



The Scottish Parliament
Pàrlamaid na h-Alba

INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

AGENDA

3rd Meeting, 2012 (Session 4)

Wednesday 8 February 2012

The Committee will meet at 10.00 am in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 and future consideration of related draft reports in private.

2. **Homelessness:** The Committee will take evidence from—

Keith Brown, Minister for Housing and Transport, and Marion Gibbs, Team Leader, Housing Options and Services Unit, Scottish Government.

3. **Scottish Social Housing Charter:** The Committee will take evidence from—

Keith Brown, Minister for Housing and Transport, William Fleming, Branch Head, and Anne Cook, Tenant Participation Development Manager, Social Housing and Strategy Unit, Scottish Government.

4. **Subordinate legislation:** The Committee will consider the following instruments which are not subject to any parliamentary procedure—

the Private Rented Housing (Scotland) Act 2011 (Commencement No. 2 and Transitional Provision) Order 2012: SSI 2012/2 (C. 2)

5. **European Union legislative proposals:** The Committee will consider the following European Union legislative proposals which may raise questions in relation to subsidiarity—

Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (COM(2011) 895); and

Proposal for a Directive of the European Parliament and of the Council on public procurement (COM(2011) 896)

6. **Homelessness and the Scottish Social Housing Charter:** The Committee will consider the evidence heard during the meeting and previous evidence sessions.

Steve Farrell
Clerk to the Infrastructure and Capital Investment Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 0131 348 5211
Email: steve.farrell@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda item 2

PRIVATE PAPER

ICI/S4/12/3/1 (P)

Written evidence

ICI/S4/12/3/2

[All written submissions received in response to the call for views](#)

Agenda item 3

PRIVATE PAPER

ICI/S4/12/3/3 (P)

[Scottish Social Housing Charter - revised draft January 2012](#)

[All written submissions received in response to the call for views](#)

Agenda item 4

Cover note

ICI/S4/12/3/4

[The Private Rented Housing \(Scotland\) Act 2011 \(Commencement No. 2 and Transitional Provision\) Order 2012: SSI 2012/2 \(C. 2\)](#)

Agenda item 5

Paper from the EU Reporter

ICI/S4/12/3/5

[Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors \(COM\(2011\) 895\)](#)

[Proposal for a Directive of the European Parliament and of the Council on public procurement \(COM\(2011\) 896\)](#)

WRITTEN EVIDENCE FROM THE SCOTTISH GOVERNMENT

The Background

1. The 2012 Homelessness commitment was introduced in the Homelessness etc. (Scotland) Act 2003. The Act granted Scottish Ministers powers to bring forward regulations which will end the use of the 'priority need test' by local authorities.

2. The 2012 homelessness commitment is not about eradicating homelessness. The 2012 commitment involves increasing homeless people's rights to housing. The aim is to remove bureaucratic distinctions between different 'categories' of homeless people and to acknowledge that all unintentionally homeless people require sustainable accommodation.

3. The phrase '2012 target' came about when the 2003 Act set out details about the future removal of the priority need test and it was agreed that local authorities would require time to prepare for the change. In December 2005 a Ministerial statement set out interim targets for each local authority of the percentage of homeless applicants assessed as priority by March 2009. March 2009 represented the halfway point and the interim targets were based on councils' moving in equal stages from the % assessed as priority in 2003-04 to 100% assessed as priority by 2012-13.

4. Scottish Ministers must specify the date, no later than 31 December 2012, when all local authorities must reasonably be expected to meet the target.

Action to deliver the target

5. The Scottish Government/COSLA 2012 Joint Steering Group was established in October 2009 to drive and oversee progress towards the 2012 Homelessness commitment. A high level group, which initially included the former Minister for Housing and Communities and now includes the Minister for Housing and Transport attending along with Cllr Harry McGuigan from COSLA, its membership also includes other local authority elected members, SFHA, ALACHO and SOLACE. It has been an enthusiastic and active group which has focused on homelessness among young people and also, critically, the prevention of homelessness.

6. Four priority areas were agreed by the Group to aid progress towards achievement of the 2012 target:

- Prevention of homelessness,
- Investing in appropriate areas.
- Access to Private Rented Sector (PRS) and Registered Social Landlord (RSL) stock,
- Corporate buy-in and joint working;

Investment impacting on the target

7. Over the period 2008-11, the Scottish Government has allocated a record £1.7 billion investment in affordable housing – even more than planned at the last Spending Review – and achieved the target to approve around 21,500 new/improved affordable homes. Around £630 million will be available for Affordable Housing Supply, including around £260 million within the Local Government settlement, over the next three years. The Scottish Government aims to deliver 30,000 affordable homes over the life of the Parliament and the spending review keeps us on track to do so. At least two-thirds of the 30,000 affordable homes target will be homes for social rent and of these at least 5,000 will be council houses.

Access to settled accommodation

8. The Scottish Government has taken steps to improve access to the Private Rented Sector for homeless households. Regulations were introduced in 2010 allowing local authorities to use this sector to discharge their homelessness duty. A number of local authorities have developed Private Sector Leasing Schemes to assist access to this tenure.

Prevention

9. Prevention of homelessness has been a key theme for the Scottish Government and its partners in planning to meet the homelessness target. Prevention of Homelessness Guidance was published by the Scottish Government and COSLA in 2009 addressing the needs of particular at risk groups and indicating the benefits of a **housing options** approach.

Housing Options

10. The Scottish Government and COSLA held a successful seminar in June 2010 focused on prevention and to promote the Housing Options approach. The Minister announced enabling funding of around £500,000 for local authorities, working in partnership, to support this, resulting in the creation of the Housing Options Hubs.

11. Five roughly regional housing options “Hubs” have been established across Scotland covering the vast majority of local authorities to help them and their partners develop the ‘Housing Options’ approach.

12. Housing Options is a process which starts with housing advice when someone approaches a local authority with a housing problem. This approach features early intervention and explores all possible housing options, including social rented housing (both local authority and RSL), the private rented sector and whether a homelessness application needs to be made.

13. Local authorities have found that through the development of a Housing Options approach that they can prevent homelessness. As an example, Moray Council reported to its committee in 2011 that, after implementing a Housing Options service, it had experienced a 26.6% decrease in homelessness during 2010/11. This compares with the national picture which shows that homelessness in Scotland reduced by 3%.

What the Hubs have been doing?

14. In the first year of operation, the Hubs have completed a range of activities to support the development of Housing Options. This has included training needs analysis and subsequent training programmes being implemented; development of good practice models; sharing delivery lessons for the overall benefit of the Hubs; along with job shadowing and information exchange. The Hubs have been able to jointly procure services including training and IT which have provided cost efficiencies.

