



Deutscher Verein
für öffentliche
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Opinion of German Association of Public and private Welfare on the EU Commission proposals for directives modernizing European procurement law for public contracts and service concessions¹

The EU Commission is currently undertaking an extensive reform of European procurement law – a very important area of law for local authorities and welfare organisations. The goal is to update the rules from 2004 to reflect the requirements of the European Single market and the new situation presented by the debt crisis. After extensive consultations conducted in the context of the Green Paper on the modernization of EU policy on public procurement, the EU Commission presented several proposed directives on 20 December, 2011.

These comments address proposed legislation relevant to public authorities, providers and users of social services within Germany. They are directed to the European Parliament, in particular to Marc Tarabella, MEP, who presented his draft legislation² as the rapporteur on the modernisation of EU procurement law on 3 May, 2012 and requested comments. At the same time, they are directed to the European Economic and Social Committee (EESC), the members of the relevant Council working group as well as directly to the EU Commission as encouragement to revise the drafted directives. These comments address the proposal

¹ Contact person in German Association: Cornelia Markowski. The opinion has been adopted by the German Association's Executive committee based on the consultations in the Committee for International cooperation and European integration on June 8, 2012.

² Draft report on the proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 0896-C7-0006 / 2012-2011 / 0438(COD) dated 03.05.2012.

for a new directive on public procurement³ and the proposal for a directive on the award of concession contracts⁴.

1. Simplification and more flexibility in the tender process

In the view of the Deutsche Verein, the simplification and increased flexibility in the tender process announced in the Single Market Act in spring 2011 has not occurred. Even keeping in mind that the need to improve efficiency in the utilisation of public funds - especially in light of the current debt crisis - while at the same time seriously pursuing the integrative target of the Europe 2020 Strategy, address conflicting aims that are difficult to reconcile, the rules for the social sector are too complicated and hardly practical.

For example, the draft directive presents various procedures to choose from in a "tool box" which may be used to conduct a public tender. This increase in flexibility is generally to be welcomed. However, no new procedures were added (with the exception of the "Innovation partnership," which plays a subordinate role in the organisation of social services). In addition, there is an "opt out" rule in Directive Art. 24 (draft) applicable to the processes which offer the awarding authority and the bidder more flexible procedures – and therefore more leeway – such as the competitive procedure with negotiation and the competitive dialogue procedure. This means that they need not be transposed into local law by the EU Member States. As a result of this limitation, the European rule makes increases in flexibility non-binding and is therefore opposed.

2. Particular procurement regime for social services

Social services have now been expressly mentioned in the proposal for a Directive on public procurement, Directive Art. 74 et seq. (draft). The Deutsche Verein welcomes the inferred recognition of the particularities of social services, e.g. through their particularly person-centred nature. At the same time, it should be recalled that precisely the personal element of social services requires conditions which cannot be adequately created by procurement rules with its focus on addressing the needs of the awarding authority targeting to the most efficient use of public funds.

³ Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 0896-2, dated 20.12.2011.

⁴ Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, COM(2011) 897 final, dated 20.12.2011.

Directive Art. 76 (draft) now gives the national legislator the task of not only ensuring their appropriateness for observing the principles of public procurement law when establishing procedures but also taking into account the specific requirements of social services. This is more specified in Directive Art. 76 (2) (draft). The first sentence states that this rule should make it possible for awarding authorities to take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of social services, the specific needs of different categories of users, the involvement and “empowerment” of users as well as innovation. In the opinion of the Deutsche Verein, the listed criteria guarantee that the most important quality requirements related to personal social services are taken into account independent of the respective applicable form of competitive regime. Accordingly, the Deutsche Verein recognises that the European legislator wants to give a signal and to create initial conditions whereby the particular characteristics of social services may in fact be taken into account by allowing the Member States a leeway for appropriate implementation.

