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WORKING DOCUMENT

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

Committee on the Internal Market and Consumer Protection

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Introduction

In the view of the Rapporteur, the modernisation of the public procurement directives should strike a balance between simplification of the rules on the one hand, and sound, effective procedures linked to innovative, sustainable award criteria on the other hand, while also ensuring a higher participation of SMEs, and generalising e-procurement.

The aim should be to fully exploit the potential of public procurement within the Single Market in order to foster sustainable growth, employment and social inclusion. In the light of the fact that public procurement markets constitute a relevant part of the economy (an estimated share of 19% of EU GDP), the successful revision and enforcement of public procurement rules would considerably help re-launching investments in the real economy and overcoming the crisis of the European economy.

The Rapporteur welcomes the Commission proposals and considers that they lay down some interesting new principles and ideas. They need however to be improved to achieve the best result possible.

In this document the Rapporteur would like to share his initial reactions to the proposals, with a view to launching the debate with the members. To this end, the Rapporteur intends to organise his work thematically on the basis of the ten clusters presented below, the key priority being clusters 1, 2, 5 and 4 (see also list of clusters in annex).

Items for discussion

The following sections present for each cluster the main items for discussion or "problématiques", which the Rapporteur would like to propose and / or examine more closely.

Cluster 1: Wider choice of procedures

The proposals seek to make procurement processes more flexible by widening contracting authorities' choice of procedures. In particular, they facilitate recourse to the "*competitive procedure with negotiation*" (formerly "*negotiated procedure with publication of a prior notice*"). The grounds for application are extended and put on a par with the competitive dialogue. However, the "*competitive procedure with negotiation*" is not made a standard procedure. In addition, a new procedure "innovation partnership" is created, that is a staged competition for the drafting of technical specifications and subsequent procurement of innovative goods or services. Other procurement tools are strengthened, making use of electronic means of communication and techniques for aggregate buying (see clusters 4 and 6).

- **Develop safeguards to accompany the extension of the competitive procedure with negotiation** so as to protect transparency, ensure effectiveness and create a level playing field for all economic operators.
- **Eliminate the criterion of the lowest price only / prescribe MEAT award criteria for all procedures:** extend the most economically advantageous tender (MEAT)

approach to all procedures (not only innovation partnership and competitive dialogue as currently proposed). Considering that price is also taken into account in the MEAT, this would allow contracting authorities to make the most adequate choices in relation to their specific needs, including the consideration of strategic societal aspects (see cluster 2).

Cluster 2: Strategic use of public procurement

The proposal clarifies and extends the use of award criteria related to sustainability and societal considerations, provided the link to the subject matter of the contract is preserved. More specifically, it introduces the concepts of life-cycle costing and externalities of the production process. Criteria related to the production process can thus now be accepted as part of the award and be weighed against other factors. Furthermore, externalities in the field of transport (e.g., carbon footprint) might be considered, provided certain conditions to assess them are met (notably, a recognised methodology allowing for an objective, verifiable and monetarised comparison).

- **Develop a more comprehensive concept of life-cycle for the definition of the MEAT, including both environmental and social sustainability criteria.** Life cycle costs should be assessed in terms of sustainability in relation to both, environment and climate change objectives, and social objectives. Such social objectives should consist of the respect and enhancement of social rights and working conditions, health and security at work, compliance with social security protection as defined by European and national legislations as well as by collective agreements. A new definition should be created within the life cycle cost concept put forward by the Commission.
- **Exclusion grounds** related to non-compliance with social, labour or environmental law should become mandatory. Annex XI should be completed, namely by adding a specific reference to the ILO Convention n. 94. These elements will be considered an important part of the evaluation process.
- Develop the above concepts in relation to the **conditions for performance of contracts**. Going beyond the case of abnormally low offers, performance conditions should be linked to the assessment of an abnormally extended subcontracting chain. "Cascade subcontracting" should be prevented, which can be damageable for social and environmental objectives as well as for the quality and effectiveness of the awarded goods, services or works.
- **Extend environmental and social sustainability conditions to sub-contractors:** In order to guarantee compliance with rules within the subcontracting chain, in cases of breaches or violations by subcontractors, the main contractor should be held responsible according to the principle of joint and several liability.
- **Further develop labels and certification for social concepts with a view to integrate them into technical specifications**, similarly to what exists with regards to environmental criteria and labels, so as to allow performance assessment. The definition and certification of labels could be developed in close cooperation between the Commission and Members States' competent national authorities. .

