



Council of the
European Union

Brussels, 6 October 2017
(OR. en)

12977/17

MAP 25
MI 683

COVER NOTE

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 4 October 2017

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

No. Cion doc.: COM(2017) 573 final

Subject: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND
SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS
Helping investment through a voluntary ex-ante assessment of the
procurement aspects for large infrastructure projects

Delegations will find attached document COM(2017) 573 final.

Encl.: COM(2017) 573 final



Strasbourg, 3.10.2017
COM(2017) 573 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
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**Helping investment through a voluntary ex-ante assessment of the procurement aspects
for large infrastructure projects**

1. INTRODUCTION

The EU's top priority is jobs, growth and competitiveness, which means stimulating investment at local, regional, national and European level. This Communication is about helping public authorities manage large procurement projects, irrespective of whether they are funded by the EU or not, as efficiently as possible so as to optimise value for taxpayers, deliver high-quality infrastructure, and maximise jobs and growth. To this end, the Commission will operate a three-pillar mechanism to support these public authorities in their application of EU procurement rules.

Since the current European Commission took office in November 2014, it has put investment centre stage, introducing the Investment Plan for Europe. This includes the European Fund for Strategic Investments (EFSI), whose objective is to mobilise EUR 315 billion by mid-2018, using public guarantees to attract and secure private investment in major projects. Key to the success of the Plan is removing obstacles to investment, achieving greater regulatory predictability and providing technical assistance for investment projects.

Given the Plan's early success in delivering results, the European Commission decided in 2016 to extend its duration, increase its firepower, and strengthen it by stepping up technical assistance and removing obstacles to investment within the Single Market¹. The European Fund for Strategic Investment (EFSI 2.0)² proposal will help to boost significantly the EU economy. Not only does the EFSI aim to increase total investment mobilised to at least EUR 500 billion by end-2020 but also to improve its geographical coverage and boost take-up in less developed and transition regions. This is crucial to future job creation, growth and competitiveness in Europe.

At the same time, the Connecting Europe Facility (CEF) supports EU connectivity in transport, energy and telecommunications, financing projects in Trans-European Network. Since 2014, it has so far invested EUR 25 billion which has resulted in approximately EUR 50 billion of overall infrastructure investment in the EU.

Attracting private investment is essential, as is using public procurement as effectively and efficiently as possible. Public procurement represents around 14 % of EU GDP, with public authorities spending over EUR 2 trillion of European taxpayers' money every year. Yet the potential for public procurement to stimulate jobs and growth is not fully used.

Procurement procedures ensure that the project promoter will be able to compare different offers and choose the most suitable one, getting the best value for money. It also gives confidence to companies to submit bids as the choice of the contractor will be done on the basis of fair treatment and equal footing. However, procurement is still often carried out without the necessary skills, technical knowledge or full procedural understanding³.

¹ COM(2016) 581.

² COM(2016) 597; 2016/0276 (COD).

³ Communication, 'Upgrading the Single Market: more opportunities for people and business' Point 3.2 of COM(2015) 550.

Many large-scale infrastructure projects are not executed according to plan. Budgets are frequently not respected and overspent. Planning and implementation often take considerably longer than initially foreseen⁴.

There are many reasons for this: uncertainty as to the level and means of financing, incomplete or superficial evaluation of needs, and changing economic and political conditions. The complexity and duration of public procurement procedures, together with errors in the procedures and weaknesses of certain Member States' public procurement systems⁵ also play a role.

Major cross-border projects closing infrastructure gaps between Member States face an additional challenge due to possible differences between the national legislative frameworks. Although the majority of the rules in public procurement have been harmonised at EU level, the public procurement directives allow for flexibility at the national level.

This situation needs to change. This Communication offers some key elements to contribute to that change. As announced in the Single Market Strategy⁶ and 'Europe investing again'⁷ Communications, the Commission is introducing a three-part mechanism for large infrastructure projects — to provide clarity and guidance to public authorities, and help them to exchange and adopt best practices. This will help to improve the effectiveness of national expenditure, which is essential to unlocking the full potential of investment in Europe.

