



EUROPEAN COMMISSION
Directorate General Internal Market and Services

Green Paper on the modernisation of EU public procurement policy

Towards a more efficient European Procurement Market

Synthesis of replies

This document is a working document of the Internal Market and Services Directorate General of the European Commission for discussion. It does not purport to represent or pre-judge the formal proposal of the Commission.

BACKGROUND

Public procurement plays an important role in the overall economic performance of the European Union. In the light of the economic crisis, it is more important than ever that taxpayer's money is spent in the most effective way bringing the best benefit to the community.

European public procurement rules bear an important responsibility in creating a legal environment guaranteeing at the same time access for all European undertakings to public contracts and efficient public spending. There is also increasing pressure to use public procurement as a policy instrument to foster the goals of the Europe 2020 strategy, by inciting public purchasers to acquire supplies and services with a higher societal value.

The Commission announced in the Single Market Act¹ that it will, on the basis of wide consultations, make legislative proposals by end 2011, for a revised and modernised public procurement legislative framework 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 consultation was opened by the publication of the Green Paper on 27 January 2011. The reply period ended on 18 April 2011, but a number of contributions were received after the deadline.

In total, 623 responses were received. The replies came from a wide variety of stakeholder groups including central Member State authorities, local and regional public purchasers and their associations, undertakings, industry associations, academics, civil society organisations (including trade unions) and individual citizens.

Stakeholders have strongly diverging views on the priority that should be given to each of the different objectives of the reform, depending on the interests they defend and sometimes their geographical origin. The present summary provides a brief overview of the main tendencies in the replies of the different stakeholder groups. For details, the reader is invited to refer to the individual replies published on the website of Directorate General Internal Market and Services².

Stakeholders

Nearly all of the 623 replies originate from organisations or authorities established within the European Union. A small number of replies were submitted by international organisations and transnational undertakings.

22 replies were submitted by the central government authorities representing the official replies of the respective Member State. The public sector in general is also strongly represented through replies sent by various local, regional and central public authorities and their associations (29% of all replies). Economic operators very actively participated in the consultation contributing individually and through

¹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Single Market Act – Twelve levers to boost growth and strengthen confidence – COM(2011) 206/4.

² http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm.

their industry associations (approximately 40% of all replies). 17% of the replies were submitted by civil society organisations, 3% by individual citizens and 7% by legal experts.

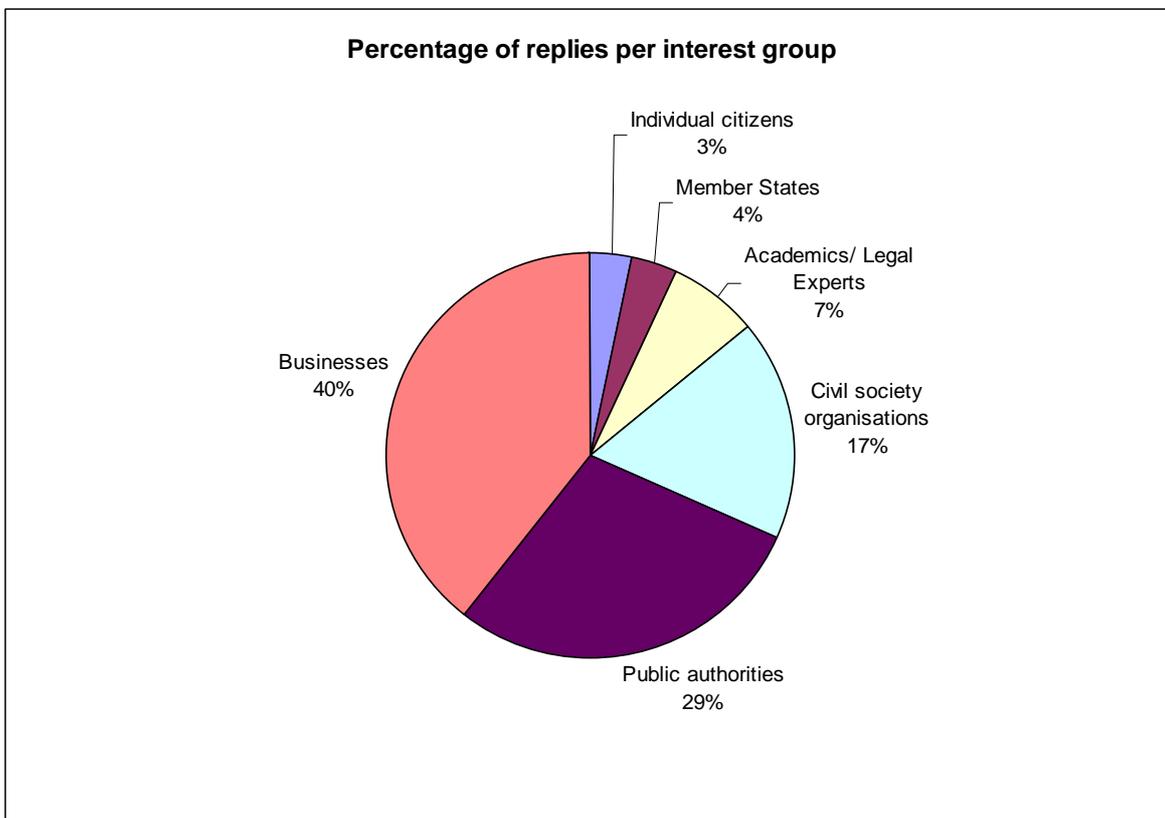


Figure 1: Stakeholders' distribution of the replies to the Green Paper³

³ The stakeholder groupings used throughout the summary emanate from the procedures used to process the replies; they are not intended to classify any particular respondent in a fixed category as there may well be instances where the respondent could have been included in another category.

