CCRE CEMR

L'Europe locale & régionale

Marchés publics

Faire court et simple!

Position du CCRE et propositions d'amendements à la proposition de la Commission relative à une nouvelle directive sur la passation des marchés publics / COM (2011) 896 final

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Messages clés du CCRE

Le CCRE invite le Parlement européen et le Conseil à modifier radicalement les propositions de la Commission de façon à mettre en place un régime simplifié

- Les gouvernements locaux et régionaux, en leur qualité d'acheteurs publics, reconnaissent la nécessité de garantir une concurrence ouverte lorsqu'ils ont recours aux appels d'offres pour tous types de marchés publics et **adhèrent totalement** aux principes d'égalité, de transparence et de non-discrimination du Traité dans le cadre des marchés publics ;

- Néanmoins, le fait de devoir appliquer constamment les règles complexes des directives européennes sans recevoir aucune offre de fournisseurs d'autres Etats membres en retour **occasionne un gaspillage de ressources et une perte d'argent** ; le régime complexe de l'UE n'est pas adapté si l'on considère les résultats obtenus ;

- Une augmentation du seuil pour les biens et les services aiderait à **éviter les pertes de temps et à faire baisser les charges financières** tant du côté des pouvoirs adjudicateurs que des soumissionnaires ;
- La transparence, la non-discrimination et l'égalité de traitement dans les procédures de passation de marchés inférieurs aux seuils doivent être garanties par les Etats membres en vertu de **règles nationales**.

Le CCRE estime qu'il est nécessaire de revenir aux objectifs et principes fondamentaux du concept de marchés publics et de trouver des solutions pragmatiques et faciles à appliquer, répondant aux considérations suivantes :

- Mettre l'accent sur les **principes du Traité** (égalité, transparence, non-discrimination) et les moyens de renforcer leur application, notamment grâce à l'utilisation des nouvelles technologies ;

- Mettre en place **un cadre juridique adapté et bien équilibré** qui respecte les principes fondamentaux, accordant suffisamment de flexibilité à la fois à l'autorité publique et au soumissionnaire ;

- Réduire les charges juridiques et administratives, en **simplifiant** et en harmonisant les procédures, à nouveau, tant pour l'autorité publique que pour le soumissionnaire ;

- Permettre aux collectivités locales et régionales de fixer leurs propres **priorités en matière d'achat** ;
- Accroître la sensibilisation et les incitations à chercher des solutions innovantes.

Partie 1 : Position du CCRE sur la proposition de la Commission

1. Les marchés publics revêtent une importance primordiale pour les collectivités locales et régionales. En effet, une part considérable des dépenses publiques est effectuée au niveau local et régional et **contribue ainsi de manière significative à l'économie** des villes, communes et régions européennes.
2. C'est particulièrement important à une époque où les investissements publics peuvent contribuer à maintenir les personnes au travail, à **encourager une croissance intelligente** dans des projets durables et à éviter une nouvelle dégradation des conditions économiques et sociales.
3. Le CCRE, en sa qualité d'organisation européenne regroupant 60 associations nationales représentant les gouvernements locaux et régionaux dans 40 pays, s'est beaucoup impliqué dans le débat sur le développement des règles européennes des marchés publics ces dix dernières années.

Commentaires sur la proposition de la Commission

4. Le CCRE tient à souligner que l'objectif premier du régime des marchés publics est de garantir un **bon rapport qualité/prix**.
5. Les collectivités locales et régionales signalent que les procédures européennes de passation de marchés publics sont très coûteuses et demandent beaucoup de temps, et qu'elles ne débouchent malgré tout pas sur le résultat escompté : **les achats transfrontaliers**. Les efforts financiers et administratifs investis dans les procédures requises sont disproportionnés par rapport au nombre de marchés passés avec des soumissionnaires d'autres Etats membres.[1]
6. Quelques-unes des 246 pages de dispositions sont en fait davantage des **lignes directrices** pour la mise en œuvre et ne devraient pas être reprises dans un texte législatif. Ces éléments devraient être proposés dans une communication ou un manuel séparé, permettant des modifications au fil du temps, sans modification législative, et ce afin de s'adapter à l'évolution rapide de la jurisprudence de la CJUE en matière de marchés publics. De cette façon, le texte législatif lui-même pourrait être considérablement simplifié.
7. Le CCRE **s'oppose fermement à des dispositions aussi détaillées**, telles qu'elles sont proposées au niveau européen, et souligne, en référence aux principes de subsidiarité et de proportionnalité, qu'il appartient aux autorités compétentes de chaque Etat membre de régler ces détails, et notamment ceux portant sur la gouvernance et la mise en œuvre.
8. A l'instar du Parlement européen dans sa résolution sur la « modernisation des marchés publics », le CCRE estime que la nouvelle directive doit proposer une **simplification importante** et une consolidation des règles.
9. Or, le texte proposé par la Commission fait le contraire. Il va bien au-delà de ce que nous considérons comme proportionné : il propose de créer de nouvelles contraintes pour les services juridiques, de **nouvelles obligations de publicité** pour les services sociaux (article 75) et une obligation d'introduire de **nouvelles procédures au niveau national** (article 76), de **nouveaux organes de contrôle** au niveau national (article 84), des explications complémentaires sur la valeur estimée du marché (article 44) et de **nombreux rapports** et des **obligations de notification contraignantes** (ex. les articles

[1] C'est ce que confirme une évaluation de la Commission européenne elle-même, qui indique que seulement 1,6% des marchés sont attribués à des entreprises situées dans d'autres Etats membres.

