

| Basic information | |
|---|---|
| 2023/2976(DEA) DEA - Delegated acts procedure Thresholds for concessions Supplementing 2011/0437(COD) Subject 2.10.02 Public procurement | Procedure completed - delegated act enters into force |

| Key players | | | |
|---------------------|---|-------------------|------------------|
| European Parliament | Committee responsible | Rapporteur | Appointed |
| | <div style="border: 1px solid red; display: inline-block; padding: 2px;">IMCO</div> Internal Market and Consumer Protection | | |

| Key events | | | |
|------------|---|------------------------------|---------|
| Date | Event | Reference | Summary |
| 15/11/2023 | Non-legislative basic document published | C(2023)07637 | |
| 15/11/2023 | Initial period for examining delegated act 2.0 month(s) | | |
| 22/11/2023 | Committee referral announced in Parliament | | |
| 31/01/2024 | Delegated act not objected by Parliament | | |

| Technical information | |
|-----------------------------------|--|
| Procedure reference | 2023/2976(DEA) |
| Procedure type | DEA - Delegated acts procedure |
| Procedure subtype | Examination of delegated act Supplementing 2011/0437(COD) |
| Stage reached in procedure | Procedure completed - delegated act enters into force |
| Committee dossier | IMCO/9/13669 |

| Documentation gateway | | | |
|--------------------------------|------------------------------|-------------|----------------|
| European Commission | | | |
| Document type | Reference | Date | Summary |
| Non-legislative basic document | C(2023)07637 | 15/11/2023 | |

Thresholds for concessions

The Council held an **orientation debate** on the modernisation of public procurement policy. It was the first ministerial debate since the presentation by the Commission, in December 2011, of the proposals for a major overhaul of public procurement rules across the EU.

The outcome of the debate provides guidance for the continuation of technical work. The intermediate target is to reach an agreement on the main principles of the reform at the Competitiveness Council in May, with the final purpose of getting the **reform approved in co legislation with the European Parliament before the end of 2012**.

The three proposals for modernising public procurement are:

- a draft **directive** setting up the new legislative framework (replacing directive 2004/18/EC);
- a draft **directive** on procurement by entities operating in the water, energy, transport and postal services (replacing directive 2004/17/EC);
- a **draft directive on the award of concession contracts**.

The debate focused on the new general legal framework. More specifically, it concentrated on **two aspects** put forward by the Presidency:

1. The degree of flexibility that should apply in the use of competitive procedures with negotiation: compared to the current rules, the Commission proposes to increase the list of cases in which member states may allow for the competitive procedure with negotiation, but not so as to allow unrestricted access to this procedure.

Ministers are invited to comment on the **following questions**:

- Does the Commission's proposal provide procuring entities sufficient access to the competitive procedure with negotiation? If not, should access be as unrestricted as possible?
- How can it be secured that more flexibility does not lead to unequal treatment?

A majority of delegations stated that a wider use of negotiated procedures in public contracts should be possible and that certain safeguards should also be put in place to ensure equal treatment for tenders. Some other delegations would prefer a limited use for this procedure, in line with the Commission proposal.

2. Rules for certain categories of services: social, cultural, health, etc: the Commission proposes abolishing the current distinction applying to certain services that can be externalised under simpler regimes (social, cultural, health, education, etc.), so that standard rules would apply to all services unless explicitly exempted.

Ministers are invited to comment on the **following questions**:

- Is the Commission right in proposing a lighter regime for certain social, cultural, educational and health services?
- Should other services also benefit from the special regime?
- Has the Commission struck the right balance between promoting efficiency through competition and delivering on the objective of lighter public procurement rules?

Many delegations emphasised that the new system should strike the right balance between promoting efficiency through competition in contract awards and delivering on the objective of lighter public procurement rules for certain services.

Thresholds for concessions

The Council held an **orientation debate** on the modernisation of the public procurement policy in the EU. The outcome of the debate provides political guidance for future work.