- **Special regime for social services:** Building on the proposed special regime for social services, the principles for awarding such contracts should be further strengthened and extended, by adding a reference to affordability and vulnerable users. The list of categories included in this special regime should be carefully assessed.

Cluster 3: Reducing document requirements

The proposal seeks to reduce requirements that contracting authorities impose on economic operators to prove their eligibility to participate in a given procurement procedure. This is achieved namely by clarifying and encouraging the use of self-declarations and electronic attestations. In addition, the concept of a European procurement passport is being introduced.

- The Rapporteur welcomes the proposal which will significantly simplify access to public procurement markets for all economic operators and SMEs in particular.
- **Further define a European procurement passport.** The criteria of Annex XVIII should be further developed and integrated to include the respect of social, environmental and legal criteria as developed in the exclusion and award section. There should be a clear obligation to comply with relevant European and national laws, as well as collective agreements, in order to obtain and maintain such European passport. The passport system should be conceived in a way to incentivise compliant economic operators and avoid distortion of competition in public procurement markets.

Cluster 4: e-procurement

The proposals consolidate and extend the existing e-procurement provisions. In particular, they prescribe that all procurement transactions be carried out electronically two years from the entry into force of the new directive. Tools making use of electronic means of communication are strengthened and improved (e.g., electronic reverse auctions; Dynamic Purchasing Systems (DPS) and electronic catalogues). Rules for the use of e-signatures are also clarified.

- Clarify data protection aspects.
- Review the investment / adjustment costs imposed on enterprises, in particular SMEs, to adapt to the new e-procedures
- Review the shortened time limit for the electronic submission of tenders, and its impact on the participation of SMEs.

Cluster 5: SME access

The directive seeks to foster the participation of SMEs by requiring the division into lots on the basis of an “apply or explain” obligation, as well as by defining obligations on a turn-over cap and allowing direct payments to sub-contractors.

- Define more precisely the proposed practice for division into lots, to avoid administrative burden for contracting authorities.
- Define concepts with regards to other ways of guaranteeing an effective participation of SMEs, such as SME groupings participating as a single economic operator or the creation of consortiums.
- Review provisions related to e-procurement and the European procurement passport in the light of the specificities of SMEs.
- The Rapporteur supports direct payments of subcontractors to increase transparency and prevent mismanagement through the subcontracting chain.
- Further review the financial and economic capacity asked of SMEs by contracting authorities and the creation of a turnover cap.

Cluster 6: Aggregation of demand

The proposal formalises several instruments available for aggregating procurement requirements, thus reflecting an increasing trend in public procurement practice. In addition to clarifying the use of Framework Agreements and Dynamic Purchasing Systems (see cluster 4), the status of Central Purchasing Bodies is enhanced and joint cross-border procurements are explicitly allowed. All instruments are voluntary; their use may be further regulated by the national legislator.

- The Rapporteur welcomes the introduction of provisions on joint procurement, and pleads in general for developing methods allowing sound aggregation of demand.

Cluster 7: Other procedural requirements (publications, variants, design contests)

The proposal foresees the mandatory online publication of procurement notices and tender documents. This implies that some procedural deadlines (e.g. for the publication of procurement notices by the OJEU and the submission of tenders or requests to participate) will be shortened, in line with the requirements applicable today if the online approach is chosen.

- Examine the time-limits for the submission of tenders to avoid barriers to the participation of SMEs.

Cluster 8: Sound procedures

The proposal sets out to improve procedural management by enhancing the existing safeguards against unsound business practices. In particular, it provides an EU definition and rules for dealing with conflicts of interest, illicit conduct and preliminary market consultation. Overall the proposal seeks to follow a proportionate approach (e.g. no immediate exclusion).

