

## Statement

### **Green Paper on the modernisation of EU public procurement policy towards a more efficient European Procurement Market**

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European Association of Public Sector Pension Institutions

Association européenne des institutions de retraite du secteur public

Europäischer Verband der Versorgungseinrichtungen des öffentlichen Dienstes

Denninger Straße 37

81925 München

Germany

Phone: +49 (0)89 9235-7575

Fax: +49 (0)89 9235-8599

[info@eapspi.eu](mailto:info@eapspi.eu)

[www.eapspi.eu](http://www.eapspi.eu)

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The European Association of Public Sector Pension Institutions (EAPSPI) welcomes a broad-based discussion on public procurement in the European Union. As EAPSPI represents first and second pillar public pension schemes, EAPSPI's statement focuses on the interaction of public pensions and procurement law rather than providing answers to every question of the Green Paper. The contribution focuses namely on public-public cooperations in case of public pension funds as well as supplementary pensions based on collective agreements.

### **I. Public-public cooperation in case of public pension funds**

Referring to the issue of public-public cooperation the question arises of whether and to what extent, public procurement rules should apply to contracts concluded between public authorities.

In our view, the application of the rules on public procurement are not appropriate for the cooperation between public authorities concerning supplementary pensions plans for public employees (i.e. persons employed by the State or state-related organisations) and should therefore either not be considered to be public procurement or fall under an exemption rule for public-public cooperation. We would like to point out that supplementary public pension arrangements are covered by the right of self-organisation and are not procurement activities benefiting from open competition among economic entities. Public service contracts relating to occupational pension schemes as mentioned above are guided mainly by considerations of public and not economic interests and should therefore not be covered by public procurement rules.

As stated in the Green Paper, the evolving case-law of the European Court of Justice has resulted in a quite complex picture of possible exceptions for public-public cooperation. Therefore, we agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed.

In our opinion the main element of such a concept should be the criterion of "market-orientation" of the entities in question. The principal aim of the cooperation must not be of a commercial nature otherwise public procurement rules apply.

Cooperations between public authorities concerning pension plans should not fall under procurement rules.

They are based on the right of self-organisation.

A concept for exempted public-public cooperation should focus on "market-orientation".

The criteria set out by the Court in the Teckal-case (C-107/98) should not be generally applicable to supplementary public pension schemes. The Teckal case established the principle that contracts between public bodies and other public bodies can in certain circumstances be regarded exempt from application of the EU procurement regime. The Court ruled that contracts awarded to a publicly owned entity are not considered to be public procurement if this entity is being controlled by the contracting authorities in the same way to that in which they control their own departments, and if it conducts the essential part of its activities with the contracting authorities.

### 1. Concept of in-house control in case of public pension funds

The concept of (joint) in-house control which could lead to exemption from the scope of public procurement is not coherent in case of public pension funds. Pension funds need to be sufficiently independent. This is inherent to the system of pension plans and therefore the criterion of control as set out in the Teckal case is not appropriate. Public service contracts relating to occupational pension schemes are not of a commercial nature as the pension funds based on public-public cooperation are not market-oriented and should therefore be qualified as being an exempted form of public-public cooperation.

### 2. Service contracts awarded on the basis of exclusive rights

According to Art 18 of Directive 2004/18/EC the rules on public procurement *“shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.”* This provision is in our view coherent with the concept of public-public cooperation and we agree particularly with the underlying idea of this provision. Due to the existence of the exclusive right, which they enjoy pursuant to a published law, regulation or administrative provision, a call for tenders would be a pure formality without any practical value.

The question arises whether procurement rules should allow the award of contracts among public-public cooperations without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been

“Teckal” criteria do not necessarily suit pension matters.

In-house control mechanisms do not apply to public-public cooperation pension funds.

Concept of “exclusive right” is coherent with concept of public-public cooperation.

“Exclusive right” should also be applicable for public-public cooperation based on collective agreement.

awarded in a transparent, competitive procedure. In case of supplementary public pension schemes based on collective agreements, the prior award of the exclusive right does not jeopardise fair competition in procurement markets. The approach via collective agreement involving the interests of social partners secures a transparent procedure taking into account public and not economic interests. The criterion of market orientation is not fulfilled, i.e. public procurement rules do not apply. The request of the social partners for a common consistent supplementary pension scheme should neither be ignored nor hindered by procurement procedures.