There were 508 replies originating from individual Member States. 92 replies were submitted by multi-country associations and interest groups.

Some Member States seem to be particularly well represented. Most replies originate from the United Kingdom, Germany, France and, to a lesser degree, Belgium, Italy, the Netherlands, Austria, Sweden, Spain and Denmark.

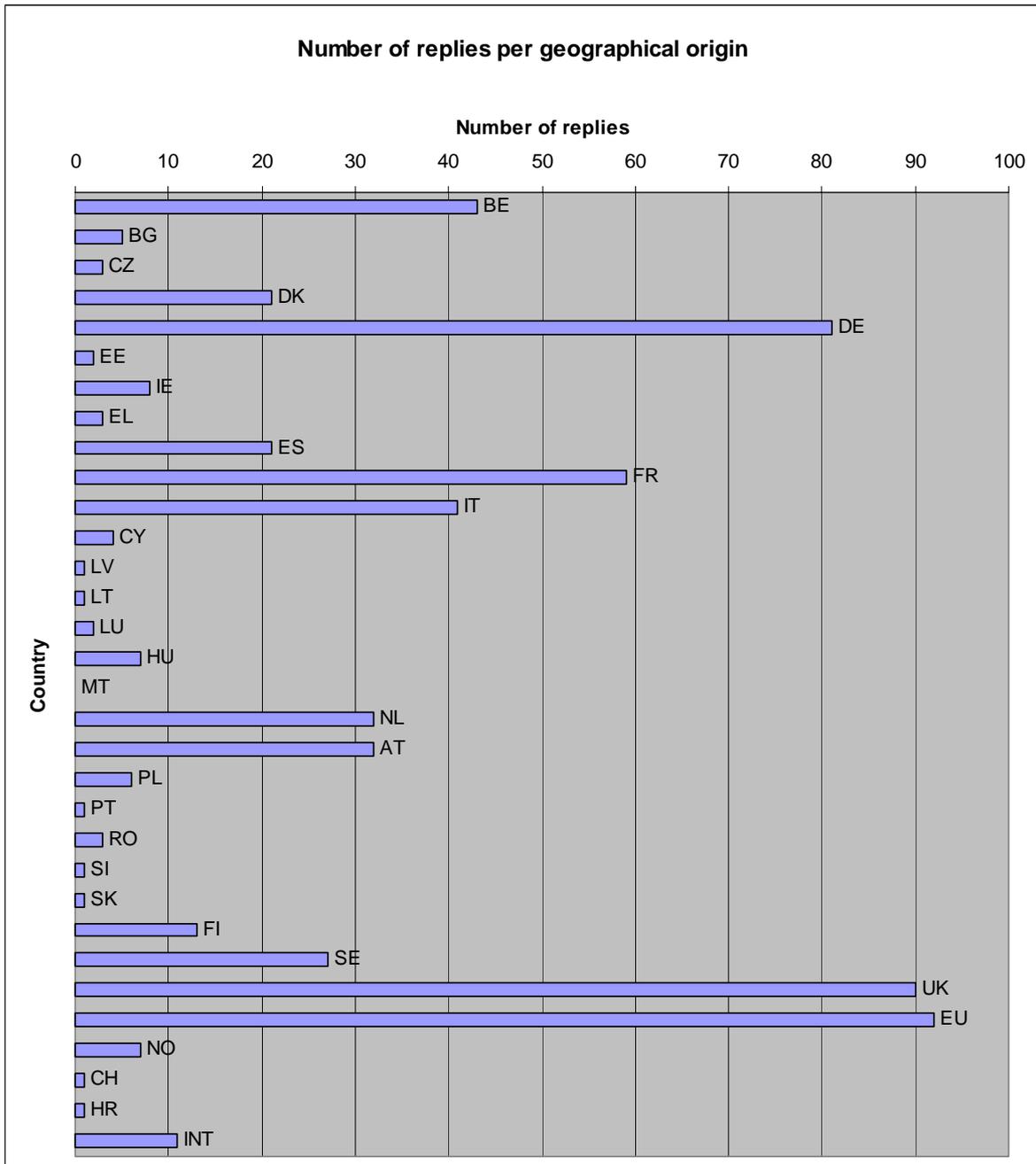


Figure 2: Distribution of replies by geographical origin

GENERAL VIEWS

Respondents generally welcomed the Green Paper. A very large majority of stakeholders appreciated the initiative of the Commission to review the current public procurement procedures in order to identify issues that should be updated and adapted to better meet the new challenges that public procurers and economic operators are facing today.

Amongst the different subjects discussed in the Green Paper, the following subjects were of most interest to the stakeholders.