15. The Housing Options Hubs model and its implementation are subject to an independent evaluation being carried out by Ipsos MORI. This is scheduled to report at the end of March 2012.

Housing Benefit Mitigation activity

16. The Hubs have proved themselves to be well placed to implement Housing Benefit mitigation activity. The Scottish Government recently announced additional money to assist with this and funding has been made available for the CIH, COSLA and the Housing Options Hubs. Current and proposed activity within the Hubs includes the identification of those affected by the changes, targeted responses which cover publicity, home visits, and landlord/tenant discussions. Innovative thinking includes proposals to develop a ‘sub-hub’ which will bring all relevant local authority departments together to co-ordinate responses to the changes.

Progress to 2012

17. The statistics for 2010/11 indicate that 88% of those assessed by local authorities were assessed as being in priority need. This is a 2% increase in the proportion assessed as in priority need in the same period in 2009/10. This represents continued progress towards the 2012 homelessness target.

18. In the quarter ending 31 March 2011, 6 local authorities assessed 100% of homeless households as being in priority need. These authorities were Angus, Dundee, Orkney, Renfrewshire, Stirling and West Dunbartonshire – this means that these councils are meeting the target

19. In another 10 council areas more than 90% of homeless households were regarded as being in priority need which shows progress towards meeting the target.

20. The percentage of homelessness assessments identified as repeat cases has fallen from 9.8% in 2002/03 to 5.5% in 2010/11. Although it is very early in the development of Housing Options, the reductions in repeat homelessness figures could be attributed to increased prevention activity resulting in more sustainable outcomes for people and households who find themselves homeless.

21. The next Homelessness statistics publication will be on the 14 February 2012. This will provide further evidence on local authorities’ readiness to meet the target.

22. RSLs have an important role to play in achieving the 2012 target. We recognise that much is already being done by a number of RSLs across Scotland in housing homeless households, with over 7,800 lets to homeless households in 2010/11 (28% of all lets). RSLs also have an important role in preventing homelessness occurring wherever possible.

National Co-ordinators

23. The Scottish Government funds national co-ordinators to establish evidence of good practice and to exchange and disseminate information on policy and practice around the themes of employability, service

user involvement, social networks, furniture re-use and rent deposit schemes in the context of homelessness prevention. The Co-ordinators are currently engaging with the Hubs to progress the 2012 Target

Potential Risks to Implementation

24. When the Homelessness etc (Scotland) Act 2003 was introduced, and the Ministerial statement made in 2005, two developments could not have been anticipated in terms of assessing risk to achievement of the 2012 target:

- The recession and the spending review have had an impact on resources available for investment in affordable housing, and lending for housing associations and households more generally; and
- The changes to Housing Benefit and the wider welfare benefit reforms, both those currently implemented and those that are proposed to come into effect over the next 2 – 3 years.

25. These new risks are a potential threat to local authorities meeting the target. Regardless however of the recession it would not have been feasible to focus only on investment to meet the target, hence the strong drive to develop homelessness prevention services with a refocusing towards Housing Options.

26. We have completed an Impact Assessment of Housing Benefit changes but as the impact will depend on claimant and landlord behaviour, it is difficult to be clear on outcomes at this stage. As stated above, additional resources have been made available to mitigate the impacts of reforms to Housing Benefit.

Conclusion

27. There is strong support amongst stakeholders for the 2012 commitment. Scottish homelessness legislation is widely regarded as amongst the most progressive in Europe. The promotion of the Housing Options approach, and the development of the Hubs, has been taken forward nationally within the context of meeting the 2012 Homelessness Target, but it is now becoming evident that the impact of this approach, and the energy and commitment of those involved, is establishing a foundation for responses to homelessness beyond the 2012 target, with a clear focus on prevention and partnership work.

Infrastructure and Capital Investment Committee

3rd Meeting, 2012 (Session 4), Wednesday, 8 February 2012

Subordinate Legislation Cover Note

Title of Instrument	The Private Rented Housing (Scotland) Act 2011 (Commencement No. 2 and Transitional Provision) Order 2012: SSI 2012/2 (C. 2)
Type of Instrument	Commencement Order
Laid Date	12 January 2012
Circulated to Members	3 February 2012
Meeting Date	8 February 2012
Minister to attend the meeting	No
SSI drawn to the Parliament's attention by Subordinate Legislation Committee	No
Reporting Deadline	27 February 2012

Procedure

1. This instrument was laid before the Parliament, but is not subject to any Parliamentary procedure. Under the new procedure introduced by the Interpretation and Legislative Reform (Scotland) Act 2010, Scottish statutory instruments previously not laid now require to be laid before the Parliament. Under Rule 10.1.3, any instrument laid before the Parliament is to be referred to a lead committee for consideration. Therefore, instruments laid only but not subject to any parliamentary procedure are also now referred to lead committees for consideration.

2. The requirement on lead committees to consider these instruments is an unintended consequence of the recent rule changes, brought into effect by the ILR Act. It is proposed that this requirement be removed in the next round of minor rule changes. Therefore, the requirement to note this type of instrument on the agenda is expected to be a temporary measure.

Purpose

3. This Order brings certain provisions of the Private Rented Housing (Scotland) Act 2011 ("the 2011 Act"). The purpose of the 2011 Act is to support responsible landlords and address the problems caused by landlords

who act unlawfully, by strengthening the regulation of the private rented sector. This involves operational changes to the registration system of private landlords and licensing of houses in multiple occupation. The Act also includes provisions intended to deal with problems caused by overcrowding in the private rented sector and to improve the working of the private sector tenancy regime.

4. This Order came into force on 31st January 2012. Sections 13(2), 13(4) and 13(5) of the Order, amend various parts of the Houses in Multiple Occupation (HMO) licensing regime (Part 5 of the Housing (Scotland) Act 2006), give additional powers to local authorities to refuse HMO licence applications in cases of breaches of planning control or overprovision of such licences in one locality. Sections 17, 19 and 32(2) relate to Overcrowding Statutory Notices are brought into force only for the purposes of making subordinate legislation. Section 29 is brought into force for the purposes of requiring consultation before issuing guidance only. Article 3 of the Order ensures that the new procedure for allowing an initial refusal of an HMO licence application, does not apply to applications received by a local authority prior to 31st January 2012.

