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SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

EEA EFTA Comment on the Commission proposals for two new directives on public procurement replacing Directives 2004/17/EC and 2004/18/EC (COM(2011) 895 and COM(2011) 896)

1. EXECUTIVE SUMMARY

1. The EEA EFTA States, Iceland, Liechtenstein and Norway, have studied with great interest the Commission's proposals for new directives on public procurement replacing Directives 2004/17/EC and 2004/18/EC (COM(2011) 895 and COM(2011) 896 respectively), as well as the "cluster" documents available via the website of the Council of the European Union. The EEA EFTA States take this opportunity to comment on the draft directives. The main views of the EEA EFTA States are the following:
 - a. First, the EEA EFTA States express their support to the elements in the proposal providing for simplification of the rules and more flexibility. However, in the opinion of the EEA EFTA States, the proposals could have provided for even more flexibility.
 - b. Second, the EEA EFTA States are pleased to see that the Commission has not introduced mandatory requirements on "what to buy". The EEA EFTA States recognise the need to make better use of public procurement in support of common societal goals, but in the opinion of the EEA EFTA States, mandatory requirements in the procurement legislation are not the best way to achieve this. Moreover, the EEA EFTA states propose some adjustments to the rules relating to environmental and social considerations.
 - c. Third, the EEA EFTA States raise questions about specific elements in the proposal. Among other things, the EEA EFTA States are of the opinion that some elements in the proposal regarding public-public cooperation should be

altered. The EEA EFTA States also believe that the distinction between A and B services should be continued. In particular, social and other specific services covered by the proposed new regime should still be exempted from the directive. Finally, the EEA EFTA States are in favour of a general access to the competitive procedure with negotiation.

2. PREFACE

2. The EEA EFTA States have already taken great interest in the Commission's work in this area. Norway took the opportunity to comment on key issues raised by the Commission in its "Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market" (COM(2011) 15).
3. The EEA EFTA States will focus on two questions of a general nature (the need for simplification and greater flexibility of procurement procedures and the use of public procurement in response to new challenges), and will further address some specific issues. The EEA EFTA States reserve the right to provide national comments on other issues raised by the proposal as well as more detailed comments to specific provisions.

3. GENERAL VIEWS

4. The EEA EFTA States welcome the process of reforming public procurement policy. The current directives are, in many respects, too complex and cause great administrative burdens and high costs for contracting authorities, as well as for economic operators taking part in public procurement procedures, in particular SMEs. Complex procedural rules and legal uncertainty result in breaches, despite a diligent process and good faith. This situation, in combination with stricter remedies, may cause contracting authorities to focus more on procedure and formalities than on actually obtaining better and more cost efficient procurements, and there is a risk of "gold plating". This is unsatisfactory, and a more flexible regime with less complicated rules is therefore required.
5. The proposals for new directives are a step in the right direction. However, the EEA EFTA States are of the opinion that the proposals could have provided for even more flexibility and less complicated rules. One example is that contracting authorities covered by the classical proposal are not provided full access to the negotiated procedure. This point is further commented below. Another example is the proposed new rules on time limits, where the EEA EFTA States generally support simplification and shortening. However, the Commission in its proposals still operates with a number of different time limits that are longer than what is actually required under the WTO/GPA-agreement. It is therefore welcomed that the Presidency, in its document on Cluster 1 (6059/12 of 03.02.2012), proposes to reduce the time limits in line with the WTO/GPA-agreement. In general, the EEA EFTA States would have liked to see that more of the flexibility available for contracting entities in the utilities sectors was also available for contracting authorities in the public sector.
6. There are, nonetheless, some positive elements in the proposals providing for more flexibility. In particular, the EEA EFTA States welcome that the rules on the selection

procedure have been softened, so that contracting authorities/entities can decide to examine tenders before verifying the fulfilment of the selection criteria. It is also very positive that new rules on self-declarations and other means of proof have been introduced. Another positive element is the new possibility for sub-central contracting authorities to use a prior information notice as a call for competition.

