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GREEN PAPER

on the modernisation of EU public procurement policy
Towards a more efficient European Procurement Market

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The Europe 2020 strategy for smart, sustainable and inclusive growth[1] sets out a vision of Europe's competitive social market economy over the next decade that rests on three interlocking and mutually reinforcing priorities: developing an economy based on knowledge and innovation; promoting a low-carbon, resource-efficient and competitive economy; and fostering a high-employment economy delivering social and territorial cohesion.

Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments that should be used to achieve these objectives. More specifically, the Europe 2020 strategy calls on public procurement to:

° improve framework conditions for business to innovate, making full use of demand side policy[2],

° support the shift towards a resource efficient and low-carbon economy, e.g. by encouraging wider use of green public procurement, and

° improve the business environment, especially for innovative SMEs.

At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open EU wide. Obtaining the best procurement outcomes through efficient procedures is of crucial importance in the context of the severe budgetary constraints and economic difficulties in many EU Member States. In the face of these challenges, there is a greater need than ever for a functioning and efficient European Procurement Market that can deliver on these ambitious goals.

In this context many stakeholders have voiced demands for a review of the EU public procurement system to increase its efficiency and effectiveness. The Commission has therefore announced in the Single Market Act[3] that it will conduct wide consultations in order to make legislative proposals in 2012 at the latest, with a view to simplifying and updating the European public procurement legislation so as to make the award of contracts more flexible and enable public contracts to be put to better use in support of other policies.

The current generation of public procurement Directives, namely Directives 2004/17/EC[4] and 2004/18/EC[5], are the latest step in a long evolution that started in 1971 with the adoption of

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1 See Green Paper from the Commission to the European Council of 3 March 2010 - COM(2010) 2020.

2 This is also taken up by the Commission Communication "Innovation Union" - SEC(2010) 1161 -, one of the Europe 2020 flagship initiatives, which addresses the strategic use of public procurement to promote research and innovation. It calls on Member States to set aside a part of their procurement budgets for research and innovation and informs that the Commission will provide guidance and support mechanisms for contracting authorities.

3 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Towards a Single Market Act – For a highly competitive social market economy of 27 October 2010 - COM(2010) 608.

4 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services

Directive 71/305/EEC[6]. By guaranteeing transparent and non-discriminatory procedures, these Directives principally aim to ensure that economic operators benefit fully from the basic freedoms in the field of public procurement. The current Directives also mention a number of objectives relating to the integration of other policies in this framework, such as protection of the environment and social standards[7] or the fight against corruption[8].

Given the key role of public procurement in coping with today's challenges, the existing tools and methods should be modernised in order to make them better suited to deal with the evolving political, social and economic context. Several main objectives are to be achieved:

The first objective is to increase the efficiency of public spending. This includes on the one hand, the search for best possible procurement outcomes (best value for money), but also the efficiency of procurement procedures as such: Streamlined procurement procedures with targeted simplification measures meeting the specific needs of small contracting authorities could help public procurers to achieve the best possible procurement outcomes for the least possible investment in terms of time and public money. More efficient procedures will benefit all economic operators and facilitate the participation of both SMEs and cross-border bidders. In fact, cross border-participation in EU public procurement procedures remains low[9]. The comparison with the private sector, where cross-border trade is much higher, shows that there is still considerable potential to be tapped. This objective of more efficient public procurement is addressed mainly through the questions in parts 2 (improve the toolbox for contracting authorities) and 3 (a more accessible European procurement market) of the Green Paper.

Another objective is to allow procurers to make better use of public procurement in support of common societal goals: These include protection of the environment, higher resource and energy efficiency and combating climate change, promoting innovation and social inclusion, and ensuring the best possible conditions for the provision of high quality public services. Issues relating to this objective are discussed in part 4 of the Green Paper (strategic use of public procurement).

Further developing EU public procurement law could also be envisaged to tackle important issues that are so far not sufficiently addressed, such as preventing and fighting corruption and favouritism (part 5) and the question how the access of European undertakings to third country markets can be improved (part 6). Finally, the review of the legislative framework will also be an

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sectors (OJ L 134, 30.4.2004, p. 1). Directive as last amended by Commission Regulation (EC) No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts (OJ L 314 , 1.12.2009, p. 64).

5 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114). Directive as last amended by Commission Regulation (EC) No 1177/2009. The following text will take as its starting point the provisions of Directive 2004/18/EC; however, unless explicitly stated otherwise, this can be understood as referring, – *mutatis mutandis* – to the corresponding provisions of Directive 2004/17/EC. The term "contracting authority" can therefore be taken as referring both to bodies whose procurement is subject to Directive 2004/18/EC and to "contracting entities" under Directive 2004/17/EC.

6 Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (OJ No L 185, 16.8.1971, p. 5).

7 See Recitals 5 and 46 of Directive 2004/18/EC and Recitals 12 and 55 of Directive 2004/17/EC.

8 See Recital 43 of Directive 2004/18/EC and the corresponding Recital 40 of Directive 2004/17/EC.

9 According to recent studies, only 1.6% of public contracts are awarded to operators from other Member States. Indirect cross-border participation – via corporate affiliates or partners situated in the Member State of the contracting authority – is more frequent. Nevertheless, even the rate of indirect cross-border awards remains relatively low (11%).

opportunity to examine if certain basic notions and concepts should be refined to ensure better legal certainty for contracting authorities and undertakings (part 1).

The Green Paper reflects a number of ideas as to how the various objectives could be better achieved. However, one has to be aware that there may be conflicts between the various goals (e.g. simplifying procedures as against taking other policy objectives into account). These different goals sometimes translate into policy options which may point in different directions, and that will require a reasoned choice at a later stage.

Furthermore, the scope for possible legislative modifications is not unlimited. Legislative changes will have to be consistent with EU international commitments[10] or may require the opening of appropriate negotiations with all partners concerned on possible requests for compensation. These commitments therefore may have the effect of limiting the scope of any legislative adjustments.

Concessions are not dealt with in this consultation; they will be the subject of a separate Commission initiative aimed at ensuring greater legal certainty for regional and local authorities and economic operators throughout Europe and at facilitating the development of Public-Private partnerships. E-procurement issues are covered by a separate Green Paper which was published on 18 October 2010[11].

In parallel with the current Green Paper, the Commission is undertaking a comprehensive evaluation of the impact and cost-effectiveness of EU public procurement policy. The evaluation will gather market-based evidence on the functioning of current procurement legislation with a view to providing empirical insights into the areas that need improvement. The results of this new research will be made public in summer 2011.

Together with the results of the evaluation, contributions from stakeholders to this Green Paper will feed the reflection on the future reform of the EU public procurement rules, which will lead to a proposal for legislative reform.

1. WHAT ARE PUBLIC PROCUREMENT RULES ABOUT?

When spending public money, public purchasers have to weigh up different incentives from those of managers of a private business who bear the risk of losses and ultimately bankruptcy, and are directly controlled by market forces.

For these reasons, public procurement rules provide for specific contract award procedures to enable public purchases to be made in the most rational, transparent and fair manner. Safeguards are put in place to compensate for the potential lack of commercial discipline in public purchasing, as well as to guard against costly preferential treatment in favour of national or local economic operators.

Therefore, European public procurement rules apply to all public contracts that are of potential interest to operators within the Internal Market, ensuring equal access to and fair competition for public contracts within the European Procurement Market.

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[10] The commitments are defined in a plurilateral agreement (GPA/WTO) and several bilateral agreements.

[11] Green Paper on expanding the use of e-Procurement in the EU, SEC(2010) 1214, 18.10.2010.

1.1. Purchasing activities

Basically, public procurement rules are meant to regulate the purchasing activities of contracting authorities. However, the EU Public Procurement Directives do not explicitly limit their scope to purchases covering the specific needs of the contracting authority.[12] This has prompted a debate about the applicability of the Directives in situations where public authorities conclude agreements that provide legally binding obligations for purposes that are not connected with their own purchasing needs.

This concerns, for instance, cases where the grant agreement for the provision of an aid includes a legally binding obligation for the beneficiary to provide specific services. Such obligations are normally provided to ensure the appropriate use of public finds; they are not intended to meet procurement needs of the public authority granting the aid.

Member State authorities and other stakeholders have complained about the lack of legal certainty with regard to the scope of the public procurement rules in these situations and have called for a clarification of the purpose of these rules. In its most recent case-law, the Court held that the concept of public contracts requires that the works, supplies or services which are the subject of the contract are carried out *for the immediate economic benefit* of the contracting authority.[13]

Question: Do you think that the scope of the Public Procurement Directives should be limited to purchasing activities? Should any such limitation simply codify the criterion of the immediate economic benefit developed by the Court or should it provide additional/alternative conditions and concepts?

1.2. Public contracts

The current classification of public contracts – in works contracts, supply contracts and service contracts – is in part the result of historic development. The need to classify public contracts in one of these categories at the very outset can result in difficulties, for instance in the case of contracts for the purchase of software applications which may be considered as either supply or service contracts, depending on the circumstances. Directive 2004/18/EC contains specific rules for mixed contracts, which have been further developed by the case-law. In the view of the Court, where a contract contains elements relating to different types, the applicable rules have to be determined by identifying the main purpose of the contract.

Some of these problems could be avoided by simplifying the present structure. It would, for instance, be conceivable to provide only two types of public contracts as in the case of the GPA system, which distinguishes only between supply and service contracts, with works being considered as a form of services ("construction service contract"). The possibility of using a unified concept of public contract and differentiating according to the subject only where this is strictly necessary (for example, in the provisions on the thresholds) could also be envisaged.

Question: Do you consider the current structure of the material scope, with its division into works, supplies and services contracts, appropriate? If not, which alternative structure would you propose?

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[12] See judgment of 18.11.2004 in Case C-126/03 Commission v Germany, paragraph 18.

[13] Judgments of 25.3.2010 in Case C-451/08 Helmut Müller GmbH, paragraphs 47-54, and of 15 July 2010 Commission v Germany, paragraph 75.

Independently of a possible restructuring of the contract types, it might be necessary to review and simplify the current definitions of the various contract types.

This concerns in particular the definition of "public works contracts" in Article 1(2)(b) of Directive 2004/18/EC, which contains three alternative conditions that are complex and partially overlapping. The concept of a public works contract includes the execution, or both the design and execution, of specific works of types listed in an annex to the Directive, the execution, or both the design and execution of a work as defined in Article 1(2)(b) of the Directive and, finally, "the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority". The last condition was added in order to make sure that the definition includes cases where the works are carried out not by the contractor itself, but by third parties acting on behalf of the contractor.

It might be envisaged to simplify the definition by replacing the current structure with a much simpler and clearer set of conditions covering all kinds of construction activities, regardless of their character and purpose, including activities connected with the realisation of specific works, possibly by third parties.

Question: Do you think that the definition of "works contract" should be reviewed and simplified? If so, would you propose to omit the reference to a specific list annexed to the Directive? What would be the elements of your proposed definition?

A/B-services

An even more important matter is the coverage with regard to service contracts.

The current Directives make a distinction between so called "A-services"[14] and "B-services"[15]. While A-services are subject to the full procedures of the Directives, contract awards for B-services have only to comply with the provisions on technical specifications and on the transmission of a notice of the results of the award procedure[16]. However, according to ECJ case-law, contracting authorities awarding contracts for B-services have to comply with the fundamental rules of primary EU law, in particular the principles of non-discrimination, equal treatment and transparency, if the contracts in question are of certain cross-border interest.[17] This implies an obligation to ensure a sufficient degree of advertising to enable interested economic operators from other Member States to decide whether to express their interest in the contract.

Initially, the intention of the legislator was to limit the full application of the Directive, for a transitional period, to certain specific service contracts which were deemed to present an increased potential for cross-border trade.[18] One has to be aware that, in view of the open character of the "B services" list (see category 27: "other services"), full application of the Directives to services is, in fact, the exception, whereas treatment as "B services" is the rule.

There are some doubts whether this situation is still appropriate in the light of the economic and legal development of the Internal Market. For some of the services explicitly mentioned in the "B" list, such as water transport services, hotel services, personnel placement and supply services or security services, it does indeed appear difficult to assume that they represent a lesser cross-border interest than the services in the "A" list.

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14 Services listed in Annex II A of Directive 2004/18/EC or Annex XVII A of Directive 2004/17/EC.

15 Services listed in Annex II B of Directive 2004/18/EC or Annex XVII B of Directive 2004/17/EC.

16 See Articles 20 and 21 of Directive 2004/18/EC and Articles 31 and 32 of Directive 2004/17/EC.

17 See judgment of 13.11.2007 in Case C-507/03 Commission v Ireland, paragraphs 24-31.

18 See recital 19 of Directive 2004/18/EC.

Furthermore, the distinction between "A" and "B" services is a source of difficulties and possible errors in the application of the rules. As in the case of contract classification, there are the problems of borderline situations and mixed contracts.[19]

The most consequent solution would be to eliminate the distinction between the current "B" services and "A" services and to apply the standard regime to all service contracts[20]. This would have the advantage of simplifying the existing rules. If the current consultation shows that the general regime needs to be simplified, such simplification could also make it easier to abolish the current special regime for B-services.

