ASSEMBLEIA DA REPÚBLICA

EUROPEAN AFFAIRS COMMITTEE

Written Opinion

COM(2011)895

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on procurement by entities operating in the water, energy, transport and postal service sectors

COM(2011)896

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on procurement

PART I - INTRODUCTORY NOTE

In accordance with the terms of Articles 6 and 7 of Law 43/2006 of 25 August, on monitoring, assessment and pronouncement by the Assembleia da República within the scope of the construction of the European Union, and in accordance with the procedures for the scrutiny of European draft acts approved on 20 January 2010, the European Affairs Committee received the Proposal 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 [COM(2011)895] and the Proposal for a Directive of the European Union and of the Council on public procurement [COM(2011)896].

In view of its subject, the above draft acts were referred to the Committee on Economics and Public Works, which analysed the draft acts and approved the Report annexed to this Written Opinion, of which it forms an integral part.

PART II – RECITALS

1 In Europe, public authorities spend around 18% of GDP on supplies, works and services. This public expense constitutes an essential basis for growth. However, in the current context of budgetary restrictions and economic difficulties in the majority of Member States, the policy of public procurement should, even more than usual, ensure efficient use of these funds, in order to support growth and the creation of employment and thus contribute to the realisation of the “Europe 2020” strategy.

2. It should be noted that European legislation[1] and national legislation have opened public procurement markets to fair competition, which has brought about better quality and a better price for consumers. However, in the light of the challenges of the current economic climate, we feel that the existing legislation on public procurement should be reviewed and updated.

3. In this context, the Commission proposes to modernise this legislative framework to try to achieve a balanced policy that supports the search for more environmentally-friendly goods and services which are socially more responsible and innovative, offer simplified and more flexible procedures for approving entities and guarantee greater ease of access for Small and Medium Enterprises (SMEs).

4. The proposed legislative reform constitutes one of the dozens of priority actions enshrined in the "Single Market Act"[2]**.**

Mindful of the provisions of this proposal, the following issues should be raised:

a) Legal Basis

The proposal is based on Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).

b) The Principle of Subsidiarity

The principle of subsidiarity applies insofar as the proposal does not fall under the exclusive competence of the EU.

[1] Directives 2004/17/EC and 2004/18/EC.
[2] Adopted in April 2011 - COM (2011) 206.

Yet, in the area of public contracting there is a pre-eminent need to move forward in the direction of greater uniformity of legislation by the Member States. In particular, the coordination of the legal, regulatory and administrative provisions of the Member States applicable to certain procedures for the approval of public procurement cannot be adequately carried out by the Member States, and can consequently be more easily achieved at the Union level.

Consequently, the proposals under analysis are in agreement with Article 5 of the Treaty of the European Union (TEU). It can, therefore, be concluded that the principle of subsidiarity is respected.

c) Content of the draft act

As has been mentioned, public procurement performs a vital role in the "Europe 2020" strategy, simultaneously ensuring the most efficient use of public funds.

However, in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement, and to enable procurers to make better use of public procurement in support of common societal goals, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 "coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors" and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 "on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts" must be revised and modernised. It is also considered necessary to clarify basic notions and concepts to guarantee improved legal security and incorporate some aspects of jurisprudence established by the Court of Justice of the European Union in this area.

In this context, these proposals presented by the Commission aim to replace the existing legislative framework[3] on public procurement, in order to make the approval procedures more flexible and allow a better utilisation of these types of contracts to support other policies.

Consequently, the proposals are aimed at two complementary objectives: i) "to increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders; ii) allow procurers to make better use of procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services."

PART III – PERSONAL VIEW OF THE RAPPORTEUR

Although it introduces important changes to the existing legal framework, this group of two proposed directives does not change the paradigm that has governed the course of European law since 1971, with the adoption of Directive 71/305/EEC and is today embodied in the current creation of directives on public procurement – Directives 2004/17/EC and 2004/18/EC.

We shall focus this opinion specifically on the proposal of Directive COM(2011)896, which has a wider scope, but many of the observations set forth herein are applicable to Directive COM(2011)895.

The first proposal deals with what is known in Portuguese law as public contract works, contracts for lease or purchase of goods, and contracts for the acquisition of services (See, Art. 6., paragraph 1, of the Code of Public Procurement). However, as has

[3] Directives 2004/17/EC and 2004/18/EC.

become standard, the proposed Directive lists numerous exclusions. The most notable concerns public procurement (this terminology is now anchored in the directives) which are now completely at the disposal of the national legislature, although it is also subject to the principles of treaties, such as the free circulation of goods, freedom of establishment, free provision of services, as well as the principles of equal treatment non-discrimination, mutual recognition, proportionality and transparency.