7. The promotion of e-procurement will also lead to a simplification of public procurement procedures, and the EEA EFTA States support the proposals in this regard. The EEA EFTA States are convinced that this will lead to time savings and minimise information and transaction costs for both contracting authorities and suppliers, and that it will thus lead to more efficient use of public funds. Furthermore, the EEA EFTA States believe that the proposed transition to a fully electronic procurement process will increase cross-border procurements and at the same time secure transparency and verifiability. The EEA EFTA States also support the streamlining and simplification of the complex rules for Dynamic Purchasing Systems and electronic catalogues.
8. The EEA EFTA States support the Member States' possibility to use public procurement as a tool to promote important societal goals, and this should be reflected in the proposals for the new directives. However, the EEA EFTA States are pleased to see that the Commission has not introduced mandatory requirements on "what to buy" in the proposals. The introduction of such requirements in the procurement legislation would, among other things, make an extensive set of rules even more complex. Furthermore, as public procurements vary significantly in type and size, there would be a risk that mandatory requirements were not sufficiently accurate. In the future, the introduction of similar requirements in the sector-specific legislation should also be kept to a minimum, and the EEA EFTA States encourage the different Directorates General of the European Commission to coordinate their policy documents/proposals in this area. On an EU level, environmental regulation should be horizontal and not limited to the public sector.

4. SPECIFIC ISSUES

4.1. Relations between public authorities

9. The possibility of carrying out public tasks through public-public cooperation is essential to the public administration. This enables the participating authorities to control the provision of services in a manner that would not be possible through public procurement resulting in a more traditional contractual relationship. In the view of the EEA EFTA States, public procurement legislation should not be an obstacle, when public-public cooperation is simply the best way to organise the public sector in order to obtain the best possible services.
10. One advantage connected to establishing legislative rules at EU level regarding the scope and criteria for public-public cooperation, is that it makes it possible to expand the scope of action for public authorities in order to achieve the best organisation of public services. Another advantage is that this will create greater legal certainty. However, the main disadvantage is the danger of creating too rigid rules, excluding

other types of public-public cooperation, which have not yet been tried by the European Court of Justice (ECJ). In the view of the EEA EFTA States, even though the proposal of the Commission contains some positive elements, it also shows that these concerns are not unfounded. Several elements in the proposal should be altered to create greater flexibility.

11. As regards the regulation of vertical cooperation, the EEA EFTA States welcome that Article 11 of the classical proposal and Article 21 of the utilities proposal explicitly state that contracts from the controlled entities to the controlling entity and contracts between “sister entities” fall outside the scope of the directive. The EEA EFTA States also recognise the advantages of fixing the percentages of the activities of the controlled body, which must be carried out for the controlling contracting authority. However, the EEA EFTA States question whether 90% is an appropriate quantification. In the affiliated undertakings exemption in Article 23 of the current utilities directive (2004/17/EC), a quantification of 80% is considered sufficient to prevent distortion of competition in the market. Similarly, 80% seems to be an appropriate quantification of the activity criterion for public-public cooperation as well. According to the proposals of the Commission, there shall be no private participation in the controlled legal person. The EEA EFTA States agree that private, commercial entities cannot be included in the derogation for vertical cooperation. However, provided that both the control and activity criteria are met, there is no reason why non-profit organisations and foundations cannot be covered.
12. Even though the Commission in principle recognises the possibility of exercising joint control, contracting authorities shall only be deemed to exercise such joint control when restrictive conditions are fulfilled. These conditions are not to be found in the current case law and will in practice make it difficult to exercise joint control. For instance, according to the proposals, the decision making bodies of the controlled legal person shall be composed of representatives of all participating contracting authorities. It should be sufficient that the highest decision making body is composed in such a manner, in order to avoid that the decision making bodies become too large in situations where many contracting authorities take part in the cooperation. Furthermore, according to the proposals, the controlled legal person shall not draw any gains other than the reimbursement of actual costs. This is a new requirement, and appears to rule out, for instance, payment in the form of exchange of services or a combination of the two.
13. As regards regulation of horizontal cooperation, the proposals are based on a single ruling from the ECJ. It is important to the EEA EFTA States that such a regulation does not limit the scope of public-public cooperation; it must be flexible enough to make it possible for public authorities to achieve the best organisation of public services. When requiring “real cooperation”, the Commission seems to require that all public authorities contribute in the actual execution of the task. However, the decisive factor should be that all public authorities have a real influence on the execution of the tasks. This would follow the logic of the exemption for vertical cooperation. Furthermore, several of the concerns related to vertical cooperation described above apply equally to the proposals related to horizontal cooperation. If sufficient flexibility is not provided in the provisions, the EEA EFTA States prefer that horizontal cooperation is not regulated by the directives, but is left for further development in case law.

