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CEEP Opinion on the GREEN PAPER on the modernisation of EU public procurement policy COM (2011) 15 final

A. MAIN ISSUES

A.1 Introduction

CEEP, in its ability as the social partner representing Public enterprises and those delivering services of general interest welcomes the Commission initiative to update the procurement policy. This internal market discipline has promoted the opening up of markets to EU-wide competition, even if the expansion of intra-community trade and cross-border economic activity plays a much more decisive role in meeting this goal.

Public procurement aims to deliver value-for-money in the purchasing activities of public bodies, while fostering competition between providers. It is anchored in the principle of equal treatment and award following objective criteria, determined and known beforehand by participants. CEEP notes with satisfaction that this nutshell of essential principles is fully preserved by the Green Paper proposals.

A.2 Simplification

CEEP believes that there is ample room for a more simplified and less cumbersome approach. A clear need emerges to strike a balance between the objective to preserve the essential principals that govern procurement rules and cutting down red tape that too often involves higher than warranted costs for public administration and also for participants. This

economic issue fails to be fully taken into account by the Green Paper, as pushing too far on equal treatment safeguards runs contrary to the basic requirement of delivering value-for-money.

CEEP will make some precise proposals in answering the questionnaire, but believes that the most straight forward way to achieve simplification is by raising the current thresholds in a significant ways. This is a Commission competence and CEEP invites this Institution to move swiftly in this direction before a new package is presented and adopted. It would undoubtedly show the determination by the EU Commission to concentrate the efforts to enforce this discipline where they are most needed, that is in markets of a certain economic relevance.

This move should be coupled with a greater effort to trim down bureaucratic excesses all too often implemented at national level. It is a fact that in most cases, the rigidities stem from national procedures that in many cases act as a barrier to cross-border access to these markets. While it is difficult to foresee a fully harmonised implementation in this Internal Market field, precautionary measures should be taken in Community Law to avoid Member States from engaging in a set of requirements and procedures that represent a barrier for new entrants.

A. 3 Discipline on public enterprises

CEEP believes that the common discipline is ill-suited to deal with enterprises that act as contracting authorities, especially within the realm of in-house providing and/or the provision of SGIs. The rationale for imposing this discipline to such public entities stems from the fact their contracts with public administration escape from open tendering. But in economic terms a main contractor would benefit much in a similar way from the advantage of executing a big contract, being free to choose its providers. Conventional wisdom would point out that a private enterprise seeking to maximise its benefits, would select the most able and less costly subcontractors. This line of reasoning can safely be applied to public enterprises, so long they are governed by private investor principles, namely the running in an efficient way of resources seeking a reasonable benefit. The rules on procurement for public enterprises should take into account the basic principle that the Treaty does not prejudice on the form of property, offering an equal treatment to private and public concerns. The current borderline that leaves outside the discipline only those public enterprises engaged in industrial and commercial activities should be further clarified to exclude those that are run pursuing an ultimate economic benefit. This category should include those entities whose profits are reinvested in a mandatory way to provide public service also and those that aim to enhance citizens welfare but are run on an entrepreneurial basis, that is following a purchasing policy targeted to provide goods and service in the most efficient way. The key notion should be the aim to maximise resources following an economic rationale, regardless of the ensuing use to be done to the corresponding benefit. Public enterprises in maximising their resources already resort to a fair selection of the best offerers. Forcing them to apply common public procurement rules encroach on their ability to run in a smooth and efficient way as an enterprise adding extra-cost in terms of tendering procedures and the financing of excessive levels of stocks, as compared to a private enterprise.

A. 4 In house providing

CEEP welcomes the initiative to deal through a legislative proposal with the uncertainties posed by the current in house treatment according to case law. It should be noted that in house relations are NOT a contract, as case law has rightly recognized. A contract is the expression of mutual obligations entered on a free will basis, never when one of the parties lacks a minimum autonomy to take up or refuse a deal, and to negotiate its terms. In house provision these basic requirements are not met and the relation, not being a proper contract, does not fall within the realm of public procurement. Thus, while legislation is badly needed to avoid the uncertainties linked to a treatment that is being shaped little by little by case law, this move should aim primarily to make clear the conditions that would identify in house and leave it outside the common discipline on public procurement. The example of the passenger transport regulation shows that there is scope to shape in a coherent way both in house and the minority participation of private investors in such firms. Case law should be taken as a starting point but it cannot prevent the legislators to enact rules so long there compatible with the Treaty. CEEP therefore favours an approach that makes it crystal clear that in house is treated as falling outside public procurement discipline, and provides a flexible and workable arrangement to deal with horizontal control by several public administrations of the in house entity, as well as providing the opportunity for private investor to hold minority stakes in it, thus increasing its ability to offer goods and services in a more efficient way, while preserving the need to uphold equal treatment in the designation of such private participants. While CEEP recognizes the added value of dealing with issues like public-public co-operation, this move would remain a half step shouldn't a comprehensive answer be found for a proper treatment of in house.