Subordinate Legislation Committee

5. The Subordinate Legislation Committee had no comments to make on this instrument.

6. A copy of the [SSI](#) and [executive note](#) are included with the papers.

Recommendation

7. **The Committee is invited to take note of this instrument.**

Steve Farrell
Clerk to the Infrastructure and Capital Investment Committee
Tel. 0131 348 5211
email: steve.farrell@scottish.parliament.uk

Infrastructure and Capital Investment Committee

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Consideration of European Union legislative proposal

Introduction

1. The Scottish Parliament's European Strategy¹, which was agreed in December 2010, specifies that any EU legislative proposal identified as raising subsidiarity concerns should be considered by the relevant subject committee. (This is in addition to the Committee's wider role in scrutinising items contained in the Commission's Work Programme (CWP), which the Committee will discuss at its meeting on 22 February.)

2. Subsidiarity is about the appropriate level at which decisions should be made. The principle states that the EU shall act in areas of shared competence, only where the aims could not be achieved at a lower level of governance, be that a national, regional, or local level.

3. In considering whether a proposal raises subsidiarity concerns, the committee should limit its consideration to the question of subsidiarity alone. The committee is to assess whether the objective of the proposal can only be achieved (or achieved to a sufficient extent) by action at EU level. The committee should also consider whether the objective would be better achieved at EU level and provide a greater benefit than individual action by member states. To assist a committee in its consideration, the positions of the UK Government and the Scottish Government are set out at Annexes A and B respectively. Advice from the Office of the Solicitor to the Scottish Parliament on the potential impact of the proposals for Scotland has also been provided to members of the Committee separately.

4. If a committee takes the view that a proposal raises subsidiarity concerns, it should write to the relevant House of Lords EU sub-committee conveying this view prior to the sub-committee's consideration of the proposal. If a committee is of the view that the proposal does not raise subsidiarity concerns, no further action is required.

EU legislative proposals relating to procurement

5. The Committee has received two EU legislative proposals in relation to which subsidiarity concerns have been raised by the UK Government. Under the Scottish Parliament's European Strategy the Committee is, therefore, required to consider these documents.

6. The following legislative proposals have been received—

- Proposal for a directive on procurement by entities operating in the water, energy, transport and postal services sectors (COM 2011/895)²
- Proposal for a directive on public procurement (COM 2011/896)³

¹ [A European Union Strategy for the Scottish Parliament](#)

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0895:FIN:EN:PDF>

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:PDF>

7. The Commission considers that public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the Commission suggests that current public procurement rules have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and enabling procurers to make better use of public procurement in support of common societal goals. The Commission suggests that, in the face of those challenges, the existing public procurement legislation needs to be revised and modernised. This concerns not only procurement by the State and public authorities, but also contract awards by utilities operators which have their own specific procurement regime.

8. To achieve these aims, the directives include measures to—

- simplify the procurement rules and provide more flexibility for purchasers;
- enable purchasers to procure goods and services that, for example, foster innovation and respect the environment;
- remove barriers for market access by SMEs;
- improve the existing safeguards against risks such as conflict of interest, favouritism and corruption and provide for additional protection; and
- require Member States to establish a single national authority (referred to as an oversight body), to be in charge of monitoring, implementation and control of public procurement law (***Note: it is this specific proposal which the UK and Scottish governments consider to raise subsidiarity concerns and is discussed below.***)

House of Lords consideration

9. The directives have been allocated to the House of Lords EU Sub-Committee on Internal Market, Energy and Transport for consideration on 13 February 2012. In order that the views of the Scottish Parliament can be taken into account by the House of Lords as a national parliament under the subsidiarity protocol, the ICI Committee is, therefore, required to take a decision on subsidiarity and to write to the Sub-Committee in time for this meeting. House of Lords clerks have confirmed that they will circulate any correspondence from the ICI Committee to their Members as soon as it is received.

UK Government position

10. The UK Government is concerned that aspects of the proposal for national oversight bodies may infringe the principle of subsidiarity. An explanation of its concerns with the approach proposed is included in the Explanatory Memoranda at **Annexe A** (see paragraphs 29-31 for each of the directives).

11. As it states in the Explanatory Memoranda, the UK Government considers that the proposal is “unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body”. Specifically, the UK Government suggests that the proposal would “require the UK to allow its oversight body to ‘seize’

the jurisdiction currently exercisable by the British courts of law to determine disputes about compliance with the procurement rules”.

12. In addition, the UK Government considers that it would “pre-empt the role of the High Court in addressing remedies for breach of procurement rules”. The High Court currently exercises the remedies functions under the UK’s current procurement regulations for the public sector and utilities in relation to England and Wales and Northern Ireland. The Sheriff Court and Court of Session currently exercise those functions in relation to Scotland.

13. The UK Government, therefore, suggests that—

“the proposal may call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body.

“More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member States structure their judicial systems in accordance with national legal traditions.

“In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.”

Scottish Government position

14. The Scottish Government has notified the Committee of its position, which is included at **Annexe B**, stating that it shares the UK Government’s concerns regarding the legislative proposal compliance with the principle of subsidiarity.

15. Specifically, the Scottish Government considers that the proposal to establish a single UK oversight body “does not take account of the fact that responsibility for the development of procurement policy and the implementation of EU procurement legislation is devolved in Scotland”. It suggests that “under the terms of the devolution settlement, it would not be possible for a UK body to provide guidance on Scottish Government procurement policy or legal interpretation of the Scottish procurement regulations”.

16. The Scottish Government also considers that the proposal to give responsibility to a particular oversight body for resolving disputes concerning alleged breaches of EU procurement law does not reflect the principle of subsidiarity. It suggests that “it would not be appropriate for the oversight body to assume judicial functions which in Scotland currently rest with the Sheriff Court and Court of Session”. The Scottish Government suggests that combining judicial and non-judicial functions in this way “would not accord with common law tradition (in Scotland and the UK) under which judicial and administrative/regulatory functions tend to be clearly separated”.

17. For these reasons the Scottish Government states that it believes that responsibility for determining appropriate arrangements for carrying out the administrative and regulatory and the judicial functions attributed to the oversight body “should remain with Member States and their legislatures and not be determined at a European level”.

Scottish Parliament legal advice

18. Further advice has been provided on the application of the subsidiarity protocol to the proposed directives by the Office of the Solicitor to the Scottish Parliament. As is standard procedure, this legal advice has been provided to Committee members only.

Recommendation

19. The Committee is invited to consider the proposal and to take a view on whether it agrees with the subsidiarity concerns raised by the UK and Scottish governments.

20. If the Committee shares these concerns, it is recommended that it agrees to delegate authority to the Convener to write to House of Lords Sub-Committee conveying these concerns in time for its consideration of the proposal.

21. The Committee may also wish to write to the Scottish Government notifying it of the outcomes of the Committee's consideration and requesting updates in relation to the directives as appropriate.

22. Furthermore, the Committee may wish to write to Scotland's MEPs to bring to their attention any subsidiarity concerns.

