



**Local & Regional  
Europe**

# The Future of Public Services in Europe

## Strong public services through local governments

CEMR position paper

December 2018

## FOREWORD

Local and regional governments are entrusted with providing a wide range of public services affecting many aspects of daily life. The regulatory framework for public service delivery is established at EU-level. The EU treaties lay out fundamental principles whilst internal market rules and competition law provide more detail governing how public money can be spent. EU rules are of great benefit and should not be too complex.

With this paper, CEMR seeks to ensure that the contribution of local and regional government to European objectives is fully reflected in the important debates to come: economic, social and territorial cohesion, circular economy and climate change, sustainable mobility, asylum and migration, digital services and infrastructure particularly in rural areas, as well as social objectives e.g. the fight against poverty and exclusion, and employment policy. Local and regional governments help deliver all these objectives on the ground. They are thus integral to the current debate on the revival of the EU project as a whole.

The capacity of local and regional governments to ensure the day-to-day provision of public services whilst also financing investment in future services and ensuring economic growth should not be considered as a problem or an exception, but as part of the solution and a major contribution to the European project.

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## INTRODUCTION

1. In the context of the debate on the Future of Europe, the Council of European Municipalities and Regions (CEMR) wishes to express its view on the future of public services in a modern Europe.
2. We recall that public services in general and local and regional public services play a unique role at the local level improving the daily lives of citizens.
3. We stress that there is a strong need from the local and regional perspective to maintain and further develop local public services which are affordable, and accessible to all. Public services respond to both local needs and deliver European objectives: social services (e.g. childcare and social housing), public transport services, broadband infrastructures etc. In that light, and in the context of the adoption of the next Multiannual Financial Framework (MFF) and EU policies such as cohesion policy, support to local public services and local investments must be considered as a priority.
4. For members of the European Union (EU) and the European Economic Area (EEA), the concept and rules of the Internal Market and EU Competition law have an increasing impact on the organisation and financing of public services, also at the local and regional level.
5. We stress the importance of full compliance with Article 4 of the Treaty on European Union (TEU) that affirms the respect of national identities, their political and constitutional structures, including regional and local self-government; as well as the principles of subsidiarity and proportionality in Article 5.
6. In most European countries, the right of local self-government is guaranteed by constitutional law, by law or longstanding practice; the European Charter of Local Self-Government, adopted in 1985, is ratified by all EU Member States, and therefore its principles should also be applied within the EU Single Market context.
7. We also recall that the EU provides interpretative provisions in Protocol 26 on Services of General Interest (SGI) of the Treaty on the Functioning of the European Union (TFEU), where it underlines "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users". Furthermore, the EU recognises the access to services of general economic interest (SGEI) in Article 36 of the Charter of Fundamental Rights.
8. While we acknowledge that fair competition is a fundamental element for the functioning of the internal market, we observe that certain developments concerning the application of the internal market and competition rules on locally provided public services have led to an imbalance between the regulatory framework and the discretion of public bodies, to the detriment of the latter.
9. The need for simplification is not only a matter of lightening the administrative burden on local and regional government: the principles of subsidiarity and proportionality may be infringed by the duplication of oversight bodies. More practically, excessive regulation, whether introduced by the EU or Member State level, may prevent innovation and notably hamper progress toward sustainability. In that sense, the European Commission should favour knowledge exchange rather than bringing an ever-greater number of public service activities within the sphere of internal market and competition law.

10. Twenty-five years of European Single Market and sixty years of European competition rules need to be reflected in the context of the changed environment also due to globalisation. We therefore wish to address relevant elements in different fields, such as public procurement, state aid and international trade agreements. We want to launch a debate on these issues and make recommendations on the way forward.

