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NOTE

from : Presidency
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Subject : Proposal for a Directive of the European Parliament and of the Council on Public Procurement (**First reading**) (*Legislative deliberation*)

- Progress report
- Orientation debate

I. Introduction

1. The European Commission adopted a public procurement package on 20 December 2011 with a view to modernising and simplifying the existing rules on public procurement and concessions.
2. The Package consists of three legislative proposals for (i) a Directive on public procurement (classical directive), (ii) a Directive on procurement by entities operating in the water, energy, transport and postal services sectors and (iii) a Directive on award of concession contracts.

II. Proceedings of the Council's preparatory bodies

3. Under the Danish Presidency, the Working Party on Public Procurement has examined and negotiated the abovementioned package on 15 occasions with a strong focus on the key proposal for public procurement in the classical sector.
4. This proposal has been singled out as a Single Market Act key action with a significant potential for enhancing growth, innovation and job creation while supporting the most efficient use of public funds. The European Council has called for the adoption of the proposal by the end of 2012.
5. Member States have all affirmed the importance of giving a high priority to the negotiations on the proposal in order to reach agreement with the European Parliament by the end of 2012.
6. In order to effectively drive negotiations forward and in view of the complexity of the subject matter, the Presidency has structured the provisions of the Public Procurement proposal into 10 thematic clusters. The same approach has subsequently been adopted by the European Parliament. The fact that the Council and the European Parliament share the same approach should ease negotiations between the Union's two legislators.
7. The Danish Presidency has invited the Council Working Party to focus on seven key clusters with a view to identifying possible compromises and finding common ground on a number of essential topics. At the same time, the Working Party has agreed on numerous technical clarifications to ensure legal certainty.
8. During the Competitiveness Council on 20 February 2012, the Ministers also provided political guidance on important matters related to access to the competitive procedure with negotiation and the proposed lighter regime for social and other specific services.

9. It has been an important objective for the Council to significantly simplify the public procurement rules and ensure legal certainty for contracting authorities as well as economic operators, while maximising flexibility and driving down transaction costs.
10. The Presidency would like to take stock of the negotiations so far in order to present the results of its work, with a view to facilitating the continuation of negotiations in the Council. During the course of negotiations a broad consensus was possible on several topics. In these areas, the Presidency believes that the possible solutions outlined in the progress report in Annex I should be the point of departure for further work on this file.
11. The Presidency underlines that the explanations and proposed solutions set out in Annex I constitute the Presidency's view on the state of play of the negotiations of the draft Directive. They do not necessarily reflect the position of each and every delegation. However, the Presidency believes that those solutions represent the way forward and should be the basis for reaching political agreement.
12. Some points still need further examination and additional work. The Presidency has in Annex II singled out two questions concerning **electronic procurement** and **governance**, and asks for political guidance from the Competitiveness Council at the meeting on 30 and 31 May 2012.

III. Action to be taken by the Council

13. The Competitiveness Council is invited, at its forthcoming meeting on 30 and 31 May 2012, to:
 - take note of the proposals as given in Annex I.
 - hold an orientation debate on the basis of the questions set out in Annex II.

Annex I – Progress report

During the course of negotiations, the Presidency has suggested a number of clarifications and proposals for compromises to the draft Directive. These are outlined in the documents referred to in brackets below. Some of the proposals outlined below are not reflected in the documents as the proposals are based upon the latest negotiations and have not yet been introduced in the documents.

On the basis of the negotiations and positions expressed in the Council Working Party, along with the political guidance provided by the Competitiveness Council on 20 February 2012, the Presidency points out a number of elements below to be included in the final political agreement.

Flexibilisation of procedures (doc 8764/12)

The procurement procedures available must ensure equal treatment and transparency, yet be flexible enough to address the different situations and needs that contracting authorities and economic operators encounter when authorities purchase supplies, services and works. The Council Working Party has thoroughly discussed the procedures proposed, as well as the conditions for their application. On the basis of the negotiations in Council and with a view to reaching final political agreement, the Presidency proposes to:

- substantially widen access to the competitive procedure with negotiation and the competitive dialogue compared to the Commission proposal. The two procedures should be available in particular whenever works contracts or contracts for services or supplies require adaptation or design efforts, or when off-the-shelf solutions would not lead to satisfactory results. Wider access to the procedures will facilitate purchasing better adapted to public authorities' needs and budgetary constraints, fostering improved and innovative public purchasing;
- fully support the new procedure targeted at promoting structured innovation partnerships in order to further the development and subsequent purchase of innovative supplies, services and works;
- reduce the minimum time limits set out in the Commission proposal in order to make public procurement more efficient, while respecting that time limits must always be proportional and give economic operators, in particular SMEs, sufficient time to prepare tenders.