Questions:

1. Do you think that the distinction between A and B services should be reviewed?

2. Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why.

Thresholds

At present, the thresholds defined in the directives are regarded as too low by some stakeholders and they consequently ask for these thresholds to be raised on the grounds that cross-border interest is considered to be too limited to justify the administrative burdens of a contract award procedure for relatively low value contracts currently covered by the Directives.

However, increasing the thresholds would exempt more contracts from the requirement of an EU-wide publication of a contract notice, reducing business opportunities for undertakings throughout Europe.

In any case, it must be noted that all international commitments taken by the EU include thresholds which are set at exactly the same value as in the current directives, except for the so-called B-services (and social services in particular)[21]. These thresholds determine market access opportunities and are one of the most important elements in all of these agreements. Any increase in the applicable thresholds in the EU would automatically involve a corresponding increase in all the agreements concluded by the EU (meaning not only in the GPA, but also in all other international agreements). This situation could in turn trigger requests for compensation from our partners. These requests could be quite significant.

Question: Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

Exclusions

The section on "excluded contracts" in Directive 2004/18/EC[22] is quite heterogeneous: Some of the exclusions are based on exceptions/limitations of the scope of the Treaty (Art. 14) or on considerations of consistency with the international legal order (Art. 15) or with other legal

[19] See Article 22 of Directive 2004/18/EC

[20] For social SIEG, cf. below Section 4.4

[21] For social services of general interest, cf. below Section 4.4

[22] Articles 12 – 18 of Directive 2004/18/EC.

disciplines (Art. 16 c, e), while others are the result of political choices (Art. 16 a, b, d, f, Art. 17). This makes it difficult to implement an overarching concept when assessing the need for a review of these provisions. In any event, a review of these exclusions must be considered in the light of Europe's international commitments which currently reflect the exceptions and derogations included in the directives. The introduction of any new exclusion would certainly be a matter of concern from this point of view. The international commitments do leave room, however, for updating or clarifying the content and presentation of the exclusions. The abolition of exclusions that may no longer be needed for legal, political or economic developments could also be considered.

Questions:

3. Do you consider the current provisions on excluded contracts to be appropriate? Do you think that the relevant section should be restructured or that individual exclusions are in need of clarification?

4. Do you think that certain exclusions should be abolished, reconsidered or updated? If yes, which ones? What would you propose?

1.3. Public purchasers

Procurement by entities belonging to the State sphere

Directive 2004/18/EC applies to contracts awarded by the State (including all of its subdivisions), regional or local authorities and bodies governed by public law, as well as associations formed by one or more of these entities.[23]

While the concepts of "State" and "local and regional authorities" are relatively straightforward, the concept of "bodies governed by public law" is more complex. It is intended to cover legally independent organisations that have close links with the State and fundamentally act like State entities. Examples include public broadcasting bodies, universities, sickness insurance funds and municipal enterprises.

The definition provided by Directive 2004/18/EC has been the subject of a whole series of judgments by the ECJ. In the light of that case-law, the conditions can be summarised as follows:

(1) The body has the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

(2) It has its own legal personality (under private or public law).

(3) It depends closely, for its financing, management or supervision, on the State, regional or local authorities or other bodies governed by public law (see the exact conditions in Article 1(9), second subparagraph, point (c)).

The proper application of these elements requires a detailed case-by-case analysis, taking into account factors such as the degree of competition in the marketplace and the question of whether the body is acting for profit and bears the losses and risks associated with its activity.

Question: Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of "body governed by public law"

[23] For the entities bound to apply Directive 2004/17/EC, see below point 7.

should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?

Public utilities

Under the current public procurement regime, a special Directive, 2004/17/EC, regulates procurement in the water, energy, transport and postal services sectors. These sectors have certain features in common: they are network industries, i.e. they involve the use of a physical or "virtual" network (e.g. pipelines, electricity grids, postal infrastructures, railway lines etc.), or they exploit geographical areas, normally on an exclusive basis, in order to provide terminal facilities or to prospect for and eventually extract minerals (oil, gas, coal etc.).

A further characteristic of these sectors is that the activities in question are carried out not only by public authorities, but also - and in some Member States above all - by commercial companies, whether they be public undertakings or private companies operating on the basis of special or exclusive rights. A major reason for introducing public procurement rules for these sectors was the closed nature of the markets in which the operators are active, owing to the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned. The extension of public procurement disciplines to include public and private (commercial) utility operators was considered necessary because of the variety of ways in which national authorities can influence the behaviour of these entities, including the granting (or not) of special or exclusive rights or participation in their capital and representation in the entities' administrative, managerial or supervisory bodies.

In other words, in the absence of sufficient competitive pressure, the discipline put in place by the application of the procedural rules of the Utilities Directive was considered to be necessary in order to ensure that procurement for the pursuit of the activities concerned would be carried out in a transparent and non-discriminatory manner. In the absence of dedicated rules, it was feared that procurement decisions by utility operators could be influenced by favouritism, local preference or other factors.

Since then, processes of liberalisation have been pursued either at EU level or at the national level for many of these sectors (for instance, concerning electricity and gas, exploration and exploitation of hydrocarbons, postal services, etc.). However, experience shows that "liberalisation", i.e. a process aimed at obtaining free access to the activity concerned, does not necessarily or automatically lead to strong competition - "established operators" often maintain very substantial market shares, and in some Member States, the presence of state-owned enterprises may also distort market functioning.

The current Directive contains a provision, Article 30, which allows the Commission to exempt certain procurements from the scope of the Directive where the level of competition (on markets to which access is unrestricted) is such that competitive pressure will ensure the necessary transparency and non-discrimination in procurement in the pursuit of such activities. To date, the Commission has adopted sixteen such Decisions concerning nine different Member States, and one application has been withdrawn. The sectors concerned until now have been the electricity sector (production and sale), the gas sector (sale), the oil and (natural) gas sectors, as well as various parts of the postal sector (in particular logistics, parcels and financial services).

One final point to consider is that more and more private entities are gaining the right to operate after undergoing open and transparent procedures and therefore do not have special or exclusive rights within the meaning of the Directive.

It should also be noted that the full scope of the Utilities Directive has been enshrined internationally, either in the GPA or in bilateral agreements. Possible restrictions of coverage could result in a modification of the international commitments undertaken by the EU, which might give rise to requests for compensation.

Questions:

5. Do you think that there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer.

5.1. If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please explain which sectors should be covered and give the reasons for your answer.

6. Currently, the scope of the Directive is defined on the basis of the activities that the entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. Do you consider these criteria to be relevant or should other criteria be used? Please give reasons for your answer.

7. Can the profit-seeking or commercial ethos of private companies be presumed to be sufficient to guarantee objective and fair procurement by those entities (even where they operate on the basis of special or exclusive rights)?

8. Does the current provision in Article 30 of the Directive constitute an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets?

2. IMPROVE THE TOOLBOX FOR CONTRACTING AUTHORITIES

Contracting authorities sometimes complain that the regulatory instruments provided by the EU rules are not fully adapted to their purchasing needs. In particular, they claim that leaner and/or more flexible procedures are needed. They further argue that, in certain cases, application of the full set of rules is not practicable (particularly in the case of procurement by very small contracting authorities); other situations (certain forms of public-public cooperation) should be entirely exempted from the application of these rules. There are also areas of public purchasing where the instruments provided by the EU procurement rules might not be sufficient (joint procurement, specific problems arising after the contract award).

These concerns will be discussed in the following section. It is clear from the feedback provided by economic operators that there have to be some basic requirements enshrined in EU rules to guarantee a European level playing field, whereas some more detailed rules of the current Directives could be reviewed. It must be noted, however, that cutting back on the EU rules will come up against certain limits. A number of procedural requirements originate directly from the GPA and the bilateral agreements signed by the EU, such as the deadlines for different procedures, the conditions for using a negotiated procedure without publication or the publication of a contract award notice. Abandoning or changing these requirements would not be possible without a renegotiation of the EU's international obligations. It should also be borne in mind that the EU rules are complemented by a large body of rules at national or regional level. Regulation

that is repealed at EU level might be replaced at other levels, thus creating a risk of more diverse national legislation and possibly more national gold-plating[24].

In this context, there might also be a case for reconsidering which instrument of EU legislation is to be used. Traditionally, EU public procurement rules were enacted in the form of directives coordinating the national procedures for the award of public contracts. It is true, however, that most of the provisions of these directives are unconditional and are sufficiently precise to be applied directly. There might therefore be a case for a regulation that covers the core aspects of public procurement procedures. This would have the advantage of providing a single set of basic rules that are directly applicable throughout the Union, without the need for national transposition measures. Member States would still be able to legislate in areas that are not covered by the Regulation. Obviously, the decision on the type of legislative instrument will depend on the content of the future rules, and on the choice of legal basis provided by the Treaty for this content, but stakeholders' views on the question of principle would be appreciated already at this stage.

Questions:

9. Do you think that the current level of detail of the EU public procurement rules is appropriate? If not, are they too detailed or not detailed enough?

10. Insofar as it is legally possible under EU primary law (depending on the content of the future rules), would you prefer a legislative instrument in the form of a Regulation or a Directive (as is currently the case)?

2.1. Modernise procedures

One of the main themes of the public debate is whether the procedures provided by the Directives are still fully suitable for the needs of contracting authorities and economic operators, or whether they should be modified, – and, if so, how – particularly with a view to reducing complexity and administrative burdens, while at the same time ensuring fair competition for public contracts and optimal procurement outcomes.

General procedures

The current Directives provide for a wide range of tools and procedures. Both, Directive 2004/17/EC and Directive 2004/18/EC give procurers a free choice between the open[25] and the restricted[26] procedure. The situation is somewhat different when it comes to the negotiated procedure with prior publication[27] of a contract notice. The Utilities Directive provides for

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24 The notion of "Gold-plating" describes national legislation adding on additional rules or requirements to the standards required by relevant the EU rules.

25 In the open procedure, contracting authorities and entities publish a contract notice, on the basis of which all interested parties can submit their offers. Amongst those bidders who fulfil the criteria for qualitative selection, the contracting authority chooses the offer that fulfils best the award criterion indicated in the contract notice (lowest price or most economically advantageous tender). This procedure accounts for nearly 3/4 of all procedures within the scope of application of the Directives.

26 In the restricted procedure, all economic operators can reply to the contract notice expressing their interest to participate, but only certain candidates, chosen on the basis of criteria indicated in the contract notice, are invited to submit offers.

27 In the negotiated procedure, contracting authorities and entities consult the economic operators of their choice and negotiate with one or more of them the terms of the contract to be concluded. Such negotiation of the terms of the offer is not possible in the open or the restricted procedure.

increased flexibility[28], with the result that utilities may freely choose to award their contracts by negotiated procedures, provided they have published a call for competition. Under Directive 2004/18/EC, on the other hand, negotiated procedures with prior publication may be used exclusively under the specific circumstances listed in Article 30. In both Directives the use of negotiated procedures without publication of a contract notice is limited to exceptional situations, which are exhaustively listed[29] and restrictively interpreted.

In the area of services, procurers can also make use of design contests[30]. Several specific procedural options and tools were introduced into the Directives in 2004, such as the competitive dialogue[31], dynamic purchasing systems[32] or electronic auctions[33]. Further procedural flexibility introduced in 2004 includes the possibility to centralise procurement by procuring from or through a central purchasing body[34] or by the award of framework agreements[35]. Furthermore, in the context of the financial crisis, the Commission considered the use of an accelerated procedure[36] to be justified for conducting major public investment projects in 2009 and 2010.

This increased range of procedural options now needs to be examined to ascertain whether the procedures under the current Directive are still the best possible toolkit for efficient procurement, including in view of the increasing importance of public-private partnerships. Both the design of the different types of procedures as such, and also the various requirements imposed by the Directives for the different stages of the procedure[37], should undergo a thorough screening as to their efficiency in ensuring optimal procurement outcomes with the least possible administrative burdens.

Questions:

11. Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not: How should the procedures be improved in order to alleviate administrative burdens/reduce transaction

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28 The increased flexibility provided for under the Utilities Directive is due to the fact that it applies not only to public authorities, but also to commercial companies, be they public undertakings or private companies operating on the basis of special or exclusive rights. Its procedures are therefore aimed at being close to commercial practices, albeit such that preserve a minimum of transparency and equal treatment.