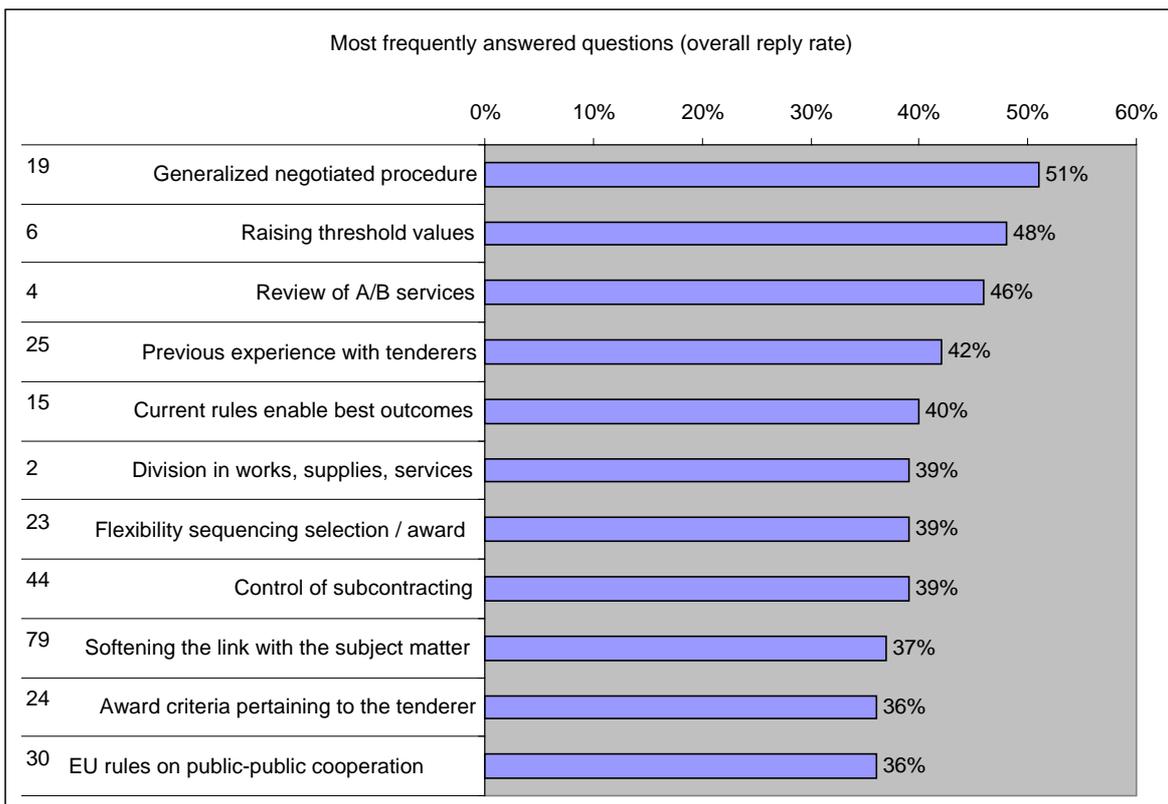


Figure 3: Most frequently answered questions

Simplification

Stakeholders put a particularly strong emphasis on the need to simplify procedures and make them more flexible. For instance, a very strong majority of all stakeholder groups supports the idea of allowing a greater use of the negotiated procedure. There is also strong support among all stakeholder groups for measures to alleviate administrative burdens related to the choice of the bidder, such as requiring supporting documents for the fulfilment of selection criteria only from the winning bidder. This is also seen as an effective way to improve access for SMEs and bidders from other Member States.