23. If the Committee is of the view that the proposals do not raise subsidiarity concerns, no further action is required.

**Jamie Hepburn MSP
European Reporter
February 2012**

UK GOVERNMENT POSITION

COM (2011) 895: UTILITIES PROCUREMENT

EXPLANATORY MEMORANDUM ON EUROPEAN COMMUNITY DOCUMENTS

Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors

Submitted by the Cabinet Office on 16 January 2012.

SUBJECT MATTER

1. The European Commission adopted on 20 December 2011 proposals for new directives on public procurement following its Green Paper on the modernisation of public procurement (COM (2011) 15 of 27 January 2011).
2. Public procurement accounted for approximately 19 % of the EU's GDP in 2009. Total public expenditure on works, goods and services exceeds 2 trillion Euro per year. European Union law includes directives governing the procurement process undertaken by government, other public bodies and utilities when awarding most contracts (depending on the nature and value of those contracts).
3. This Explanatory Memorandum relates to the proposal for a Directive to replace Directive 2004/17/EC (the Utilities Directive). The Utilities Directive and the parallel public sector Directive (2004/18/EC), (which is also being revised and on which a separate Explanatory Memorandum is being provided) contain detailed procedural rules that apply to public procurements above certain thresholds. The UK implemented these directives in 2006 through the Utilities Contracts Regulations 2006 and the Public Contracts Regulations 2006.⁴
4. In its detailed explanation of its proposal, the Commission covers the following five main areas:
 - Simplification and flexibilisation of procurement procedures
 - Strategic use of public procurement in response to new challenges
 - Better access to the market for SMEs and start-ups
 - Sound procedures
 - Governance

Simplification of procurement procedures

5. Various measures are included in the proposal, which are designed to simplify the rules and provide more flexibility for purchasers. These include:
 - clarification of the scope of the Directive, in particular:
 - o where a utility's activities are exercised pursuant to, rights which have been granted following a procedure in which adequate publicity has been

⁴ The directives were implemented in Scotland through the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

- ensured and where the granting of these rights was based on objective criteria, (notably pursuant to EU legislation), these do not constitute special or exclusive rights for the purpose of this Directive and therefore the activities are out of scope;
- the distinction between Part A services and Part B services (which had hitherto only been subject to a light-touch regime) has been removed; and
 - the oil and gas exploration sector has been removed from the scope altogether.
- a toolbox approach, to allow Member States to give utilities a new procedure for innovative procurement. Utilities will also be able to make use of six specific techniques and tools, which have been improved and clarified to facilitate e-procurement: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement;
 - the promotion of e-procurement, which is aimed at achieving the switch over to e-procurement, through the mandatory transmission of notices in electronic form, the mandatory electronic availability of procurement documents and provides for a switch to fully electronic communication within a period of two years. It streamlines and improves dynamic purchasing systems and provides for the use of electronic catalogues;
 - the modernisation of procedures, such as the shortening of time limits of procedures to allow for quicker and more streamlined procurement, making the distinction between the selection of tenderers and award stages of the contract more flexible and providing that the quality of the staff assigned to the contract can be taken into account at the award stage.
 - The procedure for the exemption of contracts awarded by utilities operating in sufficiently competitive markets has been simplified and streamlined.

Strategic use of public procurement in response to new challenges

6. The Commission sets out that the draft Directive is aimed at enabling utilities to procure good and services, in line with Europe 2020 strategic goals, through, for instance, fostering innovation and respecting the environment. The proposal enables utilities:
- to take into account the life-cycle costs (which includes the analysis of certain environmental costs) of what is being purchased in awarding contracts, which covers all the stages of the existence of a product or works, or provision of a service;
 - to refer to factors directly involved in the production process in the technical specifications and in the award criteria, which are closely related to production or provision of the good or service purchased;
 - to require that works, supplies or services require specific labels certifying environmental, social or other characteristics, provided that they also accept equivalent labels; and
 - to exclude economic operators from a procedure, if they have identified infringements of obligations established by EU law in the field of social, labour or environmental law, or of international law provisions.

Social services

7. The Commission's proposal introduces a specific regime for social services, (previously only covered by limited Part B services rules concerning the publication of contract award notices and non-discriminatory specifications), respecting the principles of transparency and equal treatment for contracts above a (higher)

threshold of 1m euros. This lighter regime is based on the fact that such services have only a very limited cross-border dimension.

Innovation

8. To enable utilities to buy innovative goods and products, the proposal includes provisions for a new procedure for the development and subsequent purchase of new, innovative products, goods and services.

Better access to the market for SMEs and start-ups

9. The proposal provides concrete measures to remove barriers for market access to SMEs. These include;
 - a provision to provide better access to framework agreements for SMEs and other suppliers, through limiting their duration to 4 years, so that the market is reopened to competition at reasonable periods; and
 - allowing Member States to provide that subcontractors may request direct payment from contracting authorities.

Sound procedures

10. The proposal improves the existing safeguards against unsound business practices concerning conflicts of interest, illicit conduct and the granting of unfair advantages.

Governance

11. The proposal provides that member states should designate a single national authority, which would be in charge of the monitoring, implementation and control of public procurement. The Commission contends that only a single body with the prescribed oversight role would be able to ensure an overview of the main implementation problems and be able to suggest appropriate remedies to any structural problems.
12. In addition, the proposal requires member states to provide support to contracting entities, in the form of legal and economic advice, guidance, training and assistance. This would be particularly relevant where contracting authorities do not have the internal expertise to deal with complex projects.
13. The Commission's Explanatory Memorandum asserts that it does not consider that requirements concerning oversight bodies and the provision of advice, guidance and training should generate an additional financial burden for Member States, as they would be able to use the existing mechanisms and structures to fulfil these functions.

SCRUTINY HISTORY

14. The Cabinet Office submitted an Explanatory Memorandum (EM) dated 8 March 2011 on 5692/11, COM(11)15: Green Paper on the modernisation of EU public procurement policy – towards a more efficient European procurement market. The Commons European Scrutiny Committee cleared it as not important in report 24, 10-11. The Lords Select Committee on the EU sifted to sub-committee B where it was cleared it on 16 May 2011 following correspondence between Lord Roper and the Minister for the Cabinet Office.
15. An EM dated 17 November 2010 was submitted on 15215/10, COM(10)571: Green Paper on the use of e-procurement in the EU. The Commons European Scrutiny

Committee cleared as not important in report 16, 10-11. The Lords Select Committee on the EU sifted to sub-committee B where it was cleared on 9 May 2011 following correspondence between Lord Roper and the Minister for the Cabinet Office.