29 Article 31 of Directive 2004/18/EC, Article 40(3) of Directive 2004/17/EC.

30 Design contests are procedures which enable the contracting authority or contracting entity to acquire a plan or design selected by a jury after being put out to competition, for example a contest to obtain ideas as to the design of a community centre of a quarter that is scheduled for urban regeneration. Design contest can also be used in other fields, for instance to obtain plans for the possible future structure of a communications network between administrations at different levels.

31 Under this procedure for particularly complex contracts, the detailed contract conditions can be determined through a dialogue between the contracting authority and the candidates; Article 29 of Directive 2004/18/EC (only in Directive 2004/18/EC). According to recent statistics, the competitive dialogue was however used for less than 0.4 % of the procedures.

32 Article 33 of Directive 2004/18/EC.

33 Article 54 of Directive 2004/18/EC.

34 Article 11 of Directive 2004/18/EC.

35 In this regard, new flexibility was introduced only into Directive 2004/18/EC (see Article 32), as the already existing (and different) provisions in the Utilities Directive (Article 14) were considered to be satisfactory in the particular context of Utilities procurement.

36 This procedure is foreseen by Article 38(8) of Directive 2004/18/EC in cases where urgency renders impracticable the regular time limits. Cf. press release IP/08/2040 of 19 December 2008.

37 For instance, rules relating to publication of notices, content of tender documents, time spans for the procedure, evidence for selection criteria, documentation and communication with bidders.

costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?

12. Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

13. Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnerships (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?

14. On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances? Would this be possible in your view without jeopardizing the quality of offers?

More negotiation

Stakeholders often suggest that more flexibility in procurement procedures is needed, and that in particular, contracting authorities should be allowed to negotiate the terms of the contract with potential bidders.

The use of negotiations is allowed in the GPA, provided that this is announced in the contract notice. Such a possibility could hence be opened in the general EU public procurement legislation, on condition of compliance with the principles of non-discrimination and fair procedure. This could indeed give contracting authorities more flexibility to obtain procurement outcomes that really fit their needs.

This option needs to be discussed in depth with all interested stakeholders, contracting authorities and economic operators. The possible advantages of more flexibility and potential simplification must be weighed against the increased risks of favouritism and, more generally, of overly subjective decisions arising from the greater discretion enjoyed by contracting authorities in the negotiated procedure. Moreover, giving more leeway to contracting authorities will deliver useful results only if they have the necessary technical expertise, knowledge of the market and skills to negotiate a good deal with the suppliers.

Finally, it must be carefully assessed for which type and size of contracts negotiation would make sense. Stakeholders often claim that negotiation would be particularly appropriate for the award of smaller contracts. On the other hand, it might also - or rather – be useful for tendering large-scale projects, notably through public-private partnerships. Given the complexity of contracts for such projects, there might be an even greater need for particularly flexible procedures and large margins for negotiation, and more technical expertise on the side of the contracting authority to conduct the negotiations.

Questions:

15. Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?

16. In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain conditions?

17.	Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination? In addition to the safeguards already provided for in the Directives for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?

Commercial goods and services

The GPA provides some special rules for "goods and services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes". Commercial goods and services are considered to be available on the market in a standardized form and hence procurement of such goods and services is simplified by the fact that price, quality and conditions are widely established on the markets. There might be a case for introducing simplified procedures for the purchase of such goods and services (for instance, streamlined procedures with shorter time-limits).

Question: Do you think that it would be appropriate to provide simplified procedures for the purchase of commercial goods and services? If so, which forms of simplification would you propose?

Selection and award

Under the current Directives, the choice of the winning bidder has to be carried out in two stages. During the selection stage, the contracting authority assesses the capacity and suitability of the economic operators. This is done on the basis of exclusion criteria and criteria of economic and financial standing, professional and technical knowledge and ability. In the award stage, the contracting authority examines the offers and chooses the best offer. This is done on the basis of objective criteria related to the quality of products and services proposed.

According to ECJ case-law[38], contracting authorities are required to operate a strict distinction between selection criteria and award criteria. The contract award decision must be based exclusively on criteria concerning the products and services offered. Considerations linked to the tenderer's ability to perform the contract, such as his experience, manpower and equipment, are not allowed.

The GPA also makes a distinction between the selection and the contract award decision. However, this distinction is less strict than in the case-law quoted above, since the GPA does not explicitly prohibit the taking into account, at the award stage, of criteria which are not linked to the goods and services offered, and hence allows bidder-related criteria to be taken into account.

Contracting authorities sometimes complain about the administrative burdens arising from the need to first verify the selection criteria for all candidates and bidders before examining the award criteria. They argue that, in some circumstances, allowing them to first examine the award criteria would help to move the process forward more quickly, as the selection criteria would only need to be examined with regard to the winning bidder.

In that respect, there might be an argument for reconsidering the organisation and the sequence of the examination of selection and award criteria within the procedural framework. A pointer in that

[38] See judgments of 20.9.1988 in Case 31/87 Beentjes, paragraphs 15-19, of 24.1.2008 in Case C-532/06 Lianakis, paragraph 30, and of 12.11.2009 in Case C-199/07 Commission v Greece, paragraphs 51 to 55.

direction is to be found in the more recent ECJ case-law which states that the Public Procurement Directives "do not in theory preclude the examination of the tenderers' suitability and the award of the contract from taking place simultaneously", provided that "the two procedures are ... distinct and are governed by different rules".[39] This suggests that it is not so much the sequence of the procedural steps that matters, but the separation in principle between selection criteria and award criteria.

However, the appropriateness of such a possibility would have to be carefully analysed. A genuine alleviation of administrative burdens can only be imagined under specific circumstances. Examining the selection criteria after the award criteria would only make sense when the award criteria can be assessed quickly and easily for all the tenders. This could be the case in particular for contract awards concerning the purchase of standard goods at the lowest price. Furthermore, the approach would be difficult to implement in a restricted or negotiated procedure where the candidates to be invited to tender or negotiate are normally selected on the basis of the criteria for qualitative selection, as well as when qualification systems are being used.

Some stakeholders present more far-reaching proposals that would call into question the separation in principle between selection and award criteria. They claim that the possibility to take into account bidder-related criteria, such as experience and qualification, as award criteria might help to improve procurement outcomes.

However, one has to be aware that creating such a possibility would result in a major change in the procedural system set out in the Public Procurement Directives. The separation between selection and award criteria guarantees fairness and objectivity in the comparison of tenders. Allowing the inclusion of bidder-related criteria such as experience and qualification as contract award criteria could undermine the comparability of the factors to be taken into account and ultimately infringe the principle of equal treatment. Proposals in that direction should therefore be envisaged, if at all, in limited circumstances only, e.g. for specific types of contracts, where the qualifications and CVs of available staff are particularly relevant.

In any event, any changes that have a bearing on the principle of the separation of selection and award would have to be considered extremely carefully. It may be necessary to provide additional safeguards in order to guarantee the fairness and objectivity of procedures.

Questions:

18. Would you be in favour of a more flexible approach to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure? If so, do you think that it should be possible to examine the award criteria before the selection criteria?

19. Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, in which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

Taking past performance into account

Stakeholders also suggest that the current Directives would not provide appropriate instruments to take account of previous experiences which the contracting authority might have had with the performance of bidders. It is true that taking such experience into account could provide useful

[39] See judgments Lianakis, paragraph 27, and Commission v Greece, paragraph 51.

pointers to the quality of the bidder and his future work. However, this possibility would entail obvious risks of discrimination between bidders. It would therefore be necessary to put appropriate safeguards in place to ensure equal treatment of bidders, transparency and a fair procedure.

Question: Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?

Specific tools for utilities

The procedural tools of the Utilities Directive differ substantially from those of Directive 2004/18/EC on a number of points. One aspect is that they are characterised by greater procedural flexibility for contracting entities. In addition to the above mentioned free choice of a negotiated procedure with a call for competition, utilities operators also have at their disposal two specific tools to organise procurement, namely: qualification systems[40] and periodic indicative notices[41].

Under the terms of the current Utilities Directive, notices on the existence of a qualification system can be used as a means of calling for competition in respect of procurements of any given type of works, supplies or services that will be procured over the duration of the qualification system, irrespective of the number of individual procurement procedures that will be used for the purpose. Where a notice on the existence of a qualification system is the chosen means of calling for competition, then the specific contract(s) concerned may only be awarded by restricted or negotiated procedures in which participants are chosen from among those - and only those – who are already qualified in accordance with the rules governing the system concerned. Qualification systems may be a useful tool in connection with procurement of technically exacting works, supplies or services[42] which involve such a lengthy procedure in order for economic operators to qualify[43] that it is advantageous for all involved to use the same qualification process in respect of a number of individual procurement procedures, rather than having to repeat the qualification process for each procurement procedure.

Periodic indicative notices can be used as a means of calling for competition in respect of procurements of any given type of works, supplies or services that are to be procured over a twelve-month period, irrespective of the number of individual procurement procedures that will be used for the purpose. When a periodic indicative notice is the chosen means of calling for competition, then the specific contract(s) concerned may not be awarded by open procedures, but only by restricted or negotiated procedures in which participants are chosen from among those - and only those – who have declared their interest in response to the periodic indicative notice. Periodic indicative notices are often used as a means of calling for competition in respect of repetitive purchases of similar uniform goods, services or works and they can therefore facilitate the day-to-day business of utilities operators.

Question: Do you consider that specific rules are needed for procurement by utilities operators? Do the different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement?

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40 See in particular Article 53.

41 Cf. Article 42(3).

42 E. g. railway rolling stock, high pressure gas pipes etc.

43 In some cases longer than six months.

2.2. Specific instruments for small contracting authorities

Small contracting authorities, in particular, often complain that applying the full regime of procedural rules and safeguards for the award of their relatively small contracts requires a disproportionate amount of time and effort. For small contracts below the thresholds of the Directives, they also complain about legal uncertainty relating to the necessity to comply or not with requirements stemming from primary law. Both concerns could be addressed as follows:

A lighter procedural framework for local and regional contracting authorities for the award of contracts above the thresholds of the Directives

There could be case for setting out a lighter procedural framework for local and regional contracting authorities so as to make full use of the flexibilities that are available under the GPA for sub-central authorities and utilities operators without compromising the need for transparency. The current Directives provide these flexibilities only for utilities operators, but not for local and regional contracting authorities. Such a differentiated system would give local authorities more freedom in their procurement business and reduce administrative burdens precisely in those areas where they might be disproportionate. On the other hand, creating different levels of procedural requirements could add to the complexity of the overall legal framework and might be difficult to transpose and apply in practice.

One element of such a lighter procedural framework could be less strict publication requirements: Under the GPA, a sub-central contracting authority can award a contract without publishing an individual contract notice, as long as it has announced its intention and published specific information in a periodic indicative notice or a notice on the existence of a qualification system[44]. This possibility could considerably reduce administrative burdens for contracting authorities. A possible downside might be reduced accessibility to contracts for economic operators, resulting in reduced competition for the individual contracts.

Another possibility could be to allow the generalized use of the negotiated procedure with prior publication of a contract notice. The possibility to allow negotiations in general has already been discussed above (section 2.1). The appropriateness of this possibility specifically for local and regional contracting authorities should be carefully analyzed. It may be a good way to adapt the contract to take into account specific concerns and needs of such authorities. On the other hand, it is not certain that small contracting authorities always have the buyer power and technical expertise to conduct negotiations on an equal footing with the bidders.

Questions:

20. Do you think that the full public procurement regime is unsuitable for the needs of smaller contracting authorities? Please explain your answer.

21. If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?

More legal certainty for awards below the thresholds of the Directives

Many of the contracts awarded by small local and regional contracting authorities have values below the thresholds of the Directives. However, according to the case-law of the ECJ, the award of such contracts must respect the basic principles of EU law, such as non-discrimination and

[44] For detailed explanation of these instruments please refer to section 2.1.

transparency, if they present a cross-border interest. The Commission has stated its view on the requirements arising from the case-law of the Court in its *Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives*[45].

However, many contracting authorities claim that the clarification provided by this Communication might not always be sufficient in practice, especially when it comes to determining whether or not there is a cross-border interest. The uncertainty of whether or not the standards of the basic principles must be respected in specific cases would make life difficult especially for smaller contracting authorities. The importance of this issue is also apparent from the measures taken by Member States in this regard in the context of the financial crisis.

Even though contracts below the thresholds would in any event not be covered by a future legislative proposal, further guidance could be considered to help contracting authorities in assessing the existence or not of a certain cross-border interest in specific cases.

Question: Do you think that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives? Or would you consider that additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed?

2.3. Public-public cooperation

Another issue which has been the subject of controversial debate in recent decades is the question of whether, and to what extent, public procurement rules should apply to contracts concluded between public authorities.

The principle of fair and open competition prevents contracts concluded between public authorities from being *automatically* excluded from the scope of application of the EU public procurement Directives. However, it is true that the application of these rules is not appropriate for certain forms of cooperation between public authorities, and therefore the European Court of Justice does not consider these to be public procurement.