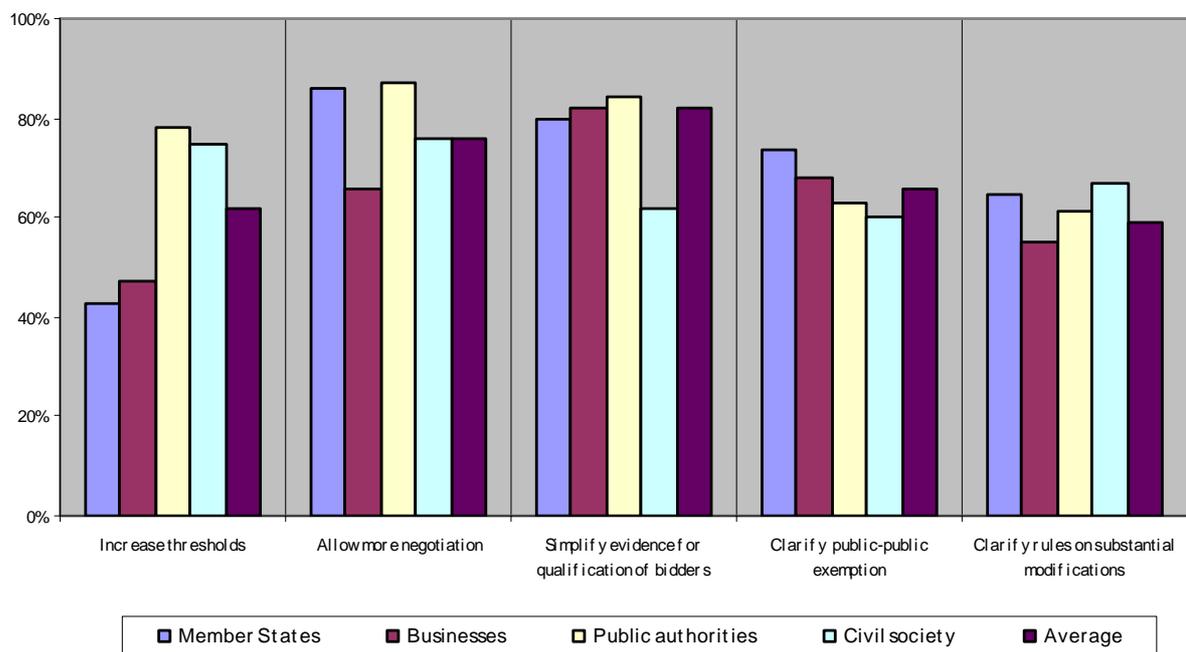


Figure 4: Simplification measures

Strategic use of public procurement

On the questions relating to strategic use of public procurement to achieve the overall societal goals of the Europe 2020 strategy, stakeholders' opinions are mixed. Many stakeholders, especially businesses, show in general reluctance to the idea of using public procurement in support of other policy objectives, and oppose most of the ideas to foster for instance green or social procurement. Other stakeholders, notably civil society organisations are strongly in favour of such strategic use and advocate radical changes to the very principles of EU public procurement policy.

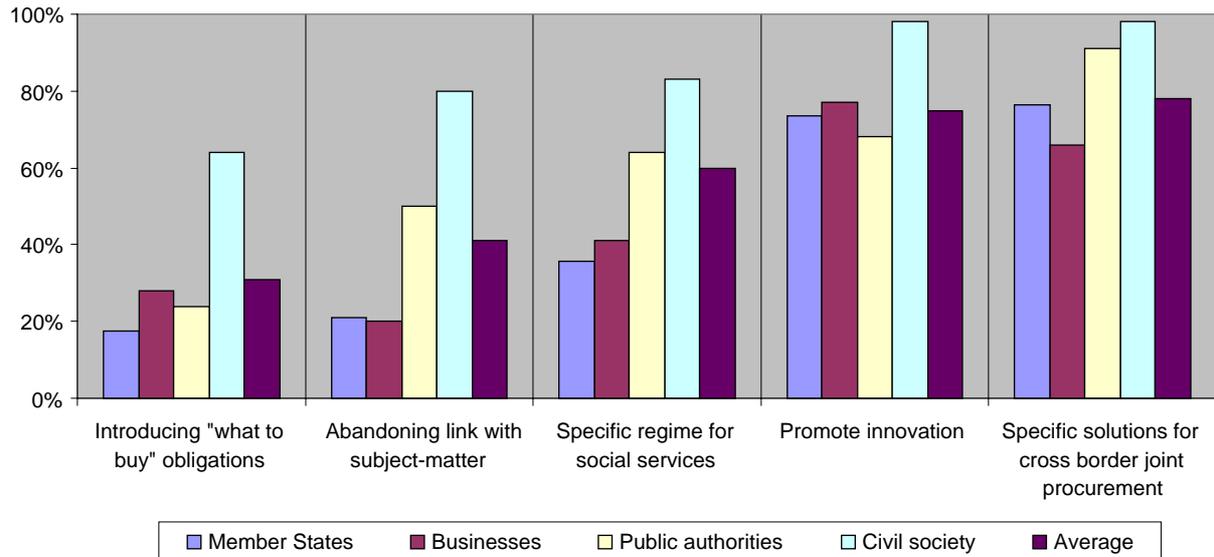


Figure 5: Measures to foster strategic use of public procurement

SUMMARY OF RESPONSES

This summary will give a brief overview of the responses for each section of the Green Paper (except for the questions relating to third country supplier access to the EU market, which are currently subject of a separate, more detailed public consultation⁴), highlighting where appropriate the differences in opinion between the various stakeholder groups⁵.

1. What are public procurement rules about?

The questions on the purpose and scope of the public procurement rules provoked mixed reactions from stakeholders. Respondents generally find that the existing concepts and structures have proven themselves and should not be substantially modified without a compelling reason as this would create legal uncertainty and run counter the objective of simplification.

Purchasing activities

The Green Paper pointed to the fact that the current Public Procurement Directives do not explicitly limit their scope to purchases covering the specific needs of the contracting authorities. This has caused a debate about the scope of the Directives in cases where public authorities conclude agreements providing legally binding obligations for purposes not connected with their own purchasing needs, such as, for example, grant agreements for the provision of an aid containing a legally binding obligation for the beneficiary to provide specific services.

The majority of respondents consider that the scope of the Public Procurement Directives should be limited to actual purchases by the contracting authorities. There is some support for the codification of the criterion of the immediate economic benefit to the contracting authority developed by the Court⁶. However, several respondents cautioned against the difficulties of defining and applying this concept.

Public contracts and public purchasers

The suggestion of replacing the present classification of public contracts – in works contracts, supply contracts and service contracts – by a distinction between only two types of contracts or even by a unified concept is clearly not supported. A large majority of respondents consider the current structure as appropriate. However, some respondents support smaller changes and adaptations, such as reviewing and simplifying the definition of “works contracts”.

A majority of respondents agree that the current approach in defining public procurers is appropriate. In this respect, appetite for change was greatest among legal experts, civil society organisations and public authorities while businesses, Member States and citizens opted clearly for maintaining the status quo. There is nevertheless support for a clarification and updating of the concept of “body governed by public law” in the light of ECJ case-law.

⁴ http://ec.europa.eu/internal_market/consultations/2011/access_EU_public_procurement_en.htm.

⁵ The indication "a majority of stakeholders" should be understood as referring to the relative majority of those stakeholders that have replied to the specific question(s); reply rates to the different questions were obviously varied.

