UNICE
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POSITION PAPER

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UNICE COMMENTS ON THE COMMISSION PROPOSAL FOR THE AMENDMENT OF REMEDIES DIRECTIVES

UNICE is pleased to see that that the European Commission has tabled a proposal which aims at increasing protection of bidders for public contracts. We are particularly supportive of the two core elements of the proposal – the introduction of a standstill period before an award decision and the combating of illegal direct awards with the obligation to publish decisions to make direct awards prior to the conclusion of the contract.

We are positive about the introduction of an automatic suspensive effect i.e. the automatic suspension of the conclusion of a contract in the case of notification from a body with responsibility for reviewing the contract decision (the proposed new article 3a in Articles 1 and 2). However the planned minimum period of just five days is, like with the standstill period, much too short. A minimum period of at least 15 days similar to the standstill period would be required for this to function effectively.

We also view positively the decision to abandon the ideas of further sanction mechanisms above and beyond national review procedures and that of a possible monitoring authority and to remove the conciliation and attestation procedures from the directives which have not proven successful in practice.

HOWEVER...

... in stating our support, and we do support this revision as being very necessary, we have to wonder a little, in particular from an internal market point of view, whether or not this revision will actually encourage more cross-boarder bidding.

We also wonder whether a standstill period of only 10 days is sufficient. It seems too short and is somewhat undermined by the numerous derogations which reduce or dispense with the standstill period altogether. Short time limits for public procurement protection are, in principle, welcome as they avoid unnecessary obstacles to award and investment decisions. However, a period of less than 15 days, i.e. less than half of the usual remedies period of at least four weeks might not be sufficient to ensure efficient bidder protection. The minimum period should perhaps then be 15 days in all cases?

In addition feel the need to highlight the fact that our ability to understand what has been proposed has, in part, made difficult by very complicated and unclear explanation (for example Articles 2a to 2e). We are concerned at the legal uncertainties which this could conceivably result in. By foregoing, for instance some of the complicated derogations on the time limits this problem would largely be remedied and the clarity of the directives would be substantially improved from amongst others, 'better regulation' point of view.

We also feel there is a need for more clarification on who should be informed of a decision and what they should be told. We would be of the opinion that those who tendered for rather then those who expressed interest in a contract are the ones who

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should be informed. What they should be informed of at the very least should mirror the information outlined in Annex I and II of the proposal.

We believe that there is a need for more explanation on how it is proposed to ensure that purchasers publish their award decision in a full, transparent and timely manner either after a tender or in an intended direct contract.

We also believe that while it is indeed useful, from a better regulation point of view, to dispense with minor procedures which are hardly every used, some form of alternative dispute resolution mechanism would be useful and should be reconsidered.

We are of the opinion that the Commission should seek to ensure that in the event of cancellation of contract, national law should not shield public authorities from meeting their liabilities to suppliers who acted in good faith.

It is also necessary to clarify what 'a sufficient degree of publicity' would be when publicising a direct award.

In addition to these general remarks we have the following particular comments regarding the Commission proposals:

THE INDIVIDUAL REGULATIONS[1]

The proposed new paragraph 3a in both directives – period for suspensive effect during review procedures (p. 14 and 20)

The period of five days for the automatic suspensive effect in the case of notification from a body with responsibility for reviewing the contract decision is too short. In order to ensure effective public procurement protection it is necessary for the suspensive effect to apply during the entire review procedure and for it to be lifted only in individual cases following a special application by the contracting authority.

Article 2a, paragraph 2 – standstill period before conclusion of contract (p. 15 and 21)

The proposed 10 day standstill period is too short. The period should amount to at least 15 calendar days EEA[2] wide and without exception. Any shorter period would be problematic, particularly for small and medium enterprises. These companies by and large do not have their own in-house experts in procurement law would hardly have sufficient time to judge the chances of a legal remedy within 10 days – even with the enlisted help of a suitably experienced lawyer.

Article 2a, paragraphs 3 & 4 plus Article 2b – exceptions to the standstill period before conclusion of contract (p. 15 and 21)

The proposed derogations which can further reduce the standstill period from 10 to seven days and may even dispense with it altogether are not suitable. They could undermine the standstill period, leaving the bidder without protection. At the same

[1] The following comments apply, unless otherwise indicated, to the amendments, set out in Articles 1 and 2 of the Commission proposal, to the provisions of the classic Remedies Directive (89/665/EEC) and the special-sectors Directive (92/13/EEC).

