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Commission proposals to modernise the European public procurement market - Frequently Asked Questions

1. Why modernise public procurement rules now?

Public procurement rules organise the way public authorities and certain public utility operators purchase goods, works and services. They set up specific contract award procedures to ensure that public purchases are made in the most rational, transparent and fair manner.

Public purchasing has to be underpinned by particular safeguards. These prevent any preferential treatment that could favour specific economic operators and guarantee sound competition between economic operators, so as to ensure that contracting authorities get the best value for European taxpayers' money.

Public procurement is a key part of the [Europe 2020](#) strategy for smart, sustainable and inclusive growth. It is one of the market-based instruments to be used to achieve the Europe 2020 objectives by improving the conditions for business to innovate and by encouraging the wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. 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 Union-wide (all the more in times of financial crisis).

In the face of these challenges, the existing public procurement legislation needs to be revised and modernised in order to make it better suited to dealing with the evolving political, social and economic context.

In its communication of 13 April 2011 on 'The Single Market Act: Twelve levers to boost growth and confidence' ([IP/11/469](#)), the Commission included among its twelve key priority actions to be adopted by the EU institutions before the end of 2012 the modernisation of the public procurement legislative framework. The Commission committed itself to adopt a legislative proposal for a "revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs".

2. How is public procurement relevant for the European economy?

Public procurement is one of the major items of expenditure for contracting authorities in Europe and an important element of the European Single Market. In 2009, the value of calls for tender published in the Official Journal of the European Union (i.e. advertised in the whole Internal Market) represented approximately €420 billion for the 27 Member States. This figure includes only those purchases which are subject to compulsory advertisement EU-wide, as they are above the thresholds for the application of the Directives. The overall value of the calls for tenders published in the Official Journal of the European Union represents 19% of the total expenditure on public works, goods and services.

A dynamic pan-European procurement market with easy access to these contracts provides huge business opportunities for European companies. It can greatly contribute to stimulating a competitive European industry and sustainable economic growth.

3. What are the main simplification measures proposed by the Commission?

For the main elements of the proposals for revised directives, see [IP/11/1580](#).

To make the procedures simpler and more flexible, the Commission suggests notably:

- an **increased possible use of negotiation** through the competitive procedure with negotiation and prior publication (see question 4);
- simplified procedures for regional and local contracting authorities, who can replace the publication of individual contract notices by the publication of a general notice for their planned procurement for the next year;
- **a reduction of documentation requirements**. This will be achieved in particular through the compulsory acceptance of self-declarations, whereby a bidder declares on oath that he fulfils the criteria which are a pre-condition for tendering, e.g. no conviction for corruption etc. Only the winning bidder will then be obliged to supply the documentary evidence to prove the facts that he declared in his self-declaration. Furthermore, the proposal prohibits contracting authorities from requiring economic operators to re-submit documents which were previously submitted to them within the past four years in an earlier procedure and which are still valid;
- **ambitious measures on electronic procurement** aiming at full electronic communication in public procurement within a period of two-year time after the implementation deadline of the adopted Directive;
- The **shortening of deadlines**,
- The **alleviation of publication requirements**.

4. The competitive procedure with negotiation appears more risky in terms of transparency, non-discrimination and equal treatment. Are safeguard measures envisaged?

The competitive procedure with negotiation whereby contracting authorities can negotiate with the tenderers to improve the quality of the offers will simplify public procurement and make it more flexible for more complex contracts. It will enable contracting authorities to purchase works and services better adapted to their needs and budgetary constraints.

The Commission is however conscious of the risks involved in this procedure. Negotiations shall therefore be supervised: contracting authorities shall specify at the time of prior publication the subject matter of the contract, the award criteria and the minimum requirements to be met. These shall not be changed in the course of negotiations. Any change in those parts of the technical specifications that are open to negotiations must be communicated to all firms participating in the negotiations so that they can submit new, adapted tenders. Before the negotiations are concluded, everybody must be given the possibility to submit a final tender. Finally, the conduct of the negotiations must be documented in the report on the procedure to be drawn up by the contracting authority and all contracting authorities shall be subject to oversight by a national independent body.

5. Why are thresholds maintained at their current level?

The Commission is not convinced that increasing the thresholds would achieve further simplification of the EU procurement policy. In essence, increasing the thresholds would mean that a larger portion of procurement would no longer be covered by the directives, and therefore, only subject to national rules, which might not always ensure the same level of transparency and non-discrimination as provided for by EU law.

Furthermore, the EU has to respect its international obligations. In particular, in the framework of the World Trade Organisation agreement on government procurement (see [IP/11/1556](#) and [MEMO/11/922](#)). The EU has committed to ensure that the procedural guarantees anchored in the proposal would apply to all contracts beyond the same value as the one of the current directives. Increasing the thresholds would therefore be a breach of our international obligations. For instance, if the current thresholds were doubled, the EU would have to compensate for that up to €30 billion.

6. Will SMEs benefit from the modernisation of the rules?

Many companies, in particular SMEs, complain that access to public contracts remains difficult in practice, because of high administrative burdens and sometimes disproportionate requirements set up by contracting authorities. Among the measures proposed to remedy this problem, the most important is the obligation for contracting authorities to accept self-declarations as a first step; only the winning bidder must then supply the documentary evidence for selection criteria; documents which have already been submitted to the same contracting authority within the past four years and which are still valid shall not have to be re-submitted. This will particularly benefit SMEs, for whom the costs and time of supplying the documents is often a serious obstacle to participation in public tender procedures. Furthermore, the list of possible selection criteria is made exhaustive; yearly turnover requirements may not exceed three times the estimated contract value. This will hinder contracting authorities from imposing exaggerated turnover requirements which automatically exclude SMEs from participating in the procedure. Contracting authorities will be encouraged to split contracts into lots allowing for the participation of more bidders and will have to specifically explain when not doing so. Finally, Member States may foresee direct payments to subcontractors, so that these subcontractors – which are often SMEs – get paid quicker and do not suffer from sometimes bad payment practice of the prime contractors.