⁶ See judgments of 25.3.2010 in Case C-451/08 Helmut Müller GmbH, paragraphs 47 to 54, and of 15.7.2010 in Case C-271/08 Commission v Germany, paragraph 75.

Likewise, a clear majority of respondents regard the current provisions on excluded contracts as appropriate. However, some respondents argue that certain exclusions, such as the provisions on national security matters, could be clarified in the light of ECJ case-law or recent developments.

There is no consensus among respondents about the handling of A/B services. Overall, a slight majority of respondents think that the distinction between A and B services should be reviewed, with the strongest support coming from business representatives and citizens. A slight majority of Member States and a large majority of civil society representatives are against such a review. The suggestion of applying the Public Procurement Directives to all services, possibly on the basis of a more flexible standard regime, was rejected by a clear majority of Member States, public authorities and civil society representatives, while it was supported by an equally clear majority of business representatives, citizens and legal experts. Many respondents suggest that the most appropriate solution might be to eliminate category 27 "other services", making full application of the Directives to services the rule while reserving the limited B regime to an exhaustive list of services.

Thresholds

The Green Paper explained that the thresholds for application of the Directives are the subject of international commitments taken by the EU in bilateral agreements and the multilateral WTO agreement on Government Procurement (GPA) and that 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. A majority of the contracting authorities, however, supports an increase of the thresholds, whereas a slight majority of Member States is against. Moreover, business and citizens representatives reject an increase whereas civil society organisations are in favour.

Many contracting authorities argue that contract awards with a value just around the thresholds do generally speaking attract little interest from economic operators from other Member States but are nevertheless imposing important administrative burdens. Business representatives, for their part, point out that higher thresholds would result in less transparency and less cross-border business opportunities.

Public utilities

There is consensus among all stakeholder groups that the EU rules on procurement by public utilities are still relevant. Many respondents point out that the reason for the introduction of these rules remains unchanged as long as there are network businesses enjoying special and exclusive rights. In the same vein, a clear majority of respondents agree that the criteria used for defining the entities subject to the utilities rules (activities carried out by the entities concerned, their legal statute and, where they are private, the existence of special or exclusive rights) are still appropriate and should be maintained. Most respondents are also in agreement that the profit-seeking or commercial ethos of private companies cannot be regarded as sufficient to guarantee objective and fair procurement, if these companies are operating on the basis of special or exclusive rights.

A clear majority of respondents agree also that there is a need for specific rules to be applied to public utilities operators and that the different rules applying to utilities operators adequately recognise the specific character of utilities procurement.

Several respondents propose even to extend the scope of the Utilities Directive to activities currently not covered such as waste-water disposal. Finally, a large majority of respondents from all stakeholder groups regard the possibility of exemption by Commission decision under the current Article 30 of Directive 2004/17/EC as an effective way of adapting the scope of the rules to changing patterns of regulation and competition in the relevant markets. There was nevertheless some criticism, mainly by contracting entities, about the complexity and length of the exemption procedure.

2. Improve the toolbox for contracting authorities

Level of detail of EU public procurement rules

A clear majority of respondents have misgivings about the level of detail of the EU public procurement rules. This is particularly true for public authorities and legal experts, but also for citizens and civil society organisations. Only Member States and business representatives have a more positive opinion. Most respondents see the procurement rules as too detailed. Many stakeholders claim that procedures should give contracting authorities more leeway, in particular by permitting negotiations and providing less strict time limitations.

Likewise, a large majority of respondents consider that the procedures provided under the current Directives do not allow contracting authorities to obtain the best possible procurement outcomes. Many respondents complain about an “excessive level of formalisation” and call for more flexibility in the conduct of the procedure, such as possibilities to contact participants in a flexible manner to clarify open issues or to discuss elements of the offer. The most frequent proposal for improvement is the general acceptance of the negotiated procedure with publication of a contract notice which is seen by many stakeholders as a simplification factor. Other suggestions include a stronger focus on aspects of quality and sustainability as award criteria. A number of respondents propose new types of procedures which, in their view, would increase the cost-effectiveness of public procurement procedures. Some of them recommend, for instance, a generalised use of qualification systems that are currently only provided under the Utilities Directive, and the introduction of specific procedures for innovative procurement, such as forward commitment contracts or long-term partnering with innovative undertakings. Finally, a slight overall majority of respondents are in favour of a generalised use of the accelerated procedure. Not surprisingly, this view is mainly supported by public authorities, while the other groups of stakeholders are mostly against.

More negotiation

There is broad support for the suggestion to allow more negotiation in public procurement procedures and/or generalising the use of the negotiated procedure with prior publication of a contract notice. With the exception of citizens and, to a certain extent, SME representatives, all stakeholder groups favour more negotiation in award procedures for all types of contracts and contracting authorities. However, stakeholders are well aware that an increased use of

negotiated procedures can have negative consequences in terms of transparency, non-discrimination and fair and objective proceedings. A clear majority of respondents share the view that a generalised use of the negotiated procedure might entail risks of abuse and discrimination and that additional safeguards for transparency and non-discrimination would be necessary in order to compensate for the higher level of discretion.

Commercial goods and services

The Green Paper explains that 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”. In accordance with the GPA rules, it would be possible to provide streamlined procedures with shorter time-limits for such purchases. A majority of respondents are in favour of using this possibility. However, some answers caution against the creation of a new concept of “commercial goods and services” that might be difficult to apply and result in additional complexity and legal uncertainty.