In essence, a dividing line has to be drawn between arrangements among contracting authorities to perform their tasks covered by their right of self–organisation on the one hand and procurement activities which should benefit from of open competition among economic operators on the other hand. The ECJ has distinguished in particular between two scenarios for public-public cooperation that are not covered by the EU public procurement Directives:

In-House: Contracts awarded to a publicly owned entity are not considered to be public procurement if this entity is being controlled by the contracting authorities in a similar way to that in which they control their own departments, and if it conducts an essential part of its activities with the contracting authorities[46]. Several contracting authorities can use a single, jointly controlled in-house entity (vertical/institutionalised cooperation). However, this case-law of the Court leaves a number of questions open, such as what is meant exactly by "similar control", the

[45] Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions ofthe Public Procurement Directives of 1.8.2006 (OJ C 179, 1.8.2006, p. 2). Cf. also the decision of the General Court of 20 May 2010 in case T-258/06, Germany vs. Commission.

[46] See e.g. cases C-107/98, Teckal; C-324/07, Coditel and C-573/07, Sea.

award of contracts from the controlled entity to the mother(s) or to an in-house sister (i.e. an entity controlled by the same mother).

"Horizontal cooperation": In a more recent judgment[47], the Court found that using jointly controlled in-house entities was not the only way to perform public-public cooperation, and that such cooperation can remain at a purely contractual level (horizontal/non-institutionalised cooperation). This kind of set-up is not covered by the EU public procurement rules in the case of joint performance by solely public entities of a public task, using own resources, having a common aim and involving mutual rights and obligations going beyond "performance of a task against remuneration" in the pursuit of objectives in the public interest.

Apart from these two forms of cooperation, one further case needs to be mentioned, which does not concern the "cooperation" in the strict sense between several contracting authorities, but rather the transfer of competence for a public task from one authority to another. Such a transfer of competences remains outside the scope of the EU public procurement Directives if the responsibility for the task as such is transferred in its entirety (as opposed to simply entrusting the actual execution of the task to another authority).

The evolving case-law of the ECJ has resulted in quite a complex picture of possible exceptions for public-public cooperation, and experience has shown that contracting authorities are not always clear about whether and under what conditions their relations fall within the scope of the EU law on public procurement. To reply to this need for clarification in the short term, the Commission services will provide guidance on the interpretation of the case law in a staff working document to be published in 2011.

The main question, however, is whether and how this issue should be addressed by legislative rules which would provide in particular a clear definition of those forms of cooperation that are outside of the scope of application of the EU public procurement Directives.

It could be useful to explore whether there is room for a concept with certain common criteria for exempted public-public cooperations. Such a concept should be designed so as to clearly distinguish between modern forms of organisation of the (joint) performance of public tasks by contracting authorities, that are guided solely by considerations of public interest on the one hand (i.e. not covered by public procurement rules), and the pure (commercial) sale and purchase of goods and services on the market on the other hand (covered by the rules). A careful analysis must be made of how this distinction can be implemented in practice, also taking into account what has been handed down by the ECJ in its recent judgments. The following aspects seem to be particularly important in this context.

First, it seems clear from the case-law of the Court[48] that any public-public cooperation exempted from the application of the EU public procurement rules must remain purely public. The participation of private capital in one of the cooperating entities will therefore prevent the cooperation from being exempted as such from public procurement rules.

Another element that seems to be important is the criterion of "limited market orientation" of the entities in question, as more recently developed by the ECJ[49]. If the entities concerned are market

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47 Case C-480/06, Commission v Germany.

48 Case Case C-26/03., Stadt Halle.

49 Case C-573/07, SEA, point 73. The requirements in judgement C-480/06, that the cooperation must be "governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and that the principle of equal treatment of the persons concerned is respected points in the same direction.

oriented, they are active on the market in direct competition with private operators, pursuing the same or similar commercial objectives and using the same instruments. Cooperation which is exempt from the procurement rules and aimed at fulfilling a public task should in principle not include such entities.

Lastly, the type of connection between the cooperating entities needs to be addressed. In institutionalised cooperation, it is the presence of a (joint) in-house control that could lead to exempting from its scope even an agreement that would normally be covered by the procurement regime. In the absence of such control, and in order to distinguish non-institutionalised cooperation from a normal public contract, it seems to be important that the former should involve mutual rights and obligations going beyond the "performance of a task against remuneration" and that the principal aim of the cooperation is not of a commercial nature.

Questions:

22. In the light of the above, do you consider it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation?

23. Would you agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed? What would in your view be the important elements of such a concept?

24. Or would you prefer specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation)? If so, please explain why and which rules they should be.

25. Should EU rules also cover transfers of competences? Please explain the reasons why.

2.4. Appropriate tools for aggregation of demand / Joint procurement

One of the issues where stakeholders often deplore what they see as the insufficiency of instruments at EU level is the issue of aggregation of demand/ coordination of public procurement between contracting authorities.

Those who are in favour of such aggregation of demand highlight the considerable positive effects for suppliers and contracting authorities, which include: economies of scale, lower production costs at the benefit of undertakings and European taxpayers, increased buying power on the part of public authorities and a possibility for them to pool skills and expertise and to share the procurement related costs and risks. The sharing of costs and risks in particular would also facilitate strategic procurement of new, innovative products and services, thereby encouraging the development of new products and markets[50].

Especially cross-border cooperation between contracting authorities from different Member States could contribute to the further integration of procurement markets, encouraging the defragmentation of European markets across national borders and thereby creating a viable, internationally competitive European industrial base.

[50] This is why the "Innovation Union" flagship initiative - SEC(2010) 1161) - which seeks to re-launch European innovation and research policies as part of the Europe 2020 Strategy, also calls for an EU initiative on joint procurement.

The current Directives already provide a number of tools for the aggregation of demand, including the central purchasing bodies[51]. There are other instruments that are not specifically designed for aggregating demand, but may be used for this purpose, such as the possibility of concluding framework contracts to which several contracting authorities participate. Of course, contracting authorities can also coordinate their procurement activities by simply sharing their experiences or coordinating certain phases of the procurement procedure.

However, there is a need for a discussion of the recurring request for more specific EU-level instruments to aggregate demand, in particular cross-border joint procurement. Such instruments and mechanisms would have to strike the right balance between allowing a stronger aggregation of demand in strategic sectors, and not restricting competition in procurement markets (in particular to the detriment of SMEs), e.g. by dividing contracts into lots.

As regards cross-border joint public procurement, there might be additional legal issues to be addressed, such as: identifying which national legislation is applicable to the public procurement procedure and to the contract, the ability of contracting authorities to use national legislation other than their own, deciding on the competent body and the applicable rules for reviewing procurement decisions, etc.

Questions:

26. In general, are you in favour of a stronger aggregation of demand/more joint procurement? What are the benefits and/or drawbacks in your view?

27. Are there in your view obstacles to an efficient aggregation of demand/joint procurement? Do you think that the instruments that these Directives provide for aggregating demand (central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?

28. Do you think that a stronger aggregation of demand/ joint procurement might involve certain risks in terms of restricting competition and hampering access to public contracts by SMEs? If so, how could possible risks be mitigated?

29. Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.

30. Do you see specific problems for cross border joint procurement (e.g. in terms of applicable legislation and review procedures)? Specifically, do you think that your national law would allow a contracting authority to be subjected to a review procedure in another Member State?

2.5. Address concerns relating to contract execution

Apart from requiring prior transparency for contract execution clauses (indication in the contract notice or the specifications), the current Directives do not regulate the execution of the contract. However, certain problems occurring during the contract execution phase can have serious consequences as regards non-discrimination between bidders and in terms of the soundness of public purchasing in general. The question arises as to whether the EU rules should provide for specific regulatory instruments that might allow contracting to deal with these problems more effectively.

[51] Cf. Article 1 par. 10 of Directive 2004/18/EC.

Substantial modifications

A particularly complex issue is the problem of subsequent developments which have an impact on the contract itself or its execution.

According to the case-law of the ECJ, amendments to the provisions of a public contract during its currency require a new contract award procedure, if they are materially different in character from the original contract[52].

The ECJ has already provided some pointers as to when amendments should be considered as material. This is notably the case where they introduce conditions which would have allowed the participation or the success of other tenderers, if they considerably extend the scope of the contract or if they change the economic balance of the contract.[53] However, contracting authorities have indicated that, for certain types of amendments, the case-law does not appear to be sufficiently clear in terms of establishing whether a new tender procedure is needed.

The present consultation seeks to establish whether a legal clarification at EU level is needed to set out the conditions under which a modification of the contract requires a new tender procedure. Such a clarification could also tackle the possible consequences of such modifications (e.g. provide for a lighter procurement procedure for tendering the amended contract)[54].

Questions:

31. Should the public procurement Directives regulate the issue of substantial modifications of a contract while it is still in force? If so, what elements of clarification would you propose?

32. Where a new competitive procedure has to be organised following an amendment of one or more essential conditions would the application of a more flexible procedure be justified? What procedure might this be?

Changes concerning the contractor and termination of contracts

Complex questions also arise from changes concerning the chosen contractor itself. According to ECJ case-law, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract constitutes a substantial modification, and therefore requires a new award, unless that substitution was provided for in the terms of the initial contract, for instance, by inserting a provision for subcontracting. This does not apply, however, in cases where a contract is transferred to another contractor belonging to the same group as part of an internal reorganization.[55] On the other hand, in exceptional situations a change of subcontractor may be considered a material amendment to the contract, even if the possibility of a change is provided for in the contract terms.[56]

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52 See judgments of 5.10.2000 in Case C-337/98 Commission v France, paragraphs 44 and 46, of 19.6.2008 in Case C-454/06 pressetext Nachrichtenagentur, paragraphs 34-37 and of 13.4.2010 in Case C-91/08, Wall AG, paragraphs 37.

53 See judgment pressetext Nachrichtenagentur, paragraphs 35-37.

54 A solution for some specific changes is already provided today in Article 31(4) of Directive 2004/18/EC, allowing the use of the negotiated procedure without prior publication for the execution of additional works or services under certain circumstances.

55 Judgment pressetext Nachrichtenagentur, paragraph 40.

56 See judgment Wall AG, paragraph 39.

Stakeholders' experience furthermore suggests that not only the substitution of the contractor by another legal entity, but also changes in its status, can have a significant impact on the contractual balance or sound execution (e.g. incidents impacting on the capacity to execute the contract, such as bankruptcy, crucial experts leaving the firm etc.).

Again, there should be a discussion to ascertain whether EU-level instruments are needed to help contracting authorities address these situations in an appropriate manner, e.g. a right for contracting authorities to terminate the contract in the event of major changes relating to the contractor, and/or a new simplified procedure to replace the former contractor in such cases[57].

Such an explicit possibility for contracting authorities to terminate the contract might also be required for cases where the ECJ declares that a specific contract has been awarded in breach of EU public procurement rules. Even though Member States are obliged to terminate contracts which have been awarded in breach of EU rules[58], some national legislations do not provide for any right of cancellation of such contracts, which makes it difficult - if not de facto impossible - for contracting authorities to take the appropriate measures to comply with ECJ judgments in infringement cases.

Questions:

33. Do you think that EU rules on changes in the context of the contract execution would have an added value? If so, what would be the added value of EU-level rules? In particular, should the EU rules make provision for the explicit obligation or right of contracting authorities to change the supplier/ terminate the contract in certain circumstances? If so, in which circumstances? Should the EU also lay down specific procedures on how the new supplier must/ may be chosen?

34. Do you agree that the EU public procurement Directives should require Member States to provide in their national law for a right to cancel contracts that have been awarded in breach of public procurement law?

More generally, national regulation on the implementation of contracts is quite detailed in many Member States and can be a source of administrative burden (e.g. rules on execution guarantees, delivery conditions, delays, pricing of adjustments, etc.). The number of national rules in this field could possibly be reduced by introducing common standards for certain aspects at EU level.

Question: Do you think that certain aspects of the contract execution – and which aspects - should be regulated at EU level? Please explain.

Subcontracting

The existing legislation contains only very limited rules on subcontracting. Article 25 of Directive 2004/18/EC provides that contracting authorities may oblige the tenderer to give indications on envisaged subcontracting. However, under ECJ case-law, a tenderer is in principle entitled to have recourse to subcontractors for the performance of the contract, even if this means that a large part of the contract or the entire contract is performed by subcontractors. Subcontracting of essential

[57] Such a procedure might also provide intermediary solutions such as the possibility to mandate the second best of the original tender procedure or to reopen competition only between the tenderers having participated in the original procedure, provided that the former procedure did not take place too long ago.

[58] See Case C-503/04, *Commission / Germany*.

parts of the contract may only be restricted or prohibited in cases where the contracting authority was not in a position to verify the technical and economic capacities of the subcontractors.

