2016, which includes the Report on the implementation by Member States of the Defence Directive 2009/81/EC (COM(2016) 762), the evaluation report of the Defence Directive 2009/81/EC (SWD(2016) 407) and the Commission's notice on government-to-government defence contracts (C(2016) 7727).

DE raises the issue of the methodology for gathering data and their reliability. COM services indicate that detailed discussions will take place in the next months on the data and the scoreboard.

In reply to AT, COM services recognise that issues related to the mutual recognition of security clearances may have an impact on cross-border procurement. The existing guidance on Security of Information tries to address this point. It would be difficult to do more –from a Public Procurement angle- in this sensitive area..

3.8. Remedies Directives: Evaluation and accompanying report adopted by the Commission on 24 January 2017 – information and discussion (GROW G3)

COM services present the results of the evaluation of the Remedies Directives (Annex 5).

SE raises concerns as regards one of the conclusions of the report, namely that standard decisions by administrative bodies are better than the ones of judicial bodies. COM services explain that administrative bodies are more efficient in terms of duration of procedures; this is what results from 75% of 170 stakeholders' replies received. DE is of the opinion that administrative bodies achieve better results probably because they are more specialised.

AT, supported by IT, expresses doubts as concerns the setting up of a remedies scoreboard and suggests cautiousness in using the corresponding figures. SI considers that the scoreboard is too simplistic and premature for remedies.

The Chair confirms that, as mentioned by SI, mistakes were spotted in the study; however only the correct data were taken into account. Then the Chair stresses that the report and the evaluation constitute a first step. Even though it is true that it is sometimes difficult to gather basic data, it is indeed important to define the right indicators for the scoreboard. The duration of the remedy procedures is an objective indicator that cannot be neglected, but it has to be used in conjunction with other indicators. In any case, COM services will be cautious and consult the Group before taking action.

3.9. Ex-ante notification mechanism: information and discussion (GROW G2)

COM services present the ex-ante notification mechanism foreseen in the the Single Market Strategy to the Group (Annex 6). The mechanism is intended for large infrastructure projects (above EUR 700 Mio) in the field of transport, energy, ICT. The aim is to provide assistance to Member States by advising them on EU public procurement law aspects. The mechanism will have three pillars: a helpdesk, a voluntary notification mechanism and an information exchange. The

mechanism will be introduced by a Commission communication. COM services consider that 10 to 15 projects per year would be eligible.

A public consultation has been launched and will close on 14.04.2017. MS representatives were encouraged to take part in the consultation. In parallel, COM services have started drafting the communication. The development of a dedicated IT tool is also underway. COM services aim at an adoption of the Communication in September 2017. The mechanism will be launched immediately upon adoption with a possible phasing in of the information exchange mechanism.

Interest in the tool is high; several members (CY, AT, NL, UK, HU, BE, DE) take the floor to voice their opinion. The main points raised concern the form of the Commission opinion as well as its binding or non-binding nature, the scope of the Commission action, and the voluntary or compulsory nature of the notification. Member States emphasize that the mechanism should be voluntary and that it could not deliver a binding decision if not introduced by legal act.

COM services clarified that no final decisions on the exact nature and scope of the mechanism had been taken. However, COM services develop the mechanism on the basis of the Single Market Strategy taking into account the results of the public consultation and the opinions voiced by MS.

3.10. Policy to fight collusion in public procurement: information and discussion (GROW G2)

COM services inform the Group on the background, basis and objectives of this new policy ([Annex 7](#)), which originates from the observation that cartels are a widespread phenomenon in public procurement markets.

COM services informed that this policy will aim at fighting collusion through awareness raising and preventive action at the planning and preparation stage of public procurement procedures (i.e. to minimise the risk of collusion to be occurred).

This policy intends to help public authorities better understand the markets where they buy their products/services; develop strategies and design the procurement processes in a way to mitigate collusive elements; and increase their ability to detect collusive elements in the context of tendering procedures.

The development of this policy and the design of the specific actions thereof will require close cooperation, joint action and exchange of information between the EU and national public procurement and competition authorities.

COM services also inform that this policy may include guidelines or other forms of clarification of provisions in the new directives which concern exclusion of economic operators relating to collusion (Article 57(4) of Directive 2014/24/EU and equivalent provisions in Directive 2014/23/EU and Directive 2014/25/EU).

As regards the information to be exchanged between authorities, NO is of the opinion that any exchange of information or data on this matter would depend on the applicable legal bases.

DK and EE welcome the clarification of the provisions of the new directives on PP concerning exclusion grounds relating to collusion (Article 57(4)). AT considers that the wording of the Directive is clear without further need for clarification.

COM services recall that when such provisions were negotiated, the fact that such cases are long was taken into account; this is why it was decided, on the one hand, that the exclusion in such cases (3 to 5 years as provided for in Article 57(7) of Directive 2014/24/EU) would already be possible in case of sufficiently plausible indications and, on the other hand, that such exclusion ground would be facultative, while allowing Member States to make it compulsory for their contracting authorities.

3.11. Any Other Business

COM services inform the members that the template of the minutes will be different from now on in order to comply with the new horizontal rules adopted by the COM as regards the creation and operation of expert groups³ and the corresponding operational implementing measures.

Regarding the preparation of the meetings of the Group, DE, supported by AT and SI, asks to receive, prior to the meeting, more detailed materials or at least a one-page topic summary. The Chair reminds that the presentations are provided for to the members of the Group as much as possible ahead of the meetings and taken into account of the other work priorities of the concerned colleagues.

4. CONCLUSIONS/RECOMMENDATIONS/OPINIONS

- **General point:** EXPP members consider that only technical and IT-related issues may be discussed by the working groups of the Multi-Stakeholders Expert Group on e-Procurement (EXEP) and that legal issues have to be discussed by the EXPP.
- **Point 3.5: eForms and contract registers:** SI and LU request sufficient implementation deadline for eForms; legal issues relating to contract registers have to be dealt with by EXPP
- **Point 3.6: Recommendation on Professionalisation of Public Procurement:** DE and AT require COM services to consult Member States before adopting the recommendation.
- **Point 3.8 remedies Directives:** envisaged remedies Scoreboard: COM services will consult the Group before taking actions.
- **Point 3.9 ex ante evaluation mechanism:** COM will reflect on issues for which Member States voiced concern, namely form of the COM action following notification (i.a. on liability, legal security).
- **Point 3.10 policy to fight collusion in public procurement:** further discussion is i.a. needed on the envisaged guidance on exclusion grounds in this respect.

5. NEXT STEPS

Topics to be included in the agenda of next meeting:

- at the request of AT, "International Procurement";
- IMI pilot project on Public Procurement: state of play and discussion

³ Commission Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups, C(2016) 3301 final, OJ L 275, 12.10.2016, p. 39

6. NEXT MEETING

The next meeting is scheduled for 15th of June 2017.

7. LIST OF PARTICIPANTS

Commission services: Representatives from Directorate G ("Single Market for Public Administrations") in charge of Public Procurement, of Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs Procurement Legislation and Enforcement; the specific competent unit is mentioned for each point discussed.

Members States: AT, BE, BG, CY, CZ, DE, DK, ES, EE, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK, UK

EFTA observers: NO, IS, CH

European Parliament: a representative from the Internal Market and Consumer Protection Committee

European Investment Bank - Office of the Chief Compliance Officer