85 et 86), même directement à la Commission européenne (ex. l'article 32, paragraphe 6)

10. Nous invitons par conséquent le Parlement européen et les Etats membres à adopter une approche audacieuse et à passer au crible la proposition de directive de façon à **en éliminer toutes les dispositions comprenant des règles trop détaillées**. A une époque où les pouvoirs publics, y compris les services de la Commission européenne, réduisent leurs effectifs, il ne nous semble pas approprié d'introduire des charges administratives encore plus lourdes.
11. Nous encourageons le Parlement européen et le Conseil à **modifier radicalement les propositions de la Commission** afin de mettre en place **un régime simplifié.**
12. Nous pensons que l'**Accord sur les marchés publics** (AMP) de l'OMC, avec ses 33 pages et 24 articles, est un très bon exemple à suivre pour mettre en place un régime aussi souple. Etant donné que les deux régimes (UE et OMC) doivent en général être cohérents, nous encourageons vivement le législateur européen à aligner la proposition de directive sur l'approche plus souple de l'AMP.
13. Le CCRE préconise de relever le **seuil** afin de trouver un juste équilibre en termes d'intérêt transfrontalier : doubler les seuils pour les biens et les services pour atteindre € 400.000 constituerait un **premier pas dans la bonne direction**.
14. En outre, et toujours dans le sens de la résolution du Parlement européen de 2011, nous plaidons pour des **procédures** moins nombreuses et plus **souples**, comme pour l'AMP, en particulier quand la Commission fait valoir que les seuils ne peuvent pas être relevés. Il est absolument nécessaire d'accroître les possibilités de négociation dans les procédures.
15. Concernant la **coopération public-public**, la proposition interprète de manière trop stricte la jurisprudence de la CJUE. La formulation de la résolution du Parlement européen[2] reflète parfaitement la jurisprudence de la CJUE et devrait être utilisée pour le texte de la directive. La résolution souligne le fait que le transfert de tâches entre des organismes du secteur public relève de l'ordre administratif interne des Etats membres et n'est pas soumis aux règles des marchés publics.
16. Nous préférerions aussi que l'exclusion dont il est question ci-avant soit **brièvement mentionnée** à l'article 1 de la directive et que l'exemption soit détaillée à l'article 11.
17. Concernant les **services sociaux et autres services spécifiques à la personne** (articles 74-76), le CCRE ne voit pas la nécessité d'introduire de nouvelles dispositions contraignantes. Comme le Parlement européen, nous sommes en faveur du maintien d'un régime simplifié pour cette catégorie de services ; en particulier pour les services sociaux et juridiques, il convient de mettre en place un régime qui reconnaisse leur caractère spécifique.
18. Des règles « plus souples » pour les pouvoirs adjudicateurs locaux et régionaux sont également les bienvenues ; les services qu'ils sous-traitent revêtent généralement une dimension transfrontalière limitée. Il faut préciser également que les services (médicaux) d'urgence tombent également dans cette catégorie.
19. Les règles de passation des marchés publics ne sont **pas adaptées** lorsqu'il s'agit de la prestation de services spécifiques, tels que les **conseils juridiques, les services sociaux, de santé ou éducationnels à des particuliers**.
20. En outre, le CCRE craint qu'au titre de l'article 10, paragraphe d, **les activités visant à lever des fonds ou mobiliser des capitaux ne soient plus exclues** de la directive. Cette disposition aura un impact majeur sur la possibilité qu'auront les collectivités

[2] Résolution du Parlement européen du 25 octobre 2011 (2011/2048(INI), point 6

locales et régionales d'emprunter de l'argent, car les procédures de marchés publics obligeront celles-ci à suivre **un processus beaucoup plus long, compliqué et cher pour emprunter.**

21. Dernier point, et non des moindres, sur la question des **concessions de services**, au sujet desquelles la Commission européenne a proposé une directive séparée : le CCRE **s'oppose à un cadre juridique strict**. Si la Commission européenne maintient son intention de légiférer sur les concessions de services, le CCRE tient à souligner que la réglementation ne doit pas aller plus loin que de simples mesures de publicité ou qu'une obligation de notification préalable.

Dans la seconde partie de ce document, le CCRE présente des propositions d'amendements à la directive de la Commission, qui reflètent les éléments de notre position. Structurées en fonction d'axes thématiques, nos propositions suivent l'ordre des négociations au sein du groupe de travail du Conseil et de la Commission du Parlement européen compétente au fond, celle du Marché intérieur et de la protection des consommateurs (IMCO). Là où c'était possible, référence a été faite aux amendements proposés par le rapporteur de la Commission, M. Tarabella.

Part 2: Proposals for amendments

Cluster 1: Greater choice of procedures

CEMR position: More flexibility for tendering authorities and bidders

CEMR believes that the new directive needs to propose a **significant simplification** and consolidation of the European public procurement rules. Tendering authorities spend a lot of time and resources on applying the very complex European procurement rules without receiving any offer from providers in another Member State.

This means a waste of resources, lengthy processes, and huge costs that local and regional government can hardly bear in times of economic difficulties.

CEMR is in favour of a more flexible use of the competitive dialogue procedure, and the introduction of a greater freedom to negotiate. We **support in general the deadlines as proposed by the European Commission** and not the extended deadlines, as proposed by the rapporteur, Mr Tarabella.

