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Public Investment through Public Procurement: Sustainable Recovery and
Reboosting of a Resilient EU Economy

Delegations will find in the Annex the text of the above draft Council Conclusions as approved by the Working Party on Public Procurement

Draft Council Conclusions**Public Investment through Public Procurement: Sustainable Recovery and Reboosting of a Resilient EU Economy**

THE COUNCIL OF THE EUROPEAN UNION

RECALLING the European Council Conclusions of 21 July 2020 stating that the plan for European recovery will need massive investment in a sustainable and resilient recovery, in creating jobs and repairing the immediate damage caused by the COVID-19 pandemic while supporting green and digital priorities;

RECALLING the European Council Conclusions of 2 October 2020¹ underlining the need for a strong and deep Single Market and the development of further instruments to address the distortive effects of foreign subsidies on it;

RECALLING that the European Union and its Member States have set up a recovery package to strengthen the European economy after the crisis that provides finance for investment to mitigate the socio-economic damage from the COVID-19 crisis;

EMPHASISING that common effort is not only necessary to support the most affected businesses but also to make public investments that foster convergence, resilience, and sustainability, taking into account the 2030 Agenda for Sustainable Development;

EMPHASISING the important role of public investment for the recovery and the growth path of the European economy that is fit for the future, and STRESSING that a considerable part of the public investment is carried out through public procurement (accounted for around 14% of EU GDP in the pre-COVID-19);

¹ European Council Conclusions of 1-2 October 2020: ST 13/20;

HIGHLIGHTING the crucial role of a well-functioning public procurement system which includes adequate risk management strategies to maintain public services and provide services of general interest, especially during times of crisis and emergency situations;

EMPHASISING that the EU Public Procurement Directives² provide public buyers with a legal framework to guarantee accountability in public spending;

RECALLING that during the COVID-19 pandemic, public buyers have experienced difficulties in ensuring the availability of necessary goods and services to fight the crisis situation; RECALLING the Commission Communication “Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis”³ which points at solutions in the existing EU legislation that provide instruments for public buyers in the Member States to cope with emergency situations such as the COVID-19;

² Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC;

Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC;

Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC and;

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts;

³ OJ 2020/c 108 I/01;

STRESSING the need for preventive measures regarding preparedness and an evaluation of the ability of the legal framework for public procurement instruments to cope with crisis situations, and to create necessary conditions for boosting the recovery;

REFERRING to Article 92 of Directive 2014/24⁴ on public procurement, enabling the Commission to review the economic effects on the internal market, in particular in terms of factors such as the cross-border award of contracts and transaction costs, resulting from the application of the thresholds;

RECALLING the recent Conclusions of the Council of the European Union on the Single Market⁵ which highlight the important role of public procurement for achieving the twin green and digital transitions, and emphasise the need for raising awareness of good practices, namely through the use of targeted criteria and digital public procurement tools in all relevant public tenders;

EMPHASISING that the efficiency of public procurement will have an important effect on the timely, adequate, and fit for the future public investments that support the recovery; and

UNDERLYING that the efficiency of public procurement will therefore constitute an important success factor for the recovery, growth, and creation of fair jobs, thus strengthening the economic and social resilience of the Union, the protection of its citizens' health, and of the environment;

REFERRING to the Commission's guidance on the participation of third country bidders and goods in the EU procurement market⁶; REFERRING to Article 25 of Directive 2014/24/EU and Articles 43 and 85 of Directive 2014/25/EU;

⁴ Directive 2014/24/EU;

⁵ ST 10698/20: 'A Deepened Single Market for a Strong Recovery and a Competitive, Sustainable Europe';

⁶ Communication from the Commission C (2019) 5494 final;

EMPHASISING that framework agreements are an important and widely used procurement tool in including different public buyers and their procurement needs by means of necessary flexibility in this instrument;

CALLS on the Commission and the Member States to work in close partnership with the European Parliament, with the regional and local authorities, the Economic and Social Committee, and the Committee of the Regions when pursuing these common objectives through effective governance structures and strong coordination at national level, and in particular for:

Enhancing efficiency of public procurement to boost recovery and to tackle future crises

1. CONSIDERS that public investment has to be accelerated to help the recovery of the EU economy, while EMPHASISING the need for transparency, equal treatment, fair competition and integrity in public procurement; URGES the Member States to use the opportunities of the relevant national and European frameworks to ensure swift and efficient procurement, and CALLS on the Member States to raise awareness among decision makers regarding well functioning structures of public buyers, further invest in the expertise, and in the professionalization of public buyers, for example of Central Purchasing Bodies, and reinforce the capacity of public buyers in order to address strategic priorities, in particular, job creation, repairing the socio-economic damage from the COVID-19 crisis, the support for SMEs as well as green and digital priorities;
2. STRESSES the importance of cooperation between public buyers within and among the Member States for efficient public investment during the recovery and to tackle future crises; CALLS, therefore, on the Member States to step up their efforts, and, where appropriate and feasible, set-up joint strategies and mechanisms while bearing in mind the specific needs and interests of SMEs, CALLS on the Commission to assist the Member States by providing support and guidance in respect of cross-border and joint procurements;