[2] The European Economic Area (i.e. the enlarged Internal Market) to which Internal Market rules apply. This economic sphere consists of the EU 25 plus Iceland, Liechtenstein and Norway.

time, these proposed derogations, whose application would, in turn, be checked in the review procedure, could provide grounds for additional procurement law disputes. Article 2a, paragraphs 3 & 4 and Article 2b should therefore be removed without substitution.

Article 2c, paragraph 1 – minimum period in which a review can be sought (p. 17 and 22)

The minimum period of 10 calendar days within which to apply for a review is too short. The period should be at least 15 calendar days for reasons similar to those listed in the above comments on the standstill period.

Article 2c, paragraph 2 – exceptions to above-mentioned minimum period (p. 17 and 23)

Article 2c, paragraph 2 is an example of a derogation which is both hard to justify and one that also formulated in a very unclear manner. A period of just seven days in which to apply for a review would restrict effective judicial protection to an unjustifiable extent. It should be removed without substitution from the final text of the proposal.

Article 2e, paragraph 1 – annulment in the case of illegal direct awards (p. 17 and 23)

We are genuinely supportive of this provision to combat illegal direct awards.

Article 2e, paragraph 2, a – publication of direct award decision (p. 17 and 26-27)

We propose to ask for a "**reasoned award decision**" from the contracting authority in order to achieve a better control of legality. Moreover this justification is required in the annexes of this proposal.

Article 2e, paragraph 2, b – publication of direct award decision (p. 17 and 23)

This proposed amendment is formulated in a way which is both complicated and unclear. With a view to practical considerations, it is not at all clear what 'a sufficient degree of publicity' would be when publicising a direct award, even if reference to Article 35 paragraph 4 and Article 36 of Directive 2004/18/EC or the corresponding provision of the utilities directive is subsequently made. Instead of proposing to amend in this way (which will virtually guarantee further legal disputes), minimum publication requirements should be stated and would be more effective.

Article 2e, paragraph 3 – minimum standstill period before direct awards (p. 18 and 24)

A minimum standstill period of just 10 calendar days is again insufficient for the publication of the intention to make a direct award. The period should be at least 15 calendar days for reasons similar to those listed in the above comments on the standstill period.

Article 2e, paragraph 4 – waiver of minimum standstill period before direct award (p. 18 and 24)

Any derogation which makes it possible to dispense with the standstill period would open the door to abuse in the case of de-facto or direct awards. It should be removed without substitution.

Article 2f, paragraphs 1 to 3 – limitation of the ineffectiveness penalty (p. 18 and 24)

Adopting a position that contracts which have been concluded during the standstill period are ineffective, whilst providing for six-month limitation period after which it can no longer be enforced, is appropriate.

However, the wording of the relevant article (Article 2f, paragraph 3, subparagraph 1) that member states, once the six-month limitation period has elapsed, may provide a contract which has "certain effects between the parties concerned or with regard to third parties" is unclear and therefore are open to various interpretations. It is necessary for reasons of legal certainty to clarify what 'effects' are being referred to.

Articles 3 to 7 of the special sectors directive – abandonment of the attestation procedure (p. 24)

We support the deletion of these articles. Saying that we believe that there is a need for the attestation standard to be maintained and revised, as a voluntary standard for both the utilities and the classical sectors.

The attestation standard was introduced to help contracting entities secure the right application of the public procurement rules and to support competitive procurement. Given the extent of the of the misconduct evident in public procurement today, an attestation standard could be used as an instrument to combat corruption, secure non discrimination and to promote sound procurement practices.

Article 4, paragraphs 1 and 2 of the classic Remedies Directive / Article 12, paragraphs 1 and 2 of the special-sectors Remedies Directive – consultation with the Advisory Committee (p. 21 and 25)

Commission consultation on evaluating national review procedures as well as on the future evaluation of the Remedies Directives, should also be undertaken with the Advisory Committee on the Opening-up of Public Procurement. Given that judicial protection is a subject which particularly affects the interests of the bidding sector, consultation needs to take place not just with government representatives but also with the procurement experts working for the Advisory Committee on the Opening-up of Public Procurement.

Articles 9 to 11 of the special-sectors directive – abandonment of the conciliation procedure (p. 27)

We support the deletion of these articles which have not proven successful in practice.