Therefore, we propose the following:

- Support amendments 44, 45 and 46 of the rapporteur;
- No support of amendments 47, 49, 50, 51, 52, 53, 54, 55 of the rapporteur;
- Additional amendments to
  - article 24, 'choice of procedures';
  - article 27, 'competitive procedure with negotiation' and
  - article 30, 'use of negotiated procedure without prior publication':

Amendment to Article 24 paragraph 1: Choice of procedures

1. ….	*1….*
Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.	*Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.*
Member States may provide that contracting authorities may apply innovation partnerships as regulated in this Directive.	*Member States **shall** provide that **the** contracting authorities may apply innovation partnerships as regulated in this Directive.*
They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue in any of the following cases:	*They **shall** also provide that that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue, **at the choice of the contracting authorities,** in any of the following cases*
….	…
(a)	*(a)*
(b)	*(b)*
(c)	*(c)*
(d)	*(d)*
(e)	*(e)*

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures.	~~*Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures.*~~

Justification

The European Commission has based its proposal on the Government Procurement Agreement (GPA) of the WTO[3]. As a result, according to the Commission, it is not possible to raise the thresholds. However, the flexible procedures in the GPA are only partially adopted by the Commission, and even allow the Member States the possibility to deny the use of them to contracting authorities.

In our opinion it is not up to the Member States to determine whether the flexible procedures should be converted into national legislation. Contracting authorities should themselves be able to decide which procedure, amongst all the procedures, is the appropriate one to use in each procurement process.

This is particularly true for the competitive procedure with negotiation, which is very important in practice. Public procurement would be significantly more difficult without this procedure. This procedure is suitable for achieving very good value for money. In addition, it reduces the administrative burden for the individual municipal offices. For that reason, the contracting authorities should remain entitled to make a choice here instead of giving member states the right to make this decision for all cases in advance.

In tenders for consulting services (e.g. comprehensive IT software), there is for example sometimes not a clear perception of how a certain task is to be performed. By drawing on the bidder's know-how, however, a solution can then be developed in a step-by-step approach within the framework of negotiations.

Amendment to Article 27 paragraph 1 sub-paragraph 2: Competitive procedure with negotiation

In the contract notice or in the invitation to confirm interest contracting authorities shall describe the procurement and the minimum requirements to be met and specify the award criteria so as to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the negotiations. ***In the technical specifications, contracting authorities shall specify which parts thereof define the minimum requirements.***	*In the contract notice or in the invitation to confirm interest contracting authorities shall describe the procurement and the minimum requirements to be met and specify the award criteria so as to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the negotiations.*

[3] GPA text see: http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm

Justification

The newly introduced Article 27 paragraph 1 sub-paragraph, sentence 2 foresees regulations for the competitive procedure with negotiation which are stricter than the ones currently in place. This will not only lead to a deterioration in practical procurement, but it also contradicts this revision's main objective to contribute to a simplification and flexibilisation of procedures. Thus, it should be deleted without substitution.

In practice, such a regulation would lead to increased legal uncertainty, as is currently the case in terms of whether or not variants are accepted. Despite the European Court of Justice's judgment of 16 October 2003 (C-421/01, "Traunfellner GmbH") defining the contracting authority's obligation to always set out minimum specifications if taking variants into consideration, it is still not entirely clear how specific these minimum specifications have to be and if they need to be set out for all or only for some (and if so, for which) parts of the work to be performed.

The contracting authority should not be obliged to set out minimum specifications before even launching the procedure. On the one hand, such minimum specifications are not legitimate if the technical specifications of a work are not subject to the tenderer's interpretation. A competitive procedure with negotiation often follows a non-successful open or restricted procedure; as a result, a negotiated procedure without prior publication may be required due to time constraints (Art. 30, par. 2 a). Thus, the procedure is not primarily chosen based on the subject-matter of the contract. And on the other hand, minimum specifications may prevent innovative solutions.

Amendment to Article 30 paragraph 2 a: Use of negotiated procedure without prior publication

(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered ***and that a report is sent to the Commission or the national oversight body designated according to Article 84 where they so request.***	(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered.

Justification

In combination with Art. 84, Art. 30, par. 2 a, 2nd half of the sentence leads to an unnecessary bureaucratic burden, especially due to the fact that there is to be only one responsible national body and due to the unclear formulation of a duty to report. The passage "and that a report is sent to the Commission or the national oversight body designated according to Article 84 where they so request" should therefore be deleted without substitution.

Amendment to Article 30 paragraph 2 c (i)

(c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: (i) the absence of competition for technical reasons;	(c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons: (i) the absence of competition for technical ***or legal*** reasons;

Justification

Art. 30, par. 2 c (i) should be completed as follows: “the absence of competition for technical or legal reasons“. That would also include cases where the contracting authority needs a building to be constructed in a specific location and the owner will only agree to sell the premises if he/she is also awarded the construction contract.

Cluster 2: Strategic use of public procurement

CEMR position: Public procurement should not be overly used as an instrument to pursue policy objectives

Local authorities are concerned about EU efforts to use procurement to address policy goals such as environmental and social issues via, for example, their inclusion as award criteria in public contracts. The choice of whether, in addition, to opt for green, or social, or innovation aspects within public contracts should be decided by the local or regional authority itself. Any EU requirements to include green, social, or other policy goals in public contracts **must remain entirely voluntary.**

Concerning **social and other person-specific services** (articles 74 – 76) CEMR does not see the necessity of introducing new burdensome provisions. We are in favour of keeping a lighter regime for this category of services, especially for social and legal services a regime is needed which recognises their specific character. Also 'lighter' rules for local or regional contracting authorities are welcome; their contracted services often have limited cross-border relevance. It also has to be clarified that emergency (medical) services also fall under this category. Furthermore, public procurement rules are **not suitable** when it comes to the provision of specific services such as **legal advice, social, health or educational services to individuals.**

Therefore, we propose the following:

- No support for amendments 86, 90, 114, 121 of the rapporteur
- Support amendments 92, 93, 120, 142, 143 of the rapporteur
- Additional amendments for
    - Article 4 (d), threshold amounts
    - Article 17, reserved contracts
    - article 54 (2), general principles;
    - article 55 (3), exclusion grounds;
    - article 66 (1) (b), contract award criteria
    - article 67 (3), life-cycle costing
    - article 75, publication of notices
    - article 76, principle of awarding contracts

Amendment to Article 4 (d)

EUR 500 000 for public contracts for social and other specific services listed in Annex XVI.	EUR ***1 000 000*** for public contracts for social and other specific services listed in Annex XVI.