MINISTERIAL RESPONSIBILITY

16. The Minister for the Cabinet Office has primary responsibility for this matter. The Secretary of State for Business Innovation and Skills is responsible for EU Single Market policy and has an interest in this matter due to the single market legal base of EU public procurement Directives.

INTEREST OF DEVOLVED ADMINISTRATIONS

17. International relations, including relations with the EU, are reserved matters under the Scotland Act on public procurement policy and the developments of EU legislation on public procurement policy are reserved matters under the devolution settlements.

18. The development and application of public procurement policy, and the implementation of EU public procurement legislation is a devolved matter in Scotland and Northern Ireland under the devolution settlement and the Scottish and Northern Ireland devolved administrations has been consulted in the preparation of this Explanatory Memorandum.

19. The current procurement and remedies directives have been implemented by Westminster for the Northern Ireland jurisdiction in addition to England and Wales. However, this legislation is implemented with the consent and on behalf of the Northern Ireland Executive. In national law terms the Northern Ireland Executive is entitled to implement separately in Northern Ireland if it so chooses.

20. The current procurement and remedies Directives have been separately implemented in Scotland.

LEGAL AND PROCEDURAL ISSUES

Legal basis

21. The legal basis is Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).

Legislative procedure

22. The procedures for this proposal is the Ordinary Legislative procedure

Voting procedure

23. Voting is by qualified majority

Impact on UK law

24. Public procurement Directives are implemented in UK law by means of statutory instrument. The new Directive, once adopted, will need to be implemented similarly.

As noted in the footnote on page 1, Scotland implemented the 2004 directives by means of statutory instruments and it is expected that they will implement this new Directive similarly.

Gibraltar

25. The public procurement Directives are implemented in Gibraltar.

FUNDAMENTAL RIGHTS ANALYSIS

26. The paragraphs below under subsidiarity explain the Government's concerns about the proposed requirement for national oversight bodies to be able to 'seize' the jurisdiction of the Courts. This substantial concern over subsidiarity gives rise to a lesser but related issue under the European Convention on Human Rights (ECHR).

27. In the Government's view, the current drafting of this aspect of the proposal fails to lay a clear foundation for the UK to implement it in a way which avoids a risk of infringing article 6(1) of the European Convention on Human Rights (the right to a fair hearing in the determination of civil rights and obligations) As currently drafted in very sweeping terms, the proposal would appear to oblige the UK to allow the oversight body to seize jurisdiction even where the nature of its previous advisory relationship with the contracting entity over the procurement in question may prevent it from acting judicially without a suspicion of bias, bearing in mind that the rights of suppliers as well as the contracting entity may be affected by the exercise of this jurisdiction.

EUROPEAN ECONOMIC AREA

28. The single market and public procurement acquis generally applies to the EEA.

SUBSIDIARITY

29. The Government is concerned that aspects of the proposal for national oversight bodies may infringe the principles of subsidiarity and/or proportionality. These proposals, which had not been foreshadowed in the Commission's Green Paper or otherwise consulted on, would require the UK to allow its national oversight body to 'seize' the jurisdiction currently exercisable by British courts of law to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work. This is a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting entity (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the utility has entered into a contract, as the jurisdiction would enable such a contract to be declared 'ineffective').

30. The various other functions of the oversight body, as they appear from article 93(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Utilities Regulations 2006, which implements Directive 92/13/EEC (SI 2006/6 as amended) addresses remedies for breach of the procurement rules. The latter directive respected the diversity of legal traditions

among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and utilities.

31. The new proposal seems to the Government to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC. In this respect, the proposal may call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member States structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.

POLICY IMPLICATIONS

32. The Government welcomes the publication of this proposal to revise the existing Utilities rules (2004/17/EC). As set out in the UK response to the Commission's Green paper, the UK supports the aim of simplifying and modernising the procurement rules, so as to make the award of contracts more flexible for the benefit of purchasers, SMEs and other suppliers.
33. The Government welcomes the decision to remove the oil and gas exploration sector from the scope of the Directive, although in the UK this sector has already been exempted from the Utilities procurement regime under 2004/17's exemption mechanism. It is helpful that the exemption mechanism has been simplified and streamlined under this new proposal, as this will allow future applications for exemptions to be addressed expeditiously.
34. The Government also welcomes the clarification that rights, which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of these rights was based on objective criteria, do not constitute special or exclusive rights. This is an important modification to the scope. This should help private sector utilities to be clear about whether they are within the scope of the rules or not. It has previously been difficult to be clear about whether utilities, for instance in the oil and gas exploration sector, were covered by the definition of special or exclusive rights.
35. The Government does have concerns about the removal of the distinction between Part A and Part B services. Part B services are currently only subject to the rules concerning the publication of contract award notices and non-discriminatory specification, because they are not regarded as being of cross border interest. The proposed changes will mean that some services, such as Legal Services, will become subject to the full rules. Although the Commission states that this distinction is no longer valid, it has not made a clear cut case that these services should be subject to the full rules. The Government also is not convinced about the benefits of the approach to social services, also previously Part B services, outlined in paragraph 7 above.

36. As set out in the response to the Green paper, the Government is in favour of clarification on how social and environmental matters can be taken into account. In that context, the provisions concerning life cycle costs and being able to take account of various factors related to the production process as long as these are linked to the subject matter of the contract are helpful, but the detail of these will have to be examined carefully during the negotiations.
37. The Government welcomes the introduction of a procedure designed to encourage innovation.
38. The Government welcomes the measures designed to provide better access for SMEs, such as shortening the duration of framework agreements.
39. The Government is in favour of sound procedures, but generally considers that these issues are best dealt with at the Member State level, rather than being explicitly covered in the Directives. This is also the case concerning the provision of legal, training, advisory and various other functions to authorities and suppliers. As set out in the paragraphs on subsidiarity above, the Government is also concerned by the proposal that a national oversight body should, as part of its duties, be able to seize the jurisdiction of national law bodies, where it had detected violations of the rules. The Commission had previously indicated that enforcement issues, which are dealt with in the Remedies Directives, would not be addressed in this proposal.

CONSULTATION

40. This proposal has been circulated for comment to Government Departments, other public bodies, utilities, the devolved administrations, the Chartered Institute of Purchasing and Supply and the CBI.

IMPACT ASSESSMENT

41. An impact assessment has been prepared and is attached

FINANCIAL IMPLICATIONS

42. The financial implications are set out in the Impact assessment.

TIMETABLE

43. The proposal will be taken forward under the Danish Presidency. It is likely that there will be an orientation debate at the Competitiveness Council on 20 February 2012 and further consideration at the May 2012 Competitiveness Council.