Member States may go further at national level. In addition, rules for contract execution (modification of contracts during their term, termination of contract), are clarified.

- The Rapporteur pays particular attention to sound procedures because simplification and flexibility of public procurement should go hand in hand with sound management.
- Review further the proposed definition of conflict of interest.
- Establish / clarify the link between illicit conducts, conflicts of interest and grounds for exclusion.

Cluster 9: Governance

With a view to establishing a more systematic control of contracting authorities' compliance with the EU rules, the proposal foresees an obligation for Member States to set up / designate a national oversight body with certain minimum rights and tasks. Modelled on national competition bodies, this should result in a network of oversight bodies, which would also act as contact points for the national monitoring and reporting on application of procurement rules.

- The Rapporteur considers that the issues of enforcement and oversight are key factors for a proper implementation of the revised directives.
- Further develop and define the concept of public oversight, the definition of the competent authority to be designated or created and the tasks to be assigned to these authorities. The leading oversight principle should be the careful implementation of and compliance with EU and national procedures, and in particular the (new) strategic criteria.

Cluster 10: Definitions and scope

The proposal aims to clarify the main definitions and scope of the directive in the light of recent ECJ case law. In particular this includes defining situations of cooperation between public authorities ("public-public cooperation") and the conditions under which they may be excluded from the scope of the EU procurement rules. The current distinction between so-called "A" and "B" services is abandoned. Only social services will in the future benefit from a special regime (higher thresholds as well as a de minimis threshold below which a lack of cross-border interest is presumed, i.e. the Treaty principles do not apply). In the light of applicable international obligations under the GPA, the Commission proposes to maintain and extend to all services the thresholds for current "A" services. A sunset clause is proposed to verify the appropriateness of these threshold levels by mid-2017.

- **Review the definition of public-public cooperation** with a careful assessment of a limited private participation.

- Private participation relating to non-profit entities pursuing clear objectives of public interest should be taken into consideration in order to ensure that current successful practices of public-public cooperation continue to be feasible.
- The provisions relating to public-public cooperation should seek to achieve comprehensive legal certainty to avoid excessive resort to the European Court of Justice.
- **Further clarify certain concepts and definitions**, notably on life cycle costing.
- The Rapporteur supports the existing thresholds.
- Give due consideration to the Government Procurement Agreement (GPA): The issue of reciprocity between the EU and 3rd countries should be recalled in the public procurement directives in order to guarantee fair treatment and respect of European standards and criteria.

List of thematic clusters - Public procurement -

(Priority clusters of the Rapporteur are indicated in bold to facilitate discussions)

Cluster 1 « Choice of procedures »

Cluster 2 « Strategic use »

Cluster 3 « Reducing documentation requirements »

Cluster 4 « E-procurement »

Cluster 5 « SME access »

Cluster 6 « Aggregation of demand »

Cluster 7 « Other procedural requirements (publications, variants, design contests) »

Cluster 8 « Sound procedures »

Cluster 9 « Governance »

Cluster 10 « Scope/Basic provisions »

N.b. The clusters are modelled on those used in the Council Working Party

DIRECTIVE ON PUBLIC PROCUREMENT - LIST OF SUBJECT CLUSTERS (STATE: 22.2.2012)