This initiative is one of the pillars of the Commission's strategy to improve the effectiveness of public procurement and make it more strategic, thereby promoting competitiveness, jobs and growth.

Hence, the ex-ante mechanism is part of a procurement package, which includes a Communication on Public Procurement Strategy, 'Making Procurement work in and for Europe', and a Commission Recommendation on Professionalisation of Public Procurement: "Building an architecture for professionalisation of public procurement". In parallel, a consultation is launched on a draft guidance on innovation procurement, to support the breakthrough of new and more sustainable solutions for our societies.

When procurement is not planned carefully, it threatens public investment

A major town was in urgent need of a new non-residential construction. A private developer proposed constructing the necessary building. The public authorities and the developer entered into a rental agreement for the building before the work started. The rental agreement, made without any call for tender, contained the public authorities' detailed requirements for the building.

On the basis of a citizen's complaint, the Commission concluded that, as the project was covered by EU public procurement rules, it should have been put out to tender. The authorities of the town were obliged to terminate the rental agreement, or else face penalties from the EU. At the same time, they were subject to claims for damages from the private developer for terminating the rental agreement.

⁴ According to Bent Flyvbjerg's study, 'What You Should Know About Megaprojects, and Why: An Overview', 2014, 9 out of 10 of these projects go over budget or over time.

⁵ These weaknesses are highlighted for certain Member States in the 2017 European Semester: Country Reports (https://ec.europa.eu/info/publications/2017-european-semester-country-reports_en).

⁶ COM(2015) 550.

⁷ COM(2016) 359.

By using the proposed mechanism, the authorities could have avoided the legal difficulties enabling them to run an economically sound project.

2. THE VOLUNTARY EX-ANTE MECHANISM

National authorities and contracting authorities/entities have the option to use the mechanism on a voluntary basis to raise questions^{8;9} with the Commission and receive an assessment¹⁰ of a project's¹¹ compatibility with the EU regulatory framework before taking important steps, e.g. launching a call for tender for the main project works, signing an international agreement or deciding to use a negotiated procedure without prior publication.

National authorities and contracting authorities/entities dealing with large-scale and, in particular, cross-border projects can use this mechanism when and where there is a perceived need or usefulness. This will help reduce the risk of delays and cost overruns arising from difficulties in public procurement processes.

The mechanism will help to develop good practices within the revised and modernised European public procurement framework adopted in 2014¹². This may be especially important for concessions, which for the first time are fully subject to a harmonised EU regime.

The mechanism is intended for all types of infrastructure projects, in particular the transport and energy sectors, ICT and non-residential construction¹³. It is generally available above certain thresholds¹⁴. In addition, a Member State can request the Commission to use the mechanism for any lower value infrastructure projects it considers to be of high importance for itself and/or the EU as a whole¹⁵, for instance, for projects of common interest (PCI) in the field of the Trans-European Networks.

⁸ A request for support can only come from the authorities involved in the project. They need to supply specific information on it and only they can explain the issues that are of concern to them. Depending on the specific nature of each project and on the Member State concerned, these authorities can range from the ministry responsible (at national or regional level) for the sector, in which the project is developed, to the national procurement authorities or the contracting authorities/entities.

⁹ The questions and notifications can be sent in any of the EU official languages.

¹⁰ The views expressed by the Commission services in their assessment are not legally binding on those using the mechanism or on the Commission, and are without prejudice to the interpretation of the relevant rules by the Court of Justice of the European Union.

¹¹ A project represents the totality of works, supplies and services required for constructing and operating large infrastructure developments and can be procured by one or more contracting authorities. It can, for example, entail developing a piece of linear transport infrastructure, such as adjacent sections of a motorway aimed at connecting two nodes, or cover a single energy infrastructure project, such as constructing a power plant and its connections to the national grid.

¹² The 2014 reform contained the Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/EU on the award of concession contracts. The transposition deadline expired on 16 April 2016.

¹³ Large framework agreements covering several smaller projects are not covered by this mechanism.