The Council also took note of a **Presidency report on the progress achieved** concerning the reform of the public procurement legal framework. The report outlines a number of possible solutions to pave the way for a political agreement in the coming months.

This was the second ministerial debate since the presentation by the Commission, on 20 December 2011, of legislative proposals for a major overhaul of public procurement rules across the EU. The Package consists of three legislative proposals for (i) a **Directive on public procurement** (classical directive), (ii) a **Directive on procurement by entities operating in the water, energy, transport and postal services sectors** and (iii) a **Directive on award of concession contracts**.

The report outlines a number of possible solutions to pave the way for a political agreement in the coming months. The debate focused on two key subjects:

(1) The use of electronic systems in public procurement (e-procurement): many delegations pointed out the considerable savings that would be achieved through increased use of digitisation and electronic procurement procedures. However, it was also noted that important technical challenges would need to be addressed as regards the adaptation of public purchasing bodies, and a certain degree of interoperability would need to be ensured, before use of this technology is standard.

Ministers are invited to comment on whether they support the Commission proposal to fully switch to electronic communication within 2 years after transposition, i.e. mid-2016 in the case of adoption of the directive in 2012, or if they would prefer a different time frame. They were also asked how the transition can best be supported.

(2) The governance and monitoring of the procurement procedures: on governance, a large majority of delegations favoured the "light" approach outlined in the Presidency compromise, with Member States having the option of organising their administrative structures without the need to create new structures.

Ministers are invited to comment on whether they agree with the Presidency approach, which would leave organisational decisions to Member States and simply identify the tasks to be carried out, including: monitoring, reporting and guidance. They are also asked to specify which other tasks should be included or should the list be reduced further.

On the basis of the negotiations and positions expressed in the Council Working Party, along with the political guidance provided by the Competitiveness Council on 20 February 2012 (refer to the summary dated from the same day), the Presidency points out a **number of elements below to be included in the final political agreement**:

Flexibilisation of procedures: the Presidency proposes to: (i) substantially widen access to the competitive procedure with negotiation and the competitive dialogue compared to the Commission proposal; (ii) fully support the new procedure targeted at promoting structured innovation partnerships in order to further the development and subsequent purchase of innovative supplies, services and works; (iii) reduce the minimum time limits set out in the Commission proposal in order to make public procurement more efficient.

Strategic use of public procurement: the Presidency proposes to: (i) promote the development of life-cycle costing and clarify how it can be integrated in the award criteria for public contracts; (ii) state that public procurement rules should continue to focus on "how to buy" and not "what to buy"; (iii) refine the scope and conditions for a light regime for certain services, including social, health, cultural, educational and hotel/restaurant services, while promoting transparency and competition.

Reducing documentation requirements: the Presidency proposes to: (i) fully support making obligatory the acceptance of economic operators' self-declarations instead of certificates and other official documents as preliminary means of proof that they are not subject to grounds for exclusion and that they fulfil the selection criteria; (ii) provide contracting authorities with a possibility to ask economic operators to supplement, clarify or complete information or documentation submitted where it is or appears to be incomplete or erroneous, while respecting the principles of transparency and equal treatment.

SME Access: the Presidency proposes to: (i) fully support the proposal of introducing a turnover cap, according to which contracting authorities should not be allowed to require economic operators to have a minimum turnover exceeding three times the estimated contract value ; (ii) fully support the involvement of SMEs in public procurement markets, by encouraging contracting authorities to duly consider dividing contracts into lots.

Aggregation of demand: the Presidency proposes to: (i) clarify the conditions for use of framework agreements; (ii) clarify the rules attributing liability for the observance of the procurement rules among the central purchasing body and the contracting authorities procuring from or through the body; (iii) make it easier for contracting authorities from different Member States to perform joint procurement across borders, thus providing an important tool for procurement of innovative solutions.

It should be recalled Member States have all affirmed the importance of giving a **high priority** to the negotiations on the proposal in order to reach agreement with the European Parliament by the end of 2012.