In addition, the "main" Directive leads to another Directive – as has occurred up to now – the contracts in the sectors of water, energy, transport and postal services, which are the subject of the second Directive that is the subject of this opinion, COM(2011)895. But the exclusions do not end here, extending through various articles of the Directive, in a web that is not always easy to untangle, and at the same time, leads back to the domestic law on public procurement.

From this analysis we arrive at a first commentary: the Directives continue to be highly complex in defining what is within and what is outside of the perimeter subject to community standards of public procurement. The objective of simplification and the reduction of the costs of complexity, invoked countless times throughout the documents that justify and serve as the framework for these proposals, does not seem to be totally achieved. The issue that could be raised is whether we should not move towards a situation of greater uniformity and codification that could dissuade the coexistence, at the national level, of numerous legal regimes, differentiated at the substantive, procedural and case law (or litigation) levels.

The consequence of this complexity would be a complex and perhaps controversial transposition. This complexity would be further aggravated if the national legislature, by arguing that the law of the Union does not require abandoning traditional categories of domestic law, continues to maintain concepts such as those of administrative contract. As this is only one sector of public procurement, it does not always justify autonomy (and a substantive differentiated regime) within public procurement (a differentiated regime that translates, for instance, in having administrative contracts that are not subject to the Code of Public Procurement).

Noting the persistence of this original sin and stressing that bolder steps could have been taken in this revision in the direction of a greater harmonisation of national

legislations, while maintaining some margin of discretion or free conformity for the national legislature, it is nonetheless admitted that the objectives of the Directives and the solutions designed generally deserve adhesion, with a reservation here or there, and noting that there will be issues that the doctrines and national jurisprudences and the Union have approached that are not yet totally clarified.

Among the objectives worthy of mention is simplification, with a view to reducing costs - which are today excessive for those launching contracting procedures and for those presenting tenders or proposals, which sometimes represent a percentage of the amount of the contract that dissuades/inhibits full competition - the difficulties for small and medium-sized businesses, especially cross-border difficulties and the length of the pre-contractual procedure, which in the Portuguese case is sometimes greater than the 180 days cited as the average in the Union.

The differentiation among the central, regional and local levels, for the definition of distinct thresholds above which the Directive would be applied, as well as the differentiation of certain social sectors, such as health and education, also seems to correspond to a justified demand for flexibility. However, the fact that these safety valves are being introduced cannot mean that, at the level of domestic law, there should not be a demand for strictness in defining the rules for public procurement which, although malleable when necessary, constitute a rigorous framework that embodies the spirit and principles of Union law in this regard.

Incorporated into the Europe 2020 strategy, one of the great innovations of the regime introduced by the Directive is to allow public procurement to be used to achieve the objectives of that strategy. Thus, the contracting authorities, in selecting tenderers, may introduce criteria or requirements with respect to innovation, the environment, fighting climate change, improving employment, public health and social conditions. It is unfortunate, however, that compliance by award candidates with the social responsibility requirements is not one of the aspects to be considered and strategically pursued by contracting authorities.

Related to the orchestration of public contracting in relation to the strategy of innovation is the creation of a new pre-contractual procedure known as partnership for innovation.

The other procedures remain basically unchanged (although there are slight differences between the two proposed Directives).

The Directive seeks to address various issues which doctrine and jurisprudence have raised over recent years, in some cases suggesting methods of resolution. We note, as an example, the subject of contractual modifications during the term of the contract, an issue that is addressed in a flawed and deficient manner. Article 72 now seeks to define precisely, on the path to jurisprudence, the substantial modifications which imply a new approval - and the non-substantial modifications, which are admissible without new approval. Not all of the questions seem to be resolved, however; (for example whether the renewal of a contract, whether or not scheduled initially, should be considered a substantial modification).