¹⁴ The proposed thresholds have been defined on the basis of an analysis of infrastructure projects published in the Tender Electronic Daily from 2010-2015. They aim to focus the mechanism on the most important infrastructure investment projects in and for the EU.

¹⁵ Following reception of a request, the Commission services will assess its admissibility, and inform the Member State on the conditions for its acceptance.

The mechanism will analyse the issues raised in the light of the European public procurement framework. It will supplement, not replace, the existing national mechanisms for ex-ante checks or support. Member State authorities are responsible for the national dimension of public procurement, and any project will have to respect national laws, including, as applicable, Union law. Member State courts or remedies bodies are competent to decide on any conflict.

Before establishing the mechanism, the Commission consulted widely with national authorities, public procurement experts, business organisations, promoters and other stakeholders on its usefulness and on the different parameters. Stakeholders generally supported the proposed mechanism and indicated their readiness to use the various tools. Many suggested broadening its scope and lowering the threshold. A summary of the results of the open public consultation has been published¹⁶.

Assistance provided through the mechanism will complement existing support mechanisms such as the European Investment Advisory Hub (EIAH), the Joint Assistance to Support Projects in European Regions (JASPERS) and the European PPP Expertise Centre (EPEC). These mechanisms only apply to projects that benefit from, or focus on sectors eligible for, financial support from the European Commission or the European Investment Bank, and they do not comprehensively focus on the procurement issues and processes. For example, JASPERS' main role is to provide assistance until a project is submitted for appraisal for EU funding. EPEC assists public authorities only when they plan to realise their projects through public-private partnerships, with an emphasis on funding and financing. It does not assist in choosing the most appropriate procurement model, and it does not provide expertise for projects developed in another way. The voluntary ex-ante mechanism will provide specific and dedicated support on all public procurement questions throughout project implementation. It offers comprehensive assistance that completes the toolbox available to Member States.

Through a combination of tools, each with its own specific features, Member State authorities and promoters will benefit considerably from existing expertise for large infrastructure projects.

Projects funded under the EFSI or other EU instruments such as the Connecting Europe Facility will benefit from the mechanism alongside support from the European Investment Advisory Hub. Many are infrastructure projects, such as renewable energy projects (e.g. wind farms) and projects to upgrade transport networks. The EFSI has also been used to improve social infrastructure. Dealing successfully with public procurement issues can be crucial to the success of these projects.

In relation to the Investment Plan for Europe, the Commission announced¹⁷ that it would set up a single investment policy team, bringing together all the responsible Commission departments to be able to assess quickly and effectively large infrastructure projects. The first steps in setting up this function have been taken. The ex-ante mechanism will provide input to this framework, and will integrate with and support this broader function once it becomes fully operational. Finally, an assessment¹⁸ and public consultation¹⁹ are

¹⁶ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9021 .

¹⁷ COM(2016) 359; COM(2016) 581; COM(2016) 764.

¹⁸ http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3272163_en

¹⁹ https://ec.europa.eu/transport/themes/infrastructure/consultations/2017-ten-t-implementation_en

underway to determine what additional measures might be useful to assist project promoters implementing cross-border projects and other TEN-T projects.

3. STRUCTURE OF THE VOLUNTARY EX-ANTE MECHANISM

The mechanism will have three components:

- i. **a helpdesk,**
- ii. **a notification mechanism** and
- iii. **an information exchange mechanism.**

These components can be used independently of each other for each project.

3.1. The helpdesk

A helpdesk will be available to national authorities and contracting authorities/entities to provide guidance, answer questions, and clarify specific public procurement issues at an early stage in preparing public procurement decisions. The helpdesk will be available for projects whose total estimated value is at least EUR 250 million²⁰.

It can play an important role for cross-border projects in understanding the implications of different potential solutions.

National authorities can contact the helpdesk on specific issues they face when developing the procurement plan for a project. These questions could, for example, concern:

- the applicable EU legal framework governing the project: classic procurement or utilities directives; concessions directive, etc.
- conditions for exclusions from the directives;
- procurement procedures to be used and their specific features;
- selection and award criteria;
- inclusion of green, social and innovative considerations;
- how to implement joint procurement under Article 39 of Directive 2014/24/EU.

