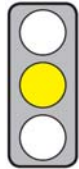


KEY ISSUES

Objective of the Directive: Procurement is to be used to the benefit of societal goals. In addition, the scope is to be substantiated.

Parties affected: Entrepreneurs and contracting entities.



Pros: The strict requirements for in-house procurement and the cooperation between contracting authorities without requests for tender mean that more contracts have to be put out to tender throughout the EU. This increases the chances for cheaper private sector providers.

Cons: (1) The instrumentalisation of procurement for environmental and socio-political targets leads to an inefficient use of taxes and possible misuse.

(2) The EU has neither the competency for the introduction of a single Member State oversight, nor is this in line with the federal structure of the German Constitution.

CONTENT

Title

Proposal COM(2011) 895 of 20 December 2011 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**

Brief Summary

► Revision of the public procurement law

In order to revise public procurement, the Commission has proposed three Directives and one Regulation with the following scope:

- COM(2011) 895: Purchase of construction works, goods and services for the water, energy, transport and postal services sectors (Sector Directive; see this CEP Policy Brief)
- COM(2011) 896: Other purchase of works, goods and services (general Directive; see [CEP Policy Brief](#))
- COM(2011) 897: Concessions (Concessions Directive)
- COM(2012) 124: Use of public procurement in trade policy

► Scope of the Sector Directive

- The Directive replacing Directive 2004/17/EC applies to the purchase of construction works, goods and services through “contracting entities” for the water, energy, transport and postal services sectors.
 - This includes in particular supplying the public with gas, heat, electricity, drinking water and transport services, the provision of ports and airports, the collection and delivery of postal services and the promotion of fossil and other “solid” fuels (Art. 5-11).

The Directive does not apply to:

- contracts in other areas (here s. COM(2011) 896 and [CEP Policy Brief](#)) and
- the procurement of concessions (here s. COM(2011) 897).
- “Contracting entities” can be either of a public or of a non-public nature.
 - Public contracting entities are (Art. 4 (3) lit. a)
 - contracting authorities (Art. 2 (1-4)) such as authorities, public undertakings not having an industrial or commercial character (“bodies governed by public law”) and associations formed by one or more such entities, as well as
 - public undertakings having an industrial or commercial character (Art. 2 (5), Art. 4 (1)).
 - Public undertakings are undertakings governed by public authorities.
 - Non-public contracting entities are private undertakings which operate in the sectors and to whom monopolistic and oligopolistic rights are granted (“special or exclusive rights”) by a Member state authority (Art. 4 (3) lit. b).

► Thresholds for the obligation to tender

- The purchase of works, goods and services in the above-mentioned sectors must be put out to tender at EU level if the estimated value of contracts reaches the following thresholds (Art. 12):
 - EUR 5 million for works contracts,
 - EUR 400,000 for goods and service contracts and
 - EUR 1 million for social services.

► **Exemptions from the obligation to tender**

- A contract is exempted from the obligation to be tendered throughout the EU (Art. 21) if:
 - awarded by a contracting authority to a legal person controlled by them (in-house procurement), if (Art. 21 (1)):
 - the legal person carries out at least 90% of its activities for the contracting authority and
 - there is no private participation in the legal person, or
 - contracting authorities carry out their service tasks jointly (Art. 21 (4)), provided
 - this involves mutual rights and obligations, and
 - the cooperation is governed by a “public interest”, and
 - the contracting authorities do not perform on the open market more than 10% of the activities relating to the cooperation, and
 - only the actual costs accruing to the contracting authorities are reimbursed, and
 - there is no private participation in any of the contracting authorities.
- A contract is not subject to the EU-wide tender obligation if a non-public contracting entity is granted monopolistic and oligopolistic rights by means of a competitive procedure (Art. 4 (2)).
- A contract is not subject to the EU-wide tender obligation if in response to a Member State request the Commission finds that an activity is directly exposed to competition on markets not subject to access restriction (Art. 27 et sqq.).
- A contract is not subject to the EU-wide tender obligation if awarded to a private or public “affiliated undertaking” (Art. 22 (3)), provided the main activity of the affiliated undertaking is to service contracts to undertakings to which it is affiliated. An undertaking is deemed affiliated if (Art. 22 (1) and (2)):
 - the contracting entity exercises a dominant influence on the undertaking;
 - the undertaking exercises a dominant influence on the contracting entity;
 - a third undertaking exercises a dominant influence on the contracting entity and the undertaking or
 - it consolidates its annual financial statement with the contracting entity.