## PUBLIC PROCUREMENT

### *CEMR's view*

1. CEMR favours the existence of an **EU and international public procurement regime** based on the following fundamental principles and goals.
2. Public procurement provides for effective and **fair competition** between providers based on advertising and **transparent tendering procedures**. Its core objective is to ensure **value for public money** and allow local and regional governments to **make their own decisions** in relation to: local **economic growth, social value, environmental benefits and innovation**, amongst others. With due regard to the autonomy of local and regional governments, CEMR encourages and supports its members to make use of **innovative procurement strategies** to pursue environmental and societal objectives, in line with the **Sustainable Development Goal 11** "Make cities and human settlements inclusive, safe, resilient and sustainable".
3. CEMR is therefore concerned by the inappropriate and increasing use of **public procurement rules** by the EU institutions **as a mandatory policy instrument**. This centralises decisions on different policy goals which should be made locally.
4. Local and regional governments are following **costly and time-consuming EU wide advertising and award procedures**, as well as an EU 'remedies' regime for complaints, and a whole host of other detailed EU processes, for few returns in terms of genuine pan-EU competition. A more proportionate and streamlined regime, based on the size and nature of the contract, should be possible.
5. There is a great need for simplification in public procurement rules. Simplification is beneficial for both public authorities and bidders and would also allow better SMEs to participate in tendering procedures.
6. CEMR is worried that further legislation may raise even more **administrative burdens and costs**, while decreasing the margin of manoeuvre for setting purchasing priorities locally. CEMR therefore welcomes the newest Commission's non-legislative initiative on public procurement, such as the guidance for practitioners<sup>1</sup> in all EU languages and its Communication "Making Public Procurement work in and for Europe"<sup>2</sup>.
7. CEMR expresses its concern about the imbalance between the complexities of the rules and the **very low amount of cross-border offers**. During the period 2009-2015, direct EU cross-border procurement accounted for only 3.5% of the total value of contracts, while indirect cross-border procurement through foreign subsidiaries accounted for only around 20%.<sup>3</sup> Even when there are large cross-border procurement operations, local and regional governments generally have little involvement with them.
8. Furthermore, specifying **local benefits as award criteria ('buy local')** **does not sit easily with the EU rules**. Public authorities are expressly forbidden from using the supplier's location as an award criterion or in taking their final decision. Even if such local benefits criteria apply only to a small proportion of the overall contract, or even if they represent only a small proportion of the contracting authority's overall procurement activity, the risk is that such criteria are considered discriminatory under EU law. Supporting the local economy and local jobs through public spending is therefore unnecessarily difficult to achieve. The EU rules should allow a degree of flexibility in this regard.

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<sup>1</sup> [http://ec.europa.eu/regional\\_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018](http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2018/public-procurement-guidance-for-practitioners-2018).

<sup>2</sup> *Making Public Procurement work in and for Europe* (COM)572 final.

<sup>3</sup> *Idem*.

9. CEMR welcomes the fact that **public-public projects and public-public cooperation do not fall within the scope of procurement legislation** (in line with CJEU case law such as C-51/15 *Remondis*). However, despite the inclusion of this new approach to **public-public cooperation** in Directive 2014/24 (Article 12.4), many authorities are wary of relying upon the exemption. This is because it is fundamentally different from the more understood ‘in-house’ exemption, and some of the EU terms involved (‘cooperation’ and ‘considerations relating to the public interest’) are not easy to define. This raises a number of questions on its implementation and the scope of the exemption is not yet well tested in the courts.

### *What we want*

1. **Policy goals should not be merged with procurement rules in a mandatory way at EU level.** If public procurement is used as a policy instrument, it needs to be optional, with the decisions taken at the regional/local level
2. Local and regional governments must always retain the possibility to choose the tender offering the lowest price.
3. The role of the **European Commission should be to act as ‘Guardian of the Single Market’**, focusing on ensuring that non-discrimination, particularly on grounds of nationality, and abuse of market dominance do not impinge on the Four Freedoms.
4. Local public authorities should have the option to specify a degree of local employment or use of local suppliers in public contracts (‘buy local’), providing a number of bidders can still compete. This would help contracting authorities to **promote local SMEs and the proximity principle for environmental and climate reasons**, increase local employment or boost local skills, as part of their overall local growth objectives.
5. It is essential to **reduce the amount of bureaucracy required for companies of all sizes**. The current system inherently favours larger organisations with the greater capacity to bid. Procurement needs to be as non-bureaucratic as possible for all bidders regardless of their size. The longer-term focus should therefore be on creating a genuinely level playing field, rather than on giving one type of supplier a preference.
6. The EU recognises that there should **not be detailed public tendering procedures** for social, health and education services to individuals below certain thresholds, e.g. the EU Directive offers a ‘light touch regime’ (LTR) for health and social care services, amongst others. Nevertheless authorities are not always benefiting from this flexibility. The Commission should encourage **Member States to take a flexible approach, and not ‘gold plate’ these rules**. This would allow local and regional government to more easily procure these specific services.
7. In the future, there is the opportunity to consider whether it would be advantageous for more, if not all, economic sectors to be subject to such a **light touch regime**. A regime more akin to that governing the award of concessions might be a good starting point, and still compatible with the EU’s World Trade Organisation (WTO) commitments.
8. The European Commission should encourage the public sector to further use the public-public cooperation exemption as introduced in Article 12.4 of the Directive 2014/24.
9. There is the need to rebalance or replace the **remedies regime** (Directive 89/665/EEC as amended by Directive 2007/66/EC) to **reduce the risk of legal challenge on public bodies**. Anecdotal evidence suggests that the threat of legal challenge may lead to risk averse behaviour such as running more expensive procurement processes that may be strictly necessary, or even changing a decision to outsource a service in the first place.
10. Such a regime should be revisited, rebalanced or replaced entirely. A **new ‘softer’ independent arbitration process** may be of benefit to both local governments and suppliers rather than litigation. This may help the EU to address the significant and pressing need to reduce the litigious culture, and associated costs, currently surrounding public sector procurement.

