



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from : General Secretariat/Presidency
to : Council

Subject : Public procurement package: Proposal for a Directive of the European Parliament and of the Council on public procurement (*Legislative deliberation*)
- Orientation debate

I. INTRODUCTION

On 21 December 2011, the Commission submitted to the Council and the European Parliament a 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 contracts³.

This package aims to modernise public procurement rules by increasing the efficiency of public spending and reducing transaction costs for public authorities and private enterprises. This would be done by making the public procurement rules more flexible and simple, and on the other hand allowing better use of public procurement in support of common societal goals.

¹ doc. 18966/11 MAP 10 MI 686

² doc. 18964/11 MAP 9 MI 685

³ doc. 18960/11 MAP 8 MI 684

II. STATE OF PLAY

The Working Party on Public Procurement held meetings on 17 and 23 January and on 1, 9 and 10 February 2012 focusing mainly on the proposal for a Directive on public procurement.

On the basis of those discussions, the Presidency considers that the issues of "flexibility and dialogue" and "lighter rules for certain services" should be referred to the Council with a view to providing guidance for future work on this proposal.

At its meeting on 15 February, the Permanent Representatives Committee took note of the discussion paper by the Presidency containing the questions on the two above issues as presented in doc. 6268/12.

III. CONCLUSION

The Competitiveness Council is invited, at its forthcoming meeting on 20 - 21 February 2012, to hold an orientation debate on the basis of the questions set out in Annex to the present note.

Questions for the meeting of the Competitiveness Council of 20 and 21 February 2012**1. Flexibility and dialogue**

The Green Paper Consultation on the modernisation of the Public Procurement directives indicated widespread support among stakeholders of reducing the level of detail in public procurement rules and to allow less restricted or full use of negotiation with prior publication of a contract notice. Wider access to the procedure could promote dialogue between procuring entities and potential suppliers and foster improved and innovative public purchasing. It could also be in support of making purchases better adapted to public needs and budgetary constraints. At the same time, stakeholders recognize that increased use of negotiation poses a risk to transparency, equal treatment as well as fair and objective proceedings.

Compared to the current directive, the Commission proposes to increase the list of cases in which Member States may allow for the competitive procedure with negotiation. Initial discussions in the Working Party on Public Procurement have clearly indicated that a number of delegations would like to go further than the Commission's proposal. The Council Legal Service has analysed possibilities for wider access to the negotiated procedure and expressed the view that the legal basis of the proposal does not provide for unrestricted access to the procedure, if there is no proof that this would improve the functioning of the internal market.

Ministers are invited to comment on the following questions:

*Does the Commission's proposal provide procuring entities sufficient access to the competitive procedure with negotiation? If not, should access be as unrestricted as possible?
How can it be secured that more flexibility does not lead to unequal treatment?*

2. Lighter rules for certain services

The European public procurement rules do not oblige Member States to externalise the execution of services. However, if contracting authorities decide to externalise services, they have to comply with EU rules.

The current directive makes a distinction between "A-services" and "B-services". While A-services are subject to the full procedures of the directive, contract awards for B-services must only comply with a simplified procedure as well as general Treaty principles like equal treatment and transparency.

B-services comprise social services, cultural services, health services, education services, legal services, hotel and restaurant services, security services, and certain transport services. Moreover, services not clearly falling under the A-category are automatically categorized as a B-service.

Originally, B-services were exempt from the full procedures of the directive due to an assumption of lack of cross-border interest. However, for certain services, e.g. legal and hotel and restaurant services, the percentage of cross-border trade is significantly higher than for the average for A-services.

It is much less burdensome for the contracting authority to tender out a contract for a B-service than for an A-service. On the other hand, transparency and competition might suffer when tendering out B-services, which consequently might lead to discrimination and higher costs. This is not least a problem during times of tight public budgets and stagnating growth rates.

Compared to the current directive, the Commission proposes to abolish the distinction between A- and B-services. Thus, the point of departure would be that standard rules apply to all services if they are not specifically exempt. Therefore, for certain social, cultural, educational and health services there would be a special light regime. If the contract value for such services exceeds a threshold of 500.000 EUR, the simple procurement regime would be in place, only requiring a publication of a contract notice and a contract award notice. If the contract value is below the threshold of 500.000 EUR, there are no procedural requirements for the said services.

Ministers are invited to comment on the following questions:

Is the Commission right in proposing a lighter regime for certain social, cultural, educational and health services? Should other services also benefit from the special regime? Has the Commission struck the right balance between promoting efficiency through competition and delivering on the objective of lighter public procurement rules?