► **Procurement procedures**

Within a tender exercise, the contracting entity may choose from several procedures (s. [CEP Overview](#)).

- Always admitted are the “open” and/or the “restricted” procedures, as well as the negotiated procedure with prior call for competition (Art. 39 (1)). Upon publication
 - each provider may submit an offer in the case of open procedures (Art. 40),
 - in the case of restricted procedures, each provider may submit a request to participate; however, only selected providers may place a tender (Art. 41) and
 - of the negotiated procedure with prior call for competition, only selected providers may negotiate with contracting entities and submit tenders (Art. 42).
- Under certain conditions, the negotiated procedure without prior call for competition (Art. 44) and the innovation partnership (Art. 43) are also admitted. The latter aims to facilitate the development and the subsequent purchase of innovative products through contracting entities (Art. 43).

► **Using procurement for societal goals**

- The Commission proposes using procurement in order to meet societal goals. This includes the fostering of innovation, green policies, employment, public health and the inclusion of vulnerable groups (Explanation p. 12).
- The contracting entity may:
 - enter into an innovation partnership with a provider (Art. 43);
 - define “social and environmental considerations” relating to the performance of a contract (Art. 80), e.g. the employment of the long-term unemployed or training measures for the unemployed or young persons (Recital 50);
 - exclude a provider from participating (Art. 74 (1) in conjunction with Art. 55 (3) general Directive) or reject the tender of a provider (Art. 70 (5), Art. 79 (4)) where it infringes European or international rules relating to social, labour or environmental law; or
 - stipulate the existence of environmental, social or other “labels” (Art. 55 (1)).

► **Easier access for small- and medium-sized enterprises (SME) to the procurement procedure**

- The contracting entity may split contracts into partial contracts (“lots”) and limit the number of lots for which a provider may submit or accept tenders (Art. 59 (1) and (2)).
- Where the contracting entity fixes a certain yearly turnover, it must not be exceeded for more than three times the contract volume (Art. 74 (2) in conjunction with Art. 56 general Directive).
- Instead of documents, providers can submit to the contracting entity a self-declaration that the criteria requested by the contracting entity are complied with; proof of this must not be given until the provider is awarded the contract (Art. 74 (3) in conjunction with Art. 55–57 general Directive).

► **Use of electronic communication means**

By 30 June 2016 at the latest, the contracting entity must carry out the entire information exchange with providers electronically (Art. 34).

► **Award criteria**

- The contracting entity may only choose between those providers who comply with the criteria they have set in relation to societal goals, if set at all.
- Within this framework, the contract award criteria are either the “most economically advantageous tender” or the lowest cost or the lowest life-cycle costing (Art. 76 (1)).
Life-cycle costing calculation takes into account a product’s basic costs during its life-cycle (Art. 77). This includes internal costs such as maintenance, recycling and energy costs, and external environmental costs such as those generated by pollutant emissions and the costs of reducing climate change.
- Providers with “abnormally” low tenders must explain their prices if (Art. 79 (1)):
 - they are more than 50% lower than the average price of the remaining tenders; and
 - more than 20% lower than the second lowest tender; and
 - at least five tenders have been submitted.

► **National oversight**

Each Member State must appoint a single, independent oversight body responsible for monitoring the entire procurement and examining complaints (Art. 93).

Changes to the Status Quo

- To date, only the ECJ has defined the scope of the Directive concerning in-house procurement and the cooperation between contracting authorities. Now the Directive itself defines this scope, too.
- New is the possibility to enter into innovation partnerships with providers, to exclude providers in the case of infringements against international and European social, labour or environmental provisions and to prescribe social labels.
- New are all measures to facilitate SME access to procurement.
- New is the introduction of a central oversight body.
- New is the obligation to convert to electronic communication means.

Statement on Subsidiarity by the Commission

According to the Commission, different national rules would impede the internal market.

Policy Context

The modernisation of public procurement is one of twelve levers announced in the Single Market Act to boost growth and strengthen confidence [COM(2011) 206]. Following on from a Green Paper [COM(2011) 15; s. [CEP Policy Brief](#)] and a consultation, the Commission has published a package of laws to reform public procurement.