Justification

The threshold for social services and other specific services should be aligned with the thresholds of the utilities directive (article 12 c of the Commission's proposal), which is EUR 1 000 000. This appears even more appropriate since social services are usually very locally provided and have little relevance for the internal market.

Amendment to Article 17, Reserved contracts

Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers. The call for competition shall make reference to this provision.	Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged ~~workers~~ persons. 'Disadvantaged persons' includes amongst others: the unemployed; people experiencing particular difficulty in achieving integration; members of vulnerable groups and members of disadvantaged minorities. The call for competition shall make reference to this provision.

Justification

The ability to reserve contracts to enterprises employing 'disadvantaged' persons is new. The term 'disadvantaged persons' therefore needs to be specified in the directive, as it is much wider than the concept of 'handicapped' persons referred to in the current directive. As the term 'disadvantaged persons' is only used in Article 17, this is the clearest place to explain the term.

Amendment to Article 54 (2)

Contracts shall be awarded on the basis of the criteria laid down in Articles 66 to 69, provided that the following cumulative conditions are fulfilled: (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account Article 43; (b) the tender comes from a tenderer that is not excluded in accordance with Articles 21 and 55 and that meets the selection criteria set out by the contracting authority in accordance with Article 56 and, where appropriate, the non-discriminatory rules and criteria referred to in Article 64.	1. Contracts shall be awarded on the basis of the criteria laid down in Articles 66 to 69, provided that the following cumulative conditions are fulfilled: (a) the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account Article 43; (b) the tender comes from a tenderer that is not excluded in accordance with Articles 21 and 55 and that meets the selection criteria set out by the contracting authority in accordance with Article 56 and, where appropriate, the non-discriminatory rules and *criteria referred to in Article 64.*

2. Contracting authorities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.	*2. Contracting authorities may decide not to award a contract to the tenderer submitting the best tender where **it has been** established that the tender does not comply, ~~at least in an equivalent manner~~, with obligations established by Union **or national** legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.*

Justification

Art. 54 paragraph 2 refers to the compliance with EU legislation. This formulation is very wide and in this way unclear. Furthermore it is already possible under the existing directive to exclude tenderers who do not act legally. Therefore, this provision is unnecessary. This kind of regulation is superfluous because it is self-evident that both, tenderer and contracting authority, have to respect EU legislation.

Amendment to Art. 55 (3), Exclusion grounds

3. A contracting authority may exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:	3. A contracting authority may exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:
(a) where it is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.	(a) where it is aware of any violation of obligations established by Union ***or national*** legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.
(b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it has entered into an arrangement with creditors, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;	(b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it has entered into an arrangement with creditors, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;
(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct;	(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct;
(d) where the economic operator has	(d) where the economic operator has

shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature with the same contracting authority. In order to apply the ground for exclusion referred to in point (d) of the first subparagraph, contracting authorities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment shall be communicated to the contractor in question, which shall be given the opportunity to object to the findings and to obtain judicial protection.	shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature with the same contracting authority. ~~***In order to apply the ground for exclusion referred to in point (d) of the first subparagraph, contracting authorities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment shall be communicated to the contractor in question, which shall be given the opportunity to object to the findings and to obtain judicial protection.***~~

Justification

The scope of Art. 55. 3 (a) is very general and wide. Besides it is pointless, because the violation of those obligations in the field of social and labour law or environmental law are already recognised as significant violations. Therefore, this provision is unnecessary. This kind of regulation is superfluous because it is self-evident that both, tenderer and contracting authority, have to respect EU legislation.

The explanation of the meaning of Art. 55. 3 (last subparagraph) is not comprehensive and is inappropriate regarding the conditions for claims. So far it only means that claims have to be noted in written form we can agree. But a new kind of remedy or legal protection would be inappropriate because the award and the execution of the contract would be mixed up. Furthermore it would create more bureaucracy for the contracting authorities, a new field of legal uncertainty and room for legal actions.

Furthermore this formulation is too detailed for a legal text. It is up to Member States to decide the standard of evidence required.

Amendment to Article 66 paragraph 3, Contract award criteria

(Amendment 120 of the rapporteur)

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.	***deleted***

Justification

Art. 66, par. 3 should be deleted without substitution. The objective of this modernization is to provide contracting authorities and bidders with a maximum of flexibility. This flexibility is

limited if Members States are put in a position to decide that certain types of contracts will have to be awarded to the most economically advantageous tender instead of making the decision based on the lowest price. This regulation only allows for over-all solutions and the lowest price should always be an option.

Small companies will have more difficulties to compete for instance on environmental or social criteria, but may well be much more competitive on cost. If the award cannot be based on the lowest cost, the opportunities for small companies to participate in the competition will be reduced significantly: they will be frozen out of the market.