A. 5 Excluded sectors

CEEP welcomes the open approach on the so-called excluded sectors, as it believes that a thorough change should be introduced in this field. The rationale for making incumbents subject to public procurement discipline is not in line with the current situation as opening up of these markets have introduced a competitive environment. In the few cases where that might not be entirely the case, like water sector, the referring market is not wide enough to justify this discipline. Enterprises running these services, whether public or private, even if they enjoy special rights, follow much the same economic principles. Thus CEEP believes that there is no longer a need to impose a public procurement policy in these sectors, or at least to raise very significantly the thresholds, to avoid that excessive costs associated with tendering feed into higher tariffs for users.

In order to preserve the Treaty principle of neutrality, the exclusion from public discipline should cover the provision of all services currently regulated under 2004/17/EC directive. Not only private and public firms should be excluded but also provision of these economic services by the Administration to users. Thus in no way this exclusion can lead to a more stringent treatment under 2004/18/EC directive. Otherwise, a clear case of unequal treatment and distortion would emerge.

A.6. Europe 2020

The strategy to foster a more efficient environment in Europe, while preserving the basic achievements of our social model, invites to focus all Community policies in order to deliver added value in pursuing that key goal. Public Procurement can and should play a sensible role in this common drive. But special care must be paid to avoid blurring its main purposes or undermining its underlying value. CEEP believes that public procurement can usefully take into account the promotion of key areas like environment protection, social policy or innovation, so long it provides the opportunity to public authorities to embed these objectives in the awarding criteria. CEEP however, opposes any move to include mandatory provision in this field like “what to buy” or “how to buy” targets or rules in the revised directives. Forcing authorities to undertake such promotion of other policies would undermine the basic need for flexibility and greater simplicity and exert a negative impact on the ability of contracting authorities to meet their needs, which is the paramount objective of any sensible procurement policy. It would also provide an invitation to extensive claims and litigation, thus undermining the normal performance of public services and policies.

B. ANSWERS TO THE QUESTIONNAIRE

CEEP as stated previously delivers its opinion in its capacity as a social partner representing public enterprises and those engaged in providing public services in general. Thus it deals more extensively with the issues that affect its members, without refraining from providing its views on more general topics. The scope and interest of the Green Paper fosters discussions by interested parties all across the board.

1. What are public procurement rules about?

1.1. Purchasing activities

Answer to question 1

CEEP favours an approach that clarifies the scope of public procurement. Thus, only purchasing activities by public administration and public bodies for covering its needs should be included. Other relations that do not amount to a purchase involving an immediate economic benefit for the public authority, even if they entail mutual obligations, should fall outside the scope. It would seem advisable to clarify this interpretative by introducing the Court criterion of the notion of “immediate economic benefit”. As referred before, there is also an urgent need to make it clear that in house is excluded (see A.4).

1.2. Public contracts

Answer to Questions 2 and 3

CEEP believes that the current distinction between works, services and supplies reflects the different nature of such transactions. Should the works scheme melt down, there would be a need to introduce different thresholds for works concessions and for the special treatment in social housing. The different thresholds are stem from multilateral agreements, a matter that should be carefully considered.

Simplification as regards the works directive should be undertaken primarily through an upward revision of the thresholds. Doing away with the list defining the various components of works, would undermine legal certainty, without bringing any visible benefit.

Answer to Question 5

The distinction between A and B services is fully warranted and reflects the need to apply different approaches to these two set of services, due to fundamental differences that avoid a similar treatment. B services cover public and social services whose provision should fully take into account the article 14 of the Treaty in order to preserve the best quality for their delivery, as well specific rules that govern them as the corresponding recital of the current EC 2004/18 recalls.