With regard to public procurement through contracting authorities, the Sector Directive allows for the same degree of misuse in sectors as do the areas covered by the general Directive. In this respect, both Directives are identical. However, the sectors include scope for misuse which are inherent in the sectors: in the case of non-public contracting entities, the granting of monopolistic or oligopolistic rights creates potential for misuse with the authorities granting such rights. For instance, an authority might link the granting of such a right to the condition of favouring local enterprises when awarding the contract. Something similar is true for public undertakings which trade industrially or commercially, as the public authorities can influence them due to their financial participation in them. For these reasons, the obligation to tender applies to these cases.

Legislative Procedure

20 December 2011	Adoption by the Commission
30 May 2012	Debate in the Council
10 December 2012	1. Reading in the European Parliament

Options for Influencing the Political Process

Leading Directorate General:	DG Internal Market and Services
Committees of the European Parliament:	Internal Market and Consumer Protection (leading), rapporteur: Marc Tarabella (S&D Group, BE);
Committees of the German Bundestag:	Economy and Technology (leading)
Decision mode in the Council:	Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competency:	Art. 53 (1), Art. 62 TFEU (mutual recognition and coordination) and Art. 114 TFEU (Internal Market)
Form of legislative competency:	Shared competency (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The statutory requirements relating to procurement are expanded significantly. Consequently, the administrative burden is increased for both the contracting authorities and the providers.

The strict requirements for in-house procurement and for the cooperation between contracting authorities without requests for tender will lead in future to significantly more contracts having to be put out to tender throughout the EU. On the one hand, this increases the administrative burden, on the other hand, **it makes room for cheaper private sector providers of goods and services.**

Clarifying when the Directive applies to in-house procurement and the cooperation between contracting authorities increases legal certainty. The prohibition of private participation in in-house procurement and the cooperation between contracting authorities helps prevent distortion of competition. The exemption from the procurement requirement for (private and public) affiliated companies corresponds to in-house procurement and the cooperation between contracting authorities. It does not lead to distortion of competition as the activities of the affiliated undertaking are mainly focused on internal projects.

An innovation partnership can give participating companies for a long period a competitive advantage over other enterprises. Therefore, there is the threat of a distortion of competition. Consequently, criteria should be developed which can prevent this. In particular, an innovation partnership should be a subordinate option, applicable only if other procedures do not qualify.

The – already contained in the existing Directive and now tightened even further – instrumentalisation of procurement for societal objectives, in particular for environmental and social considerations, during contract performance leads to an inefficient use of taxes if, in the process, this raises production costs or restricts competition on the part of providers. **This would result in higher taxes or higher public indebtedness.**

Moreover, the administrative burden is increased both for the tenderers, who must prove compliance with the additional requirements, and for the contracting entities, who must review this evidence. The use of labels can only partly mitigate this, as the number of labels is constantly increasing.

Also **problematic is the fact that the social and environmental concerns** pursuant to Art. 80 **must not necessarily be linked to the subject-matter of the contract, which allows for a possible misuse.** The relevant reference under Recital 50 does not suffice.

The inclusion of external environmental costs in the calculation of life-cycle costing is not an efficient way to achieve environmental policy targets. Environmental protection is already regulated through numerous measures such as statutory requirements or emissions trading. In order to improve environmental protection, existing measures should be expanded [s. [CEP Policy Brief](#) on green public procurement COM(2008) 400].

Legal Assessment

Competency

Unproblematic, apart from one exception: **The EU competency does not involve the right to oblige Member States to establish a central oversight body, since such structural measures would interfere with national administration powers** without engendering any recognisable improvements in the internal market.

Subsidiarity

Unproblematic.

Proportionality

Unproblematic.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

The introduction of a central oversight – mandatorily in the form of a federal authority - would infringe the federal structure of the German Constitution according to which the federal states are responsible for the establishment and definition of the tasks authorities carry out and of the administrative procedures (Art. 84 GG – German Constitution).

Conclusion

The strict requirements for in-house procurement and the cooperation between contracting authorities without prior requests for tender lead to more contracts having to be put out to tender throughout the EU. Thus cheaper private sector service providers are given the chance to be awarded tenders. The danger of instrumentalising procurement for environmental and social targets when performing contracts is that taxes be used inefficiently. Since social and environmental considerations need not have any factual relevance for the contract object, misuse is possible. The EU does not have competency for the introduction of a single Member State oversight, nor is this in line with the federal structure of the German Constitution.