Strategic use of public procurement (doc 8765/12)

The sheer amount of public resources spent on procurement makes it an effective tool to achieve the objectives of the Europe 2020 Strategy of a smart, sustainable and inclusive economy. The Council Working Party has thoroughly discussed, inter alia, how contracting authorities can establish award criteria serving this purpose, how to take account of life-cycle costs to foster sustainable solutions, the use of functional requirements to promote innovation and the lighter regime for certain social services. On the basis of the negotiations in Council and with a view to reaching final political agreement, the Presidency proposes to:

- promote the development of life-cycle costing and clarify how it can be integrated in the award criteria for public contracts. Life-cycle costing should make it possible to take account of, for instance, costs related to energy consumption and recycling as well as costs imposed by environmental externalities such as emissions of greenhouse gases. Any method for calculating life-cycle costs must be determined in an objective and non-discriminatory manner and normally diligent economic operators should be able to provide the data required without unreasonable effort;
- encourage Member States to make full use of performance and functional requirements as a method apt to foster innovation, when laying down technical specifications;
- public procurement rules should continue to focus on "how to buy" and not "what to buy". Setting mandatory objectives and targets in accordance with the particular policies and conditions of a relevant sector should be left to Member States and sector-specific legislation. It should thus be ensured that Member States wishing to do so are in a position to promote political objectives, as long as the criteria used for this purpose are linked to the subject-matter of the contract;
- refine the scope and conditions for a light regime for certain services, including social, health, cultural, educational and hotel/restaurant services, while promoting transparency and competition. It should be possible to create transparency and flexibility while driving down transaction costs by publishing a Prior Information Notice (PIN). Services with no cross-border interest should be excluded from the scope of the directive.

Reducing documentation requirements (doc 9185/12)

There is a strong need to simplify procurement rules and procedures, thus reducing transaction costs for both contracting authorities and economic operators. This will result in more economic operators taking part in procedures for public contracts, not least SMEs, which in turn would intensify competition, promote innovation and lead to better procurement outcomes. The Council Working Party has thoroughly discussed how to reduce red tape and increase flexibility for both contracting authorities and economic operators. On the basis of the negotiations in Council and with a view to reaching final political agreement, the Presidency proposes to:

- fully support making obligatory the acceptance of economic operators' self-declarations instead of certificates and other official documents as preliminary means of proof that they are not subject to grounds for exclusion and that they fulfil the selection criteria. As the clear point of departure, only the winner of a contract should submit the required documentation to the contracting authority;
- provide contracting authorities with a possibility to ask economic operators to supplement, clarify or complete information or documentation submitted where it is or appears to be incomplete or erroneous, while respecting the principles of transparency and equal treatment;
- make it possible for contracting authorities to exclude an economic operator on the basis of poor performance under a prior public contract;
- pursue the possibility of exempting economic operators from submitting documents and information which the contracting authority can itself easily obtain from databases or registers;
- facilitate handling of documentation and exchange of information in cross-border situations by extending to the area of public procurement the existing electronic tool for cross-border information exchange "Internal Market Information System" (IMI).

E-Procurement (doc 8073/12)

The use of electronic procurement carries a significant potential for increasing transparency, reducing transaction costs and improving procurement outcomes. Moreover, e-procurement could contribute to preventing, detecting and correcting errors due to misunderstanding or misinterpretation of public procurement rules. The Council Working Party has thoroughly discussed how to integrate electronic means of communication in public procurement and how to ensure equal access. On the basis of the negotiations in Council and with a view to reaching final political agreement, the Presidency proposes to:

- pursue mandatory transmission of notices in electronic form, mandatory electronic availability of procurement documents and impose the switch to fully electronic communication, in particular e-submission, in all procurement procedures within a transition period of two years starting from the transposition of the directive;

Some additional political guidance on this issue is needed as set out in question 1 of Annex II.

- streamline and improve the fully electronic procurement tools, Dynamic Purchasing Systems and electronic catalogues, which are particularly adapted to highly aggregated procurement of standard purchasing, typically carried out by Central Purchasing Bodies;
- Central Purchasing Bodies should make the full transition to electronic communication by the date of entry into force of the Directive, as they are in an even better position to speedily adapt to electronic means of communication.

SME Access (doc 8074/12)

Small and medium-sized enterprises (SMEs) possess huge potential for job creation, growth and innovation. Easy access to procurement markets can help them unlock this potential while allowing contracting authorities to broaden their supplier base, with greater competition having positive consequences for public contracts. The Council Working Party has thoroughly discussed how to ease access for SMEs to public contracts without distorting the market and generating red tape. On the basis of the negotiations in Council and with a view to reaching final political agreement, the Presidency proposes to:

- fully support the proposal of introducing a turnover cap, according to which contracting authorities should not be allowed to require economic operators to have a minimum turnover exceeding three times the estimated contract value. Only in duly justified circumstances relating to special risks can higher requirements be applied, though they must always be proportional;
- fully support the involvement of SMEs in public procurement markets, by encouraging contracting authorities to duly consider dividing contracts into lots;
- the Commission shall compile data based on what Member States report on the implementation of SME friendly policies. The Commission shall make these policies known in order to encourage participation of SMEs in public procurement.