The revision also seeks to improve the system of governing/overseeing the pre-contractual procedures and contractual execution. The proposal provides therefore that Member States designate a single national authority in charge of monitoring, implementation and control of procurement law (a supervisory body). On the other hand, the Member States must make support structures available to provide counselling, guidance, training and assistance in legal and judicial matters (knowledge centres). Since the intentions underlying these proposals cannot be challenged in the abstract, it is important to guarantee that the solutions to be adopted do not create more public bodies and generate new public or private burdens, and a scrupulous cost-benefit analysis must be made. On the other hand, we must also avoid the intervention of third parties, in relation to the contracting authority and the contractor candidates or the contracting party, translating into increased bureaucracy.

One objective that deserves total agreement, although it is not clear that the Directive goes as far as it should, is that of transparency with regard to the candidate actually hired. Today, under the terms of Union law, public contracts are not generally subject to a requirement of publication or of free access to third parties. The same occurs, in general, in national law, since it is often practically impossible for a third party to have access to the text of a public contract, even when invoking a legitimate interest, or when acting in defence of the public interest. It is now possible to obtain, "upon written request, free, direct and complete access, at no charge, of the contracts" agreed,

above certain amounts (1,000,000 or 10,000,000 euros). Access to certain parts of the contract may be refused on certain grounds and there are an important number of safeguards, but this solution represents progress compared with the current situation, merely imposing limitations and safeguards that will not lead back or be interpreted in a restrictive sense, as sometimes happens with regard to standards that seek to ensure greater transparency in the exercise of the administrative function.

The transposition of the Directive for the national law represents an important challenge, and this opportunity should be used to correct various solutions of the Code of Public Procurement. Keeping in mind the amounts involved in public procurement, but the enormous interest that the approval of these new Directives will raise among professionals and economic agents, it is the opinion of the Rapporteur that the European Affairs Committee can and should monitor the subsequent development at the level of the community legislative process, and it is expected that the text now presented will be significantly altered.

PART V – OPINION

Mindful of the above and having regard to the Report of the Committee with responsibility for the matter in question, the European Affairs Committee is of the opinion that:

1. This draft act **respects the principle of subsidiarity, in that the proposed objective will be more effectively achieved through action at the EU level**;

2. The European Affairs Committee will proceed with monitoring the legislative process for this initiative.

São Bento Palace, 28 February 2012

Rapporteur, Vitalino Canas

Committee Chairman, Paulo Mota Pinto

PART V – ANNEX

Report of the Committee on Economics and Public Works

Report of the Committee on Economics and Public Works

Proposal for a Directive of the European Parliament and of the Council on public procurement by entities operating in the water, energy, transport and postal service sectors, as well as on public procurement (in general).

COM(2011)895 final and COM(2011)896 final

Rapporteur: MP

João Paulo Viegas

PART I - INTRODUCTORY NOTE

1. Preliminary Note

The European Affairs Committee, under the terms set forth in Article 7 of Law No. 43/2006, of 25 August, on the monitoring, assessment and pronouncement by the Assembleia da República within the scope of the construction of the European Union, sent the proposal of the Directive of Parliament and the European Council, on procurement by entities operating in the water, energy, transport and postal services sectors - COM(2011)895 final - as well as the Proposal for a Directive of the European Union and of the Council on public procurement - [COM(2011)896] final - to the Committee on Economy and Public Works, for them to give their opinion on the material contained in the legal text in question.

2. Procedure adopted

During the week of 16 to 20 January, this proposal was received by the Committee on Economics and Public Works, who later named MP João Paulo Viegas from the Parliamentary Group of the CDS-PP as Rapporteur.

PART II – RECITALS

1. Background

The documents of the European directives that are not presented have as their subject public procurement and its issues.

Thus, at issue are two documents that, although referring to the same subject, are distinguished by the fact that one is generic in nature and the other deals with contracts regarding the sectors of water, energy, transport and postal services.

2. Purpose of the initiative

2.1. Justification

With regard to these two directives, the concern is clear when we consider the sense of convergence with the Europe 2020 strategy that is based on intelligent, sustainable and inclusive growth.

Notable within the aforementioned strategy are concerns such as employment, efficiency, knowledge and innovation.

In the application of the "values" revealed for application of this European strategy and in the context of application to public contracting, emphasis is placed on the need for improvement of the quality/price relationship, through simplification and flexibilisation of the rules.

This type of approach to public contracting will facilitate participation of SMEs within the community area.

Candidates in public tenders should pay attention to details related to common social objectives, such as the environment, energy, etc.

The document being discussed was the "target" of a vast public consultation, performed after the launching of the green paper for the modernisation and efficiency of public contracting.