Some stakeholders are calling for stronger restrictions on subcontracting in order to allow contracting authorities to exert more influence on the performance of the contract. They are advocating, for instance, the possibility to exclude subcontracting completely or at least for essential parts of the contract, or to restrict it to a certain share percentage of the contract or provide for a general right for the contracting authority to reject proposed subcontractors.

Question: Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?

3. A MORE ACCESSIBLE EUROPEAN PROCUREMENT MARKET

One of the foremost objectives of EU public procurement legislation is to enable economic operators to compete effectively for public contracts in other Member States. Considerable success has been achieved in this regard since the introduction of the first public procurement Directives in the 1970s. Nevertheless, there still seems to be some room for improvement to create a true European procurement market that is fully accessible to all European undertakings. This concerns, in particular, better access for SMEs and more competitive procurement markets generally.

Question: Do you think that the current Directives allow economic operators to avail themselves fully of procurement opportunities within the Internal Market? If not: Which provisions do you consider are not properly adapted to the needs of economic operators and why?

3.1. Better access for SMEs and Start-ups

The purpose of the Public Procurement Directives is to open up the public procurement market for all economic operators, regardless of their size. However, special attention needs to be paid to the issue of access to those markets by small and medium-sized enterprises (SMEs)[59].

SMEs are regarded as the backbone of the EU economy, and they have a huge potential for job creation, growth and innovation. Easy access to procurement markets can help them to unlock this growth and innovation potential, while having a positive impact on the European economy. Moreover, a strong involvement by SMEs in public purchasing allows contracting authorities to considerably broaden the potential supplier base, with positive effects of higher competition for public contracts and as a counterbalance to dominant market players.

In order to make public procurements of all sizes as accessible as possible to SMEs, the Commission published in 2008 the "European Code of Best Practices facilitating access by SMEs to public procurement contracts"[60]. The Code highlights and develops a number of practices within the EU regulatory framework which optimise tenders for the participation of SMEs and ensure equal chances for this bidder group.

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59 See also the request of the European Parliament that the Commission should make more efforts in order to facilitate access by SMEs to procurement markets in the Report on new developments in public procurement (2009/2175(INI)).

60 Commission Staff Working Document SEC(2008) 2193.

A recent study commissioned by the European Commission[61] reveals that, between 2006 and 2008, the proportion of SMEs amongst companies which won public contracts *above the EU thresholds* was between 58% and 61% in the EU-27. In terms of estimated total contract value secured, SMEs accounted for between 31% and 38% of public procurement while their overall share in the economy, as calculated on the basis of their combined turnover is 52%.

Against this background, it is worth analysing whether it is necessary to envisage legislative measures at EU level to ensure that contracting authorities take full advantage of the economic and innovative potential of SMEs in their procurement dealings.

Reducing administrative burdens in the selection phase

Feedback from small and medium-sized economic operators suggests that the major obstacles to SME participation in public tenders are to be found in the selection phase. On the one hand this relates to the evidence that has to be provided. The large number of certificates that are often required at the selection phase entails an administrative burden which may be difficult for SMEs to cope with, especially in a cross-border context when the certificates even have to be translated. On the other hand, the selection criteria themselves are often set so high (e.g. turnover requirements or number of required reference contracts) that it is virtually impossible for SMEs to fulfil them.

On the first issue (evidence for selection criteria), a solution that is often proposed could be to generally allow undertakings to submit only a summary of the relevant information for selection and/or provide self-declarations on the fulfilment of the selection criteria as a first step. In principle, only the successful tenderer or the tenderers admitted to the award phase would then be asked to submit actual supporting documents (certificates). However, the contracting authority would have the possibility to request the documents at any moment during or even after the procurement procedure for fraud prevention purposes. This would reduce the administrative burden, particularly for small and medium sized enterprises, without compromising the guarantees for making sound choices.

On the second issue (excessively demanding selection criteria), there might be a case for introducing into the EU rules a cap on certain requirements for qualitative selection, especially on financial standing. This could avoid contracting authorities setting excessively demanding selection criteria (e.g. on turnover) which inevitably exclude SMEs. Such a measure would further develop the already existing obligation to apply proportionate selection criteria. On the other hand, it would restrict the freedom of the contracting authorities to determine which standards they deem necessary to ensure that the contract is implemented properly.

Other suggestions

Stakeholders have also sometimes suggested introducing measures of positive discrimination in relation to SMEs, such as advance fixing of procurement quotas reserved exclusively for SMEs. Unlike some of our trading partners who have introduced such measures, the EU is not in favour of reserving markets to specific undertakings. Such actions would also be in contradiction with the principle of equal treatment of tenderers, a fundamental pillar of the EU public procurement regime anchored by the Court of Justice in the Treaty freedoms.

However, internal administrative measures encouraging contracting authorities to do their utmost to improve access by SMEs to their public contracts could be a viable possibility. One idea, for

[61] Evaluation of SMEs' access to public procurement markets in the EU (2009 update), produced in September 2010. Commissioned by Directorate General of Enterprise and Industry. Consultant: GHK.

instance, might be to set targets for SME shares in overall procurement. Such a system would not involve *reserving specific contracts* for SMEs, but they would simply provide an incentive for contracting authorities to make the best possible use of the available instruments for SME-friendly procurement.

Another option would be to allow contracting authorities to require the successful tenderer to subcontract a given share of the contract value to third parties. Such an obligation already exists under Directive 2004/18/EC for public works concessions (Article 60) and under Directive 2009/81/EC on procurement in the fields of defence and security (Article 21).

Questions:

35. Do you think that the EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

36. Would you be of the opinion that some of the measures set out in the Code of Best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subject to certain caveats)?

37. Do you think that the rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

38. Would you be in favour of a solution which would require submission and verification of evidence only by short-listed candidates/ the winning bidder?

39. Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declarations be useful (particularly facts in the sphere of the undertaking itself) and on which not?

40. Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

41. Would you be in favour of an option for Member States to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties?

3.2. Ensuring fair and effective competition

Public procurers often buy on markets with anti-competitive market structures[62]. On such markets, the aim of public procurement rules - namely open and effective competition - may be difficult to

[62] The waste disposal market is in many Member States dominated by one or two big players. The construction sector is, at least concerning large infrastructure projects, oligopolistic and prone to cartel-building. Other examples are IT-supply, the electricity market in certain Member States, as illustrated

achieve by simply applying the procedural rules provided for by the current Directives. Procurement decisions which are taken without regard to market structures, even if they are fully in line with the rules of the Directives, entail the risk of consolidating or even aggravating anti-competitive structures. This is particularly true in cases of high contract values and in sectors where public authorities are the main clients and private demand is not big enough to compensate the impact of the public authorities' purchases on the market.

Intelligent procurement aimed at maximizing competition in such markets would require in the first place that procurers are aware of the structure of the markets in question. Furthermore, they would have to adapt their procurement strategies (design of contracts and procedural choices) accordingly. For instance, contracting authorities should avoid tendering contracts which can only be executed by one or a small number of market player(s), as this would solidify oligopolistic structures and make new market entries almost impossible. In the worst case, the contracting authority would end up with one dominant supplier who could dictate contract terms and prices.

The right shape of contracts obviously depends on the structure of the relevant market. If smaller competitors on the market are able to deliver the service or products in question on a smaller scale, efficient ways to maximise competition may include reducing the volume / duration of contracts. Efficient competition could also be achieved by splitting contracts into lots, possibly accompanied by a maximum number of lots that can be awarded to one bidder. If there are not enough competitors amongst the smaller firms, an alternative way to ensure efficient competition might be to group several purchases into one contract, in order to attract potential competitors from other Member States.

A number of other instruments are often mentioned as useful safeguards for efficient competition in procurement markets, which could be introduced at EU level as optional choices for Member States or contracting authorities. As mentioned above, less demanding selection criteria will normally increase the number of valid bids[63]. Disadvantageous contracts imposed by dominant suppliers can be prevented by the prior definition of a maximum reserve price, above which the contract is not awarded, or by the possibility of cancelling the procedure if only the offer(s) of one bidder passes the selection stage.

More generally, measures aimed at facilitating the participation of bidders from other Member States should also be considered, wherever possible. As already highlighted, there is considerable untapped potential for increasing intra-European trade in public procurement in order to create a truly European procurement market. This would multiply business opportunities for European undertakings and at the same time increase the potential supplier base for contracting authorities. Measures to facilitate cross-border participation may include a better mutual recognition of certificates (or even putting in place a common European pre-qualification system). Some stakeholders even suggest that, for certain high-value contracts, drawing up tender specifications in a second language or accepting tenders in foreign languages might be helpful. Using a system of automatic translation – at least for preliminary information purposes - for certain steps of the procedure might also be considered.

All measures aiming at enhancing competition in procurement markets presuppose that contracting authorities have a good knowledge of the markets on which they purchase (e.g. via studies on the structure and shape of the targeted market prior to the actual procurement). Putting

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by the Article 30 decisions concerning the electricity market in Czech Republic, Spain and Italy, and the market for certain postal services in a number of Member States, as illustrated by the Article 30 decisions concerning the electricity market in Sweden, Finland and Austria.

63 Lower turnover requirements facilitate the participation of smaller firms, lower requirements concerning previous experience favour new market entries, etc.

these (or other) safeguards into practice would require an additional effort on the part of contracting authorities, which would probably only be justified for large contracts with a considerable potential impact on the market structure.

Questions:

42. Do you agree that public procurement can have an important impact on market structures and that procurers should, where possible, seek to adjust their procurement strategies in order to combat anti-competitive market structures?

43. Do you think that European public procurement rules and policy should provide for (optional) instruments to encourage such pro-competitive procurement strategies? If so, which instruments would you suggest?

44. In this context, do you think more specific instruments or initiatives are needed to encourage the participation of bidders from other Member States? If so, please describe them.

45. Do you think the mutual recognition of certificates needs to be improved? Would you be in favour of creating a Europe-wide pre-qualification system?

46. How would you propose to tackle the issue of language barriers? Do you take the view that contracting authorities should be obliged to draw up tender specifications for high-value contracts in a second language or to accept tenders in foreign languages?

47. What instruments could public procurement rules put in place to prevent the development of dominant suppliers? How could contracting authorities be better protected against the power of dominant suppliers?

Preventing anti-competitive behaviours

A related issue is the problem of anti-competitive behaviours in procurement markets. Procurement markets seem to be particularly prone to collusive behaviours of the participants (bid-rigging, market sharing…)[64], amongst other factors, because of the stability and predictability of public demand. Some analysts also consider that the transparency of the process is actually conducive to cartel-building.

Even though the number of violations of competition law in public procurement procedures is far from marginal[65], the current EU public procurement rules do not specifically address this issue. So far, the view has been that the problem could be handled efficiently on the basis of the current rules, e.g. by providing guidance to procurement agents on how to prevent and detect collusive behaviours.

However, there should be a debate as to whether such guidance is sufficient to combat collusion efficiently in procurement markets, or whether specific legislative instruments are needed, such as: stricter debarment in case of bid-rigging; the possibility of not disclosing certain information or the obligatory use of the negotiated procedure in sectors with a high probability of cartel-

64 See also the extensive work of the OECD, for instance the guidelines for fighting bid-rigging in public procurement: http://www.oecd.org/document/29/0,3343,en_2649_40381615_42230813_1_1_1_1,00.html

65 For some "famous" cartels in public procurement markets, cf. for example the "Lunch coupons case" in Italy, or the French case "Lycées de l'Ile-de-France".

building; the use of Certificates of Independent Bid Determination; obligations for procurers to consult competition authorities in cases of suspicious patterns in bids, etc.

Experience also suggests that it might be useful to make certain instruments which present a particular risk of being misused for collusion more "collusion-proof". For instance, subcontracting certain parts of the contract is a popular way for the winning bidder to reward cartel members for abiding by the cartel agreement. One possible way to address this problem could be to forbid, under certain conditions, subcontracting to undertakings which participated themselves in the tender procedure[66].

It is clear that additional guarantees against anti-competitive behaviours could contribute to maintaining sound competition in procurement markets. Again, this advantage must be carefully weighed against the additional administrative burdens that such rules would entail for procurers and undertakings.

Question: Do you think that stronger safeguards against anti-competitive behaviours in tender procedures should be introduced into EU public procurement rules? If so, which new instruments/provisions would you suggest?

3.3. Procurement in the case of non-existent competition/exclusive rights

In practice, contracting authorities often need to purchase from one specific economic operator because that undertaking holds exclusive rights on the production of the goods or the provision of the services in question. In such cases, normal competition for the contracts in question is ruled out. This is why the public procurement Directives allow the use of the negotiated procedure without prior publication in cases where, "for technical or artistic reasons or reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator"[67].

It is true that, due to the existence of the exclusive right, a call for tenders would be a pure formality without any practical value. It is undeniable however, that the access to the public contract in question has been locked by the prior award of the exclusive right, thus eliminating any possibility of competition before the procurement process has even started.