Selection and award

Under the current rules, the stages of selection and award are strictly separated: During the selection stage, the contracting authority assesses the capacity and suitability of candidates and tenderers while the award decision must be exclusively based on criteria concerning the products and services offered. The Green Paper raised the appropriateness of allowing a more flexible approach to the organisation of the procedure.

Stakeholders are responding positively to the questioning of the current rigid separation: A strong majority are in favour of a more flexible approach to the organisation and sequence of the examination of the selection and award criteria. The proposal received a high rate of approval from all groups of stakeholders except business representatives. There is also a clear, albeit smaller, majority supporting the possibility to examine the award criteria before the selection criteria.

A distinctive majority of respondents from all stakeholder groups, with the exception of citizens, think 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. Many respondents argue that this could be appropriate in the case of certain service contracts, in particular contracts for consultancy services or social services, where the professional experience and qualification of the service providers are considered to be of paramount importance. Some answers emphasise the importance of appropriate safeguards, in particular full disclosure of the attribution system used, to ensure transparency and non-discrimination.

Taking past performance into account

A broad majority of respondents from all stakeholder groups consider that the Directive should explicitly allow contracting authorities to take into account their previous experience with one or several bidders. Again, respondents are aware of the risks and drawbacks of such a suggestion: some critical answers are cautioning against the danger of favouritism and discrimination while others are proposing safeguards to ensure a fair and objective assessment, such as the

requirement of a measurable and objective performance control system (to avoid subjective blacklisting), judicial protection and possibly a cap for the weighting of the relevant criterion, to keep the market open for newcomers.

Specific instruments for local and regional contracting authorities

The Green Paper analyses the possibility of providing a lighter procedural framework for local and regional authorities allowed under the GPA rules for sub-central authorities. This would allow, for instance, the award of contracts without publishing an individual contract notice provided that the contracting authority has announced its intention and published specific information in a periodic indicative notice or a notice on the existence of a qualification system.

Responses on that suggestion are mixed. A majority of public authorities and civil society organisations support such a regime while all the other groups of stakeholders are against it. Some respondents – mainly public authorities – are questioning the appropriateness of a special treatment for local and regional authorities arguing that it would be preferable to simplify the rules for all contracting authorities instead of creating new classes and distinctions.

More legal certainty for awards below the thresholds of the Directives

There is no clear opinion on the award of contracts below the thresholds for application of the Public Procurement Directives. Respondents are evenly divided about whether the ECJ case-law as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of low-value contracts. There is, however, a majority in support of additional guidance to help contracting authorities in assessing the existence or not of a certain cross-border interest in specific cases.

Public-public cooperation

The Green Paper sets out the ECJ case-law development on the different forms of cooperation between public authorities and asks a number of questions on possible legislative rules covering the scope and conditions of public-public cooperation.

There is a clear majority in all stakeholder groups supporting legislative rules at EU level on the scope and criteria for public-public cooperation. As for the form and content of such rules, a majority favours the development of a single concept with certain common criteria for exempted forms of public-public cooperation, while a minority would prefer setting up specific rules for the different forms of cooperation, codifying the ECJ case-law.

Aggregation of demand / joint procurement

Stakeholders are in general in favour of a stronger and more generalised aggregation of demand. Many respondents consider that there are various obstacles to an effective aggregation of demand and that the current public procurement legal framework does not provide sufficient tools to overcome them. Nearly all stakeholders believe that the aggregation of demand implies a certain amount of risk for competition and may hinder SME access to public contracts. They also agree on the fact that some areas are more convenient for aggregation of demand than others.

A distinctive majority of stakeholders agree that there are specific problems for cross-border joint procurement. In particular, public utilities operators, but also local and regional authorities from border areas are complaining about a lack of rules on the applicable public procurement law for contract award procedures involving contracting authorities/entities from different Member States. Review proceedings are seen as a particular difficulty in cross-border situations. A large majority of respondents from all stakeholder categories confirm that their national law would not allow a contracting authority to be subject to a review procedure in another Member State.

Contract execution

The Green Paper refers to the ECJ case-law on amendments to public contracts during their performance⁷. According to the ECJ, such amendments are considered as a new contract award if they result in substantial changes to the contract. 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.

A majority of respondents from all stakeholder groups support the introduction of provisions defining and clarifying the conditions and legal consequences of a substantial modification of a contract during its execution. As for the consequences, a majority favours the application of a more flexible procedure for the award of the amended contract.

The Green Paper addresses specifically the issue of changes concerning the contractor, such as the substitution of the contractor by another legal entity, but also changes in its status or ownership. Surprisingly, only a minority of stakeholders see an added value in EU rules on changes concerning the chosen contractor during contract execution. Nevertheless, a majority of respondents propose to provide the right for the contracting authority to change the contractor or terminate the contract in certain circumstances, such as major changes relating to the contractor.

Finally, there is clearly no support for EU regulation of contract execution aspects such as execution guarantees, delivery conditions, delays, payment, etc. Many respondents argue that these matters belong to civil and commercial law and should be kept separate from public procurement law.

Regulate subcontracting

A majority of public authorities and civil society organisations are in favour of allowing public procurers to have more influence on subcontracting by the successful tenderer, while the other stakeholder groups reject such a possibility. As concrete instruments, respondents propose, for instance, a right to exclude individual subcontractors or the possibility to limit subcontracting to a certain share of the contract or to require that the contractor executes essential parts of the contract himself. In particular, civil society organisations place great importance on the issue of subcontracting. They insist that contracting authorities must be able to enforce compliance with social requirements and labour laws not only at the level of the main contractor but also against subcontractors.

