

CEEP VIEWS ON HOW TO IMPLEMENT THE PUBLIC PROCUREMENT PACKAGE

Key messages:

- The transposition and implementation process of the public procurement package should respect the core principles which are underpinning the agreed legislation, amongst which is principle of freedom of organisation of public authorities when providing public services, i.e. the free choice to provide public services either through its own resources (with certain conditions) or through the market
- Member States should fully transpose the content and the wording on public-public cooperation in order to facilitate the use of such tools and enable public authorities to provide public services in the most efficient way according to the diversity of realities they are facing
- Contracting authorities should not suffer unnecessary administrative burden when organising tendering procedures. Therefore, Member states should not impose a mandatory division of tenders into lots and avoid any mandatory use of social and environmental criteria in tendering procedures

The Public Procurement Package has been one of the most important battles of CEEP over the past few years and major successful outcomes have been achieved to preserve the autonomy of public authorities in providing public services. It is now important to ensure that these positive outcomes are not undermined during the transposition and implementation process of the package. The transposition deadline being less than one year ahead (18 April 2016), the public procurement package is high the EU and national political agendas. The new Commission has announced that it has and will deploy important means to ensure the right implementation of the package, notably in the context of and as a follow-up of the Single Market Strategy.

Guarantee the discretionary power of public authorities

The principle of freedom of organisation of public authorities has been enshrined in secondary law for the first time with the public procurement package. In all proposals, provisions have been included which state that the directives do not affect the freedom of authorities to organise public services. The Public Procurement Directive even clearly refers to article 14 TFEU and Protocol 26 in its article 1. In line with this fundamental principle, the directives foresee clear exemptions from competitive tendering if a public authority decides to provide a service through vertical ("in-house") or horizontal public-public cooperation as codified in the directives.

CEEP had been calling for several years for clear definition of public-public cooperation in European secondary legislation and strongly welcomed the inclusion of a positive definition of in-house and public-public cooperation in all Directives. Both horizontal and vertical (in-house) cooperation are very useful tools that need to be available to authorities and companies and adapted to their needs.

The precise codification of public-public cooperation in the directives provides more legal certainty for public services providers and avoids the multiplication of court procedures. The basic criteria of the European Court of Justice have been taken over to avoid undue distortion of competition.

CEEP calls national legislators to adequately transpose the clear wording and the scope of the exemptions for horizontal and vertical public-public cooperation from competitive tendering as agreed in the Directive. A more restrictive interpretation of public-public cooperation risks to fail to mirror the multiple realities of local public services provision. Moreover, it is essential that the national rules provide public authorities with sufficient legal certainty. The transposition of the precise conditions laid down in the directives are particularly important to guarantee this autonomy of public authorities, notably the possibility of private capital participation and the criteria of more than 80 % of the activity carried out for the controlling entity.

Ensure simplified and flexible awarding procedures

CEEP has been a strong advocator of clearer, simpler and more flexible public procurement rules together with legal certainty. The outcome of the legislative procedure has been overall satisfying in this regard. National legislators should keep in mind the spirit of simplification and flexibility of tendering procedures when transposing the directives and not add up complexity and administrative burden.

- **Division of tendering offers into lots:** the public procurement directives allow Member States to introduce a mandatory division into lots at national level. Furthermore, the decision not to divide a tender into lots has to be justified by contracting authorities. CEEP believes that public authorities are capable without any law to evaluate the added value of the division of their offers into lots. Forcing them to do so and even publish a justification of their decisions provides additional burden and costs and disproportionate risks of litigation. Therefore, CEEP calls Member states to not impose such a mandatory requirement on contracting authorities.
- **Awarding criteria in tendering procedures:** In the same spirit, CEEP calls Member states to not impose mandatory criteria requirements for tendering to contracting authorities beyond the obligations included in the directives. As social partner and representative of members committed to corporate social responsibility, CEEP welcomes the possibility and the incentives included in the Directive to broaden awarding criteria to other considerations than the lowest price. CEEP very much supports the development of the use of labels or equivalents in award procedures, in line with its members' commitment to develop the CEEP-CSR Label which rewards good practices of public services providers. Nevertheless, in order to ensure that the contracting authority can best meet its own needs, it is also of primary importance that the framework remains flexible and on a voluntary basis. As a consequence, Member states should avoid introducing a mandatory use of environmental and social criteria.