4.2. The distinction between A and B services

14. The EEA EFTA States do not support the proposals to abolish the distinction between the so-called A and B services. The EEA EFTA States recognise the need to review the distinction between A and B services in the light of the economic and legal developments, but believe that some of the 11 categories of B services have particular characteristics that make them less suited for cross-border procurement. These services should therefore be exempt from the full application of the new directives.
15. The EEA EFTA States believe that these proposals are in conflict with the objective of simplifying the existing public procurement rules and increasing the efficiency of public spending. The proposals will entail stricter and more complex rules for the procurement of B services, and will require contracting authorities/entities to spend more time and resources on the procurement of these services. Contracting authorities/entities, especially sub-central contracting authorities, will be burdened with additional administrative demands, and as some of the B services have a limited cross-border dimension, the benefits of the full application of the directives to these services seem to be limited. The increased administrative costs might outweigh the possible gain in price and product quality.
16. In the preamble of the classical proposal, the Commission refers to the Evaluation on the Impact and Effectiveness of EU Public Procurement Legislation. The evaluation, however, shows that B services have a much lower share of cross-border procurement than A services. The abolishment of the distinction between A and B services entails, for instance, that hotel and restaurant services will be subject to the full application of the directive. According to the evaluation, only 0.3% of the total value of hotel and restaurant service contracts was awarded directly cross-border between 2007 and 2009. It also showed that in the same time period, there had been no (0.0%) direct cross-border procurement of personnel placement and supply services.
17. However, if the abolition of the distinction between A and B services is adopted, the services which are most ill-suited for cross-border should still be completely exempted from the full application of the directive. Alternatively, the EEA EFTA States are in favour of applying the particular regime proposed for social and other specific services to more of the services that today fall under the B category, such as hotel and restaurant services and legal services.

4.3. A particular regime for social and other specific services

18. The EEA EFTA States would like to stress the importance of maintaining flexibility in particular for health and social services. The public procurement principles are not always well designed for the specificities of these services. Furthermore, these services have limited cross border interest. Therefore, the EEA EFTA States principally argue that these services in particular should still be exempted from the directives, regardless of any threshold. However, the EEA EFTA States would like to express their views on the proposed regulations in case the proposal to regulate these services is maintained.