Amendment to Article 66 paragraph 4, sentence 1 and 2

4. Award criteria shall not confer an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.	***deleted***

Justification

Art. 66, par. 4, sentences 1 and 2 are ambiguous or they do not have any additional message. They should therefore be deleted for the benefit of simplification and in order to ensure legal certainty It is unclear what the Commission intends to regulate with these two sentences as their content is already covered by the general principle of non-abuse of process and the principle of transparency.

The content of this text is already covered by the general principles of the Treaty, in particular by the principal of transparency.

Amendment to Article 67, paragraph 3, Life-cycle costing

Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 66(1). A list of such legislative and delegated acts is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.	***Delete***

Justification

Local and regional government supports the Europe 2020 objectives and recognises the value of a sustainable, socially responsible and innovative procurement policy. In line with our wishes, the proposal contains no obligations.

In this respect, the lifecycle costs occupy an important role. We support this objective, but have noted that the development of the calculation method is still experiencing teething problems. An obligation to use the EU method, given the current circumstances, would be too ambitious. We are also not in favour of the authority for determining the methods being delegated to the Commission.

Amendment to Article 75, Publication of notices

1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means of a contract notice.	~~1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means of a contract notice.~~
2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice.	2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice.
3. The notices referred to in paragraphs 1 and 2 shall contain the information referred to in Annexes VI Part H and I, in accordance with the standard forms.	3. The notices referred to in paragraphs 1 ~~and 2~~ shall contain the information referred to in Annexes VI Part H and I, in accordance with the standard forms.
The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.	~~The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.~~
4. The notices referred to in paragraphs 1 and 2 shall be published in accordance with Article 49.	4. The notices referred to in paragraphs 1 ~~and 2~~ shall be published in accordance with Article 49.

Justification

New ex-ante advertising requirements for social and other specific services are unwelcome as they introduce new burdens which are not appropriate to this category of service. Transparency should be ensured, as currently, through ex-post publication of a contract award notice.

***Amendment to* Article 76, Principles of awarding contracts**

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question. 2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.	***delete***

Justification

Social services are locally provided and do by their nature not have any relevance for the internal market. Consequently they are in practice not offered transitionally. New burdensome provisions for social services on European or national level creates therefore unnecessary administrative burden for tendering authorities. Particularly in the field of social services in terms of simplification and flexibility new provisions have to be avoided. The ex-post publication requirement of the current directive is sufficient to meet the EU principles of transparency, equal treatment and proportionality.

Cluster 5: SME access

CEMR position: The public procurement rules should be more simple. This would make it easier for SMEs to submit offers.

The general aim should be to make the rules as simple as possible so that contracting authorities of all sizes can work with them. Where procurement rules remain complex, contracting authorities remain with 'in house' delivery models. However, if the European legislator really wants to make public procurement more SME friendly, it could consider the inclusion of 'reservations' to allow a proportion of contracts to be specifically directed towards SMEs. This is permitted by the GPA and used widely in the USA and several WTO countries. Such 'reservations' would also be of value as regards non-profit organisations. Furthermore, placing new limits on sub-contracting limits market opportunities for smaller businesses.

Therefore, CEMR proposes the following:

- No support for amendments 81 and 137 of the rapporteur;
- Additional amendments to
    - article 44, division of contracts into lots
    - article 71, subcontracting

Amendment to Article 44, Division of contracts into lots

1. Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.^ Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders are limited to one or more lots only.	1. Public contracts may be subdivided into homogenous or heterogeneous lots. ~~For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.~~ Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders are limited to one or more lots only.
2. Contracting authorities may, even where the possibility to tender for all lots has been indicated, limit the number of lots that may be awarded to a tenderer, provided that the maximum number is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots where the application of the chosen award criteria would result in the award to one tenderer of more lots than the maximum number.	2. Contracting authorities may, even where the possibility to tender for all lots has been indicated, limit the number of lots that may be awarded to a tenderer, provided that the maximum number is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots where the application of the chosen award criteria would result in the award to one tenderer of more lots than the maximum number.

3. Where more than one lot may be awarded to the same tenderer, contracting authorities may provide that they will either award a contract per lot or one or more contracts covering several or all lots. Contracting authorities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract. Contracting authorities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 66 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 66 are better fulfilled with regard to all the lots covered by that contract. Contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory. 4. Contracting authorities may require that all contractors coordinate their activities under the direction of the economic operator to which has been awarded a lot involving the coordination of the entire project or its relevant parts.	3. Where more than one lot may be awarded to the same tenderer, contracting authorities may provide that they will either award a contract per lot or one or more contracts covering several or all lots. Contracting authorities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract. Contracting authorities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 66 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 66 are better fulfilled with regard to all the lots covered by that contract. ~~Contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.~~ 4. Contracting authorities may require that all contractors coordinate their activities under the direction of the economic operator to which has been awarded a lot involving the coordination of the entire project or its relevant parts.

Justification

The value of a contract is determined by the very nature and scale of the goods, works or services procured. Why a contract is valued above €500,000 will be self-evident according the subject matter. It is therefore an unnecessary administrative burden, and an exaggerated duty, for contracting authorities to have to explain and give reasons in every larger contract why the contract has a value above €500,000 and has not been disaggregated.

Amendment to Article 71, Subcontracting

1. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.	1. In the ***contract*** documents, the contracting authority may ask ~~***or may be required by Member State to ask***~~ the tenderer to indicate in ***his*** **tender** any share of the contract ***he*** may intend to subcontract to third parties and any proposed subcontractors.
2. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.	~~2. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.~~
3. Paragraphs 1 and 2 shall be without prejudice to the question of the principal economic operator's liability.	3. ***The indication*** shall be without prejudice to the question of the principal economic operator's liability.