## STATE AID

### *CEMR's view*

1. CEMR is in favour of a **regulatory state aid regime at EU and international level** to limit arbitrary practices and artificial barriers to competition. The aim of the EU rules is rightly to ensure that fair competition is not unduly distorted by one organisation or business receiving public money to the detriment of its competitors.
2. Local and regional governments organise and provide essential services for their citizens and businesses, and they strive to deliver efficient and high quality public services, which can be delivered in many different ways. The prevailing intention is not to circumvent competition rules, but – depending what procedure is adequate and appropriate – either launch a public **procurement procedure and/or deliver via a public enterprise, rather than provide state aid** (such as a grant or subsidy) directly to an organisation or a business active on the market.
3. Local and regional governments consider the state aid regime to be **very complex**, requiring knowledge of different pieces of EU legislation depending on the sector concerned, the purpose of the aid, and the financial amounts involved. This complexity can even stop valuable local projects from going ahead. The examination of whether state aid is involved requires in general external legal advice, and its **costs are often disproportionate** to the amount of money involved.
4. CEMR also deems that the **European Commission should focus on large scale awards of aid** – thus confirming the approach of the current Commission, which concerns economic practices that really distort intra-EU trade. In its “Notion of Aid”<sup>4</sup> Communication and recent decisions (subsidies for local culture/minority languages, local hospital and care centre refurbishment, sport centres and local infrastructure renewal), the Commission has taken the next logical step towards recognising that awards of financial support can be ‘purely local’ in nature, and thus not even constitute state aid at all. The Commission should continue to exempt an even wider range of local activities due to their ‘purely local’ nature.
5. However, the European Commission tends to unnecessarily limit local services by defining them as services of general economic interest, despite the fact that its role is restricted to rectifying ‘**manifest errors**’ in SGEI definitions adopted by the Member States<sup>5</sup>.  
**Almost all cases of local SGEI do not have internal market relevance** and their funding does not qualify as state aid.
6. Complexity, uncertainty, and ambiguity has detrimental effects on whole policy fields, e.g. housing. The alarming decline of public investments at local level is linked to the uncertainty and instability of the finance framework and low expected returns prevent investments, inter alia in social and affordable housing. To address all these challenges, local and regional governments must be able to adopt adequate policies, including state aid measures, to create conditions and support for investments in social and affordable housing.

### *What we want*

1. **Simplification of the aid process itself:** light-touch notification and reporting requirements focussing purely on larger awards of aid; rapid and transparent assessment and approval of aid, taking full account of the public benefits that the aid delivers.

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<sup>4</sup> Commission Notice on the notion of State aid (2016/C 262/01).

<sup>5</sup> Commission Staff Working Document, SWD(2013) 53 final/2, *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest*, cf. paragraph 196.

2. **Continue to develop new flexibilities for aid of a ‘purely local’ nature which delivers public-interest objectives.**
3. A greater use of **block exemptions** and **increased thresholds for *de minimis* provision** that would be beneficial and help to achieve our request of simplification. These two steps would allow to focus on the more distortive type of aids, and relieve public bodies from the need to notify several forms of aid.
4. A **reversed burden of proof**, which still lies with the public authorities: local public services should be exempted from the internal market and competition rules unless the Commission is able to prove that a local service has an impact on intra-EU trade.
5. Controls on state aid to failing private sector industries which are no longer economically viable, but a **supportive aid regime for workers retraining**, including funds such as the Globalisation Adjustment Fund.
6. EU state aid law should **not be misused to regulate certain policy sectors** which the EU does not succeed to regulate by dedicated legal instruments, e.g. the energy sector and housing, where the European Commission promotes a residual concept of access to social housing, focusing on disadvantaged citizens or socially less advantaged groups.
7. There is a real democratic deficit in the area of state aid law as the European Commission has the exclusive competence to set the applicable law and to control its application. **In the longer term, all legislation in this area should be done by ordinary legislative procedure with the European Parliament and the Council.** This requires a change of European primary law.