However, the Deutsche Verein views the wording of Directive Art. 76 (2), sentence 2 (draft) critically, as it in turn suggests that the awarding authority may make its selection primarily on the basis of lowest price and may only consider other criteria as an exception. The text needs to be clear on this point so that the first sentence is not contradicted. As a solution, the Deutsche Verein refers to the principal criterion in German procurement law, the "most economically advantageous offer" pursuant to Section 97 (5) of the Act against Restraints on Competition⁵, which includes a consideration of value for money. It does not question the significance of costs as such or making a decision on the basis of the lowest costs, but rather has proven to be more sophisticated and in this respect also includes the option for the public awarding authority to make a purely price-driven decision for the award of a social services contract when other criteria are not important. The decisions of German courts relating to Section 97 (5) have borne this out. The added value of a European rule codifying the option of the "most economically advantageous offer" would be uniform statutory treatment across Europe within the Single market even though the Deutsche Verein views the relevance of social services for the Single market as very low.

⁵ Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) in the version published on 15 July 2005 (BGBl. I S. 2114; 2009 I S. 3850), last amended by Art. 2 (62) of the Act, dated 22 December 2011 (BGBl. I S. 3044).

For the sake of consistency, Directive Art. 66 (draft) should be modified to provide that an award to a public tender for social services may be made on the basis of what is the most economically advantageous offer.

The rules for the process of making an award notwithstanding, Directive Art. 75 (1) (draft) imposes a new obligation to provide a notice of contract throughout Europe in the case of social services contracts with a value of more than EUR 500,000 (not including VAT) as soon as plans are made for the award of a social services contract (ex ante). On the basis of current law, social services are classified as so-called "B" services meaning that, pursuant to Art. 35 (4) of Directive 2004/18/EC, there is merely an obligation to provide notice of the results of the award procedure (ex post). Accordingly, the proposed Directive would introduce a new notice obligation for certain contracts which would entail new administrative effort and expense rather than the announced simplification. In this regard, the Deutsche Verein suggests that no new ex ante notice obligation be codified. Alternatively, the threshold value for the special award procedure should be raised to EUR 900,000 (not including VAT) in order to limit increased administrative cost and effort to contracts which actually are relevant to the Single market. As the EU Commission already recognised in its 2011 Green Paper modernization of EU policy on public procurement, Chap. 1.2, these services do not have great potential for expansion in cross-border trade. The risk of a fragmentation of the Single market is low.

The definition of services included within the terms of Directive Art. 74 (draft) includes health and social services, administrative educational, healthcare and cultural sectors and compulsory social security services. At present, rescue services which are frequently above the currently proposed threshold value based on contract value are not expressly covered. As already stated in the Deutscher Verein's consultation response to the Green Paper, in practice there are also often medical services included within the rubric of health services and separating them from the patient transport services provided is often difficult⁶. Including them within Annex XVI of the proposed directive would make a significant contribution toward providing legal certainty to public awarding authorities who offer rescue services via the so-called tender model.

⁶ Stellungnahme des Deutschen Vereins zum „Grünbuch über die Modernisierung der europäischen Politik im Bereich des öffentlichen Auftragswesens“, KOM(2011) 15/4 vom 27. Januar 2011, NDV 2011, p. 261, English version at www.deutscher-verein.de.

3. Consideration of social criteria in the public procurement process

Art. 70 of the proposed directive confirms the possibility of establishing social considerations as a condition for the performance of a contract to the extent they are indicated and described in the call. The public awarding authority is free to make a decision for or against the realisation of social considerations and to utilise public funds for the purpose of social cohesion or reducing disadvantages for people as applicable. In the view of the Deutsche Verein, this represents a step in the right direction toward aligning the utilisation of public funds with the inclusive growth target of the Europe 2020 strategy and at the same time retaining the voluntary nature of applying criteria that are unrelated to public procurement – in particular social criteria. A close link to the performance of the contract or the subject-matter of the contract ensures that a conflict in objectives in relation to the principles of EU procurement law such as non-discrimination, equal treatment and transparency does not arise.

4. Increasing flexibility in selection and award criteria

Directive Art. 54 No. 3 (draft) contains the proposal that the selection and award criteria in reviewing offers be made more flexible. These changes would have a positive effect on the practice of making awards as they make it easier for public awarding authorities to make appropriate decisions in relation to services to be provided. In addition, practice has shown that it is not always possible to make a clear distinction between the capability of the tenderer and that of the assessment of the subject-matter of the contract. Experience has also shown that procedural errors are often made in this regard which often leads to the end of the award process as a result of the relatively few options for correcting errors contained in procurement law.