3. CONSIDERS that the digitalisation of public procurement will substantially enhance the digital transformation of the EU economy, reduce administrative burden, foster transparency and accountability, and improve the business environment of economic operators; CALLS on the Member States to accelerate the digital transformation of public procurement, also through public-public cooperation; CALLS on the Member States to cooperate in the procurement of digital solutions to facilitate data processing, while ensuring interoperability;
4. URGES the Member States and the Commission to monitor the implementation of public investments and measure the progress in achieving innovative and sustainable objectives in accordance with the appropriate sectoral strategies and legislation; CALLS on the Member States to opt for an ambitious implementation of the new generation of standard forms (eForms), including, where appropriate and feasible, as mandatory fields areas, such as green, socially responsible and innovative public procurement;
5. STRESSES the utmost importance of swift and effective remedies systems for the timely and successful realisation of public projects, and URGES the Member States to monitor the effectiveness of their own remedies systems. WELCOMES the enhanced cooperation among the Member States through the Network of First Instance Review Bodies;
6. CALLS on the Commission and the Member States to identify best practices, and develop common recommendations and guidance with regard to a timely conduct of public procurement procedures;

7. CALLS on the Commission to review the economic effects on the single market, resulting from the application of the thresholds, set in the Public Procurement Directives⁷, in light of the need to boost investment throughout Europe in the aftermath of COVID-19, bearing also in mind SMEs' access to the public procurement markets, and the role of SMEs in the European Union's recovery, report thereon to the European Parliament and the Council, as well as to consider suggesting an increase of the threshold amounts applicable during the next round of negotiations, where possible and appropriate, as stated particularly in Art. 92 of the Directive 2014/24/EU;
8. CALLS on the Commission and the Member States to identify additional measures to reduce bureaucratic burden and compliance costs and to also reduce procedural constraints on the public buyers with the aim to simplify and enhance public investment, while ensuring a maximum of effective competition between economic operators and improving the functioning of the Single Market, thereby in particular:
- examine the efficiency and effectiveness of the public procurement framework including the Public Procurement Directives, in line with the GPA;
 - explore the possibilities to harness the 'light regime' under Title III of Directive 2014/24, and consider an extended application to other services, in accordance with the provisions of the GPA;
 - as far as appropriate and feasible, clarify and, if needed, increase the flexibilities in the use of framework agreements with regard to determining the quantity of works, services, and supplies concerned as well as with regard to the term of the framework agreement envisaged, bearing also in mind SMEs' access to the public procurement markets;
 - for the Commission, to review the economic effects on the internal market of applying public procurement rules in sectors where there might be no cross-border interest (such as youth and elderly care) and report on the results of the review and inter alia possible adjustments of the legal framework, if needed;

⁷ See Footnote 2;

- examine the possibility and suitability of approximating some arrangements applicable to the contracting authorities (Directive 2014/24) and the contracting entities (Directive 2014/25);
 - consider how to tackle concerns with ensuring security (reliability) of supply.
9. CALLS on the Commission to assist and facilitate investment efforts in the procurement process to address urgent challenges that arise from the pandemic situation, including digital capacities, and, in close cooperation with the Member States, identify the measures needed to deal efficiently with future emergency and crisis situations in public procurement, thereby considering, in particular:
- providing clarification on the scope of Directive 2014/24, especially concerning the use of the negotiated procedure without prior publication; this clarification should comprise guidance specifying the reasons for extreme urgency and a list of possible examples of highly sensitive sectors;
 - evaluating the need to introduce further exclusions to the application of the procurement Directives for the procurement of specific strategic goods and services in emergency and crisis situations, resulting from pandemics, terrorist attacks, state of defence, serious and present threats to public safety or natural disasters;

Setting the right incentives for innovative and sustainable investment and growth in the EU through public procurement

10. WELCOMES the Commission's proposals in the Sustainable Europe Investment Plan to introduce green public procurement criteria or targets in sectorial initiatives, EU funding or product-specific legislation, and to set up a Sustainable Procurement Screening; CALLS on the Commission to develop guidance and support tools to harmonise project implementation for sustainable public infrastructure projects, thus to increase the overall sustainability and attractiveness of the investments;