If need be, the helpdesk will continue to offer advice throughout the project, for example on issues related to award procedures or the possibility of amending existing contracts. However, any detailed assessment of the broader procurement plan or specific aspects of it, will have to be conducted under the notification mechanism. The conditions of the notification mechanism will apply.

All questions will need to be submitted through the dedicated electronic system at: <https://ec.europa.eu/growth/tools-databases/pp-large-projects/>. The electronic system will handle all exchanges of information, any subsequent questions and Commission replies. Through this system, users can submit additional questions or notify the Commission of

²⁰ A Member State can request the Commission to use the mechanism for any lower value infrastructure projects it considers to be of high importance for itself and/or the EU as a whole, for instance, for projects of common interest (PCI) in the field of the Trans-European Networks. Following reception of a request, the Commission will assess its admissibility, and inform the Member State on the conditions for its acceptance.

the project at a later stage. This will allow the Commission to keep track of the project development.

The Commission will endeavour to reply²¹ to questions within one month. It can, if necessary, request additional information relevant to the analysis, in which case the deadline for replies will be extended.

Once a request is closed, an anonymised version of the questions and answers will be published on the website of the ex-ante mechanism²². All confidential and commercially sensitive information will be removed in cooperation with the relevant contracting authority²³. This will enable contracting authorities to learn from a wide range of cases submitted to the Commission, including for projects that are not directly eligible for assistance under the mechanism.

Future construction of a railway line — assistance from the helpdesk

A contracting authority is considering the best procurement solution for constructing a new railway line, 150 km in length. It could contact the helpdesk, once or more often, to inquire, for instance:

- *How should the public-private partnership that will build and operate the railway be developed? Does the envisaged distribution of risks require using procurement procedures in the field of utilities or will the project fall under the concessions directive?*
- *If the country concerned is considering signing an international agreement covering the implementation of the project, would this agreement exempt the procurement procedures from the scope of the directives?*
- *How best could a competitive procedure involving negotiation be designed and managed? How could the number of qualified candidates invited to participate in the procedure be reduced, etc.?*
- *How could goals of green, social, and innovative procurement best be included in the project?*

If the railway line links two different countries, the helpdesk could also be contacted:

- *to seek clarification of the agreement needed between the contracting authorities from two countries to undertake joint procurement;*
- *to clarify the applicable procurement regime when two Member States want to set up a joint entity to realise a project.*

If a contract needs to be modified after it has been signed, an authority could submit questions concerning the conditions under which contracts could be modified. This would help it to decide whether or not a modification is possible without a new transparent procurement procedure.

²¹ Please see footnote 10.

²² Please see footnote 10.

²³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents applies to all documents drawn up or received by the Commission and in its possession.

3.2. The notification mechanism

Once a decision is reached on how the project will be carried out from a public procurement point of view, and the national authorities and/or contracting authorities/entities have advanced with the preparation of the necessary tender documentation²⁴, they will have the possibility of notifying the Commission of the procurement plan of infrastructure projects whose total estimated value exceeds EUR 500 million²⁵. The Commission services will then provide an assessment²⁶, in which the Commission services express their views on whether the procurement plan complies with EU procurement rules, without prejudice to any future legal interpretation or assessment.

While the helpdesk is available for specific questions, the notification mechanism covers the broader procurement plan. The procurement plan defines how a project will be implemented from a public procurement point of view. For example, it establishes (i) whether the project will use a Build, a Design-Build or a Design-Build-Operate contract, (ii) whether a project will be executed through many separate tenders and which procurement procedures will be used, and (iii) how procurement for a cross-border project will be carried out.

National authorities and/or contracting authorities/entities can notify the Commission of the overall procurement plan of the project and/or specific issues of decisive importance to the whole project. In the latter case, they should clearly identify the specific elements requiring an assessment.