19. The EEA EFTA States are pleased to see that the Commission has proposed not to include any specific procedural rules for these services, except the obligation to publish a contract notice. Such a flexible approach gives the Member States significant leeway when establishing appropriate procedures for the awarding of contracts, which take into account the specificities of these services while adhering to the general principles of the Treaty.
20. In the opinion of the EEA EFTA States, the proposed threshold for these services is too low. These are very labour intensive services and, in particular in high cost countries, many contracts which clearly will not have any cross-border interest will be above EUR 500 000. The EEA EFTA States therefore propose that this threshold is raised significantly.
21. Furthermore, even though the proposed provisions are very flexible, they will still cause significant challenges for certain types of contracts within this field, in particular contracts for services procured for single users. The application of procurement law to the provision of personal social services is not always the best way of ensuring optimal results for the users of the services in questions. The users' need for stability must be respected, as well as provisions on confidentiality and user participation. These contracts rarely have cross-border interest, but will usually have a contract value well above the proposed threshold, in particular because it is often necessary with long-term contracts in order to ensure stability for the users. Publication of contract notices in TED (Tenders Electronic Daily) with detailed information about single users' very specific needs is not meaningful and gives rise to serious concerns related to users' need for privacy. Therefore, a specific exemption should be included for contracts for health and social services procured for single users.
22. The EEA EFTA States are of the opinion that contracting authorities should be allowed to reserve contracts for non-profit organisations. Non-profit organisations differ from commercial companies in ways that may influence the quality of the services they provide. They have idealistic goals for their activities, not profit-making. Consequently, they have fewer incentives to cut costs related to the quality of the services or workers rights. The ECJ judgment in case C-70/95 *Sodemare* already opens up for reserving contracts for non-profit organisations, and the EEA EFTA States assume that this will still be allowed under the new regime. A specific provision allowing for this would, however, be useful.

4.4. SME participation

23. The proposals contain several measures, which will accommodate the participation of SMEs. In particular, the EEA EFTA States welcome Article 56(3) of the proposed classical directive, which limits turnover requirements to three times the estimated contract value. SMEs often report of problems related to disproportionate qualification requirements, and this provision appears to be a useful tool to prevent this.
24. However, the EEA EFTA States are concerned about Article 71 of the proposed classical directive and Article 81 of the proposed utilities directive regarding subcontracting. According to these proposals, Member States may provide that at the request of the subcontractor, the contracting authority/entity shall transfer due

payments directly to the subcontractor for services, supplies or works provided to the main contractor. These proposals will interfere with the common contract incentives with “back-to-back” contract clauses obligating both the main contractor and the subcontractor to meet the obligation of the contract with the contracting authority/entity. If one changes the flow of money, this incentive structure will be disturbed. It may lead to situations where the contracting authorities/entities have paid a subcontractor who has not fulfilled his contractual obligations and is in dispute with the main contractor, and thereby the main contractor and indirectly the contracting authorities/entities have lost an important tool to ensure the fulfilment of the contract.

4.5. Access to the competitive procedure with negotiation

25. The EEA EFTA States are in favour of a wider access to the competitive procedure with negotiations than is suggested in Article 26 of the classical proposal. The principal position of the EEA EFTA States is that contracting authorities should, in line with the WTO/GPA-agreement, have general access to this type of procedure without any restrictions. This will give the contracting authorities the needed flexibility to adjust each procurement process to the specific needs of the procurement in question, rather than having to make a difficult assessment of whether they fall under one of the particular exceptions. Thus, it also entails a simplification of the procedures. The “Report on Cross-Border Procurement above EU Thresholds” also shows that the share of direct cross-border procurement is highest for negotiated procedures. Allowing for more negotiation could thus facilitate more cross-border trade.
26. Furthermore, the EEA EFTA States are of the opinion that the challenges the competitive procedure with negotiations imply in terms of equal treatment etc., will apply to all proceedings. Rather than limiting the freedom to choose the negotiated procedure to specific types of procurements, these challenges should instead be addressed by providing rules and guidelines on the conduct of the negotiations.
27. Alternatively, if the access to the competitive procedure with negotiation is limited, the EEA EFTA States prefer the option to reserve the procedure to contracts which are awarded on the sole basis of the award criterion of the most economically advantageous tender, cf. the alternative proposals of the Presidency (document 5952/12 of 31.01.2012).