11. UNDERLINES the role model function of the public sector in meeting the objectives of the 2030 Agenda for Sustainable Development; the European Green Deal and the objective of achieving climate neutrality by 2050, the Circular Economy Action Plan, the EU Biodiversity Strategy for 2030 and the UN Guiding Principles on Business and Human Rights; in this context, SUPPORTS, as far as appropriate and feasible, ambitious environmental considerations, for example criteria or targets, bearing also in mind their practical implications for procurement procedures and STRESSES the need for reporting and monitoring as intended in the Circular Economy Action Plan; CALLS on the Commission to consider human rights safeguards and human rights due diligence standards, thereby fostering policy coherence with regard to the Action Plan on Financing Sustainable Growth, in particular Regulation (EU) 2020/852⁸ on the establishment of a framework to facilitate sustainable investment, as well as the Commission's initiative on Sustainable Corporate Governance⁹;
12. WELCOMES the Commission's initiative in the Circular Economy Action Plan to support capacity building with guidance, training, and dissemination of good practices to underline the important role of public authorities in contributing towards the 2050 climate-neutrality goal. This exercise should aim at enabling public buyers to consider climate-friendly and resource-efficient products and services, and, as comprehensively as possible, should take into account (external) life cycle and economic costs in their purchasing process; and CALLS on the Commission to develop and disseminate operational methods for calculating life cycle costs, particularly with regard to the cost imputed to environmental externalities;

⁸ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088;

⁹ European Commission: New Consultation on Sustainable Corporate Governance, September 2020;

13. CONSIDERS that public buyers should use their purchasing power strategically to obtain better value for money, and support the transition to a greener, more innovative and circular economy, in particular by investing in sustainable infrastructure, in reusable, recyclable, repairable, and resource efficient products, and in the renovation of public buildings to improve their sustainability and optimise life cycle costs; EMPHASISES that public purchases can and should be used to support social considerations and the protection of human rights in global supply chains, social inclusion and fair employment to counter the socio-economic effects of the crisis and CALLS on the Commission to provide guidance including examples on how to implement such goals within a procurement procedure;
14. EMPHASISES that transparency, accountability and fair competition will be crucial to ensure the successful and efficient use of EU and national resources for the green transition and the recovery efforts;
15. CONSIDERS that it is essential to know how to realise sustainable and innovative procurement in order to harness the benefits of public purchasing power and, therefore, CALLS on the Member States and the other Institutions of the European Union to maximise the transformational power of public procurement by developing crucial skills and capacities to meet current challenges, and, on the Commission, to support Member States in creating a European network of best practices advisory hubs for the development of sustainable and innovative procurement; INVITES the Member States to foster education, training, and information campaigns for public buyers;

Contributing through public procurement to a more resilient EU economy

16. CONSIDERS that innovation plays a key role in the resilience of the European economy, and EMPHASISES that public buyers should stimulate the demand for innovation; CALLS on the Member States to encourage and foster innovative procurement;
17. NOTES that cooperation between public buyers can shape markets, stimulate innovation, and increase efficiency of public investment; CALLS on the Member States and the Commission to encourage interaction between public buyers and industrial and innovation ecosystems in order to facilitate the matchmaking of demand, including through setting platforms that allow interactions between buyers and suppliers for better sourcing strategies;
18. RECOGNISES the need to enhance the resilience of the European economy, and STRESSES that Member States and their public buyers have a vital role to play in this regard, especially as they are crucial investors in several sectors of the economy and thus might potentially be exposed to unfair external competition;
19. CALLS on the Commission and the Member States to cooperate in developing guidelines and criteria through a common methodology to support the public sector in sourcing through transparent, reliable, flexible, and diversified supply chains with the aim to strengthen the European economy, and reduce strategic dependence on third countries, especially in certain sectors of the European economy which are crucial for the functioning of public services and public health care, e.g., medicinal products and medical devices; the impact on competition, prices and procurement procedures shall be thoroughly considered in determining a proportionate and targeted approach to address this issue;

20. EMPHASISES the need for the EU to promote an ambitious and balanced free trade agenda, while safeguarding its interests in the light of unfair and abusive practices, and ensuring reciprocity; WELCOMES the work on the International Procurement Instrument¹⁰ to be accelerated to promote better access to public procurement in third countries¹¹, and the development of further instruments to address the distortive effects of foreign subsidies in the Single Market; CALLS on the Commission to consider how to tackle distortive effects resulting from a participation of bidders with activities in jurisdictions included on the EU list of non-cooperative jurisdictions for tax purposes leading to unjustified competitive advantages in procurement procedures.
21. CALLS on the Commission to further clarify and update, on the basis of the EU's international commitments and the EU Public Procurement Directives, the room for manoeuvre for Member States and public buyers to draw the consequences from the scope of these agreements with regard to the participation of tenderers and products from third countries.
22. CALLS on the Member States to develop comprehensive purchasing policies and strategies, which should in particular target sectors where public demand has a significant impact, such as medicinal products, medical devices or IT, also taking into account considerations about resilience, risk management, and security of supply.

¹⁰ ST 5752/16- COM (2016) 34 final and 2012/0060 (COD);

¹¹ European Council Conclusions of 1-2 October 2020: ST 13/20.