Most large infrastructure projects use several calls for tender. In order to ensure effective treatment and keep the mechanism easy to use, authorities may want to raise specific issues linked to one of the tenders, but they should not notify each individual call for tender to the Commission.

When implementing projects, it is common practice for contracts to be amended to reflect changes to the initial conditions. Such changes raise complex legal issues; although the procurement directives already give guidance and clarify the conditions for such amendments. Therefore, national authorities and/or contracting authorities/entities can also notify the Commission of their proposal for specific contract amendments.

Procurement plans can also change over time as a project develops. National authorities can inform the Commission of any substantial changes to a previous notification that might have a bearing on the outcome of an assessment, e.g. changing a public procurement procedure from a standard to an exceptional procedure.

Future construction of a railway line – notification to the Commission

For the construction of a railway line, the authorities have decided to split the project into three sections of approximately 50 km each. They will be tendered out separately,

²⁴ The helpdesk is the appropriate tool for clarifying issues or asking questions in the lead-up to these decisions.

²⁵ Please see footnote 20.

²⁶ Please see footnote 10.

for construction and maintenance, under the utilities procurement framework.

The authorities want to check that this approach is in line with the EU procurement rules, and notify this plan to the Commission. This notification will need to include information on the procurement procedures to be used to award the contracts for the three lots, the planning of the procurement process, the envisaged timing, the advertising and information process, etc.

The contracting entity can indicate specific issues needing particular attention such as the definition of the award criteria in the technical specifications for the first segment.

If the contracting entity plans to modify a contract, it might want to receive an assessment from the Commission services that their plan is compliant with EU rules. In this case, the contracting entity could notify this modification to the Commission.

3.2.1. Notification procedure

National authorities and contracting authorities/entities (notifying authorities) will use a standard form accompanied by supporting documents. The structure of the standard form is annexed to this Communication.

Besides identifying the project and the authority notifying it, the standard form will request information on the procurement plan for the entire project, which is necessary for the analysis. This information includes:

- the subject matter of the project,
- the project value,
- the organisations involved (contracting authority/authorities etc.),
- the different phases of the project,
- whether the project is expected to be funded by the EU,
- whether the project has been submitted to a national competent body for approval,
- the planning of the procurement process,
- the conditions requiring modification of the contract, when the subject of the notification is a contract amendment.

Notifying authorities will also be able to upload documents that they consider relevant to the analysis. They should, however, only provide information that is necessary for the assessment.

The Commission and the notifying authority will, if necessary, stay in contact to clarify aspects of the notification.

For the purpose of notification, the notifying authorities will use a dedicated electronic system, also used for the helpdesk (<https://ec.europa.eu/growth/tools-databases/pp-large-projects/>). The system will provide the necessary security for submitting and handling data.

3.2.2. The Commission's response

On the basis of the information provided, the competent Commission services will deliver its views on the compatibility of the project's procurement plan with EU procurement legislation, or of the specific issues raised by the national authorities in a letter. It will also provide an assessment of any specific issues raised in the notification.

This assessment will not include the views of the Commission services on compliance of the measure with provisions of EU law other than public procurement. The assessment of the Commission services will always be based on the information provided and the conditions applicable at the time.

The Commission endeavours to give its response within 3 months of the date of notification. Should the Commission request additional information from the national authorities, a stop-the-clock rule will apply.

The Commission will also invite the authorities concerned to provide documents linked to the project for the information exchange mechanism, as appropriate and when available. All confidential and commercially sensitive information will be treated accordingly and removed in cooperation with the relevant authorities²⁷.

3.3. The information exchange mechanism

The information exchange mechanism is a knowledge management tool for use by national authorities and contracting authorities/entities. It aims to build up reference classes of similar projects as a means of sharing experience. It will also serve as a platform for exchanges on different aspects related to projects, such as the type of procurement procedure, the project stages, the problems in implementing a project, etc.

In the initial phase, this tool will include two components: a widely accessible database containing all relevant information, and a platform where stakeholders can exchange views and information. The two elements will become available in early 2018.