7. How is the regime proposed for social services being simplified?

Social services already benefited from the simplified regime applicable to the so-called "B" or "non-priority" services". As they generally have a limited cross-border dimension, social, health and education services will now benefit from a specific and much simpler regime. They will be subject to a higher threshold (€500,000) above which Member States will remain free to determine the procedural rules applicable, while respecting the basic principles of transparency and equal treatment. The only obligations shall consist in the publication of a contract notice and of a contract award notice. In addition, Member States will have to make sure that contracting authorities may take into account *inter alia* all quality and continuity criteria they consider necessary for the services in question. Member States may also eliminate the price as sole award criterion for such services.

8. Other services benefited from a lighter regime under the actual Directives. Will this regime be maintained?

The evaluation has shown that it is no longer justified to restrict the application of the normal procurement regime to given services, given that the cross-border tradability of the services which were not covered by the full regime is not significantly lower than those of the others. For legal services and hotel and restaurant services in particular, the evaluation has shown that the percentage of cross-border trade is significantly higher than the average for services falling under the full procurement regime. Therefore, except for social services, the standard rules will now apply to all services.

9. Does the proposed modernisation contribute to the implementation of the Europe 2020 strategy objectives for a greener, more social, innovative and inclusive economy?

To further support the Europe 2020 strategy objectives and due to the positive reactions to the Green Paper, the Commission suggests the introduction of a life-cycle cost concept, which will encourage public authorities to consider the full life-cycle of products in their purchasing decisions. The life-cycle cost will include internal costs and monetised external environmental costs. Member States and contracting authorities will remain free to decide whether to integrate life-cycle costing in their procurement procedures.

Contracting authorities may take into account criteria linked to the production process of the goods or services to be purchased.

In addition, contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, as long as only the criteria and characteristics of the label which are linked to the subject-matter of the contract are required and that equivalent labels are accepted.

More specifically on social inclusion, the Commission suggests broadening the current contracts' reservation in favour of sheltered workshops: on the one hand, this exception is extended to economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers; and on the other hand, the minimum required percentage of disabled or disadvantaged workers is reduced from 50% to 30%.

10. Are specific measures in favour of innovation proposed?

Innovation needs to be fostered. With this aim in mind, the Commission suggests a completely new partnership procedure where the contracting authority shall cooperate with a company – selected in a regular competitive tender procedure - to develop an innovative product, work or service, which does not exist on the market. The Commission also proposes measures facilitating cross-border procurement and improvements to the competitive dialogue procedure.

11. Is the soundness of procedures going to be guaranteed further?

Conflicts of interests, illicit conduct, and the limits to when modifications of a contract during its execution are acceptable without new tender procedures, are specifically defined in the proposal. The contracting authorities shall not award a contract to the best bidder if the latter cannot provide the required documentation or if he has provided a false declaration either on the absence of any privileged links with members of the contracting authority or on the absence of illicit conduct from his side. Abnormally low tenders shall be investigated. In particular, an established violation of EU obligations in the field of social and labour law or environmental law or violation of the international social and environmental law shall lead to the rejection of the tender. Finally, the contracting authorities may specify critical tasks which shall be executed by the principal tenderer only and may not be subcontracted.

12. What do the governance measures proposed by the Commission consist of?

To ensure better monitoring of the implementation and functioning of the public procurement rules, Member States will designate a national independent oversight body in charge of monitoring, implementation and control of public procurement. They will provide support to public authorities and businesses through structures or mechanisms offering legal and economic advice, guidance, training and assistance. Finally, national oversight bodies shall cooperate and share information and best practices through the Internal Market Information system ([IMI](#)).

13. What are the main specific changes brought to the regime applicable to the "utilities" sectors (water, energy, transport and postal services)?

In particular, the Commission suggests improvements to the mechanism for exemption from the procurement rules provided for in Article 30 of [Directive 2004/17/EC](#). The proposal clarifies the notion of special and exclusive rights. Finally, it excludes from the Directive's scope the exploration for oil and gas, because this sector has consistently been found to be exposed to competition.

14. What are the costs and benefits of the proposed Directives?

The current total cost to companies and authorities of procuring the goods and services covered by the Directives is estimated at around €5.26 billion per year (2009 data). This is less than 1.3% of the value of invitations to tender published in the same period. This cost relates to the whole procurement process and not just actions driven by the EU rules. Companies and authorities would still bear part of these costs even without the EU Directives.

The benefits resulting from the application of the public procurement Directives are about four times greater than these costs. Savings due to the increased transparency and competition resulting from these rules are estimated to be around 4-5% per annum. In 2009, this amounts to around €16.8 – €21 billion, without any allowance for improvements in quality or environmental and social benefits.

The measures presented today are designed to simplify the existing process further and should therefore lower the cost of procuring in general. For example, by requiring only the winning bidder to provide certain documents, the administrative burden on companies should reduce by over 80% (reducing the initial figure by around €169 million). In addition, the requirements to generalise the use of e-procurement should generate significant savings (estimated at between €50 and €70 billion per year for the total procurement spend).

15. When will the new rules come into force?

The Commission's proposals now pass to the Council (Member States) and the European Parliament for negotiation and adoption. If they are adopted by the end of 2012 as provided for in the Single Market Act, the Directives will have to be implemented by Member States at the latest by 30 June 2014.