Right Honourable Francis Maude MP
Minister for the Cabinet Office

COM (2011) 896: PUBLIC PROCUREMENT

EXPLANATORY MEMORANDUM ON EUROPEAN COMMUNITY DOCUMENTS

Proposal for a Directive of the European Parliament and of the Council on public procurement

Submitted by the Cabinet Office on 16 January 2012.

SUBJECT MATTER

1. The European Commission adopted on 20 December 2011 proposals for two new Directives on public procurement covering the public sector and Utility sectors respectively, following its Green Paper on the modernisation of public procurement (COM (2011) 15 of 27 January 2011). On the same day it also published a proposal on the award of concession contracts, on which a separate Explanatory Memorandum (EM) will be provided.
2. In 2009, public procurement accounted for approximately 19 % of the European Union's GDP. Total public expenditure on works, goods and services exceeds 2 trillion Euro per year. European Union (EU) law includes directives governing the procurement process undertaken by government and other public bodies when awarding most contracts (depending on the nature and value of those contracts).
3. This Explanatory memorandum relates to the proposal for a Directive to replace Directive 2004/18/EC (the public sector Directive). The public sector Directive and the parallel Utilities Directive (2004/17/EC), (which is also being revised and on which a separate Explanatory Memorandum is being provided) contain detailed procedural rules that apply to public procurements above certain thresholds. The UK implemented these directives in 2006 through the Public Contracts Regulations 2006 (SI 2006/5) and the Utilities Contracts Regulations 2006 (SI 2006/6).⁵
4. In its detailed explanation of its proposal, the Commission covers the following five main areas:
 - Simplification of procurement procedures and the provision of more flexibility in the use of procedures
 - Strategic use of public procurement in response to new challenges
 - Better access to the market for SMEs and start-ups
 - Sound procedures
 - Governance

Simplification of procurement procedures

5. Various measures are included in the proposal, which are designed to simplify the rules and provide more flexibility for purchasers. These include:

⁵ The directives were implemented in Scotland through the Public Contracts (Scotland) Regulations 2006 and the Utilities Contracts (Scotland) Regulations 2006.

- clarification of the scope, including the revision of certain key concepts, such as body governed by public law, in the light of the case law of the Court of Justice and the removal of the distinction between services classified as Part A and Part B services (the latter of which have hitherto been subject to a lighter-touch rules regime);
- a toolbox approach, to allow Member States to give contracting authorities (public purchasers) more choice over which procedure to use in addition to the standard open and restricted procedures, whether it be competitive negotiation with a call for competition or competitive dialogue, in the circumstances set out in the proposal or a new procedure for innovative procurement. Contracting authorities will also be able to make use of the following six specific techniques and tools, which have been improved and clarified to facilitate e-procurement: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement;
- a lighter approach for contracting authorities below the central government level, so that purchasers in local authorities may use a prior information notices as a call for competition, so that they don't have to publish a separate contract notice before launching the procurement procedure and which allows them to agree time limits with the participants. This mirrors the flexibility given to sub-central authorities in the WTO Government Procurement Agreement, to which the EU is a signatory;
- the promotion of e-procurement, which is aimed at achieving the switch-over to e-procurement, through the mandatory transmission of notices in electronic form, and the mandatory electronic availability of procurement documents. A switch to fully electronic communication will be required within a period of two years. The proposal streamlines and improves dynamic purchasing systems and provides for the use of electronic catalogues;
- the modernisation of procedures, such as: the shortening of time limits of procedures to allow for quicker and more streamlined procurement, making the distinction between the selection of tenderers and award stages of the contract more flexible and providing that the quality of the staff assigned to the contract can be taken into account, where relevant, at the award stage. Contracting authorities will be entitled to exclude suppliers who have performed badly on previous contracts and will be able to take into account "self-cleaning" measures taken by suppliers, who would otherwise have been excluded from bidding because of convictions for bribery or certain other offences.

Strategic use of public procurement in response to new challenges

6. The Commission sets out that the draft Directive is aimed at enabling contracting authorities to procure goods and services, in line with Europe 2020 strategic goals, through, for instance, fostering innovation and respecting the environment. The proposal enables contracting authorities:
 - to take into account the life-cycle costs (which includes analysis of certain environmental costs) of what is being purchased, in awarding contracts, which cover all the stages of the existence of a product or works, or provision of a service;
 - to refer to factors directly involved in the production process in the technical specifications and in the award criteria, which are related to the specific production or provision of the good or service purchased;

- to take into account innovative character in assessing the most economically advantageous tender (provided that it is linked to the subject matter of the contract);
- to require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they also accept equivalent labels; and
- can exclude economic operators from a procedure, if they have identified infringements of obligations established by EU legislation in the field of social, labour or environmental law, or of international labour law provisions.

Social services

7. The Commission's proposal introduces a specific regime for social services, which also includes health and education services. These services were previously Part B and only covered by limited rules concerning the publication of contract award notices and non-discriminatory specifications. The proposals require Member States to put in place procurement procedures ensuring compliance the principles of transparency and equal treatment for contracts above a (higher) threshold of 500k euros. This higher threshold is based on the fact that such services have only a very limited cross-border dimension.

Innovation

8. To enable public purchasers to buy innovative goods and products, the proposal includes provisions for a new procedure for the development and subsequent purchase of new, innovative products, goods and services.

Better access to the market for SMEs and start-ups

9. The proposal provides concrete measures to remove barriers to market access for SMEs. These include:
 - a general simplification of information requirements, so that self-declarations will have to be accepted prima-facie evidence for evaluating the capacity and capability of supplies necessary to select them as tenderers. The proposal covers the provision of a standardised document, the European Procurement Passport, the ownership of which by a supplier would serve as proof of fulfilment of certain basic conditions of participating, including that there are no grounds for mandatory exclusion;
 - a provision which invites contracting authorities to divide contracts above certain values into "lots" (ie smaller chunks, so that smaller firms can bid) and, where this does not happen, requires a specific explanation for not dividing them to be provided;
 - a limitation on requirements for participation, to avoid unjustified barriers to SME participation. In particular, except in justified cases, turnover requirements are explicitly limited to three times the estimated contract value; and
 - allowing Member States to provide that subcontractors may request direct payment from contracting authorities.

Sound procedures

10. The proposal improves the existing safeguards against unsound business practices concerning conflicts of interest, illicit conduct and the granting of unfair advantages.

Governance

11. The proposal provides that member states should designate a single national authority, which would be in charge of the monitoring, implementation and control of public procurement. The Commission contends that only a single body with the prescribed oversight role would be able to ensure an overview of the main implementation problems and be able to suggest appropriate remedies to any structural problems.
12. In addition, the proposal requires member states to provide support to contracting authorities and economic operators, in the form of legal and economic advice, guidance, training and assistance.
13. The Commission's Explanatory Memorandum asserts out that requirements concerning oversight bodies and the provision of advice, guidance and training, should not generate an additional financial burden, as Member States would be able to use their existing mechanisms and structures to fulfil these functions.