Therefore, on all accounts public-public cooperation should not be considered as public procurement in case of supplementary pension schemes introduced by collective agreements on the basis of an exclusive right.

### 3. Horizontal cooperation

Furthermore, considering the Teckal criteria, there is still no legal certainty as to the application of the in-house exemption on contracts between affiliated entities of a public entity. In our opinion, the in-house-exemption should also be horizontally applicable between affiliated entities unless the companies involved are “market-oriented”.

The concept of “market-orientation” including entities of a commercial nature aiming at an immediate economic benefit, seems to be an easily applicable and comprehensible criterion to distinguish between whether or not public procurement rules should apply. Applying the criterion of “market-orientation”, there is no valid reason for differentiating between vertical and horizontal cooperation.

## II. Supplementary public pension schemes based on collective agreements

Supplementary public pensions are based on collective agreements in many European countries. A confrontation of procurement law and social partners’ rights may occur. We would like to suggest a general exemption from procurement law for supplementary public pension schemes based on collective agreements.

Criterion of “market-orientation” should also be applicable for horizontal cooperations.

Suggestion to generally exempt public pensions based on collective agreements from procurement law.

The Court has recently ruled that under the current legislation (Directive 2004/18) the balance of procurement law and Social Partners' rights requires a call for tenders to award supplementary pension contracts on conversion of earnings (case C-271/08, European Commission / Federal Republic of Germany). According to this ruling, the Social Partners of the public sector are – at a national level – merely given the right to define the criteria for the award of supplementary pensions (C-271/08, para. 55 and 56).

In our view, the Social Partners rights should not be limited in this way. The Social Partners may exercise their right to bargain collectively by defining the criteria of supplementary pensions, the employees' representatives, however, are not involved in the selection process of a provider. The social partners' rights are therefore limited by the ruling in spite of the outstanding role given to them by primary EU law: the right to bargain collectively is recognised by Art. 12 of the Community Charter of the Fundamental Rights of Workers and Art. 28 of the Charter of Fundamental Rights of the European Union an instrument to which Article 6 TEU accords the same legal value as the Treaties. Furthermore, Art. 152 TFEU recognises and promotes the role of the social partners at EU level, taking into account the diversity of national systems.

Furthermore, a call for tenders regarding supplementary pensions based on collective agreements is not needed. The court expressed the view that the concept of public contracts requires that the works, supplies or services which are the subject of the contract are carried out for the immediate economic benefit of the contracting authority (C-271/08, para 75).

In our opinion, supplementary public pension schemes based on collective agreements take into account the respective non-economic interests on the basis of the principle of solidarity. Collective agreements meet social objectives, in terms of supplementary pensions to enhance the level of retirement income of the workers concerned. As the supplementary public pension schemes as mentioned above are not carried out for the immediate economic benefit of the public employer they do not fall under the scope of the Public Procurement Directive. The balance of employers' and employees' interests serves as a guarantee of a transparent selection process and as a control mechanism.

In addition, the implementation of a clearing house at EU level may be helpful. The clearing house should consist of representatives of

Recent ruling of the Court limits social partners' rights which have outstanding role in primary EU law.

Transparency and control mechanisms in selection process are guaranteed by mechanisms of collective bargaining.

A clearing house at EU level may help a fruitful dialogue.

different Directorates General of the Commission (Internal Market, Competition, Employment). It would serve to help detect or solve conflicts e.g. between collective agreements and procurement law. A dialogue between public entities or social partners and Commission representatives about questions of doubt and potential conflicts with procurement may help to avoid law suits and to find a common understanding in this complex matter.

## About EAPSPI

The European Association of Public Sector Pension Institutions (EAPSPI) is a group of 25 public sector pension schemes out of 16 European countries. The members and observers are institutions from the following countries: Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Germany, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. These institutions cover the special basic schemes for civil servants or the supplementary schemes for public employees. They are responsible for more than 28 million active members in the public sector and pensioners.

The main purpose of EAPSPI is to enable their members to improve the reciprocal knowledge of their institutions and that of the social organisation of their respective countries. Furthermore, the association intends to take part in the construction of a social Europe and, in this context, to study the consequences of the opening up of Europe, particularly regarding free movement. In this context, EAPSPI analyses ways and means of improving services offered to their clients (pensioners, active members or employers). To achieve this purpose, the association mainly intends to promote exchanges of expertise and information, involving also the area of products and services linked to retirement and to position itself as a pension expert, in order to develop relations and interact with European institutions and other international organisations.