Justification

The relationship between a contractor and a sub-contractor is a fundamental element of contract law, falling within the sphere of competition law, which should not be altered in the current Directive.

The possibility to allow direct payment of subcontractors by contracting authorities creates additional confusion and complexities around sub-contracting. If a contractor is performing a task against remuneration for a contracting authority then it becomes a contractor, not a sub-contractor.

Furthermore, the proposal will see unwelcome approaches by sub-contractors directly to contracting authorities to seek payment. This interferes with the right of contracting authorities to withhold payment from the contractor for valid contract performance reasons, even those for which the sub-contractor is not responsible.

The amendment introduces the text of the current Directive 2004/18/EC with a modification.

Cluster 8: Sound procedures

CEMR position: Keep the rules simple and flexible for both the contracting authorities and the bidders

CEMR **strongly objects detailed provisions** at European level as proposed by the Commission and stresses, with reference to the principles of subsidiarity and proportionality that such details should be left to the appropriate authorities in each Member State. In times when public authorities are reducing staff, it is not appropriate to introduce ever-heavier administrative burdens on the tendering authorities and the bidders.

CEMR therefore proposes the following:

- Amendments to
  - article 18 (1), confidentiality
  - article 69, abnormally low tenders

Amendment to article 18 paragraph 1, Confidentiality

*1. Unless **otherwise provided** in this Directive or in the national law **concerning access to information,** and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.*	*1. ~~Unless~~ **Notwithstanding provisions** in this Directive or in the national law and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders*

Justification

Within the framework of the General Rules, art. 18 should make clear that this rule does not apply if the contracting authority is entitled or obliged to pass on the relevant information in accordance with other regulations, e.g. in case of a review procedure, when dealing with the legal supervisory authority or in due process of law.

Amendment to article 69, abnormally low tenders

1. Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled: (a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders (b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;	***1. If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant. Those details may relate in particular to:*** ***(a) the economics of the construction***

(c) at least five tenders have been submitted.	***method, the manufacturing process or the services provided;*** ***(b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services;*** ***(c) the originality of the work, supplies or services proposed by the tenderer;*** ***(d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed;*** ***(e) the possibility of the tenderer obtaining State aid.***
2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.	2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.
3. The explanations referred to in paragraphs 1 and 2 may in particular relate to: (a) the economics of the construction method, the manufacturing process or the services provided; (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services; (c) the originality of the work, supplies or services proposed by the tenderer; (d) compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection; (e) the possibility of the tenderer obtaining State aid.	3***. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission of that fact.***
4. The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations	~~4. The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply~~

established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI. 5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof. 6. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.	~~with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.~~ ~~5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.~~ ~~6. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.~~

Justification

The amendment aims to replace the text from the proposal of the Commission with the text of the current article on abnormally low tenders. The new proposal introduces administrative burdens for companies and contracting authorities by narrowly describing abnormally low prices on one hand (eliminating reasons that could be justifiable like an innovative or cost-efficient solution) and obliging contracting authorities to always reject these tenders. Furthermore it would limit the freedom of the contracting authority in the tendering process more than the current Directive.

Cluster 9: Governance

CEMR position: No need to introduce new administrative oversight structures

CEMR believes that the Commission's proposal for new monitoring bodies at national level and heavy reporting and notification obligations are disproportionate and not in line with the principles of subsidiarity and proportionality.

CEMR therefore proposes the following:

- Deletion of
  - article 83, enforcement;
  - article 84, public oversight;
  - article 85, individual reports on procedures for the award of contracts;
  - article 86, national reporting and lists of contracting authorities;
  - article 87, assistance to contracting authorities and businesses.
- Introduction of a new article on 'content of reports' (taken from Article 43 of current directive).
- Amendment to article 88, administrative cooperation

Justification

Article 83: It is superfluous in a Directive to have an article stating that the Directive should be applied correctly.

Articles 84, 85, 86, 87: The requirements to create new national 'oversight bodies' and send contracts to them clearly infringe subsidiarity and duplicate the role of existing national courts, government ministries, and procurement advisory bodies. These articles cause unnecessary administrative burdens.

Article 84 should be deleted for various reasons. It is up to the Member States to organise their internal administration. Member States can decide to create an oversight body (article 84) without European regulation. Article 84 is contrary to the principle of subsidiarity.

We think that enforcement and compliance with the rules is very important. We do not believe that big top down structures are very helpful for sound enforcement and compliance throughout Europe at every level. It is better that the bodies responsible for carrying out democratic control are equipped to fully undertake this task. Reports from financial and legal auditors on procurement practices should be available to municipal and regional councils. Bottom up control will better promote compliance than the appointment of one or more separate oversight bodies.

In addition, businesses should be able to monitor compliance by appealing to the courts.

Article 85 should be deleted. Instead a new Article 83 should be inserted mirroring the current Article 43 from Directive 2004/18. This allows the Commission to request reports on an exceptional basis from contracting authorities, rather than requiring contracting authorities to systematically send every large contract to the Commission which is another bureaucratic burden, and runs contrary to the simplification aims of the Directive.

Article 88 should be maintained but without the references to the new 'oversight bodies'.