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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*, paragraph 37.

3. A more accessible European procurement market

Better access for SMEs

Many stakeholders consider that SME access to public contracts should be further improved, also through changes to the EU legislative framework.

Specific obstacles for SME access that are recurrently highlighted are administrative burdens and costs of participation, particularly with regard to documentation for qualification of candidates (evidence for selection criteria). Hence, a vast majority of stakeholders think that business, and in particular SMEs would benefit greatly from alleviation of administrative burden related to the choice of bidders. In particular, stakeholders from all interest groups advocate the use of self-declarations and the introduction of a rule according to which original certificates may only be required from the winning bidder.

As regards the necessity of introducing additional measures more specifically focused on improving SME access, such as mandatory splitting of contracts into lots or turnover caps, stakeholder's opinions are less unanimous. Public authorities are in general quite sceptical about such coercive measures; business' opinions are divided.

Ensuring fair competition

Many respondents acknowledge that public procurement can have an important impact on market structures and that public procurers should, where possible, seek to adjust their procurement strategies to combat anti-competitive market structures. A slight majority of respondents are in favour of specific EU level instruments which would encourage pro-competitive procurement strategies, under the condition that such instruments remain optional and do not entail additional administrative burden.

Some respondents also indicated concrete examples of possible instruments, such as: market analysis for specific sectors, the possibility for contracting authorities to define maximum reserved prices, to cancel the procedure where only one bidder passes the selection stage and to restrict subcontracting if there are indications of anti-competitive behaviour, a professionalisation of contracting authorities and more guidance for intelligent tender design and detection of bid-rigging.

Encouraging cross-border participation

Stakeholders are rather sceptical toward more specific EU level instruments to encourage participation of bidders from other Member States. In particular, the idea of requiring contracting authorities to draw up tenders in a second language and/ or to accept bids in a different language is rejected by a very large majority of all stakeholder groups.

Stakeholders identify, however, a clear need for better recognition of certificates across borders and a better coordination of national systems in this context. Some respondents think that certificates should have a European-wide standardised content; others recommend a greater use of electronic databases for facilitating the use of certificates in a cross-border context, such as e-certis. The idea of a European-wide prequalification system finds some support from business but meets opposition from contracting authorities.

Exclusive rights

A majority of stakeholders, notably a strong majority of businesses, share the view that the attribution of exclusive rights can jeopardize fair competition in procurement markets. Views are, however, mixed as regards possible solutions to this problem.

The idea put forward in the Green Paper (to allow the award of contracts without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right has itself been awarded in a competitive procedure) receives strong support from business, academics and most Member States; public authorities' replies are mixed.

4. Strategic use of public procurement in response to new challenges

When it comes to the strategic use of public procurement in support of other policies, the replies to the consultation show a clear dividing line between business and contracting authorities on the one hand, civil society on the other.

For instance, a majority of business and contracting authorities believe that the current rules on technical specifications make sufficient allowance for the introduction of considerations related to societal policy objectives, whereas a very clear majority of civil society organisations consider them to be insufficient.

EU obligations to buy high societal value products and services

Most stakeholder groups are against introducing obligations on "what to buy" in EU public procurement rules. There is opposition from businesses, public authorities and Member States; the only stakeholder group supporting this idea to a certain extent are civil society organisations.

Most frequently raised arguments against such obligations are the fear of too much interference from the EU in the decisions of public purchasers, increased complexity of the legal framework, the risk of affecting contracting authorities' ability to adapt their purchasing decisions to their specific needs, risks of price increases and of disproportionate administrative costs for public purchasers and businesses, particularly SMEs.

A majority of contracting authorities, civil society organisations and Member States, however, do believe that the possibility of including environmental or social criteria in the award phase should be better spelt out in the Directives. There is also a certain degree of support, for instance from businesses (public authorities having mixed opinions), for concrete measures such as making mandatory the consideration of life-cycle costs under certain conditions. A number of replies indicated that contracting authorities use this criterion already successfully today. Many respondents, however, caution that such measures presuppose the establishment of clear criteria to ensure correct assessment of the life-cycle cost.

Abandoning the link with the subject-matter of the contract

In recent years, contracting authorities and civil society organisations increasingly expressed the wish that public procurers could choose bidders not only on the basis of the characteristics of the product or service bought, but should also be able to take into account other factors, such as corporate social responsibility policies of the bidding firms or other social involvement.

Such criteria are currently not allowed, as one of the leading principles of the current rules is that suppliers must compete on the quality of the purchase and not on factors which are not related to the subject-matter of the contract. Thus, the Green Paper consulted the public on the question whether this principle of "subject-matter-link" should be abandoned or softened in the future legislation.

The reactions from stakeholders were quite varied, with an overall majority of replies in favour of maintaining the link with the subject matter.

Nearly all business, the majority of academics and legal experts and Member States were strongly opposed to abandoning this principle which they consider crucial to ensure fair competition and best value for money. They fear that eliminating this condition would lead to award decisions which would not be transparent, increase administrative burden and procurement costs for contracting authorities and undertakings, resulting in higher prices for public purchases.