SCRUTINY HISTORY

14. The Cabinet Office submitted an Explanatory Memorandum dated 8 March 2011 on 5692/11, COM(11)15: Green Paper on the modernisation of EU public procurement policy – towards a more efficient European procurement market. The Commons European Scrutiny Committee cleared it as not important in report 24, 10-11. The Lords Select Committee on the EU sifted to sub-committee B where it was cleared it on 16 May 2011 following correspondence between Lord Roper and the Minister for the Cabinet Office.
15. On 17 November 2010, the Cabinet Office submitted an Explanatory Memorandum on COM(10)571: Green Paper on the use of e-procurement in the EU. The Commons European Scrutiny Committee cleared as not important in report 16, 10-11. The Lords Select Committee on the EU sifted to sub-committee B where it was cleared on 9 May 2011 following correspondence between Lord Roper and the Minister for the Cabinet Office.

MINISTERIAL RESPONSIBILITY

16. The Minister for the Cabinet Office has primary responsibility for this matter. The Secretary of State for Business Innovation and Skills is responsible for EU Single Market policy and has an interest in this matter due to the single market legal base of EU public procurement Directives.

INTEREST OF DEVOLVED ADMINSTRATIONS

17. International relations, including relations with the EU, are reserved matters under the Scotland Act 1998 and excepted matters under the Northern Ireland Act 1998.
18. The development and application of public procurement policy and the implementation of public procurement legislation is a devolved matter in Scotland and Northern Ireland under the devolution settlements, and the Scotland and Northern Ireland devolved administrations have been consulted in the preparation of this Explanatory Memorandum

19. The current procurement and remedies directives have been implemented by Westminster for the Northern Ireland jurisdiction in addition to England and Wales. However, this legislation is implemented with the consent and on behalf of the Northern Ireland Executive. In national law terms the Northern Ireland Executive is entitled to implement separately in Northern Ireland if it so chooses.

20. The current procurement and remedies Directives have been separately implemented in Scotland.

LEGAL AND PROCEDURAL ISSUES

Legal basis

21. The legal basis is Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union.

Legislative procedure

22. The procedures for this proposal is the Ordinary Legislative procedure

Voting procedure

23. Voting is by qualified majority

Impact on UK law

24. Public procurement Directives are implemented in UK law by means of statutory instruments. The new Directive, once adopted, will need to be implemented similarly. As noted in the footnote on page 1, Scotland implemented the 2004 Directives by means of statutory instruments and it is expected that they will implement the new Directives similarly.

Gibraltar

25. The public procurement Directives are implemented in Gibraltar.

FUNDAMENTAL RIGHTS ANALYSIS

26. The paragraphs below under 'Subsidiarity' explain the Government's concerns about the proposed requirement for national oversight bodies to be able to 'seize' the jurisdiction of the Courts. This substantial concern over subsidiarity gives rise to a lesser but related issue under the European Convention on Human Rights (ECHR). There are no other human rights issues raised by the proposals.

27. In the Government's view, the current drafting of this aspect of the proposal fails to lay a clear foundation for the UK to implement it in a way which avoids a risk of infringing article 6(1) of the ECHR (the right to a fair hearing in the determination of civil rights and obligations) As currently drafted in very sweeping terms, the proposal would appear to oblige the UK to allow the oversight body to seize jurisdiction even where the nature of its previous advisory relationship with the contracting authority over the procurement in question may prevent it from acting

judicially without a suspicion of bias, bearing in mind that the rights of suppliers as well as the contracting authority may be affected by the exercise of this jurisdiction.

EUROPEAN ECONOMIC AREA

28. The single market and public procurement acquis generally applies to the EEA.

SUBSIDIARITY

29. The Government is concerned that aspects of the proposal for national oversight bodies may infringe the principles of subsidiarity and/or proportionality. These proposals, which had not been foreshadowed in the Commission's Green Paper or otherwise consulted on, would require the UK to allow its national oversight body to 'seize' the jurisdiction currently exercisable by British courts of law to determine disputes about compliance with the procurement rules, where a violation is detected by the oversight body in the course of its monitoring and legal advisory work (see the final paragraph of article 84(3) of the proposed directive). This is a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting authority (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the contracting authority has entered into a contract, as the jurisdiction would enable such a contract to be declared 'ineffective').
30. The various other functions of the oversight body, as they appear from article 84(3), are primarily administrative or regulatory. The proposal would therefore require the UK to combine in a single body a mixture of administrative, regulatory and judicial functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court under Part 9 of the Public Contracts Regulations 2006 (SI 2006/5 as amended) which implements Directive 89/665/EEC (as amended) which addresses remedies for breach of the procurement rules. The latter directive respected the diversity of legal traditions among Member States by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and contracting authorities.
31. The new proposal seems to the Government to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 89/665/EEC. In this respect, the proposal may call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member States structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.

POLICY IMPLICATIONS

32. The Government welcomes the publication of this proposal to revise the existing public procurement rules (Directive 2004/18/EC). As set out in the UK response to the Commission's Green paper consultation on the revision of the rules, the Government supports the aim of simplifying and modernising the procurement rules, so as to make the award of contracts more flexible for the benefit of purchasers, SMEs and other suppliers.

Simplification of procurement procedures

33. The Government generally welcomes many of the proposals to simplify the rules and provide more flexibility for purchasers and is pleased that these include many of the UK- proposed measures have been included in the Commission's proposals. These include: reduced timescales; allowing greater freedom to use the competitive negotiated procedure; improving dynamic purchasing systems; providing that the quality of staff can be taken into account at the award stage (for service contracts and design of works); and allowing the past performance of economic operators to be taken into account. Where suppliers, under the existing rules, would previously have been automatically excluded from bidding because of convictions for bribery or other offences, it is helpful that contracting authorities will now be allowed to take into any self-cleaning measures undertaken by the suppliers when deciding whether to allow their participation.

34. If these measures for simplification can be maintained through the negotiating process, there will be less need for the thresholds to be raised, as the process of letting and bidding for contracts will be simpler. In any case, the Commission has also indicated that there will be a review of the thresholds (Article 94), which the UK will want to see undertaken as soon as possible and to report earlier than the suggested date of 2017.

