Joint Call by the Republic of Austria, the Federal Republic of Germany, the Italian Republic, the Republic of France and the Republic of Poland

supported by the Republic of Bulgaria, the Republic of Croatia, the Czech Republic, the Republic of Latvia, the Portuguese Republic, the Republic of Slovenia and the Kingdom of Norway

to the European Commission on the Insurmountable Legal and Practical Risks of a Regulation in the EU Public Procurement Law Reform

October 29th, 2026

The signatory Member States regret that the proposal for a Public Procurement Act, published on the 9th of September, does not address the **serious concerns raised regarding the choice of a regulation** as the legal instrument for public procurement law.

The discussions held with the European Commission since the publication of the proposal have not demonstrated a genuine dialogue with Member States on the chosen legal form, despite the fact that they will be on the front line in addressing the many practical and legal challenges arising from this regulatory approach. **We urge the Commission to resubmit the revision proposal in the form of a directive**, in order to properly meet the announced objectives of simplification and flexibility, while tackling internal market fragmentation and enhancing competition, which can only be done with a clear and flexible legal framework.

Besides the **unresolved issue regarding the legal basis**, the adoption of a regulation, due to its maximum harmonisation effect, risks creating **unprecedented legal uncertainty** and **litigation risks for all public procurement stakeholders**. The Commission's persistence in this approach threatens - to an unnecessary extent – to **disrupt the well-established practices** of public buyers and economic operators, to the detriment of our competitiveness and our ability to deploy public funds quickly and easily. It would deprive Member States, contracting authorities and contracting entities of the flexibility needed to fully leverage public procurement as a tool for efficient and strategic public spending. Above all, it would excessively rigidify the use of certain procurement tools for the future, thus increasing the duration and costs of procurement procedure both for public buyers and economic operators.

Our analysis of the proposal confirms that opting for a regulation would be detrimental to the objective of simplification and does not ensure legal certainty.

As brought forward in May 2026, **clarity and legal certainty** are essential in public procurement for both public buyers and economic operators, as emphasized several times in the proposal and in the Commission's Communication "A Simpler, Clearer and Better Enforced EU Rulebook". Public buyers operate under constant risk of legal challenges and review procedures. Switching completely from familiar national public procurement rules to a **directly applicable EU regulation** which both public

buyers and economic operators must become familiar with increases uncertainty and **administrative burdens** for an unforeseeable period of time, slowing down the use of public funds.

The over **250,000 contracting authorities and entities and even more economic operators across the EU** would be required, for contracts above EU thresholds (representing around € 2,6 trillion each year), to comply not only with the regulation, but also with numerous delegated and implementing acts, non-consolidated sectoral EU instruments, and necessary national implementing measures. Moreover, public buyers, who regularly award contracts both below and above EU thresholds, will find themselves operating under a purely national legal framework in the former case, and **a complex interplay of EU and implementing national law** in the latter.

Legal fragmentation is particularly evident in the context of litigation

As the **Remedies Directives** would remain transposed into national law, the rules on legal remedies and review procedures would add another layer to this complex framework. To the extent that **additional** (rather than merely implementing) **rules adopted by Member States** were permissible (which would be very unclear and would have to be determined separately for each provision of the Public Procurement Act, see below), practitioners would also have to apply these national rules, meaning that they would have to apply both EU and national law at the same time also in these cases.

The application of exclusion grounds would impose an unreasonable administrative burden on contracting authorities and entities

The issue of fragmentation also arises with respect to **exclusion grounds** as the choice of a regulation necessarily entails **multiple references to sectoral legislation, implementing acts and international agreements**. Therefore, public buyers would need to apply these exclusion criteria by referring to a multitude of legal sources for every procurement procedure they conduct, creating an **unprecedented administrative burden**. Furthermore, **offences** constituting an exclusion ground are set forth in directives requiring implementation. However, **implementation may differ** between Member States. On the one hand, certain offences may already be covered by national criminal law – for example, corruption offences referred to in Article 25(1)(b) PPA may be covered by a general fraud offence. On the other hand, some Member States are not even bound by the relevant EU legal acts in the field of substantive criminal law. For example, Denmark is not bound by such acts and Ireland may opt in to them. Consequently, public buyers would face **considerable difficulties** in determining whether offences under national criminal law fall within the scope of the exclusion grounds under the PPA, thereby creating an additional administrative burden.