The question of how the exclusive right itself has been awarded, and in particular whether there has been fair competition at the stage of the award of the exclusive right (which pre-empts the later procurement decision), is not addressed in the current public procurement Directives as far as contracts awarded to private operators are concerned.

The issue is dealt with only in the context of public-public cooperation, where public service contracts between contracting authorities are excluded from the application of the Directive if they are awarded on the basis of an exclusive right – but only under the condition that this exclusive right is compatible with the principles of the Treaty.[68]

This specific provision will probably no longer be needed once an overall solution is found to the issues related to public-public cooperation. It should however be considered whether, for the sake of sound competition in procurement markets, there should be a generalisation of the underlying

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66 Participation of bidders because of risks of collusion can however only be restricted under relatively narrow conditions, cf. the judgement of the ECJ of 19 May 2009 in case C-538/07, Assitur (concerning temporary groups of undertakings).

67 Article 31(1)(b) of Directive 2004/18/EC.

68 Article 18 of Directive 2004/18/EC.

idea of this Article. This principle would only allow contracts to be awarded without a competitive procedure on the basis of exclusive rights, if these exclusive rights have also been subject to a competitive procedure.

Questions:

48. In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?

49. If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?

4. STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

Public authorities can make an important contribution to the achievement of the Europe 2020 strategic goals[69], by using their purchasing power to procure goods and services with higher "societal" value in terms of fostering innovation, respecting the environment and fighting climate change, reducing energy consumption, improving employment, public health[70] and social conditions, and promoting equality while improving inclusion of disadvantaged groups. Significant demand from public authorities for "greener", low-carbon more innovative and socially responsible goods and services can shape production and consumption trends for the years to come. Of course, addressing societal challenges should not decrease the efficiency of public procurement. Taking into account policy related considerations in public procurement should be done in a way so as to avoid creating disproportionate additional administrative burdens for contracting authorities or distorting competition in procurement markets.

There are two possible ways to use public procurement in order to achieve the Europe 2020 policy objectives:

° provide contracting authorities with the wherewithal to take into account those objectives under procedural public procurement rules ("how to buy");

° impose mandatory requirements on contracting authorities or provide for incentives to steer their decisions as to which goods and services should be procured ("what to buy").

The public procurement Directives provide a common framework for public purchases by laying down procedural rules on "how to buy", and leave the contracting authorities free in their basic decision of "what to buy", to define the characteristics of the works, products or services that best fit their needs and to put in place the conditions which are the most appropriate for their desired policy objectives (as long as they are transparent and non-discriminatory).

EU public procurement legislation also allows incentives for procurement in line with the Europe 2020 objectives, or the imposition of obligations on the contracting authorities on "what to buy", either at European or at national level, to ensure that public procurement strategies are consistent with overall policy objectives.

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69 See Green Paper from the Commission to the European Council of 3 March 2010 - COM(2010) 2020.

70 See Council Conclusions of 13 September 2010 on the lessons learned from the A/H1N1 pandemic.

A range of policy specific initiatives have already been launched in the recent years, both at European and at national level, to encourage the use of public procurement in support of the above outlined policy objectives, such as the ongoing work on promoting Green public procurement (GPP)[71], on social considerations in public procurement[72] and on innovation[73]. The following section will discuss whether and what changes to EU public procurement rules are needed to ensure the coherence and appropriateness of the various measures that are or could be taken at EU and national level.

4.1. "How to buy" in order to achieve the Europe 2020 objectives

Considerations relating to environmental protection, social inclusion or promotion of innovation may be relevant at different stages of the procurement procedure, depending on their nature. Not all of the different considerations relating to these policy objectives can be taken into account at every stage. The following section will discuss how each of the individual policy objectives could be taken into account at the successive stages of a procurement procedure.

Describing the subject matter of the contract and the technical specifications

Under the current EU public procurement rules, contracting authorities have to ensure a clear and non-discriminatory description of the subject-matter of the contract and they have to define technical specifications which must not have the effect of favouring certain undertakings.

Requirements in respect of process and production methods must relate to the manufacturing of the product and contribute to its characteristics, without necessarily being visible. Under the current rules it is not possible to require process and production methods that do not relate to the manufacturing of the product and are not reflected in the characteristics of the product.

Public authorities and stakeholders sometimes claim that, for environmental and health related reasons, certain products would necessarily have to be or ought to be sourced locally. In this context it should be emphasized that such requirements infringe EU law if they result in unjustified direct or indirect discriminations between suppliers. They can only be justified in exceptional cases where legitimate and objective needs that are not related to purely economic considerations can only be met by products from a certain region.

Questions:

50. Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

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71 Cf. Commission Communication "*Public Procurement for a Better Environment"* - COM(2008) 400 - that set targets for the uptake of GPP in Member States and started the process of development of common voluntary European GPP criteria. Cf. also the *"Handbook on Environmental Public Procurement (Buying Green)"*, http://ec.europa.eu/environment/gpp/guideline_en.htm.

72 Cf. the handbook **"***Buying social – A Guide to Taking Account of Social Considerations in Public Procurement*" - SEC(2010) 1258.

73 Following the "Innovation Union" communication commitment n° 17, the European Commission is currently monitoring a study (starting November 2010 - ending November 2011) that intends to develop a new support mechanism for procurement of innovation. This scheme will provide guidance and set up a (financial) support mechanism to help contracting authorities to implement these procurements in a non-discriminatory and open manner, to pool demand, to draw up common specifications, and to promote SME access. On pre-commercial procurement, cf. the Commission communication "*Pre-commercial procurement: Driving innovation to ensure sustainable high quality public services in Europe* - COM(2007) 799.

51.	Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?
52.	By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility[74] criteria for persons with disabilities or design for all users? If not, what needs to be done?
53.	Do you think that some of the procedures provided under the current Directives[75] (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?
54.	What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the respect of the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?
55.	Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?
56.	Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

Requiring the most relevant selection criteria

When assessing the candidates' ability to perform the contract, contracting authorities may take into account specific experience and competence relating to social or environmental aspects that are relevant to the subject matter of the contract.

Question: What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion and enhancing innovation?

Using the most appropriate award criteria

In order to ensure effective competition between economic operators and avoid arbitrary decisions by public authorities, the current EU public procurement rules require that award criteria must be linked to the subject-matter of the contract, may not confer an unrestricted freedom of choice on the contracting authority, and must be expressly mentioned in the tender documents.

Contracting authorities are free to decide the relative weighting to be given to each of the criteria used to identify the most economically advantageous tender. This allows them to reflect in the

[74] Accessibility in this context means accessibility by persons with functional limitations (disabilities).

[75] For the description of the procedures, please refer to section 2.1 above.

evaluation the importance they wish to attach to environmental or social criteria compared to the other criteria, including price.

For standard goods and services, it is already in many cases possible to set high environmental or social standards in technical specifications or contract performance conditions while awarding the contract on the criterion of the lowest price. In this way, contracting authorities can obtain products and services complying with high standards at the best price.

However, using criteria that relate to the environment, energy efficiency, accessibility or innovation in the award phase rather than only in the technical specifications or as contract performance conditions can have the benefit of prompting companies to submit bids that go further than the level set in the technical specifications and thereby promote the introduction of innovative products on to the market. It could also be useful to apply such criteria in the award phase in cases where there is uncertainty as to the products or services available on the market.

Questions:

57. The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):

57.1.1. to eliminate the criterion of the lowest price only;

57.1.2. to limit the use of the price criterion or the weight which contracting authorities can give to the price;

57.1.3. to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

58. Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

59. Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

60. In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

Imposing proper contract performance clauses

Under the current EU public procurement rules, contract performance clauses must be linked to the tasks which are necessary for the production and the provision of the goods or services purchased. Such conditions relating to the performance of the contract may take into account

other policy considerations, such as social and environmental issues[76]. Contract performance clauses could also be used to stimulate innovation during the execution of the contract, e.g. by providing incentives to further develop the products or services during the performance of the contract.

At this stage, contracting authorities can impose certain obligations on the successful tenderer which relate to achieving different environmental or social objectives, and which cannot be reflected in the earlier stages of the procurement procedure

Questions:

61. Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

62. What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

63. Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

Verification of the requirements

Contracting authorities could specify environmental or social requirements when drawing up the technical specifications or devising selection/award criteria or introducing contract performance clauses. In such cases, they will normally draw up a list of particulars (certification/documentation and or specific commitment) to be submitted by candidates or tenderers so as to demonstrate that they are able to meet the environmental or social requirements. Under the current rules, specific certification schemes (e.g. forest certification schemes, social certificates, etc.) may be accepted as a possible means of proof, but equivalent means must also be accepted. A general problem that arises in public procurement is how to verify these requirements in the supply chain. The issue of verification is particularly relevant in cases where part of the supply chain is located in a third country.

When examining requests to participate and offers, the contracting authority will check whether the information and documentation supplied by candidates or tenderers conforms to the requirements. If required particulars are missing, or if the information provided is considered unsatisfactory, the candidate or tenderer will be excluded from the procedure.

Questions:

64. Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?

65. How could contracting authorities best be helped to verify the requirements? Would the development of "standardised" conformity assessment schemes and documentation, as

[76] See Article 26 of Directive 2004/18/EC.

well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

Link with the subject matter/ with the execution of the contract

As previously indicated, in the current EU public procurement legal framework the link with the subject-matter of the contract is a fundamental condition that has to be taken into account when introducing into the public procurement process any considerations that relate to other policies. This is true throughout the successive stages of the procurement process and for different aspects (technical specifications, selection criteria, award criteria). In the case of contract execution clauses, what is required is that there should be a link with the performance of the tasks necessary for the production/provision of the goods/services being tendered.

Relaxation of this requirement might enable public authorities to go further in pursuing Europe 2020 policy objectives through public procurement. Among others, it would allow contracting authorities to influence the behaviour of undertakings regardless of the product or service purchased, e.g. in order to encourage more environmental responsibility or greater attention to corporate social responsibility. This could be a powerful instrument in support of Europe 2020 policy objectives.

However, when considering such a possibility, the trade-offs with other policy considerations must be carefully assessed. The link with the subject-matter of the contract ensures that the purchase itself remains central to the process in which taxpayers' money is used. This is an important guarantee to ensure that contracting authorities obtain the best possible offer with efficient use of public monies. As explained above, this objective is also highlighted in the Europe 2020 strategy, which stresses that public procurement policy must ensure the most efficient use of public funds. At the same time, this guarantee of purchases at the best price ensures a measure of consistency between EU public procurement policy and the rules in the field of State aid, as it makes sure that no undue economic advantage is conferred on economic operators through the award of public contracts. Loosening the link with the subject-matter of the contract might therefore entail a risk of distancing the application of EU public procurement rules from that of the State aid rules, and may eventually run counter to the objective of more convergence between State aid rules and public procurement rules.

The link with the subject matter can also help avoid a situation where some economic operators from a particular country might potentially be favoured to the detriment of those from other Member States. While this is particularly relevant for some types of considerations (for example, some social requirements) because they are more likely to be rooted in the national, regional or even local realities, it is also true for other policy considerations such as environmental issues. For example, in the case of the supply of goods, the requirement that the office buildings used by the tenderers be exclusively heated by solar power could favour undertakings from Member States with specific meteorological conditions favourable to solar technology.

The link between policy related considerations and the subject matter of the contract is also intended to ensure certainty and predictability for enterprises. Otherwise, in the absence of such a link (and of harmonised requirements at EU level), economic operators might be asked to comply with different requirements (with regard to the percentage of women, number of unemployed people recruited, child care facilities available for employees, environmental or waste management measures, eco-labels, etc.) for every procurement or for each contracting authority.

Meeting the different requirements imposed by the contracting authorities might be particularly difficult for SMEs, as they may not have the necessary economic and human resources to fulfil a wide variety of societal requirements on a case-by-case basis.

Finally, requirements unrelated to the product or service purchased could go against the Europe 2020 objective of promoting innovation, as competition between undertakings would no longer take place on the grounds of developing the best (possibly innovative) product or service, but on the basis of corporate policy.

Questions:

66. Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages of loosening or dropping the link with the subject matter?

67. If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?

68. Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?

69. If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?

69.1. Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

69.2. Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender-equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

69.3. Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

69.3.1. Award criteria other than the lowest price/ the economically most advantageous tender/ criteria not linked to the subject-matter of the contract might separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

69.4. Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and services in question (e.g. requiring the contractor to put in

place child care services for the his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

4.2. "What to buy" in support of Europe 2020 policy objectives

Another way of achieving policy objectives through public procurement may be to impose on contracting authorities obligations on "what to buy". For example, this could be done by imposing mandatory requirements or criteria governing the characteristics of the goods or services to be provided, or alternatively by setting targets (e.g. 60% of public purchases must be environmentally friendly)[77].

