



Constitutional and Legislative Affairs Committee Subsidiarity Report

Proposal for a Directive of the European Parliament and of the Council on Public Procurement

This report is laid following consideration by the Committee under Standing Order 21.8 of aspects of the proposed directive drawn to its attention by the Procurement Task and Finish Group of the Enterprise and Business Committee. The report will form the basis of representations to be made to the relevant committees of the House of Commons and the House of Lords under Standing Order 21.9.

Legal Context

1. The principle of subsidiarity is enshrined in Article 5 of the Treaty on European Union:

“Article 5

(ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

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3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. EN C 83/18 Official Journal of the European Union.”

2. Its application is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, the relevant part of which for our purpose is the first paragraph of Article 6:

“Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.” [Our emphasis.]

Commission Proposals

3. On the 20th December 2011, the Commission published its proposal for a new Directive on Public Procurement. This proposal has been the subject of detailed consideration by the Procurement Task and Finish Group of the National Assembly’s Enterprise and Business Committee. As part of that consideration, the Group considered the Explanatory Memorandum prepared by the UK Government for the Parliamentary Committees on European issues. In its consideration of subsidiarity, the Memorandum stated as follows:

“SUBSIDIARITY

29. *The Government is concerned that aspects of the proposal for national oversight bodies may infringe the principles of subsidiarity and/or proportionality. These proposals, which had not been foreshadowed in the Commission’s Green Paper or otherwise consulted on, would require the UK to allow its national oversight body to ‘seize’ the jurisdiction currently exercisable by British courts of law to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work (see the final paragraph of article 84(3) of the proposed directive). This is a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting authority (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the contracting authority has entered into a contract, as the jurisdiction would enable such a contract to be declared ‘ineffective’).*

30. *The various other functions of the oversight body, as they appear from article 84(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Public Contracts Regulations 2006 (SI 2006/5 as amended) which implements Directive 89/665/EEC (as amended) which addresses remedies for breach of the procurement rules. The latter directive respected the diversity of legal traditions among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and contracting authorities.*

31. *The new proposal seems to the Government to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body and in requiring that this body be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 89/665/EEC. In this respect, the proposal may call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member states structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory*

functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.”

4. The ‘national oversight body’ would be set up under Articles 84-86 of the draft Directive. Article 84, which sets out the proposed function, is annexed to this report for ease of reference. From our perspective the crucial wording appears in the very first sentence “Member States shall appoint a **single** independent body responsible for the oversight and coordination of implementation activities (hereinafter ‘the oversight body’).” The Commission proposal contains the following explanation –

“National oversight bodies: The evaluation has shown that not all Member States are consistently and systematically monitoring the implementation and functioning of the public procurement rules. This compromises the efficient and uniform application of European Union law. The proposal provides therefore that Member States designate a single national authority in charge of monitoring, implementation and control of public procurement. Only a single body with overarching tasks will ensure an overview of main implementation difficulties and will be able to suggest appropriate remedies to more structural problems. It will be in the position to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice, thus contributing to the quick identification of solutions and the improvement of the procurement procedures.”

5. The normal distinction between Directives and Regulations in terms of European legislation is that the former specify what is to be done, leaving the Member States with discretion as to how that is done. Regulations on the other hand are directly applicable, even if some implementing legislation, such as enforcement arrangements, is left to the Member States. In this case, the Directive purports to tell the Member States how the oversight requirements are to be met, and in particular by specifying that it is to be done by a single body.

6. The UK Government has already identified that such an approach would breach the principle of subsidiarity by requiring an administrative body to carry out functions that would normally be carried out by the courts in the UK.

We agree with that assessment and support the objection to the requirement for a national oversight body because it breaches the principle of subsidiarity in that way.

7. The proposal also fails to have regard to the principle of devolution in imposing the duties on a single body. It fails to reflect the way in which separate implementing regulations have hitherto been made in Scotland, and

the way in which extensive administrative and advisory functions in relation to procurement in Wales are exercised by or on behalf of Welsh Ministers. This should be contrasted with Article 87 which deals with the provision of assistance to contracting authorities and businesses. Article 87.4 provides specifically –

“For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure due coordination between those bodies and structures.”

8. Article 84 does not currently provide the degree of flexibility provided by Article 87. Witnesses to the Task and Finish Group had mixed views on the desirability of the proposed new arrangements. In general, representatives of public bodies have regarded this as an additional degree of bureaucracy, whilst the construction sector skills council considered that a national oversight body in Wales might be helpful to monitor application of the regulations.

The Committee has therefore concluded that even if a national oversight body were to be established for the purposes of reporting under Article 84.2, Member States should be able to take account of their own constitutional structures. Such arrangements could be made by inserting into Article 84 the degree of flexibility provided for in Article 87. That would at least mitigate the degree to which Article 84 breaches the principle of subsidiarity.

ANNEXE

“Article 84

Public oversight

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation. All contracting authorities shall be subject to such oversight.

2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.

The annual report shall include the following:

(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;

(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;

(c) information on the monitoring and follow-up of breaches to procurement rules affecting the budget of the Union in accordance with paragraphs 3 to 5 of the present article;

(d) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.

3. The oversight body shall be responsible for the following tasks:

(a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;

(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;

(c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;

(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the

Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudice the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.

6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts.

7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their

disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.

The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2.”