Proposal for a new article: 'content of reports' (taken from Article 43 of current directive)

	For every contract, framework agreement, and every establishment of a dynamic purchasing system, the contracting authorities shall draw up a written report which shall include at least the following: ***(a) the name and address of the contracting authority, the subject matter and value of the contract, framework agreement or dynamic purchasing system;*** ***(b) the names of the successful candidates or tenderers and the reasons for their selection;*** ***(c) the names of the candidates or tenderers rejected and the reasons for their rejection;*** ***(d) the reasons for the rejection of tenders found to be abnormally low;*** ***(e) the name of the successful tenderer and the reasons why his tender was selected and, if known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;*** ***(f) for negotiated procedures, the circumstances referred to in Articles XX and XX which justify the use of these procedures;*** ***(g) as far as the competitive dialogue is concerned, the circumstances as laid down in Article XX justifying the use of this procedure;*** ***(h) if necessary, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system.*** ***The contracting authorities shall take appropriate steps to document the progress of award procedures conducted by electronic means.*** ***The report, or the main features of it, shall be communicated to the Commission if it so requests.***

Amendment of article 88, administrative cooperation

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 40, 41, 42, 55, 57, 59, 60, 61, 63 and 69. They shall ensure the confidentiality of the information which they exchange.	1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 40, 41, 42, 55, 57, 59, 60, 61, 63 and 69. They shall ensure the confidentiality of the information which they exchange.
2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council[4] and 2002/58/EC of the European Parliament and of the Council[5].	2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council7 and 2002/58/EC of the European Parliament and of the Council8.
3. For the purposes of this Article, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States, the oversight bodies and the Commission. Member States shall publish and regularly update the list of liaison points. The oversight body shall be in charge of the coordination of such liaison points.	~~3.~~ For the purposes of this Article, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States, ~~the oversight bodies~~ and the Commission. Member States shall publish and regularly update the list of liaison points. ~~The oversight body shall be in charge of the coordination of such liaison points.~~
4. The exchange of information shall take place via the Internal Market Information system established pursuant to Regulation (EU) N° XXX/XXXX of the European Parliament and Council[6] [proposal for a Regulation of the European Parliament and Council on the administrative cooperation through the Internal Market Information System ('the IMI Regulation') COM(2011) 522]. Member States shall supply information requested by other Member States within the shortest possible period of time.	4. The exchange of information shall take place via the Internal Market Information system established pursuant to Regulation (EU) N° XXX/XXXX of the European Parliament and Council9 [proposal for a Regulation of the European Parliament and Council on the administrative cooperation through the Internal Market Information System ('the IMI Regulation') COM(2011) 522]. Member States shall supply information requested by other Member States within the shortest possible period of time.

4 OJ L 281, 23.11.1995, p. 31.
5 OJ L 201, 31.7.2002, p. 37.
6 OJ L […]
7 OJ L 281, 23.11.1995, p. 31.
8 OJ L 201, 31.7.2002, p. 37.
9 OJ L […]

Cluster 10: Definitions and scope

CEMR position: Need to clearly define the scope of the Directive and clarify the exclusion of relations between public authorities

In the current financial climate, cost savings through the sharing of back office or front-line functions is increasingly common practice across contracting authorities. Sharing services between public sector bodies is a way to organise services efficiently and innovatively in the interest of the public. It is about internal administrative organisation and not about avoiding competition.

CEMR therefore considers the provisions in the Commission's proposal useful, however, proposes some amendments to better adjust them to the CJEU jurisprudence and current practice.

Therefore, we propose the following:

- Support amendments 2, 23 and 29 of the rapporteur
- Additional amendments on
    - article 1, subject-matter and scope
    - Article 4 (b)(c), services and supplies thresholds
    - article 10, specific exclusions for service contracts
    - article 11, relations between public authorities

Amendment to article 1, subject-matter and scope

1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.	1. This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.
2. Procurement within the meaning of this Directive is the purchase or other forms of acquisition of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose. An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.	2. Procurement within the meaning of this Directive is the purchase ~~or other forms of acquisition~~ of works, supplies or services <u>via public contracts</u> by one or more contracting authorities from economic operators chosen by those contracting authorities, ~~whether or not the works, supplies or services are intended for a public purpose.~~ ~~An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.~~

Justification

It is clear that procurement Directive applies only to 'procurements' including lease and hire activities. It does not apply to 'other forms of acquisition' such as borrowing a good for no charge.

According to the ruling of the Court of Justice of The European Union (*Helmut Müller* C-451/08), works, supplies or services that are not intended for a public purpose are *not* subject to procurement law. The Commission should not seek to expand the scope of the rules in this way.

The basis of the procurement definition should be a single contract and not a single project. One project may have many contracts some of which may fall within the scope of the Directive, some of which may not. Adding up values of services, supplies and works only because they are part of the same project is of no additional value and an obvious attempt made by the Commission to increase the number of contracts which fall under the scope of this Directive. For example, the architectural services and the legal advisory services in connection with a works contract are clearly separate from the services connected with the actual construction. Therefore this sentence has to be entirely deleted.

Amendment to article 4(b)(c), services and supplies thresholds

This Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:	This Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:
(a) EUR 5 000 000 for public works contracts;	(a) EUR 5 000 000 for public works contracts;
(b) EUR 130 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;	(b) EUR **260 000** for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;
(c) EUR 200 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.	(c) EUR **400 000** for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.
(d) EUR 500 000 for public contracts for social and other specific services listed in Annex XVI.	(d) EUR **1 000 000** for public contracts for social and other specific services listed in Annex XVI.

As outlined in our introduction (pages 3-5) the current thresholds do not represent a level at which cross-border provision becomes economically viable for bidders and suppliers. The Commission's own figures show that only 1.6% of contracts are in practice awarded to a provider based in another Member State. The rules are therefore disproportionate to the results being achieved.

CEMR strongly advocates for an increased threshold in order to get the balance right in terms of reflecting cross-border interest: doubling the thresholds for goods and services to €400,000 would be a positive first step.