5. Codification of public-public cooperation

Codification of the legal principles for public-public cooperation is opposed. To date, public-public cooperation was on the basis of ECJ jurisprudence based on the primary law principle of non-discrimination, equality of treatment and transparency. This jurisprudence was just recently summarised in a working paper from the Commission offices.⁷ However,

⁷ Commission staff working paper concerning the application of EU public procurement law to relations between contracting authorities ("public-public cooperation"), SEC(2011) 1169 final dated 4.10.2011.

the wording of Directive Art. 11 (draft) reveals that the new rules are not consistent with the ECJ decision in the *Stadtreinigung Hamburg* case.

Furthermore, the rule proposed in Directive Art. 11 (5), sent. 2 (draft) suggests that private participation in a public-public partnership should be given priority as the public-public partnership receives little protection during the performance of the contract when a private party has an interest and immediately gives rise to a right to termination.

6. Comprehensive introduction of the “e-procurement”

In the long term, the electronic auction process proposed in Directive Art. 33 et seq. (draft) will lead to a reduction in administrative burdens and in this regard will provide relief to public awarding authorities. However, the expense related to the conversion of the systems of all public awarding authorities and smaller and mid-sized businesses should not be understated. For example in Germany, the municipalities have in large part not yet implemented the requirements for the “e-procurement”. In any event, the proposed deadline of two years should be extended.

7. Codification of public procurement procedures for service concessions

With its proposal for a directive on the award of concessions, the EU Commission has for the first time created secondary legislation for the services concession sector. Decisions of the ECJ have specified the primary law principles that also must be complied with in connection with the award of concessions. The Deutsche Verein joins the comments of other institutions such as the German Bundestag, Bundesrat and the European Parliament and requests that this area not be codified so as not to create new bureaucratic hurdles. In contrast to the award of public contracts, concessions involve primary duties of a sovereign state, the transfer of which requires a special degree of trust in the concessionaire. Similarly, regarding the variety of contract arrangements in which awards are made is hardly possible if the award of concessions should not in fact to be restricted.

In this regard, the Deutsche Verein points out that the provision of social services in Germany regularly does not correspond to a classic bi-polar contractual relationship between the service provider and the user, but rather a triangular relationship between the party bearing the costs, the service provider and the user. Every service provider, independent of its legal form or origin, which satisfies the common legal requirements - in particular those relating to the quality of services - is approved or in a way licensed by a

public authority. This form of organising the social services is fixed in many provisions of German social legislation. Recital No. 6 of the draft directive states that “certain State acts such as authorisations or licences whereby the State or a public authority establishes the conditions for the exercise of an economic activity” are not concessions. In light of the triangular relationship, the Deutsche Verein suggests that the Recital be supplemented to the effect that the existence of certain agreements which have as their subject an authorisation to provide social services likewise do not qualify as concessions. This should be made clear in the text of the directive as well in the event it ever goes into effect.

8. Conclusion

The role of social services is not defined by cost-efficiency alone. Children and youth care services, services for people with disabilities and the elderly, etc. have as their primary goal to meet the needs and provide individual help within the context of a welfare system. They safeguard a person’s existence and human dignity. This goal is the cornerstone for the creation and maintenance of social security systems and must retain its primary importance.

In this respect, the adoption of the Europe 2020 strategy, in particular with its target of combating poverty, sets a standard that can only be met if all societal forces are bundled together and the legal standards in all areas, such as economic and social legislation, are intertwined with each other anew and made uniform. The reform of EU procurement law at this point in time offers an excellent opportunity to seize this starting point and to introduce specific steps in order to achieve this goal in practice.

The German Association for Public and Private Welfare (Deutscher Verein für öffentliche und private Fürsorge e.V.) is the common forum for local authorities and non-profit organisations, as well as their facilities, the German federal states and representatives from the sciences for all areas of social work and social policy. Using its expertise and experience, it provides support and shapes the development of, amongst others, policies in the field of child, youth and family care, social assistance and services for the elderly, basic social security as well as care and rehabilitation service in Germany.

More information available at: www.deutscher-verein.de