## INTERNATIONAL TRADE AGREEMENTS

### *CEMR’s view*

1. CEMR supports the opening of respective markets and ensured reciprocity with international trade partners. However, this cannot come at any price, but it needs to be to the advantage of the **well-being of citizens** on both sides; notably through the **conservation of the highest standards** possible and the **most efficient provision of public services**.
2. Furthermore, international trade agreements shall respect the **possibility for local and regional governments to apply the same derogations foreseen in the EU internal market and competitions rules** to serve the general public interest. This means that public services may need to be excluded in their entirety from certain trade agreements.
3. International trade agreements must respect public authorities’ rights and interests. CEMR emphasizes notably **the inviolable principle of self-administration and the freedom for local and regional governments to govern**, regulate and fulfil their public service missions, in accordance with Protocol 26 of the TFEU that recognises “the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users”.
4. Trade negotiations should be the occasion to increase the standards of common goods and services, while reaffirming the continued right for local and regional governments to set public policies and standards in all fields of competences and to decide to establish higher standards where necessary on the grounds of **general public interest**.



### *What we want*

1. The first requirement to ensure a fair international trade agreement lies in **the negotiating method of the European Commission**. In particular having in mind the opinion C-2/15 of the Court of Justice of the European Union (CJEU) stating that the free trade agreement between the EU and Singapore cannot be concluded by the EU alone.
2. CEMR calls for a transparent monitoring and **comprehensive involvement and consultation of local and regional governments** on relevant issues during international trade negotiations.
3. To this regard, we support the **Namur Declaration**<sup>6</sup>, when affirming that “the negotiating mandates regarding mixed agreements should be the object of a prior parliamentary debate in the national and European Assemblies (as well as the regional Assemblies with equivalent powers), involving as much as possible representatives of civil society”.
4. Thus, mirroring the good practices in some Member States (particularly Scandinavian countries, the Netherlands, Austria and Belgium), where the national government either consults local and regional governments or representatives whenever their powers are affected by EU or International trade issues, there is a case for the **European Commission seeking the views of the European Local Government representatives** in setting the terms and scope of future Trade Agreements that concern subnational competences or their freedom to provide or tender public services.
5. A **positive list** should be included in the agreements to ensure that only those specific services listed fall within the scope of the provisions. This avoids ambiguity and makes it clear to all exactly which services the agreement applies to. Also new services, which are not yet on the General Agreements on Tariffs and Trade (GATTs) list, would not automatically be covered by the agreement
6. CEMR renews its **opposition to the Investor-to-State Dispute Settlement (ISDS)** and welcomes the European Commission’s intention to establish a multi-lateral investment court system with rule-of-law principles, transparent procedures, independent and adequately qualified judges and the possibility of appeal. The ‘right to regulate’ should prevail for local and regional government.
7. In that perspective, regulatory cooperation shall not lead to the creation of formal or informal institutions whose prerogatives may **circumvent or weaken the legitimate legislative and regulatory procedures and assemblies** and harm national and subnational public authorities’ sovereignty.
8. At best, negotiations should be the occasion to increase the standards of common trade partners’ goods and services; at least, **EU standards should not be downgraded**.

### **CLOSING REMARKS**

25 years after the introduction of the European Single Market and 60 years of European competition rules, it is timely to assess its state. Much has been achieved to the advantage of citizens, consumers and businesses. But much has changed in the environment as well: a considerable increase of member states with different economies, globalisation, electronic services and e-commerce and their impact on our lives and our communities.

We believe that there is a need to better serve the interests of the citizens, acknowledging the diversity in Europe and to modify the EU rules accordingly by introducing more flexibility and devolution.

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<sup>6</sup> <http://declarationdenamur.eu/en/>

CEMR and its member associations hope that the presented issues will be addressed in the European Parliament and the European Commission in their next mandate and look forward to contribute to further reflections.



## Contact

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## About CEMR

The Council of European Municipalities and Regions (CEMR) is the broadest organisation of local and regional authorities in Europe. Its members are over 60 national associations of municipalities and regions from 41 European countries. Together these associations represent some 130 000 local and regional authorities.

CEMR's objectives are twofold: to influence European legislation on behalf of local and regional authorities and to provide a platform for exchange between its member associations and their elected officials and experts.

Moreover, CEMR is the European section of United Cities and Local Governments (UCLG), the worldwide organisation of local government.

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