



**COUNCIL OF
THE EUROPEAN UNION**

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16727/12

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NOTE

From: Permanent Representatives Committee
To: Council

No. prev. doc.: 16409/12 MAP 66 MI 746 CODEC 2718

No. Cion prop.: 18964/11 MAP 9 MI 685 + ADD 1 + ADD 2

Subject: Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors
- General approach

I. INTRODUCTION

1. On 21 December 2011, the Commission submitted to the Council and the European Parliament a public procurement package consisting of proposal for a Directive on public procurement¹ together with a proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors² and a proposal for a Directive on the award of concession contracts. The above proposal for a Directive on public procurement aims at increasing the efficiency of public procurement by simplification and modernization of existing rules.

¹ doc. 18966/11 MAP 10 MI 686

² doc. 18964/11 MAP 9 MI 685

³ doc. 18960/11 MAP 8 MI 684

2. The proposal has been identified as one of the twelve key levers of the Single Market Act, with the aim to be adopted by the end of 2012, which has been called for by the European Council as well.
3. European Economic and Social Committee delivered its opinion on 26 April and Committee of the Regions on 9 October 2012.
4. The vote in the IMCO Committee of the European Parliament is foreseen for 24 January 2013.
5. Working Party on Public Procurement discussed in depth the issues which are specific to the above proposal at 4 meetings of the Working Party during Danish and Cyprus Presidencies. The numerous provisions, which are identical or similar for both the above proposal and the proposal for a Directive on public procurement were considered in 19 meetings and have been transferred into the Utilities proposal, having due regard for its specificities.
6. Thus, based on the text of the proposal for a Directive on public procurement, the Competitiveness Council has provided guidance on four important issues, namely "Flexibility and dialogue" and "Lighter rules for certain services" on its meeting on 20 and 21 February, and "Electronic procurement" and "Governance" on its meeting on 30 and 31 May 2012. *Mutatis mutandis*, this guidance is also relevant in the context of this proposal.
7. The Permanent Representatives Committee, at its meeting of 28 November, discussed the outstanding issues and endorsed the text as amended during the meeting, pending the outstanding issue presented below.
8. In the light of these discussions, the Presidency drew up a compromise text which is reflected in document 16729/12.
9. Some delegations have not yet indicated whether they have lifted their reservations and are invited to do so by the Council meeting.

II. OUTSTANDING ISSUE

10. Following the meeting of the Permanent Representatives Committee on 28 November there is still an outstanding issue on **Rules on relations with third countries (Articles 79a and 79b)** that has to be discussed and resolved.

Contrary to the current Utilities Directive, 2004/17/EC, the Commission's initial proposal did not contain any provisions on relations with third countries. The current provisions, Articles 58 and 59 of Directive 2004/17/EC had been deleted because the adoption of the Proposal for a regulation establishing rules on the access of third-country goods and services to the European Union's internal market in public procurement and procedures supporting negotiations on access of European Union goods and services to the public procurement markets of third countries would make such rules redundant in the proposed Utilities Directive.

However, the negotiations on the proposed Regulation have revealed themselves to be rather complex and any possible compromise on that proposal would be more than likely to intervene much later than the adoption of this proposal.

Consequently, a certain number of delegations have requested that the previous provisions on the issue should be reinstated. A few Member States have indicated that they are opposed to re-introducing such provisions, while yet others have indicated that they might – reluctantly – be able to accept them as part of an overall compromise.

Pending the discussions on the proposed Regulation, the Presidency has proposed to re-introduce the current provisions of Directive 2004/17/EC, unchanged as to substance except for some adaptations which the Legal Service of Council pointed out were necessary as a consequence of recent jurisprudence and the changed Treaty.

III. CONCLUSION

11. The Council is invited to:

- resolve the outstanding issue;
- reach an agreement on the general approach on the basis of the Presidency compromise as set out in document 16729/12; and
- invite the Presidency to start negotiations with the European Parliament on the basis this general approach, with a view to reaching an agreement at first reading.

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