Answer to Question 6

As referred before (See A.2) CEEP believes that a significant rise in thresholds would bring great benefits in terms of simplification and reduction of administrative cost and less bureaucracy that currently hampers both public authorities and economic agents.

Answer to Questions 7 and 8

- The current exclusions are fully warranted and their use has not given rise to any major difficulty in terms of interpretation. However CEEP believes that two new cases of exclusion could be included:
- Explicit exclusion of conventions of pooling of internal resources between public bodies, because of the need to gather the means needed in providing a service of general economic interest

Exclusion of the notion of control of the management of those controls that are made compulsory in the competition rules regarding public service compensations

1.3. Public purchasers

Answer to Question 10 to 13

CEEP has dealt with these questions in a extensive way under A.3

2. Improve the toolbox for contracting authorities

Answer to Question 14

It is a matter of fact that excessive burden stemming from public procurement comes mainly through national requirements that add up red tape and administrative costs for enterprises in seeking public contracts. It is suggested that Community legislation includes a comprehensive set of requirements and sets limits and safeguards to avoid additional burden imposed by national Law.

2.1. Modernise procedures

Answer to Question 15

Current procedures do not include some cases that may occur during the life of the contract and that affecting its implementation.

For example, existing procedures do not allow to deal with cases of bankruptcy in contract already awarded. They rather contribute to adding cumbersome administrative and financial burdens to the contracting authority.

The court-ordered liquidation of a business has the effect of interrupting its activities. Such company is no longer able to fulfil contractual obligations arising from the public contract signed with the corresponding authority.

When the bankruptcy party has started the implementation of work the current directive does not provide the possibility for contracting authorities to use a negotiated procedure in order to fill the gap.

The contracting authority being obliged to conduct a full new tender, this procedure entails delays and additional costs.

There should be a specific procedure in the case of bankrupt contractor in line with the principles of public purchasing but streamlined and relatively speedy.

The use of new technologies should be encouraged so to allow that certain procedures could be carried through these technologies (for instance, electronic presentation of documents). It could also be useful to allow some specific requirements (solvency, capacity) to be credited only once for a reasonable period of time covering several potential contracts.

Another way to provide better performance is to incorporate in the current directive 2004/18 the possibility of a dynamic purchasing system and electronic auction.

Answer to Question 17

In recent years the phenomenon of public-private partnership (PPP) has developed in many areas and many European countries. Many members of CEEP is part of IPPP. However, the legal uncertainty surrounding the participation of private partners for IPPP could affect the success of the formula.

Therefore, the revision of "Directives on public procurement is an opportunity to provide legal certainty to the clarifications made by the Interpretative Communication of February 2008 on the application of Community law on public contracts and concessions for public-private partnerships (IPPP) (C (2007) 6661) and by the case law of the ECJ. Indeed, the Court has validated the direct award of a public service to a local public company in which the private partner is selected by public tender in Case Acoset Spa c / Conferenza 15 October 2009.

Answer to Question 18

CEEP considers appropriate to reduce the time periods of accelerated procedure and extend this reduction to the remaining procedures

Answer to Questions 19 to 21

CEEP believes that there is a need to provide broader room of manoeuvre for negotiation in public procurement in order to better grasp the needs of public authorities, especially when they entail complex buying operations. It is for sure that greater levels of negotiations should safeguard the basic need to deliver transparency and equal treatment, much in the same way as they are preserved now under the negotiated procedure.

Answer to Question 22

CEEP believes that simplified procedures to reduce systemic cost are welcome. The commercial goods and services should be defined clearly and precisely and should be included in a list. This list should be updated quickly. The dynamic purchasing system under Directive 2004/17 seems an appropriate instrument that could be generalised to all types of contracts.

Answer to Question 23 and 24

A more flexible procedural approach would bring greater benefits, so long that equal treatment is fairly preserved. Scorching from the current sequence to a more flexible one involving the examination of award criteria before the selection of candidate, should in principle apply to standard goods subjects to tendering procedures seeking the lowest price.

Answer to Question 25

The experience of a contractor can result in cost savings in subsequent contracts and improved product quality or service under contract. It is therefore worth taking this experience into account in subsequent awards, provided that a fair amount of savings or high levels of quality have been met in a number of previous contracts; experience could be taken into account in a simple and straight forward way like allocating a number of points per year of experience in the awarding criteria.