Recent European sector specific legislation at EU level has:

- introduced obligations on contracting authorities to require in their public contracts a certain level of energy efficiency [78];
- introduced obligations on contracting authorities to take energy or other environmental impacts into account in their public procurement decisions[79];
- called on the public sector to play an exemplary role in the field of energy efficiency by adopting a minimum number of energy efficient procurement measures[80] and by promoting green public buildings (e.g. buildings with low or zero primary energy consumption[81]).

More generally, introducing mandatory requirements into EU public procurement rules by means of legislation based on delegated acts has been advocated as a further means of promoting innovation or other policy objectives within the Europe 2020 strategy[82].

Imposing such obligations can be a very effective instrument for achieving the Europe 2020 policy objectives, by fostering the market uptake of goods and services of a high societal value. Moreover, centralising the decisions on purchasing strategies can avoid fragmentation of procurement policies and increase predictability, to the benefit of economic operators.

On the other hand, some concerns have been raised with regard to imposing obligations on what to buy.

One important aspect to be considered is the risk that the introduction of such obligations may lead to discrimination or restrict competition in procurement markets, possibly resulting in higher prices, which might be problematic in times of economic difficulties and budgetary restraints in many Member States. To mitigate this risk, the requirements and criteria imposed must be objective and non discriminatory, and should be used only when there is sufficient EU-wide market development to ensure effective competition.

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77 For instance in the field of green public procurement, several Member States, like the Netherlands, Finland, Slovenia, Austria, or Belgium have set ambitious green public procurement targets at national level.

78 Regulation (EC) No 106/2008 (OJ L39, 13.2.2008, p. 1) (so called EU Energy Star Regulation).

79 Directive 2009/33/EC on promotion of clean and energy-efficient vehicles.

80 Directive 2006/ 32/ EC on energy end-use efficiency and energy services.

81 Directive 2009/28/EC on the promotion of the use of energy from renewable sources (OJ L 140, 5.6.2009, p. 16), and Directive 2010/31/EU on the energy performance of buildings (OJ L 153, 18.06.2010, p. 13).

82 Report from Mario Monti to the President of the European Commission of 9 May 2010, "A new strategy for the Single Market", point 3.4, p. 78.

Some types of obligations may have a bigger impact on competition in procurement markets than others.

– Technical specifications in terms of performance requirements are likely to have a less limiting effect on competition than detailed specifications on the technical characteristics of the goods to be procured.

– Mandatory prescriptions on the technical characteristics of the goods to be procured could considerably reduce choice and competition in procurement markets, or even eliminate them altogether, whereas mandatory provisions concerning the decision as to which of the various award criteria should be taken into account (for example energy efficiency, life-cycle costing, accessibility) would probably have less limiting effects on competition in procurement markets.

Another effect of imposing "what to buy" obligations on contracting authorities is that their room for manoeuvre in the procurement procedures is reduced. This may affect their capacity to procure goods and services that are perfectly adapted to meet the specific needs of the individual contracting authorities.

It is also argued that centrally imposed obligations on what to buy would create an additional administrative burden for contracting authorities and economic operators, such as an increased workload to verify that undertakings meet the requirements. Additional education and adequate training could help contracting authorities cope efficiently with this workload.

A less far-reaching solution would be to provide incentives for the procurement of certain types of goods or services, but not impose it. Such incentives could consist in financial advantages for contracting authorities procuring environmentally-friendly, socially inclusive or innovative goods and services, mechanisms for the exchange of best practices between contracting authorities or other support mechanisms for contracting authorities wishing to pursue Europe 2020 objectives through their procurement.

Questions:

70. Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice.

71. Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

72. Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

73. Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

73.1. What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

73.2.	Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?
74.	In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?
75.	The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?
76.	Do you consider that imposing obligations on "what to buy" would increase the administrative burden, particularly for small businesses? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?
77.	If you are not in favour of obligations on "what to buy", would you consider any other instruments (e.g. recommendations or other incentives) to be appropriate?

4.3. Innovation

The current EU Directives on public procurement adopt a flexible approach which enables contracting authorities to make use of innovation-oriented tendering, which can encourage industry to find new advanced solutions.

Design contests[83] enable contracting authorities to acquire plans or designs in fields such as architecture, engineering or data processing: under such a procedure participants are asked to propose projects outside of the strict terms of reference; they are therefore free to put forward innovative ideas that may be used in a future procurement procedure.

In case of particularly complex contracts, where contracting authorities consider that the use of the open or restricted procedure will not allow the award of the contract, the Directive provides for another procedure, the competitive dialogue[84]. In this procedure contracting authorities can engage in a dialogue with candidates to identify and define the means best suited to satisfying the needs of the contracting authority. Participants are required to propose ideas and solutions which are discussed with the contracting authorities.

The aim of the current EU public procurement rules is to protect innovative solutions, even if they are not embodied in intellectual property rights. Proposed solutions and other confidential information may not be communicated by the contracting authorities to the other participants without the agreement of the bidder[85].

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83 See Articles 66 to 74 of Directive 2004/18/EC.

84 See Article 29 of Directive 2004/18/EC and recital 31 of Directive 2004/18/EC. The competitive dialogue is not provided for under Directive 2004/17/EC. However, there is nothing to prevent a contracting authority which has opted for a negotiated procedure with prior call for competition from stipulating in the specifications that the procedure will be as laid down in Directive 2004/18/EC for the competitive dialogue.

85 Article 29(3) of Directive 2004/18/EC. Such guarantee is a further rule added to the confidentiality clause of Article 6 of that Directive.

Nevertheless, "cherry picking" of intellectual property rights or of innovative solutions themselves has been raised as an issue of concern, particularly with regard to the competitive dialogue: if a participant discloses the unique features of its solution, these may become known to the other candidates. While the current rules require that such information must be kept confidential, the contracting authority is nevertheless in a bind between the obligation to protect the confidential information and the need to disclose some information in order to identify solutions which are best suited to satisfying its needs. Contracting authorities might be tempted to put pressure on tenderers to agree to disclosure. Moreover, the fact that the best solution (the one chosen by the contracting authority) is inevitably presented to all the participants, who are then invited to submit their tenders on the basis of this solution, may be a disincentive for participants to propose highly innovative solutions, as they are not sure whether they will be "rewarded" for inventing this solution by the award of the actual contract.

When preparing a call for tenders, contracting authorities may also decide to authorise tenderers to submit variants. In such a case, goods or services may be offered which do not correspond to those identified by the contracting authority, but which meet the minimum technical requirements contained in the tender documents. The opportunity to submit tenders that differ from the technical specifications initially set out by the contracting authorities encourages economic operators to propose more innovative services or products. This may stimulate research into new technologies and allow users to take advantage of technical progress.

Another important way to stimulate innovation is for contracting authorities to request the development of products or services that are not yet available on the market. Under the current legal framework, this can be done via what is known as "pre-commercial procurement"[86], consisting of the procurement of research and development services for the development of new solutions[87], with a view to the possible purchase of the final product or service through a normal public procurement procedure at a later stage. This approach enables public authorities to share the risks and benefits of designing, prototyping and testing a limited volume of new products and services with suppliers, without involving State aid.

Pre-commercial procurement can help contracting authorities to make radical improvements to the quality and efficiency of public services, by triggering the development of new breakthrough solutions that can address public sector challenges for which there are no ready-made products and services available yet on the market.

Questions:

78. Do you think that the competitive dialogue allows sufficient protection of intellectual property rights and innovative solutions, such as to ensure that the tenderers are not deprived of the benefits from their innovative ideas?

79. Do you think that other procedures would better meet the requirement of strengthening innovation by protecting original solutions? If so, which kind of procedures would be the most appropriate?

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86 For more guidance cf. the Commission Communication and associated staff working document 'Pre-commercial procurement: Driving innovation to ensure sustainable high quality public services in Europe' - COM(2007) 799 and SEC (2007) 1668. For more information on latest developments and news on pre-commercial procurement: http://cordis.europa.eu/fp7/ict/pcp/home_en.html

87 Procurement not covered by the EU public procurement Directives by virtue of Art. 16 (f) of Directive 2004/18/EC.

80.	In your view, is the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, suited to stimulating innovation? Is there a need for further best practice sharing and/or benchmarking of R&D procurement practices used across Member States to facilitate the wider usage of pre-commercial procurement? Might there be any other ways in which contracting authorities could request the development of products or services not yet available on the market? Do you see any specific ways that contracting authorities could encourage SMEs and start-ups to participate to pre-commercial procurement?
81.	Are other measures needed to foster the innovation capacity of SMEs? If so, what kind of specific measures would you suggest?

4.4. Social services

Social services are listed in Annex II B of Directive 2004/18/EC. Therefore, as explained above, contracts for social services with a value above the thresholds for application of the Public Procurement Directives are subject to only a few specific rules of the Directives (those concerning technical specifications and the publication of the results of the procurement procedure) and to the basic principles of EU law, such as non-discrimination and transparency[88]. As explained above, contracts below the thresholds are only subject to the basic principles of EU law - such as non-discrimination and transparency - if they present a cross-border interest.

Therefore, when outsourcing social services via a public service contract, public authorities already enjoy considerable latitude with regard to the procedures to be followed. Moreover, public authorities can introduce requirements concerning in particular the quality, comprehensiveness and continuity of the service at stake, as well as requirements referring to users' involvement and participation in the service provision and evaluation or ensuring that service providers familiarize themselves with the local context when carrying out the service[89].

Nevertheless, some stakeholders claim that adaptations of the current rules are needed in order to take better account of the specificities of social services. There are in particular calls for higher thresholds for such services. It should be noted that, in the case of social services, an increase of the applicable thresholds would not result in a restriction of coverage and possible compensation requests under the GPA and other international agreements, since B-services are not covered by these instruments.

Questions:	
82.	Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?

[88] Social services figure among the services listed in Annex II B of Directive 2004/18/EC, to which only limited rules of that Directive apply (for the distinction between services listed in Annex II A and services listed in Annex II B, see Articles 20 and 21 of that Directive).

[89] Specific guidance on the application of public procurement rules to social services and notably clarification on the room for manoeuvre that public authorities enjoy in this field has been provided in the Commission Staff Working Document Frequently Asked Questions concerning the application of public procurement rules to social services of general interest - SEC(2007) 1514, 20.11.2007 - updated 2010 (Guide on the application of the EU rules on State aid, public procurement and internal market to services of general economic interest and, in particular, to social services of general interest - SEC(2010) 1545).

82.1.	Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services? In particular:
82.1.1.	Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?
82.1.2.	Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?
82.2.	Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or de minimis type rules for such services)? What would be the justification for such special treatment of social services?

5. ENSURING SOUND PROCEDURES

The financial risks at stake and the close interaction between the public and the private sectors make public procurement a risk area for unsound business practices, such as conflict of interest, favouritism and corruption. In the same line of thinking, the Stockholm programme[90] mentions public procurement as an area of special attention in the context of the fight against corruption.

Effective mechanisms to prevent unsound business practices in public procurement are not only needed in order to ensure fair competition on an equal basis and to guarantee the efficient use of taxpayers' money, but they can also make a considerable contribution to the success of the overall fight against economic crime .

The requirements set out in the Directives on the transparency of the procedure in order to guarantee equal treatment of all bidders are already minimising the risks of unsound business practices. However, the current Directives do not include more specific rules to prevent and sanction conflicts of interest, and they have few specific rules for penalising favouritism and corruption in public procurement. These issues are more particularly addressed in national legislation, but the level of specific safeguards offered by national legislation varies greatly between Member States.

Increasing the procedural guarantees against unsound business practices at EU level could improve the European common standard of protection against such practices, increase the overall fairness of the procedures and make procurement processes less vulnerable to fraud and corruption. However, such additional guarantees would often entail additional administrative burdens for procurers and undertakings, and their added value in the fight against unsound business practices must be carefully weighed against a possible negative impact on the overall objective of simplification of the procedures.

5.1. Preventing conflicts of interest

The notion of conflict of interest characterises a situation where persons involved in the contract award decision have competing professional or personal obligations or personal or financial interests which could make it difficult for them to fulfil their duties fairly and impartially, or

[90] Council document 17024/09 adopted by the European Council on 10/11 December 2009.

where a person is in a position to influence the contracting authority's decision-making process in order to further his own interests. Such a conflict of interest does not necessarily lead to corruption, but it may lead to corrupt conduct. Identifying and resolving conflicts of interest is therefore key to prevent fraud. It has to be emphasised that a conflict of interest constitutes, objectively and on itself a serious irregularity regardless of the intentions of the parties concerned and whether they were acting in good or bad faith.[91]

There should be a debate about whether basic rules are needed at EU level, such as a common definition of unacceptable conflict-of-interest situations and some safeguards to prevent or resolve such situations.[92] These safeguards could include requiring declarations of absence of conflict of interest as well as a certain degree of transparency and accountability of procurement officials with regard to their personal situation, naturally in full compliance with data protection rules and standards. For instance, EU rules could make it mandatory to disclose the names of the members of the evaluation committee to a control body, or introduce a requirement for the contracting authority to verify that there are no conflicts of interest when setting up the evaluation committee.

