



First reaction to the European Commission's proposal for a new directive on public procurement

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**Proposal for a Directive of the European Parliament
and of the Council on public procurement**

COM(2011) 896 final

CEMR calls on the European Parliament & Council to significantly reform the Commission's proposals so that they deliver a 'light' regime

- Local and regional government as public procurers fully endorse the need for open competition when tendering many types of public contract **and fully support** the Treaty principles of equality, transparency, and non-discrimination when it comes to public procurement;
- However, consistently applying the complex rules of the European directives without receiving any offer from providers in another member state **means a waste of resources and cost:** the complex EU regime is not proportionate to the results being achieved;
- An increase of the threshold for goods and services would help to **reduce time and cost burdens** on both sides: the contracting authorities and the bidders;
- Transparency, non-discrimination and equal treatment in public procurement procedures below the thresholds should be ensured by the Member States via **national rules**.

CEMR believes that it is necessary to return to the basic objectives and principles of the public procurement concept and find pragmatic, manageable solutions, along the following lines:

- Focus on the **Treaty principles** (equality, transparency, non-discrimination) and ways to strengthen their application, in particular by using new technologies;
- A proportionate and **well-balanced legal framework** that provides for the basic principles, leaving sufficient flexibility for both the public authority and the bidder;
- Reduction of legal and administrative burdens, **simplifying** and aligning procedures, again for both the public authority and the bidder;
- Allow local and regional authorities to determine their own **purchasing priorities**;
- Increase awareness and incentives to look for innovative solutions.

Introduction

1. Public Procurement is a core issue for local and regional authorities. A major part of public spending is done at local and regional level and thus **contributes in a significant way to the economy** in Europe's cities, municipalities and regions.
2. This is particularly important in times where public investments can help to keep people in their jobs, **stimulate smart growth** in sustainable projects and avoid further economic and social degradation.
3. CEMR as the European umbrella organisation of 60 national associations representing local and regional government from 40 countries has been actively engaged in the debate on the development of the European public procurement rules over the last decade.
4. This is a first reaction to the European Commission's proposal for a new directive on public procurement. A more detailed position paper with proposals for European Parliament amendments will follow.

Comments on the Commission's proposal

5. CEMR wishes to underline that the original objective of the public procurement regime is to ensure **value for money**.
6. Local and regional authorities report that European public procurement procedures are very costly and time consuming and still do not materialise in the expected result: **cross-border purchasing**. The financial and administrative efforts invested in the required procedures are disproportionate to the number of contracts concluded with tenderers from another Member State.¹
7. Some of the 246 pages of provisions have more the **character of guidelines** for implementation and should not be part of a legislative text. Such elements should be provided in a separate, accompanying communication or handbook, which allows modifications over time, without legislative amendment, to keep up with the fast pace of CJEU procurement case law. In this way the legislative text itself could be significantly simplified.
8. CEMR **strongly objects to such detailed provisions** at European level as proposed and stresses, with reference to the principles of subsidiarity and proportionality that such details, including governance and enforcement, should be left to the appropriate authorities in each Member State.
9. Like the European Parliament in its resolution on 'modernisation of public procurement', CEMR believes that a new directive needs to propose a **significant simplification** and consolidation of the rules.
10. However, the proposed text does the opposite. It goes way beyond what we consider being proportionate: it proposes to create new burdens for legal services, **new advertising requirements** for social services (article 75) and a requirement to introduce **new procedures nationally** (76), **new monitoring bodies** at national level (article 84), additional explanations as to the contract value chosen (article 44), and **heavy reporting** and **notification obligations** (e.g. articles 85 & 86), even directly to the European Commission (e.g. article 32 (6)).

¹ This is confirmed by the Commission's own evaluation which shows that only 1.6% of contracts are awarded to companies in other Member States.

11. We therefore call on the European Parliament and the Member States to take a bold approach and screen the draft directive in order **to eliminate all provisions containing too detailed rules**. In times when public authorities, including the European Commission services, are reducing staff, it is not appropriate to introduce ever-heavier administrative burdens.
12. We would encourage the European Parliament & Council to significantly **reform the Commission's proposals** so that they deliver a **'light' regime**.
13. We consider the WTO **Government Procurement Agreement** (GPA) with its 24 articles on 33 pages to be an excellent model for such a light regime. Since both regimes (EU and WTO) must be generally consistent, we strongly encourage the European legislator to align the proposed directive to the lighter approach of the GPA.
14. CEMR strongly advocates for an increased **threshold** in order to get the balance right in terms of reflecting cross-border interest: doubling the thresholds for goods and services to €400,000 would be **a positive first step**.
15. Furthermore, and again in line with the European Parliament resolution from 2011, we call for fewer and more **flexible procedures** in line with the GPA, especially when the Commission argues thresholds cannot be raised.
16. Concerning **public-public cooperation**, the proposal assumes too strict an interpretation of the CJEU case law. The wording of the European Parliament's resolution² perfectly reflects the jurisprudence of the CJEU and should be used for the text in the directive. The resolution underlines the fact that transferring tasks between public sector organisations is a matter for the Member States' internal administrative organisation and not subject to procurement rules.
17. We would also prefer to have the relevant elements included in article 1 (scope) and article 2 (definitions) of the directive instead of a separate article as proposed by the Commission (article 11).
18. Concerning **social and other person-specific services** (articles 74 – 76) CEMR does not see the necessity of introducing a new system. Like the European Parliament in its resolution, we are in favour of keeping the classification of **A and B services**, which recognises the specific character and also 'lighter' rules for locally or regionally provided services of limited cross-border relevance.
19. Public procurement rules are **not suitable** when it comes to the provision of specific services such as **legal advice, social, health or educational services to individuals**. We advocate a regime that leaves Member States sufficient room to establish suitable national regimes that ensure value for public money and comply with the Treaty principles of transparency, equal treatment and non-discrimination.
20. Finally, CEMR is concerned that under article 10 (d) **activities to raise money or capital are no longer excluded** from the directive. This will have a major impact on the ability of local and regional authorities to borrow money because public procurement procedures **will make public borrowing much more complicated and expensive**.

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² European Parliament resolution of 25 Oct. 2011 (2011/2048(INI)), point 6