Amendment to article 10, specific exclusions for service contracts

This Directive shall not apply to public service contracts for:	This Directive shall not apply to public service contracts for: ***1. Service contracts awarded on the basis of an exclusive right*** ***This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.***
This Directive shall not apply to public service contracts for: (c) arbitration and conciliation services;	This Directive shall ***also*** not apply to public service contracts for: (c) arbitration and conciliation services; **(c a) any of the following legal services:** **(i) legal representation of a client in judicial proceedings before courts, tribunals or public authorities by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;** **(ii) document certification services which must be provided by notaries;** **(iii) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned;** **(iv) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority** (d) financial services in connection with the issue,

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility;	sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, ***in particular transactions by the contracting authorities to raise money or capital,*** central bank services and operations conducted with the European Financial Stability Facility; …

Justification

The current Directive 2004/18 excludes public service contracts that are based on an exclusive right enshrined in a published law, regulation or administrative provision, compatible with the Treaty. These exclusive rights correspond with the possibility of Member States in the EU Treaty to award such exclusive rights

Legal services are often national by nature and cannot be easily performed transnationally. In the case of litigation, it is often necessary to award legal services to a specialist in the relevant field who is particularly suitable for the particular case. To implement tendering procedures is not possible within the short time typically required for legal advice. Furthermore, the client is generally not able to describe the necessary services because he or she is not an expert and therefore cannot calculate the value of the award either. Last but not least, the award of legal services is generally subject to trust, and established relationships with existing legal advisers. These cannot be interpreted objectively or quantified. Therefore the purpose of this Directive does not go together with the award of legal services.

CEMR is concerned that under article 10 (d) activities to raise money or capital are no longer excluded from the Directive. This will have a major impact on the ability of local and regional authorities to borrow money because public procurement procedures will make public borrowing a much more lengthy, complicated and expensive process.

Amendment to article 11, Relations between public authorities

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:	1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:
(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.	(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.
(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;	(b) the ***essential part*** of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;
(c) there is no private participation in the controlled legal person.	(c) there is no ***active*** private participation in the controlled legal person.
A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments	~~A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments~~

within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.	~~within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.~~
2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.	2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity ***or entities***, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.
3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:	3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract ~~without applying this Directive~~ ***outside the scope of this Directive*** to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:
(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;	(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;
(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;	(b) ***the essential part*** of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;
(c) there is no private participation in the controlled legal person.	(c) there is no ***active*** private participation in the controlled legal person.
For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:	~~For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:~~
(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;	~~(a) at least one of the principal decision-making bodies of the controlled legal person is composed of representatives of all participating contracting authorities;~~
(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;	~~(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;~~
(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;	~~(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;~~
(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.	~~(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.~~
4. An agreement concluded between two or more contracting authorities shall not be	4. An agreement concluded between two or more

deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled: (a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties; (b) the agreement is governed only by considerations relating to the public interest; (c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement; (d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies; (e) there is no private participation in any of the contracting authorities involved. 5. The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement. The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.	contracting authorities shall not be deemed to be a public contract within the meaning of Article ***2(7)*** of this Directive, ***and thus fall outside the scope of the Directive*** where the following cumulative conditions are fulfilled: ***(a) the purpose of the partnership is the provision of a public-service task conferred on all the public authorities or the provision of an ancillary task necessary to deliver the public service task conferred on all the public authorities;*** ***(b) the task is carried out solely by the public authorities concerned i.e. without the involvement of active private capital.*** ~~5. The absence of private participation referred to in paragraphs 3 to 6 shall be verified at the time of the award of the contract or of the conclusion of the agreement.~~ ~~The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.~~

Justification

In the current financial climate, cost savings through the sharing of back office or front-line functions is increasingly common practice across contracting authorities. Sharing services between public sector bodies is a way to organise services efficiently and innovatively in the interest of the public. It is about internal administrative organisation and not about avoiding competition.

11.1.b), 11.3.b) The CJEU jurisprudence (Teckal Case C-107/98) refers to the 'essential part' of an authorities' activities, not 90% of an authorities' activities. Restricting Teckal case law further should be avoided.

11.1.c)11.3.c), 11.4.b): The reference should be only to an 'operational' or 'active' capital holding in the controlled legal person. This is to allow 'non-operational' or 'sleeping' capital to be invested into the controlled legal person without breaking the 'in-house' or 'public-public' link. This would help public authorities to share services with each other and save taxpayers' money.

11.4 a) The 'provision public service task conferred on all the public authorities' refers to the ECJ jurisprudence in the case C-480/06 Stadtreinigung Hamburg. Also ancillary tasks, such as cleaning or IT services provided by another contracting authority, as well as internal services which the public authorities have to use in order to deliver their public tasks and to ensure the functioning of their

administrative structures have to be covered by the exemption. These tasks are by nature of public character.

11.5 deletions: To achieve the stated aim of legislative simplification, excessive explanations should be avoided in a legal text and instead placed into separate guidance, a handbook, or interpretative communications from the Commission.

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Le CCRE

Le Conseil des Communes et Régions d'Europe (CCRE) est la plus grande organisation d'autorités locales et régionales en Europe. Ses membres sont plus de 50 associations nationales de villes, municipalités et régions de 40 pays européens. Ensemble, ces associations représentent près de 100.000 collectivités territoriales.

Les missions du CCRE sont doubles : influencer la législation européenne au nom des autorités locales et régionales et fournir une plateforme d'échanges entre ses associations membres et leurs représentants élus et experts.

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