Questions:

83. Would you be in favour of introducing an EU definition of conflict of interest in public procurement? What activities/situations harbouring a potential risk should be covered (personal relationships, business interests such as shareholdings, incompatibilities with external activities/ etc.)?

84. Do you think that there is a need for safeguards to prevent, identify and resolve conflict-of-interest situations effectively at EU level? If so, which kind of safeguards would you consider useful?

5.2. Fighting favouritism and corruption

Procurement markets, and especially major works projects, are often considered a lucrative target for potential bribery. It should also be emphasized that the integrity of the process is not only endangered in the case of corruption, which is fairly obvious, but also more generally in all cases of favouritism, even if it does not necessarily involve corrupt conduct, e.g. favouritism shown to a local candidate. The most common corruption scenarios that might occur in the public procurement procedures are the so-called "kickback" (i.e. payment of a bribe as a reward for the official who influenced the procurement process), manipulation of tender documents to favour a specific bidder, and the use of front/intermediary companies to cover the illegal activities of the corrupt official.

The procurement rules of many Member States contain mechanisms specifically designed to prevent and combat corruption and favouritism. In the same way as for the issue of conflict of interest, an analysis must be made as to whether certain specific safeguards should be integrated in the EU public procurement legislation, on the condition of not creating disproportionate administrative burdens. However, it should be borne in mind not only that corruption is a highly sensitive issue for Member States but also that the actual problems in this field and also the potential solutions depend on the – widely diverging – national administrative and business

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91 See judgment of 15 June 1999 in Case T-277/97 Ismeri Europa Srl v Court of Auditors, paragraph 123, concerning the procurement rules by EU institutions.

92 See, for instance, the rules provided for procurement by EU institutions: Article 52 of Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, and the relevant case-law, notably judgments of 9 July 2002 in Case T-21/01 Zavvos v Commission, and of 17 March 2005 in Case T-160/03 AFCon Management Consultants v Commission.

cultures. Consequently, it might be difficult to find "one size fits all" solutions to be put in place at EU level.

It is often proposed that corruption in public procurement should be tackled by increasing the level of transparency concerning, in particular, the decisions taken by procurement officials throughout the procedure. This would allow candidates and possibly the general public to scrutinise public officials' decisions and hence act as an efficient instrument against corruption. Such increased transparency could, for instance, be introduced for the opening of the bids or the compulsory publication of the reports documenting the procurement process. The additional administrative burden of such a measure would be fairly limited, as contracting authorities are already obliged to draw up these reports[93]. In the same way, the publication of concluded contracts (with redacting of commercially sensitive information) might be conducive to better democratic scrutiny of procurement decisions.

It could also be envisaged to develop specific tools, such as free phone or Internet based fraud notification systems to encourage participants or other persons to provide information about any wrongdoing or irregularity. The contract notice, the contracting authority's website and other means of publication could include references to such a system through which the contracting authority or a supervising authority may receive information from anonymous or identified sources.

The use of practices such as existing toolkits that enhance good, transparent management of the whole procurement cycle should be encouraged. In this context the development of red flag indicator lists for contracting authorities could be useful, despite known limitations[94]. Promoting clear rules on reporting requirements and on protection of whistleblowers might be helpful for the enforcement of more efficient reporting practices. The use of external monitors (e.g. governance experts, NGOs, etc) may add value to the internal control tools in assessing the performance of contractors, as well as detecting and reporting suspicious cases.

The use of the existing evaluation mechanisms to monitor compliance with relevant international instruments comprising provisions on corruption in public procurement may also be considered[95].

Finally, limiting the discretion of contracting authorities for certain aspects might make it more difficult to put into practice decisions which are not justified on objective grounds and thereby prevent favouritism (for instance, limiting the discretion of contracting authorities for the annulment of procedures). However, such measures must not hamper the necessary room for manoeuvre that contracting authorities require in order to purchase goods and services adapted to their specific needs.

Questions:

85. Do you share the view that procurement markets are exposed to a risk of corruption and favouritism? Do you think EU action in this field is needed or should this be left to Member States alone?

86. In your view, what are the critical risks for integrity at each of the different stages of the public procurement process (definition of the subject-matter, preparation of the tender, selection stage, award stage, performance of the contract)?

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93 Article 43 of Directive 2004/18/EC.

94 World Bank Policy Research Paper no. 5243, 29 March 2010.

95 Notably the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention against Corruption.

87.	Which of the identified risks should, in your opinion, be addressed by introducing more specific/additional rules in the EU public procurement Directives, and how (which rules/safeguards)?
88.	What additional instruments could be provided by the Directives to tackle organised crime in public procurement? Would you be in favour, for instance, of establishing an ex-ante control on subcontracting?

5.3. Exclusion of "unsound" bidders

Exclusion of bidders that are guilty of corruption and, more generally, professional misconduct ("debarment") is a powerful weapon to punish – and also to a certain extent prevent – unsound business behaviours. Article 45 of Directive 2004/18/EC) already sets out an obligation to exclude bidders convicted of certain listed offences (notably corruption), as well as the possibility of excluding bidders for a number of other unsound business practices (including "grave professional misconduct").

However, a number of questions relating to the scope, interpretation, transposition and practical application of this provision remain open, and Member States and contracting authorities have called for further clarification.

It should be examined in particular whether the exclusion grounds in Article 45 are appropriate, sufficiently clear (notably the exclusion ground of "professional misconduct") and exhaustive enough, or if further exclusion grounds should be introduced. Contracting authorities also seem to be faced with practical difficulties when trying to obtain all relevant information on the personal situation of tenderers and candidates established in other Member States and their eligibility according to their national law.

Furthermore, the scope for implementing national legislation on exclusion grounds will probably need to be clarified. Providing for Member States to introduce additional exclusion grounds in their national legislation might enable them to tackle specific problems of unsound business behaviours linked to the national context more effectively. On the other hand, specific national exclusion grounds always entail a risk of discrimination against foreign bidders and could jeopardise the principle of a European level playing field.

An important issue on which the current EU public procurement Directives remain silent is what are referred to as the "self-cleaning" measures, i.e. measures taken by the interested economic operator to remedy a negative situation affecting his/her eligibility. Their effectiveness depends on their acceptance by Member States. The issue of "self-cleaning measures" stems from the need to strike a balance between the implementation of the grounds for exclusion and respect for proportionality and equality of treatment. The consideration of self-cleaning measures may help contracting authorities in carrying out an objective and fuller assessment of the individual situation of the candidate or tenderer in order to decide its exclusion from a procurement procedure.

Article 45 allows Member States to take into account self-cleaning measures as far as such measures show that the concerns about professional honesty, solvency and reliability of the candidate or tenderer have been eliminated. However, there are no uniform rules on "self-cleaning", even though measures taken by the economic operator to remedy the situation of exclusion are taken into account anyway by the contracting authorities in some Member States.

Furthermore, the question arises as to whether the EU should explicitly impose sanctions for attempts to jeopardise the transparency and impartiality of the procurement procedure (e.g.

candidates or tenderers attempting to gain access to confidential information or to unduly influence the activity of the contracting authority, such as the selection and the award phases). Such sanctions could consist, for instance, in rejecting the candidature or tender, as long as the decision is duly substantiated.

Some serious forms of unsound behaviour, such as corruption or deliberately undeclared conflicts of interest, could be penalised more seriously, e.g. through criminal sanctions. The appropriateness of requiring such sanctions must be carefully assessed in the light of the principles of subsidiarity and proportionality[96].

Questions:

89. Do you think that Article 45 of Directive 2004/18/EC concerning the exclusion of bidders is a useful instrument to sanction unsound business behaviours? What improvements to this mechanism and/or alternative mechanisms would you propose?

90. How could the cooperation among contracting authorities in obtaining the information on the personal situation of candidates and tenderers be strengthened?

91. Do you think that the issue of "self-cleaning measures" should be expressly addressed in Article 45 or it should be regulated only at national level?

92. Is a reasoned decision to reject a tender or an application an appropriate sanction to improve observance of the principle of equality of treatment?

93. Do you think that in particular circumstances, such as corruption or undeclared conflicts of interest, a criminal sanction could also be envisaged?

5.4. Avoiding unfair advantages

Finally, there may be situations where, in the absence of any conflict-of-interest situation or unsound business practices, the fairness of the procedure may be jeopardised because certain bidders are in an advantageous situation. For instance, a previous involvement of the candidate or tenderer in preparatory activities linked with the development of the service to be procured (such as research and/or design) can confer considerable advantages on that bidder in terms of privileged information and therefore may give rise to concerns as to the observance of equality of treatment[97].

The question here is to what extent advantages could be compensated without discriminating against the bidder in question. Simply excluding bidders who participated in the preparation of the project would probably be a disproportionate reaction, and might not even be feasible in practice, especially when there are few qualified competitors on the market in question. Meaningful compensation might consist, for instance, in an obligation to disclose to all competing bidders any privileged information that the advantaged bidder might have obtained from a prior association with the project.

An even more delicate issue is the problem of the natural advantages of incumbent bidders, which are even more difficult to identify clearly and to compensate. Again, mandatory disclosure of some privileged information may be appropriate in order to mitigate risks of discrimination, on the condition that commercially sensitive information is adequately protected.

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96 On the EU's functional criminal-law competence, see Case C-440/05, *Commission v Council*, para 66.

97 See Joined Cases C-21/03 and C-34/03, Fabricom.

Questions:

94. Should there be specific rules at EU level to address the issue of advantages of certain tenderers because of their prior association with the design of the project subject of the call for tenders? Which safeguards would you propose?

95. Do you think that the problem of possible advantages of incumbent bidders needs to be addressed at EU level and, if so, how?

6. ACCESS OF THIRD COUNTRY SUPPLIERS TO THE EU MARKET

The international commitments undertaken by the EU in the field of procurement are reflected by various provisions in the Directives.

Recital 7 of Directive 2004/18/EC and Recital 14 of Directive 2004/17/EC expressly refer to Council Decision 94/800/EC, which approved the WTO GPA. It states that "*the arrangements to be applied to tenderers and products from signatory third countries are those defined by the Agreement*". In addition, the conditions related to the GPA are reflected in Article 5 of Directive 2004/18/EC and Article 12 of Directive 2004/17/EC. As a result, economic operators originating from the GPA signatories countries should enjoy the same treatment as European economic operators under the conditions laid down in the GPA, in particular the EU's Appendix 1 which includes all the EU's commitments under the Agreement.

Further, within the areas not committed internationally by the EU, Article 58 of Directive 2004/17/EC introduces a Community preference for procurement of goods, and Article 59 of the same Directive allows the possibility of restricting access to the EU utilities procurement market.

Recently, many stakeholders have pointed out that the EU procurement market is more open than the procurement markets of our international partners. As a result, EU companies do not always compete on an equal footing with foreign companies. Also, this situation has a negative effect on the EU's negotiating position in international negotiations for greater market access. It is therefore necessary to reflect on the EU's public procurement policy vis-à-vis third countries and on the use of the above-mentioned provisions and on possible improvements which may include widening the scope of both Articles 58 and 59 beyond the area of utilities procurement.

This is related to the on-going debate on possible ways to strengthen the EU's leverage in international negotiations with a view to ensuring a more balanced and reciprocal access to EU and foreign procurement markets. In this context, the Commission will clarify in a legislative instrument the exact content of its market access commitments and restrictions that have been agreed in the context of the Government Procurement Agreement. Further guidance documents might usefully be provided.

Questions:

96. What are your experiences with and/or your views on the mechanisms set out in Articles 58 and 59 of Directive 2004/17/EC?

96.1. Should these provisions be further improved? If so, how?

96.2. Could it be appropriate to expand the scope of these provisions beyond the area of utilities procurement?

97.	Do you think that other mechanisms should be used to substitute or complement the existing one? If so, which ones?
97.1.	Could, in your view, restrictions be best applied by individual contracting entities on a case by case basis or should these be decided by the EU?

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The present Green Paper tackles the issues that have been identified by the Commission as important aspects of a future reform of the EU public procurement policy. There may be other key subjects that are not addressed in the above Green Paper. Also, it would be interesting to hear from stakeholders which of the above subjects they consider most important and which issues seem less relevant in view of a future reform. Hence, all stakeholders are invited to reply to the questions below.

Questions:

98.	Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?
99.	Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

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The Commission invites all interested parties to submit their contributions before 18 April 2011, preferably by e-mail and in Word format to MARKT-CONSULT-PP-REFORM@ec.europa.eu.

These contributions do not need to cover all of the questions raised in this paper. They can be limited to questions of particular interest for you. Please indicate clearly the aspects to which your contributions relate.