A large majority of civil society organisations advocate a more flexible approach to the requirement of the link with the subject matter. They highlight that this would give public authorities an efficient instrument to steer the behaviour of industries and greatly improve the use of public procurement to achieve overall societal goals.

Certain Member States, albeit against abandoning the link, think, however, that the notion of what is linked to the subject matter should be interpreted in a more supple way. This concerns in particular requirements that may not be related to the product itself, but to the production process.

Contracting authorities' opinions on this question are divergent, without a clear tendency in either direction.

It is also noteworthy that a large majority of respondents from all stakeholder groups except for civil society organisations fear that abandoning the link with the subject matter might create serious problems for SMEs, which may not be able to meet the various societal requirements of different contracting authorities.

Innovation

Stakeholders clearly advocate further promoting and stimulating innovation through public procurement. They recommend for instance a greater use of procedures particularly suited for innovative procurement such as competitive dialogue, design contest and in particular the negotiated procedure, as well as a wider allowance of variants and performance requirements in technical specifications. Another idea brought up by some stakeholders is that contracting authorities should be given the possibility (framed in the procurement rules) to react to unsolicited proposals.

A majority of business and public authorities – but not Member States - think that additional measures are needed to strengthen the innovation capacity of SMEs, recommending for instance financial support schemes and compensation of bidding costs.

Pre-commercial procurement is considered as a well-suited instrument for promoting innovation by a large majority of civil society organisations and Member States and by a slight majority of contracting authorities and businesses.

All stakeholder groups see a clear need for further benchmarking and sharing of best practices across Member States in this area.

Social services

Replies to the questions on social services again show disparity between the different stakeholder groups.

Civil society organisations and a slight majority of contracting authorities call for a special procurement regime to better take into account the specificities of social services. Many of them consider that the procurement of these services should be less regulated at EU level.

Businesses are rather not in favour of a special regime for social services, and clearly opposed to further reducing the density of EU regulation for the procurement of these services, as is the clear majority of Member States.

Many civil society organisations and providers of social services are also in favour of prohibiting or limiting the use of the lowest price criterion for the procurement of social services. The other stakeholder groups are sceptical about this idea.

5. Ensuring sound procedures

Corruption / conflicts of interest

All stakeholders agree on the fact that procurement markets are exposed to risks of favouritism and corruption. Most stakeholders (except for academia/ legal experts) consider however that European instruments are not needed to offset these risks, but that this issue should rather be addressed through national legislation, for subsidiarity reasons and in order to take account of the very different administrative and business cultures in the Member States.

However, a majority of business, civil society and legal experts see a necessity for a common European definition of "conflicts of interest", and certain minimum safeguards to be enshrined in the EU public procurement rules. Amongst the various possible instruments proposed by stakeholders, one can quote, for instance, the recommendation to foresee mandatory routine checks for potential conflicts of interests in procurement procedures, or additional possibilities for informal complaints to be investigated by a specific independent body (outside formal review proceedings, e.g. anonymous complaints).

Contracting authorities and Member States are mostly against the introduction of European rules on conflicts of interest, as they consider the national rules sufficient.

Exclusion grounds

There is consensus amongst all stakeholder groups that Article 45 of Directive 2004/18/EC is a useful instrument to sanction unsound business behaviours. Nevertheless, certain clarifications are considered useful by many respondents, notably with regard to generic notions such as "professional misconduct", as well as rules on a maximum duration of the debarment. Businesses and Member States also advocate that Article 45 should address the issue of self-cleaning, to create legal certainty and overcome the fragmentation of practices in the EU. Contracting authorities are mostly opposed to the introduction of EU rules on self-cleaning.

Avoiding unfair advantages

The consultation does not show clear tendencies on whether EU rules should explicitly address the issue of advantages of certain tenderers because of their prior association to the tender design. A majority of Member States, academia, legal experts and citizens are in favour, contracting authorities are rather opposed to such rules. Business and civil society have mixed views.

Possible EU rules on advantages of incumbent bidders are clearly opposed by business, contracting authorities, legal experts and civil society; this idea, however, finds support from individual citizens' replies and some Member States.

Several respondents propose, as a possible remedy to unfair advantages, an obligation for the contracting authority to make available certain information to all interested candidates where this is necessary to ensure a fair bidding process.

6. Other issues

Stakeholders suggested a wide variety of other issues that should, in their view, be looked into in the upcoming reform. This includes:

- the need for additional competence building amongst contracting authorities;
- the creation of knowledge centres to advise public procurers, monitor the overall compliance with EU public procurement rules and ensure sound financial management of tender procedures;
- regulation of the pre-procurement phase;
- measures to protect economic operators against an abuse of buyer power;
- measures to help SMEs constitute bidding consortia by creating a site in which they can find consortia partners;
- rules for a better protection of subcontractors vis-à-vis their main contractors;
- specific rules for procurement of ICT (information and communication technology);
- clarification of rules on abnormally low tenders;
- a stronger involvement of workers associations or other stakeholders in procurement procedures.

NEXT STEPS

The Commission will host a conference on 30 June 2011 to allow for an exchange of views between leading policy-makers, procurement practitioners and civil society representatives on priorities for the modernisation of EU procurement policy. The responses to the Green Paper and the results of the evaluation of the Public Procurement Directives will set the scene for these discussions. They will also constitute critical inputs to the preparation of the legislative proposal which will be tabled for adoption by the Commission before the end of 2011.