2.2. Description of the purpose

- Prior consultation with interested parties

In a first phase a working group was formed to construct the Green Paper on modernising the public contract policies of the EU, which was achieved on 27 January 2011. Subsequently, a vast public consultation was held to identify the legislative changes that should be proposed to facilitate the contracting mechanisms.

The public consultation closed on 18 April 2011 and took into consideration the opinions of various interested parties, namely key Member State authorities, local and regional public purchasers, companies, academics, civil society organisations and individual citizens.

Various contributions came out of this public consultation, which generically recommend focusing attention on relieving administrative burdens and simplifying procedures, while always safeguarding the special procurement sectors.

- Evaluation of prior impact

The directive in question will lead to a consequent transposition and adaptation of national legal orders, considering the improvement of contractual flexibility, that allow a greater participation by SMEs and an increase in contractual efficiency, not merely by virtue of the fact that new means of procurement will be available, but because there will be a larger offering for contracting authorities, considering the increased transparency, as well as the cost of the award throughout its lifetime.

The European text under analysis here also has an impact in the area of supervision, since it is proposed that the fiscal entity be transversal through the entire contractual procedure, leading to a fusion of various entities which are now scattered through various stages of the process.

- Summary of the proposed action

Often there is a barrier between the text of the law and the understanding of the recipients. Thus, proposals are made with the aim of facilitating this understanding, which will be carried out through small adjustments and alterations.

The proposal refers to greater flexibility for the contractor, through simplification and modernisation of procedures, and the recommended use of electronic methods.

The public contract at times signifies the divergence between what is sought to be achieved and the expenses associated with contracting. Therefore, it is now understood that there should be a strategic sense with respect to its use. This draft legislation promotes the use of tools that consider not only the cost of the contract, but also the cost of the asset throughout its life cycle.

We are facing a new reality. Europe and the world are facing a series of challenges which must be addressed by public procurement itself. From this perspective, the Directive foresees the establishment of sanctions for contract bidders who violate social, labour or environmental legislation. The sanctions could even lead to the exclusion of operators.

The European draft legislation proposes that, in the context of contracting, there be a distinction for contracts dealing with a specific social issue. Collective interests should have a distinct weight, with less restrictive rules established for these situations that guarantee effectiveness in action.

The concern transmitted by the Directive is fighting corruption. Therefore, methods are proposed to reduce distrust to a minimum, promoting more closed rules in the sense of conflict of interests, illegal conduct or unfair advantages.

Administrative cooperation should therefore be a plan, and we should advance in the sense of sharing information and improving practices among institutions.

Therefore, the following methods are highlighted:

The classic instruments at the disposal of those carrying out public procurement will have one more item, the so-called "negotiating procedures with prior opening of the tender", and can then attain more attractive rates for the contracting authority.

An important measure, and one that is referred to in the Directives, is the subdivision of the contract into lots and direct payment to subcontractors.

Transparency should also be taken into account, and the competent authorities, at the time of award, should send the text of the contract to the supervisory bodies and interested parties.

With respect to supervision, the proposal is directed towards naming a national authority with transversal responsibility in all matters related to public contracting.

2.3. The Portuguese case

In Portugal, Decree-Law No. 18/2008 of 29 January (Code of Public Procurement) is in force , which revoked: Decree-Law No. 59/99, of 2 March (public works contracts); Decree-Law No. 197/99, of 8 June (acquisitions of goods and services); and Decree-Law No. 223/2001, of 9 August (contracts and acquisitions in the context of special sectors).

Harmonisation of European legislation is today a need felt by Europe, and there is doctrine that argues that this harmonisation is a factor of stability, not only in the country, but also in the EU itself. Thus, there cannot be great disparities.

The supervision of public contracting is performed in Portugal by the Court of Auditors. Questions of a judicial nature are the competence of the Courts, and with a right of appeal to the Administrative and Tax Courts and the Supreme Administrative Court.

3.Legal Basis

The proposal is based on Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).

3.1.Principle of Subsidiarity

The general definitions of the concepts of subsidiarity and proportionality are found in paragraphs 2 and 3 of Article 5 of the Treaty that instituted the European Community (EC Treaty). Protocol No. 30 of the Treaty provides more detailed directions regarding the application of these two principles.