Aggregation of demand (doc 9184/12)

Aggregation of demand, either by accumulating the number of contracting authorities or by volume and value over time, often leads to economies of scale and consequently lower prices. This could result in significant savings and better use of public funds. The Council Working Party has thoroughly discussed, inter alia, how to improve rules on framework agreements and the allocation of responsibility when contracting authorities perform joint procurement, as well as the risk of excessive concentration of purchasing power. On the basis of the negotiations in Council and with a view to reaching final political agreement, the Presidency proposes to:

- clarify the conditions for use of framework agreements and making it clear that the same framework agreement may provide for direct call-offs and mini-competition, provided that the conditions governing when to use direct call-offs and mini-competition respectively are clearly set out in the framework agreement;
- clarify the rules attributing liability for the observance of the procurement rules among the central purchasing body and the contracting authorities procuring from or through the body;
- making it easier for contracting authorities from different Member States to perform joint procurement across borders, thus providing an important tool for procurement of innovative solutions.

Governance (doc 9183/12)

A genuine and efficient internal market requires a level playing field and means that public contracts should be awarded on a non-discriminatory basis to the best tenderer. The Commission has proposed, inter alia, the establishment of completely new comprehensive governance structures. While Member States fully support the internal market, almost all Member States found the proposal excessively burdensome and were strongly opposed to the proposed new structures that could force Member States to change already existing procedures. On the basis of the negotiations in Council and with a view to reaching final political agreement, the Presidency proposes to:

- accentuate the objectives of good governance while ensuring that Member States must remain free to organise their administrative structures as they see fit;
- further refine the list of necessary tasks to be carried out by Member States and the Commission to ensure good governance;
- support the exchange of best practises relating to governance and professionalization of public procurement.

Some additional political guidance on this thematic cluster is needed as set out in question 2 of Annex II.

1. Electronic procurement

Full electronic procurement involves the replacement of paper based procedures with electronic communications and processing throughout the procurement chain. Studies show that e-procurement generates considerable savings through reduction of transaction costs for authorities and companies, improves transparency and furthers access to procurement markets, not least for SMEs. Moreover, e-procurement facilitate the delivery of better procurement outcomes (lower price, better quality) by stimulating greater competition across the Single Market. On the other hand, the implementation of e-procurement solutions inevitably triggers certain up-front costs and requires contracting authorities as well as economic operators to adapt to new electronic systems and procedures. This may prove burdensome in the transitional period.

Procurement procedures are increasingly handled electronically, but the overall use of electronic means remains relatively low. During the informal Competitiveness Council held in Copenhagen on 2-3 February 2012, Ministers discussed how to further the use of e-procurement. E-procurement is still used in only 5-10% of procurement procedures carried out across the EU despite the political target, set by Ministers in 2005, of 50% to be met by 2010.

The Commission proposal provides for making electronic communication in procurement mandatory two years after the national transposition of the Directive. Assuming that the Directive is adopted by the end of 2012, the deadline would be mid-2016. By this time, all information on procurement opportunities and submission of tenders would need to be transmitted electronically. The proposal does, however, not require contracting authorities to use electronic means for processing or assessment of tenders or the management of contracts such as e-invoicing.

The electronic communication requirement would cover all procurement falling within the scope of the Directive, while Member States are free to decide on procurement not covered. Concurrently, the Commission is working on a series of flanking measures meant to support all stakeholders, including SMEs, in completing the transition.

Ministers are invited to comment on the following questions:

Do you support the Commission proposal to fully switch to electronic communication within 2 years after transposition, i.e. mid-2016 in the case of adoption of the directive in 2012, or would you prefer a different time frame? How can the transition best be supported?

2. Governance

The aim of the public procurement rules is a well-functioning Internal Market for public contracts, with a true level playing field for all economic operators. The modernisation and flexibilisation of the public procurement rules should go hand in hand with appropriate provisions on governance.

The current procurement Directives already provide for a number of instruments to monitor procurement practices, through reporting and a general obligation for Member States to ensure implementation by effective, available and transparent mechanisms. Member States have different structures in place to monitor the application of public procurement rules and provide guidance and assistance to contracting authorities and/or economic operators.

Evaluations show that wrong application of the procurement rules leads to serious delays and inefficient use of public monies. Evaluations also show that in a number of instances, more should be done to ensure sound and professional procurement practices to the benefit of European taxpayers and businesses, and that better procurement practices would also create business opportunities abroad.

Starting from a quite far-reaching Commission proposal to substantially increase monitoring by Member States, by the mandatory establishment of a national oversight body in each Member state and by putting in place a comprehensive range of new tasks including the provision of free guidance and counsel to contracting authorities and economic operators, the Presidency would, based on discussions in the Working Party, suggest a different approach: rules for better governance would henceforth focus on the tasks of monitoring, reporting, and guidance. Questions of administrative organisation would be left to Member States.

Ministers are invited to comment on the following questions:

Would you agree with the Presidency approach, which would leave organisational decisions to Member States and simply identify the tasks to be carried out, including: monitoring, reporting and guidance? Should other tasks be included or should the list be reduced further?