Answer to Question 26

This question has already been answered in A.5 It should be noted that the substance of Directive 2004/17 is that the negotiated procedure with publication of a contract notice can be freely chosen. Therefore, in case Directive 2004/17 is not abolish this basic issue should remain unchanged.

2.2. Specific instruments for small contracting authorities

Answer to Question 27

The regulation involves full compliance with a long series of steps presupposing an organization capable of assuming them. Small contracting authorities can rarely afford such an organization. Thus, these powers should be allowed to comply with the directives but taking into account their available resources. This entails the need for a much simplified procedure. But the drive for simplification should not be targeted exclusively for small contracting authorities. There is a widespread need to simplify across the board. Flexibility does not undermine the basic principles public procurement is based upon. It rather provides more incentive to pursue these goals and contributes to open up the markets reducing the burdens for public authorities and potential provides alike.

Answer to Question 28

Imposing less heavy requirement in terms of publicity less stringent time limits to present offers and more flexible awarding procedures would be welcome.

Answer to Question 29

Below the thresholds, contracting authorities are obliged to respect the basic rules of public procurement in accordance with the Treaty: the principle of non-discrimination and transparency. Under the Treaty the Court of Justice is the competent institution to determine those rules. The Commission Communication fails to provide full legal certainty in cases where contracts are challenged before a Court.

2.3. Public-public cooperation

Answer to Questions 30 to 33.

These questions have been answered in A.4

2.4. Appropriate tools for aggregation of demand / Joint procurement

Answer to Questions 34 to 38

The aggregation of demand appears, in principle, as a practice to be encouraged, provided that quantitative limits are set to avoid any risk of exclusion. Presumably, higher concentration should bring more standardization, and result in cost savings. However, this benefit could be offset by the difficulty of finding a uniform price beneficial for all and each of the participating contracting authorities. Besides, significant legal problems arise in particular as regards the applicable law and the decision-making body in terms of resources. It is unclear how EU legislation determine the national law applicable.

The Current systems of central purchasing and framework agreement should be more flexible in determining the amounts and duration and be based on estimated quantities as these procedures rest on forecasts. Contracting should be allowed even if final orders exceed in a reasonable percentage the original estimate

2.5. Address concerns relating to contract execution

Answer to Question 39

CEEP support the idea to regulate this issue, so long the capacity to determine the status of substantial modification for any amendment resides in the contracting authority and no in the bidder. It would be simpler to establish in the regulation what is not considered to be a substantial modification. For example, by setting a contract execution percentage above which there is no longer a case for substantial modification.

Answer to Question 40

The most advisable procedure should be a negotiated one.

Answer to Question 41

Contracting authorities should retain the capacity to qualify the contract amendments. Thus, the EU rules on the matter should only regulate the right of the contracting authority to change suppliers or terminate the contract, it being understood that this initiative can never be imposed as an obligation to contracting authorities. It is up to them to decide as appropriate, taking into account the public interest.

Answer to Question 42

National laws on this matter establish a presumption of legality for the performance of the contracting authorities in public procurement. We can not presume a priori, as this question

suggests, that a selection procedure has violated the procurement law. If this assumption is accepted, it will generate immediate economic responsibilities for the government, a result which seems unacceptable. This does not mean that bidders are deprived of their rights. On the contrary, the judicial system gives them adequate protection since they can rely on the ways set out in "Remedies" Directive.

Answer to Question 43

The regulation of execution could undermine freedom of contract. It is also noted that delays in payments and are already covered by Directive 2011/7/EU of The European Parliament and of The Council, of 16 February 2011, on combating late payment in commercial transactions.

Answer to Question 44

Authorities should retain the possibility to exclude or restrict subcontracting to ensure proper control over goods, services and, specially, works to be delivered by the contracting party. Authorities should also be able to reject proposed subcontractors for objective reasons in the framework of the selection process. Special care should be taken in regulation to avoid such rejection to give rise to undue litigation.

3. A more accessible European procurement market

Answer to Question 45

CEEP believes that the main hurdle posed by current rules to economic operators is the time consuming and costs of many tendering procedures. The uncertainty linked to the lack of effective penalties on reckless complainers that too often disrupt the execution of fair contracts, is a matter that should also being paid due attention. The cost of litigation in administrative procedures is so low that it fosters systematic claims whether they are funded or not. It is difficult to envisage common rules to govern administrative and/or legal procedures in this field, a matter for Member States. But it might be useful to reflect on ways to avoid such abuses.