3.3.1. Database structure, source and accessibility

The database will contain various types of documents related to the procurement process of large infrastructure projects. These include tender files, documents on the organisational structure of the project, contracts, guidelines on certain types of procedures, specific information on cross-border projects and rulings from the European Court of Justice. The Commission will manage the database and upload documents in its possession or which Member States and/or promoters have submitted.

National authorities and contracting authorities/entities are encouraged to submit to the Commission information on large-scale infrastructure projects that are already implemented or which are being undertaken. The database will fulfil its function as an information tool for national authorities best if, from the outset, it contains information on projects that have already been fully implemented.

The database will be widely accessible upon registration. Thus, the information exchange mechanism will also benefit private project promoters and contracting authorities

²⁷ Please see footnote 23.

developing projects whose value falls below the applicable threshold for using the helpdesk and the notification mechanism.

Information provided by authorities in the framework of the notification procedure will be made available in the database only with the agreement of the authority concerned. For all other information, Member States must ensure that sensitive information has been removed²⁸.

Documents can be provided in any of the official languages of the EU. The database will include a machine translation facility. It will be linked to other similar initiatives, such as the JASPERS' Knowledge and Learning Centre.

3.3.2. The platform

Peer-to-peer discussions are one of the most effective tools for learning and development. Therefore, alongside the database, the Commission will create an IT platform to facilitate the direct exchange of information and experience between those involved in developing large infrastructure projects in the EU. The platform will be open to professionals in the EU upon registration. It will allow for the creation of discussion subgroups per type of project or procurement issue. These groups may be open or closed, i.e. accessible only to the members initiating the discussion.

4. CONCLUSION

The ex-ante mechanism is not a one-off measure. It is part of the new partnership proposed by the Commission with and between national, regional and local authorities. It is directly linked to the overarching objective of making public procurement a more strategic tool. The success of this mechanism will depend on this concept of partnership and on widespread use of the proposed tools in the Member States. National authorities are invited to actively promote the mechanism and to make the best and most appropriate use of the assistance offered by the mechanism.

This action has been developed with particular attention to the needs of stakeholders, expressed either in the public consultation or on other occasions. As stakeholder needs may evolve over time, the Commission will monitor and evaluate the use of the ex-ante mechanism. It will also evaluate whether the tool has delivered effective support. The assessment will be performed when the tools have been fully operational for 24 months or earlier if appropriate and necessary. Based on these elements, the tools will be adjusted accordingly if need be.

²⁸ Please see footnote 23.

Annex I

Standard form

Identification questions

Title of the project: _____ Sector: _____
Contracting authority/entity: _____ Member State: _____
Authority notifying the projectⁱ _____ Contact details: _____
Total estimated cost _____

This notification concerns:

A new project A contract modification

Project description

Please describe the relevant elements of the projectⁱⁱ:

Please describe the procurement plan for the projectⁱⁱⁱ:

For new projects

Please describe the different phases in which the procurement will be carried out and the estimated start date/timetable of the tendering procedures:

Please specify the issues you want the Commission Services to assess:

For contract modification

Please describe the contract needing modification and the circumstances for this^{iv}:

Additional information

Have you obtained an opinion on the procurement aspects of this project from a competent national authority? If yes, please provide it.

No

Yes

Does the notification contain sensitive information? If yes, please specify which ones..

No

Yes

Additional information relevant to the question:

ⁱ If this is different from the contracting authority/entity.

ⁱⁱ Please include in the description: the project's objectives, the main stakeholders, the project's funding and financing, the current stage of the project, basic technical information (especially functional requirements) and, if available, evaluation criteria and social clauses.

ⁱⁱⁱ The procurement plan defines how a project will be implemented from a public procurement point of view. It establishes, for example, (i) whether the project will use a Build, a Design-Build or a Design-Build-Operate contract, (ii) whether a project will be executed through many separate tenders and which procurement procedures will be used, and (iii) how procurement for a cross-border project will be carried out.

^{iv} The description should also include the impact of the potential change on the total value of the contract.