Subsidiarity constitutes a guiding principle for defining the frontier between the responsibilities of the Member States and those of the EU, i.e., *who should act?* If the Community has exclusive competence in the area in question, there are no doubts as to who should act and subsidiarity does not apply. In the event of sharing competencies between the Community and the Member States, the principle clearly establishes a presumption in favour of decentralisation. The Community should only intervene if the objectives of the proposed action cannot be sufficiently realised by action of the Member States (condition of necessity) and if they can be more adequately achieved through an action of the Community (value added condition or of compared effectiveness).

Regarding public contracting, this can be clearly seen; there is an urgent need to proceed in the direction of legislative uniformity of the Member States. Only then can the plans of the documents be met, which seek greater efficiency in the public contracting context.

Thus, there is no violation of the principle of subsidiarity.

3.2. Principle of proportionality

Proportionality constitutes a guiding principle for the way in which the Union should exercise its competencies, both exclusive and shared *(what should be the form and nature of the action of the EU?)* Both Article 5 of the EC Treaty and the Protocol establish that the action of the Community should not be greater than needed to achieve the objectives of the Treaty. The decisions should favour the least burdensome option.

The function of these Directives is to act as a guideline for the various jurisdictions of the European Union, since the possibility of making the directive adequate to the same is respected, as well as using balanced mechanisms which do not violate the principle of proportionality.

PART III - OPINION OF THE RAPPORTEUR

Public contracting has been taking place for many years, and has contributed to the development of the country and various regions. The time that has passed has led us to identify and correct some issues associated with the use of the mechanism itself.

The ever greater recourse to public contracting, besides encouraging the completion of various projects and promoting the acquisition of various goods and services, today represents a factor for economic growth, bearing in mind that this accounts for a large proportion of some companies' turnover.

The public interest is the basis for this document. Ensuring that public expenditure becomes increasingly more proportionate to costs should be a real concern.

I believe this was the reason that led to making adjustments to the community directive and these are the guidelines that lead us in the direction of a greater alignment with the public interest.

The new challenges of public contracting should serve the interests of the people, but we must increasingly reflect on the financial situation in which we live. Therefore, there are new concerns to take into account.

So that there can be ever more entities on the supply side (in the context of public offering) mechanisms should be safeguarded that promote equality among private individuals, thus promoting fair competition.

Another issue of great importance here to which I would like to add my voice is the suitability of public contracting in the sense of allowing a greater participation by the SMEs. These have been development engines for many regions of the country and true strategic partners for the economic future of Portugal.

Greater control and transparency is an objective of the most fundamental justice which corresponds to the most basic rules of respect for taxpayers, so that supervision must be more careful and effective. Measures that promote transparency should be a reference point, we must promote the supervision of contracting.

Contracting efficiently, with respect for the environment, with guarantees of quality in the services provided to the public administration and the countless institutions that represent it; these are guidelines of the greatest importance and which also respect the "goals" of the Europe 2020 strategy.
European uniformity in this regard is thus necessary, insofar as there was legislation in the various Member States with completely distinct approaches.

I thus believe that the directives in question can promote fairer competition, a greater supervision and access to lower prices with guarantees of greater quality and transparency.

PART IV – CONCLUSIONS

This Directive proposes the creation of community guidelines that will mean more transparency, more competition and more efficiency in public procurement.

The fact that there are various legal mechanisms in different jurisdictions based on different decisions of the Court of Justice, were decisive factors for going forward with simplification and flexibilisation of the procedure of awarding of public contracts.

It is suited to public contracting in the sense of converging with the Europe 2020 strategy, allowing the contracting authorities to take into account the life cycle of the goods that are the object of contracting, while sanctioning those who do not respect labour, environmental and social standards

It improves the access of SMEs to the public contract markets, simplifying the information requirements, promoting subdivision into lots and allowing direct payment to subcontractors.

The fight against corruption promises to be a strong and solid tool of this document; the financial interests involved and the interaction between the public and private sector are targets of additional protection.

It is anticipated that each Member State will need to find a national authority with competence for transverse supervision with regard to the analysis of the entire public contract. Thus, this may make a strong contribution in resolving possible problems.

These draft acts do not breach either the principle of subsidiarity nor that of proportionality, in that the proposed objective will be more effectively achieved through action at EU level.

The Committee on Economics and Public Works hereby concludes the scrutiny of these draft acts, and this report, under the terms of Law No. 43/2006, of 25 August 2006, should be sent to the European Affairs Committee for all due purposes.

São Bento Palace, 22 February 2012

MP acting as Rapporteur	Committee Chairman
João Paulo Viegas	(Luís Campos Ferreira)