3.1. Better access for SMEs and Start-ups

Answer to Questions 46 to 52

CEEP believes that the idea of providing extra advantages to SMEs through public procurement policy should be properly assessed. It would run contrary to market principles and to equal treatment, and might undermine the rational of maximising value-for-money in public expenditure. Thus, careful consideration should be paid before engaging in such a drive. A particular concern is raised by the idea of switching to self-declarations replacing certificate, as this might prove a source of abuses. The request for sound economic balance and resources in order to perform a task seems essential to avoid reckless offers and the

possibility of failure to deliver the goods or services with the minimum required standards of quality and certainty. This would prove especially damaging in the realm of public services.

3.2. Ensuring fair and effective competition

3.3. Procurement in the case of non-existent competition/exclusive rights

Answer to question 53 to 61

Public Procurement policy promotes competition to the extent that the contract is awarded to the lowest bidder. In fact, in many cases it means that the holding of a tender in order to obtain the lowest cost to public funds (simultaneous with other requirements) precludes State aid.

However, this does not mean that public procurement policy should replace competition policy. The latter has proprietary tools that should be implemented to combat the abuses that might occur. Decision makers in public procurement can not and must not perform the functions of national regulators and supervisors on matters regarding competition.

Increased cross-border participation in a tender depends mainly on willingness by bidders to participate. Promote such participation should not be pursued at the expense of increased costs for contracting authorities as in the case of translations into a second language. These matters are subject to national administrative law and are financed with national public resources.

4. Strategic use of public procurement in response to new challenges

4.1. "How to buy" in order to achieve the Europe 2020 objectives

Answer to Questions 62 to 76

CEEP supports the principle of voluntary integration by companies of social and environmental concerns in its activities and its management, interacting with other partners. To this end CEEP emphasizes its commitment to social and environmental responsibility under the European label created with the support of the European Commission under the pilot project DISCERNO. CEEP believes that this initiative should be made permanent by the Commission

Answer to questions 79 to 82.4

The link to the subject of the contract should remain unchanged.

Public contracts have a fundamental objective: the provision of goods and services to contracting authorities to carry out their purposes. It is thus essential that the award criteria

are linked with the object of contract. Establishing selection criteria not related to that object could jeopardize the fulfillment of essential purpose, even though it might contribute to achieve other policy objectives.

4.2. "What to buy" in support of Europe 2020 policy objectives

Answer to Questions 83 to 90

We already noted earlier that CEEP opted for the voluntary integration of social and environmental concerns in corporate governance. The imposition of duties on what to buy could restrict the contractual freedom of the respective contracting authorities. If, for example, it is deemed appropriate that the production of a specific product should use certain types of energy or use a technology-friendly environment, it will be a matter for sector-specific regulation to establish the requirements for product marketing.

4.3. Innovation

Answer to Questions 91 to 96

Innovation is a key issue in Community Strategy to deliver better economic performance. Public authorities should therefore have the opportunity to promote this goal so long it is made on an objective and non-discriminatory basis.

4.4. Social services

Answer to Questions 97 to 97.2

Special treatment for Social Services should be a key issue in the revision of public procurement rules, fully taking into account the obligation to foster them under article 14 of The Treaty as well as in the corresponding chapter dealing with social policy.

<h3>5. Ensuring sound procedures</h3>
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5.1. Preventing conflicts of interest

5.2. Fighting favouritism and corruption

5.3. Exclusion of "unsound" bidders

5.4. Avoiding unfair advantages

Answer to Questions 98 to 110

The issues raised in these questions fall within the competence of Member States and it is not considered necessary to introduce specific new rules.

6. Access of third country suppliers to the EU market
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Answer to Questions 111 to 112

CEEP has stated before (see A.5) the convenience to suppress the current public procurement rules on excluded sectors. This does not mean that the Community should not pursue an active policy in opening up third country market, providing wider and fair access to them by EU firms. It should be noted that up to now, multilateral rules fail often to be respected by third countries, especially when their incumbent firms are State-owned. A more vigilant stance by the European Commission would be welcome.