35. The Government does, however, have concerns about the removal of the distinction between Part A and Part B services. Part B services are currently only subject to the rules concerning the publication of contract award notices and non-discriminatory specification, because they are not regarded as being of cross border interest. The proposed changes will mean a significant extension in the scope of the Part A rules, with many services, such as Legal Services, becoming subject to the full rules. Although the Commission states that this distinction is no longer valid, it has not made a clear cut case that these services should be subject to the full rules. The UK also is not convinced about the benefits of the approach to social services, also previously Part B services, outlined in paragraph above.

36. The encouragement of the greater use of e-procurement is to be welcomed, as this should help SME access and increase the level of cross border procurement. The simplification of dynamic purchasing systems and the provisions for the use of e-catalogues should increase the use of these approaches.

37. In general, the Commission's proposals to encourage electronic communication are welcome. However, we will wish to ensure appropriate safeguards. Empowering Member States to require advanced electronic communication must not hinder cross-border bidding, and we would not wish any Member State to require advanced

electronic (digital) signatures without allowing alternative means of authentication. Otherwise UK firms, which do not routinely use qualified or advanced digital signatures, could be disadvantaged. We will want some exceptions or derogations from the requirements to offer unrestricted electronic access to documents from the date of contract notice, and to carry out “all procedures” electronically within five years.

Strategic use of public procurement in response to new challenges

38. As set out in the response to the Green paper, the Government is in favour of clarification on how social and environmental matters can be taken into account. In that context, the provisions concerning life cycle costs and being able to take account of various factors related to the production process as long as these are linked to the subject matter of the contract are helpful, but the detail of these will have to be examined carefully during the negotiations.

39. The Government welcomes the introduction of a procedure designed to encourage innovation.

Better access to the market for SMEs and start ups

40. The Government welcomes the measures designed to cut red tape in the procurement process, which will be of particular benefit to SMEs. These include a general simplification of information requirements, so that self-declarations are accepted and that the supporting documents are only required from the winning bidder. The UK is pleased that the division of contracts into lots has not been made mandatory, but remains to be convinced that setting a maximum turnover figure is the best approach.

Sound procedures and governance

41. The Government is in favour of sound procedures, but generally considers that these issues are best dealt with at the Member State level, rather than being explicitly covered in the Directives. On governance, ie the provision of legal, training, advisory and various other functions by the member state to authorities and suppliers, we are concerned that the proposals might require an overhaul of the UK's current system, whereby such services are substantially delivered by the private sector. As covered in paragraphs on subsidiarity above, the Government is also concerned by the proposal in article 84(3) that a national oversight body should, as part of its duties, be able to seize the jurisdiction of national law bodies, where it had detected violations of the rules. The Commission had previously indicated that enforcement issues, which are dealt with in the Remedies Directives, would not be addressed in this proposal.

CONSULTATION

42. This proposal has been circulated for comment to Government Departments, the devolved administrations, other public bodies the Chartered Institute of Purchasing and Supply and the CBI.

IMPACT ASSESSMENT

43. An impact assessment has been prepared and is attached.

FINANCIAL IMPLICATIONS

44. The financial implications are covered in the impact assessment.

TIMETABLE

45. The proposal will be taken forward under the Danish Presidency. It is likely that there will be an orientation debate at the Competitiveness Council on 20 February 2012 and further consideration at the May 2012 Competitiveness Council.

Right Honourable Francis Maude MP
Minister for the Cabinet Office

SCOTTISH GOVERNMENT POSITION

BRIEFING PAPER FOR THE INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE, SCOTTISH PARLIAMENT

Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors – Explanatory Memorandum 18964/11

Proposal for a Directive of the European Parliament and of the Council on public procurement – Explanatory Memorandum 18966/11

Scottish Government's interest

Whilst the negotiation and development of EU procurement legislation is a matter for the UK Government, the development of procurement policy and the implementation of EU procurement legislation in Scotland is devolved. Current Directives on procurement have been transposed into Scots law by the Public Contracts (Scotland) Regulations 2006 (as amended) and the Utilities Contracts (Scotland) Regulations 2006 (as amended).

Background to the legislative proposals

The European Commission has undertaken a comprehensive review of EU procurement legislation, with the intention of simplifying and updating the rules to make the award of contracts more flexible and to enable contracts to be put to better use in support of other policies. The Commission published a Green Paper in January 2011 which contained detailed information about the issues it was considering as part of its review. Following consultation with stakeholders, the Scottish Government formally responded to the Green Paper in March 2011⁶. The Scottish Government also engaged with the UK Government on the UK's response to the Green Paper.

Legislative proposals

In December 2011, the European Commission published proposals for revised Directives on public procurement and procurement in the utilities sectors.

The UK Government consulted the Scottish Government on the preparation of the above Explanatory Memoranda relating to these legislative proposals.

The Scottish Government supports the UK Government's view that EU legislation on procurement is, in principle, consistent with the principle of subsidiarity. We agree with the UK Government's assessment that aspects of the Commission's current proposal for national oversight bodies (which was not included in the Commission's Green Paper) may, however, infringe the principle of subsidiarity and/or proportionality under which the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level. We share the UK Government's concerns for the following reasons:

⁶ <http://www.scotland.gov.uk/Resource/Doc/116601/0118347.pdf>

- The proposal requires the establishment of a *single* national ‘oversight body’ within each Member State which would combine administrative and regulatory functions.

The proposal does not take account of the fact that responsibility for the development of procurement policy and the implementation of EU procurement legislation is devolved in Scotland. Under the terms of the devolution settlement, it would not be possible for a UK body to provide guidance on Scottish Government procurement policy or legal interpretation of the Scottish Procurement Regulations.

We therefore believe that responsibility for determining appropriate arrangements for carrying out the administrative and regulatory functions attributed to the oversight body should remain with Member States and their legislatures and not be determined at a European level.

- The proposal also requires that the oversight body is given responsibility for resolving disputes concerning alleged breaches of EU procurement law.

Council Directive 89/665/EEC (as amended), which sets out the remedies regime for breaches of EU procurement law, respects the diversity of Member States’ legal systems and gives them flexibility to determine which bodies should have responsibility for resolving disputes between contracting authorities and suppliers. This reflects the subsidiarity principle and there is nothing to indicate that there should be any change in this regard.

By contrast, the proposal requires Member States to give responsibility to a particular body which would, as a result, combine judicial and non-judicial functions.

It would not be appropriate for the oversight body to assume judicial functions which in Scotland currently rest with the Sheriff Court and Court of Session. In addition, requiring judicial and non-judicial functions to be combined in this way would not accord with common law tradition (in Scotland/the UK) under which judicial and administrative/regulatory functions tend to be clearly separated.

We therefore believe that responsibility for determining appropriate arrangements for carrying out the judicial functions attributed to the oversight body should remain with Member States.

Scottish Government
January 2012