4.6. The use of qualification and experience as award criteria

28. The EEA EFTA States welcome Article 66(2)(b) of the proposed classical directive and Article 76(2)(b) of the proposed utilities directive, which allow for contracting authorities/entities to take into consideration as award criteria, the qualification and experience of the staff assigned to perform the contract when awarding service contracts and contracts involving the design of works.
29. The EEA EFTA States nevertheless advocate that there is a well-founded need for extending the proposals to include works in general. For certain works, the quality of the performing personnel is decisive for the successful completion of the contract. E.g. the restoration of old buildings may require particular craftsmanship that is not

necessarily held by any craftsman. To ensure the desired quality of the restoration, the contracting authority/entity should not be excluded from considering the proposed personnel's qualification and experience. A general access for the contracting authority/entity to decide when it is required to award a works contract on the basis of the proposed personnel's qualification and experience, will further contribute to make the procurement rules simpler and provide more tools in the toolbox.

4.7. Environmental and social considerations

30. As stated above, the EEA EFTA States recognise the wish for making better use of public procurement in support of common societal goals. However, we are pleased that the Commission has not introduced mandatory environmental or social requirements in its proposals, as such mandatory requirements will make the rules even more complex.
31. The EEA EFTA States welcome the clarification of environmental considerations in the procurement process including the proposed regulation of life-cycle costing in Article 67 of the proposed classical directive and Article 77 of the proposed utilities directive.
32. The proposals also include a possibility for the contracting authority/entity to require that works, services or supplies bear a specific label for environmental and social characteristics. However, the contracting authority/entity must still compare different labels and technical dossiers or other appropriate means of proof in the verification process (as to whether they fulfil the requirements or not). This is often a voluminous and technically complicated process. It would have eased the administrative burden considerably if the contracting authority/entity could just require third part certified documentation as fulfilment of the environmental requirements. This would lead to equal treatment among those tenders who meet this requirement.
33. When it comes to social considerations, it is not clear which social characteristics are relevant as requirements in the technical specification. On the one hand, labels certifying that the product is free of child labour are specifically mentioned in the Commission's detailed explanation of the proposals. On the other hand, in recital 41 of the classical proposal and recital 47 of the utilities proposal, the use of conditions of the persons directly participating in the process seems to be limited to inclusion in the award criterion of the most economically advantageous tender. The EEA EFTA States are of the opinion that contracting authorities can include social characteristics (i.e. ILO core conventions) in the technical specifications, when this is relevant and linked to the subject matter of the contract. This should be made clear in the directives. Furthermore, social considerations are not mentioned in the non-exhaustive list of possible award criteria in Article 66(2)(a) of the classical proposal or Article 76(2)(a). The EEA EFTA States believe that it would be helpful to do so.
34. Furthermore, the judgment of the ECJ in case C-346/06 *Rüffert* has created uncertainty as to the compatibility of ILO Convention No. 94 Labour Clauses (Public contracts) (hereinafter referred to as "ILO 94") with the public procurement directives. The EEA EFTA States make reference to the European Parliament's resolution of 25 October 2011, which calls for an explicit statement in the directives that they do not prevent

any Member State from complying with this ILO Convention. The EEA EFTA States support this initiative, which does not seem to be reflected in the proposals.

35. The EEA EFTA States also believe that it should be made clear that contracting authorities/entities have the possibility to set as a condition that the workers performing under the contract are subject to employment and labour conditions that are not inferior to those issuing from collective agreements or conditions that are normal for the place and profession. This should be the case regardless of whether the Member State has a statutory minimum wage or has made collective agreements generally applicable. This would make it possible for all Member States to fulfil the obligations stemming from ILO 94, without having to make substantial changes to their systems of wage formation.

4.8. Service contracts awarded on the basis of an exclusive right

36. The EEA EFTA States observe that the proposals do not include an exemption for service contracts awarded on the basis of an exclusive right, cf. Article 18 of the current Directive 2004/18/EC and Article 25 of the current Directive 2004/17/EC. As several contracting authorities in the EEA EFTA States report on a continued need to award contracts under this current regime, the EEA EFTA States are concerned about the consequences of deleting this exemption.
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