

April 2006

## **UNICE COMMENTS ON COMMUNITY LAW APPLICABLE TO CONTRACT AWARDS NOT OR ONLY PARTIALLY COVERED BY THE PUBLIC PROCUREMENT DIRECTIVES**

As drafted today, UNICE can support the initiative<sup>1</sup> being prepared by the Commission to explain the consequences of EU primary Community law for procurement procedures below the thresholds<sup>2</sup>.

We share the view of the Commission that on the basis of the jurisdiction of the European Court of Justice there is a common understanding that the fundamental freedoms as well as the basic principles of the EU treaty (equal treatment, non-discrimination and transparency, furthermore proportionality and mutual recognition) have to be respected in cases of contract awards not covered by the EU directives on public procurement (directives 2004/18/EC and 2004/17/EC). One should bear in mind that also the detailed provisions of the directives on public procurement are based on these fundamental freedoms of the treaty and the above-mentioned basic principles.

### **Overall importance of jurisdiction by the European Court of Justice**

The Court decisions referred to in the Draft Communication are more than just isolated judgements in specific cases: Unquestionably the Court follows general principles according to which it has decided in specific cases. This becomes obvious when looking at repeated quotations of earlier decisions in the relevant jurisdiction of the Court. This clearly appears in the Court decisions Telaustria, Coname and - recently - Parking Brixen, dedicated to the question of applicability of the above-mentioned principles on a concession of services.

The general approach of the Court is also mirrored in the concrete wording of decisions. Thus for instance in Nr. 50 of the decision Parking Brixen the Court explains in general terms:

*“... a complete lack of any call for competition in the case of the award of a public service concession such as that at issue in the main proceedings does not comply with the requirements of Articles 43 EC and 49 EC any more than with the principles of equal treatment, non-discrimination and transparency.”*

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<sup>1</sup> Based on the document “Community law applicable to contract awards not or only partially covered by the public procurement directives” (CC/2005/11 EN), prepared for the meeting of the advisory committee on public procurement, 25<sup>th</sup> October 2005.

<sup>2</sup> This support is conditional given that our assessment is made on a document that was produced early in the drafting phase. In principle we support this initiative but full formal backing is will have to await a review of the Commission’s final draft of the proposal

With a view to providing legal certainty, UNICE explicitly welcomes this basic clarification of the Court, which the Commission rightly highlights in its Draft Communication.

### **Impact of the draft Communication on national legislation**

The envisaged communication might cause concern if it would lead to de facto rule-setting for contracts below the thresholds of the procurement directives. Considering that the draft communication is supposed to state only what follows from the Treaty and the jurisdiction of the Court of Justice, it should clearly spell out that it must not be interpreted as for small contracts.

### **Comments on specific items**

#### **Procurement procedure (Section 2, 3 and 5)**

We view positively the decision to select and describe important core items of the procurement procedure under section 2 up to 3.3 in the Draft Communication (advertising: basic obligations, content, media, exceptions; further procedure: principles, pre-selection of applicants, contract award).

The principles laid down in these sections may only cause problems to those Member States or contracting authorities which did not set up basic rules on public procurement below the thresholds of the EC directives or ignore the consequences of primary Community law respectively the jurisdiction of the European Court of Justice.

Finally the provisions of section 5, according to which the Commission will not institute proceedings in cases which do not exceed 10% of the thresholds, deserve attention. They do however not harm Member States' competences, but just stipulate a self-commitment of the Commission.

#### **Remedies (section 4.3)**

We view as useful clarification that beyond the scope of the procurement directives an effective judicial protection in case of infringements of basic standards derived from the EU Treaties is also being granted.

More in-depth discussion may be necessary to clarify the provisions of the draft Communication according to which

- *“at least the decisions adversely affecting an applicant or tenderer ...may be reviewed for possible violations of the basic standards derived from primary Community law”* (section 4.3, paragraph 2) and
- *“remedies in the review procedure must not be less efficient than those applying to similar claims based on domestic law* (section 4.3, paragraph 3)”.*”*

- **Contract awards of minor importance (section 5)**  
UNICE agrees with the Commission that the question whether a contract is of minor importance has to be assessed by an evaluation of the individual circumstances of the contract award. An individual contract award where the contract value does not exceed 10% of the threshold value is a reasonable general rule as it is unlikely that suppliers in another Member State will be interested in contracts below this value level. In order to “make life easier” for both contracting authorities and suppliers it would be helpful to indicate some examples of this, such as contracts awarded in boarder regions and niche (high tech) activities.

Given the importance of this issue, UNICE would be open to a further exchange of information and views on this proposed communication.