Other examples highlight the impracticality of a regulation.

As for "**contracting authority**", the concept of "bodies governed by public law" under the regulation may, in some national legal systems, cover private-law entities. Although the 2014 Directives included the same concept, the national transposition measures allowed it to be clarified and adapted to the legal specificities of each country. The thousands of **public procurement practitioners cannot be deemed to be EU law experts**, and such divergences between national and EU legal concepts can only lead to **wrong application of the common rules**. Similarly, the concept of “economic operator” – based on dichotomy between natural and legal persons – remains unchanged under the proposal for a regulation as compared to the 2014 Directives. In some Member States, the lack of flexibility of a regulation would lead to exclude entities without legal personality from its scope.

Regarding the performance of the contract, in particular **payments**, as the proposed provisions do not mandate advance payments as a general rule, **they do not explicitly allow Member States to adopt stricter national rules** in this area. Consequently, such an interference in the field of financial implementation would create significant uncertainty as to whether Member States may legislate on these matters beyond the aspects governed by the proposed regulation. More generally, where the regulation governs certain matters without expressly providing that Member States may adopt stricter rules, such rules will have to be repealed from national law, which is not acceptable.

Public procurement contracts are governed by both national and transposed EU rules.

As already brought forward in the Joint Call by several Member States to the European Commission on May 4th, 2026, the internal market (inter alia) is governed by the **principle of subsidiarity** (Article 5 of the TEU) which must be respected. Given the application of the principle of subsidiarity to the internal market and the diversity of national specificities, particularly economic, organizational and legal ones, which justify maintaining a degree of flexibility for Member States, the most appropriate and suitable instrument for establishing the legislative framework for public procurement still is the directive, as the Commission itself has pointed out when proposing the revision in 2011. Also, in its Resolution of 9 September 2025 on public procurement, the European Parliament pointed "*to **significant legal and administrative differences across the Member States and their procurement systems**, ranging from varying degrees of autonomy for local authorities to differing procurement strategies*" and recognised "*the **benefits of the directive format**, which allows for such diversity while ensuring legal coherence and mutual respect for national systems*".

Procurement law is at the **crossroad of various national legislation** ranging from constitutional law, to organizational law, environmental law, technology law and social law (just to name a few). Since a procurement procedure "results" in a contractual relationship, civil and contract law plays a crucial role in connection with procurement. This can be illustrated by reference to provisions of contract modification and contract termination already enshrined in the current Directives. These provisions were transposed in a way to make them fit into the **overall legal framework of civil law in numerous Member States**. However, a regulation would directly affect the mentioned legal areas regardless if they are suitable for each Member State concerned. For many Member States, the adoption of a regulation to address a matter inherently tied to civil law would then constitutes a significant and deleterious shift.

Moreover, in many policy fields, contracts which are presently governed by both EU public procurement law and specific national rules (e.g., energy performance contracts, design and build contracts, concessions etc.) will fall under instruments of different nature, i.e., likely to be conceptually divergent.

This legal fragmentation is unacceptable: it would generate **high legal uncertainty** undermining the ability of public authorities to carry out their investments.

The degree of precision necessary in public procurement legislation is incompatible with the choice of a regulation

Notwithstanding a regulation not requiring implementation, **national legislation would still be required**. As already brought forward in May 2026, given the specificities of their national laws, Member States would have to adopt measures to adapt to the new provisions of the regulation, thereby reintroducing, due to the scale of these measures, a form of "implementation". This would particularly apply to national rules regarding eProcurement service providers (Art. 131(8)), regarding

the digital ecosystem (see e.g. Art. 134, in particular (9), Art. 138), and rules for outermost regions (Art. 144).