Item	COM proposal - 2011(896) - Classic
Cluster 1: Greater choice of procedures	•
Wider Choice of procedures	Art. 24-26, 30
Competitive procedure with negotiation	Art. 24 and 27
New version of competitive dialogue	Art. 28
Innovation partnership	Art. 29
Possibility for sub-central authorities to call for competition by PIN notice only	Art. 24(4), 46
Cluster 2: Strategic use of public procurement	
Green public procurement	
Exclusion and selection criteria	Art. 54, 55 (except Art. 54.2; 55.3.a - see Cluster 2 Strategic use) Art. 56 (except Art. 56.3 2nd sub-para - see cluster 5 SMEs) [NOT CWP LIST]
Award criteria, notably production process and life-cycle costing	Art. 66, 67 + Annex XV
Contract performance clauses	Art. 70
Technical specifications	Art. 40, Annex VIII
Labels and certification	Art. 41, 42
Exclusions for violation of social and environmental obligations	Art. 54.2; 55.3; 69.4; Annex XI
Social criteria in public procurement	
Allow social criteria related to production process	Rec 41, Art. 66
Reserved contracts (sheltered workshops)	Art. 17
Social services:	Rec 11; Art. 4(d), Art. 74-76, Annex XVI Art. 74-76
Exclusions for violation of obligations relating to taxes, environmental protection, employment protection provisions and working conditions (see above "Green PP")	Art. 54.2; 55.3; 69.4; Annex XI [NOT CWP LIST]
Sub-contracting (SEE ALSO cluster 5 SME access)	Art. 71 [NOT CWP LIST]

Cluster 3: Reducing documentation requirements	COM proposal - 2011(896) - Classic
Exclusion and selection criteria	Art. 54, 55 (except for Art. 54.2; 55.3.a - see Cluster 2 Strategic use) Art. 56 (except for Art. 56.3 2nd sub-para - see cluster 5 SMEs)
Reliance on capacities of others	Art. 62
Means of proof, notably self-declarations and procurement passport	Art. 57
eCERTIS online repository of certificates	Art. 58
European Procurement Passport	Art. 59, Annex XIII
Certificates	Art. 60
Quality assurance and environmental standards	Art. 61, Annexes XII-XIV
Lists of approved economic operators	Art. 63
Reduction of the number of candidates, tenders and solutions	Art. 64-65
Cluster 4: e-procurement	
Electronic communication	Art. 19, Annex IV
Electronic availability of procurement documents - enhanced use of e-Certis (see cluster 3) - European Procurement Passport	Art. 51, 58-59
Dynamic Purchasing System (DPS)	Art. 32
Electronic catalogues	Art. 34
Electronic auctions	Art. 33, Annex VII
Electronic signatures	Art. 19(5)(d), Annex X
Empowerment for COM to adopt interoperability standards	Art. 19.3

Cluster 5: SME access	COM proposal - 2011(896) - Classic
Sub-division into lots	Art. 44
Direct payment for sub-contractors (sub-contracting)	Art. 71
Control of sub-contracting	
Turnover cap	Art. 56.3 2nd sub-para
Cluster 6: Aggregation of demand	
Framework Agreements	Art. 31
Dynamic Purchasing System (DPS) (SEE ABOVE Cluster 6)	Art. 32
Central and ancillary purchasing systems (CPBs)	Art. 35, 36, 37
Joint procurement	Art. 37, 38
Cluster 7: Other procedural requirements	
Publication/transparency and time-limits	Art. 45-50, 52, 53; Annexes VI, IX and X
Variants	Art. 43
Design contests	Art. 77-82
Cluster 8: Sound procedures	
General rules	Art. 15, 16, 18
Conflicts of interest (Safeguards against undue influence or advantages)	Art. 21
Illicit conduct	Art. 22
Preliminary market consultation/ prior involvement of candidates and tenderers	Art. 39
Impediments to award	Art. 68
Abnormally low tenders	Art. 69 (except 69.4 2nd sub-para - see Strategic use)
Modification during contract execution	Art. 72
Termination of contracts	Art. 73

Cluster 9: Governance	COM proposal - 2011(896) - Classic
Enforcement and oversight	Art. 83, 84
Individual reports	Art. 85
National reporting	Art. 86
Assistance to contracting authorities and businesses	Art. 87
Administrative cooperation	Art. 88
Cluster 10: Definitions and scope	
Concept of procurement	Art. 1
Definitions	Art. 2, Annexes I, II
Mixed procurement	Art. 3
Thresholds	Art. 4-6 (except for Art. 4.d - see strategic use)
Exclusions and specific situations, including public-public	Art. 7-14
Nomenclatures	Art. 20
International compliance	Art. 23, Annex V
Delegated powers, implementing powers and final provisions	Art. 89-93, 95, 96; Annex XVII