

IN-HOUSE CONTRACTS

**SECTION 2.1.3 OF THE COMMISSION COMMUNICATION "PUBLIC
PROCUREMENT IN THE EUROPEAN UNION"**

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UNICE POSITION PAPER

The Commission has declared its intention to clarify the applicability of the public procurement directives on "in-house" contracts, i.e. contracts awarded within the public administration.

UNICE welcomes such an interpretative document, since considerable problems have arisen due to the differing interpretations, not only between the various Member States, but also between individual contracting authorities.

Of major concern is the use of an Authority's in-house resources to provide services to other entities which are themselves subject to the public procurement directives. There are instances of this happening in two ways: without call for tender, which sets aside the principles of transparency, competition and non-discrimination that the directives are to protect, or the Authority's in-house department takes part in the tendering procedure without safeguards against cross-subsidy from other parts of that Authority. Either way, these practices actually endanger the proper functioning of the market and are, in UNICE's view, not compatible with the public procurement directives.

Another problem arises when a Contracting Authority, by itself or together with other Authorities, establishes a separate company to satisfy its needs of a particular service. Purchases from such a company without a call for tender, creates a foreclosed market to which other providers of similar services do not have access. If that company, in addition, provides its services to other Contracting Authorities in competition with other companies, there is an imminent risk of cross-subsidisation from the "protected" contracts to the contracts subject to competition. Also in this case, the proper functioning of the market is frustrated in a manner which cannot be considered in line with the public procurement directives.

Against this background, an interpretative document on in-house contracts should, in UNICE's view, state the following principles:

- If a Contracting Authority wishes such an in-house unit to provide services to other authorities subject to the public procurement directives, that entity must be separated from the other activities of the Authority in such a way that any possibility of cross-subsidisation is excluded and the tendering is transparent. Furthermore, in order to be practically enforceable, the burden of proof of such a separation must lie with the Authority concerned.

- Purchases by a Contracting Authority from any entity with an established separate legal personality, including such entities which are wholly or partly owned by that Authority, should be subject to competitive tendering.