At the same time, a regulation would **remove necessary flexibility** (for example to implement national objectives in addition to Union objectives) and hinder implementation into national terminology and structures without fully achieving the goal of avoiding regulatory divergence. The early discussion in the CWG already showed that it needs a **case-by-case analysis of all provisions** to determine, if Member States 1) still retain a level of national regulatory competence and 2) the extent of such a competence. This creates legal uncertainty for all stakeholders and will also lead to different implementation measures across Member States.

Several rights and obligations not only for Member States but for public buyers and economic operators are established by the proposal (see for example Art. 21 et seqq. of the proposal). Such **rights and obligations have immediate effect**, once the regulation is applicable. A regulation would have to be formulated very precisely and should not leave too much leeway for interpretation. Otherwise, legal uncertainty for public buyers as well as economic operators would prevail, and uniform application could not be ensured.

The proposal, however, does include several **indeterminate legal terms and unclear provisions** which could not be transposed into concrete, practical terms and provisions by national law (see e.g. “appropriate measures” in Art. 4(4), “minor amounts” in Art. 25(3), “protection of the security and public safety interests of the Union” which public buyers must ensure under Art. 66(1), “indirect” link in Art. 90, potential discrimination of Union economic operators compared to third-country economic operators under Art. 25).

Even if the proposed regulation were substantially clarified, the issue would not be fully resolved**: the diversity of national legal traditions in the field of public procurement law prevent any regulation to achieve the level of precision required** to ensure legal certainty for contracting authorities, entities, and economic operators.

Thus, **a significant shift of responsibilities to national jurisdictions** will take place if a regulation is not worded precisely. The (independent) national courts would be a centrepiece for ensuring uniform application and would likely, in most cases, decide to initiate preliminary ruling procedures before the ECJ to interpret the regulation. However, **protracted procedures of judicial interpretation** cannot currently be in the best interest of the Union and its internal market.

Strategic public procurement rules are also seriously compromised by this approach.

By introducing directly applicable provisions for strategic public procurement, higher levels of some Member States in terms of environmental and climate protection as well as social justice, fair working conditions and inclusiveness may be lowered. Many existing national legislations, although aligned with currently applicable EU law and the EU’s objectives on green transition and social rights, will be under the threat of incompatibility with EU law. Under a regulation, it is unclear whether Member States would still be able to aim for higher environmental and social objectives by, for example, imposing an obligation for public buyers to require other (stricter) ecolabels than the EU Ecolabel, or by making additional ILO conventions (compared to the ones listed in Annex II) mandatory in terms of the performance of public contracts. Thus, proceeding by way of a regulation could, for some Member States, represent an **important regression** in terms of environmental and climate protection as well as social justice, fair working conditions and inclusiveness.

Public procurement needs national discretion to a certain extent, otherwise public procurement practitioners would face significant uncertainty. Such discretion cannot be granted by opening clauses.

While opening clauses, such as the one proposed on division into lots, could address part of the issues, it would however create additional difficulties in the day-to-day application of the new legal framework by public procurement practitioners. **National rules permitted by opening clauses would necessarily face stricter ECJ scrutiny than current transposition measures, which makes the recourse to opening clauses an appealing but unsatisfactory solution**. **Until the ECJ has clarified its interpretation of each opening clause, national measures would face significant risks of non-compliance with EU rules**, thereby exposing public procurement practitioners to a high degree of legal uncertainty for years to come.

Furthermore, **any national measure which would not be explicitly allowed by the regulation could be deemed incompatible with Union law by the ECJ**. Such a risk would require the exhaustive listing of all potential derogations requested by Member States, which would seriously hinder the objective of simplification and significantly slow down the negotiation process.