

# MODERNISING PUBLIC PROCUREMENT

Conference  
Brussels, 30 June 2011

– Summary of the proceedings –

## Opening speech<sup>1</sup>

**Michel Barnier, Commissioner for Internal Market and Services**

**Commissioner Barnier** emphasised the key role of the modernisation of the Public Procurement Directives which is one of the 12 levers to boost growth and strengthen confidence described in the Single Market Act. He insisted on the need for an optimised public procurement policy to achieve a new, more sustainable and inclusive growth. Simpler and more efficient public procurement rules should be seen as a factor of empowerment and not as limitation by public procurers in the European Union.

The Commissioner presented the four main areas of reform:

1. **Simplification:** The evaluation and the public consultation show clearly that simplification and flexibilisation of procedures are necessary. There are a number of relatively simple and generally supported tools such as allowing for more negotiation in procurement procedures, reducing requirements for evidence by accepting self-declarations (“solemn declarations”) and promoting e-procurement. With regard to the thresholds for application of the EU procurement rules, an open debate would be beneficial. In fact, many contracting authorities argue that the current thresholds are too low, causing unnecessary burdensome procedure for low-value contracts. On the other hand, businesses fear that higher thresholds would restrict access to an important part of public contracts. It will be necessary to fully consider the consequences of a modification, including on commitments made by the European Union on an international level.
2. **Facilitating SME access to public contracts:** The Commissioner insisted on the importance of measures to increase the share of contracts won by SMEs. In addition to general simplification which will be of particular for SMEs, one has to consider specific instruments targeted to SMEs, such as an obligation to subdivide contracts into lots, measures in the area of subcontracting and administrative targets.
3. **Promoting green, social and innovation procurement:** Commissioner Barnier pointed out that the strategic use of public procurement could be a major vector for the realisation of the Europe 2020 objectives. He acknowledged that opinions expressed in the consultation were mixed and that many stakeholders had concerns about disproportionate administrative burdens caused by general obligations on what to buy. The Commissioner promised to stick to an ambitious agenda on this point, with the aim of providing credible and realistic instruments to support the EU 2020 strategy. This could include a formal recognition of the life cycle costs approach, a specific procedure for the purchase of innovative procedures and services or specially adapted rules for social services.

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<sup>1</sup> Full text available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/490&format=HTML&aged=0&language=FR&guiLanguage=fr>

4. **Fostering good governance of public procurement at all levels:** The Commissioner advocated professionalisation of public procurement, aggregation of demand and improved support structures for smaller contracting authorities.

#### **Keynote speech<sup>2</sup>**

**Maxime Verhagen, Deputy Prime Minister and Minister of Economic Affairs, Agriculture and Innovation of the Netherlands**

**Minister Verhagen** welcomed the Commission initiative to modernise EU public procurement policy. He highlighted the need for a thorough review of public procurement law, at both European and national level. This should result in simpler, cheaper and smarter procedures that help stimulate growth, innovation and sustainability while increasing opportunities for SMEs.

The main priority should be cutting red tape and reducing administrative burdens for companies. In this respect, requiring a simple self declaration from tenderers instead of the immediate submission of all documents would be an important step forward. Mr Verhagen pointed out that in the Netherlands bidding costs could be reduced by 30 million EUR if a uniform self declaration form would be used for all European tenders. He also advocated raising the thresholds substantially for supplies and services substantially since this would allow for lighter national procedures for the award of smaller contracts, in line with the principle of subsidiarity: European procurement procedures if we must and national tailor-made solutions if we can. Finally, Mr Verhagen proposed to introduce more flexibility, for instance by providing the negotiated procedure with publication of a contract notice as a more standard procedure and allowing prior market consultations as a good practice. He argued that reality cannot always be captured in detailed rules and that it is time to focus less on legal rules and more on practical effectiveness.

#### **Panel I: Simplification of procurement procedures and better access to markets – squaring the circle?**

**Andreas Schwab, MEP**, remarked that everybody is in favour of growth, sustainability and reducing bureaucracy. The point is how to achieve these goals. In his view, the current Directives have proven their worth. There might certainly be some areas of possible simplification, but one should not sacrifice the basic principles of transparency and non-discrimination in order to obtain more simplification. In particular the thresholds have also to be seen in the international context. In general, it would be more urgent to ensure better training of public procurers.

**Henk Kool, Deputy Mayor of the Hague and Rapporteur of the Report on Public Procurement Modernisation in the Committee of Regions (CoR)**, presented the “10 principal recommendations for amendment of the EU Public Procurement Directives” based on the conclusions of the CoR report and published by him in the form of a brochure. He called in particular for simplification, SME-friendly procurement, more flexibility, higher thresholds, the retention of B-services, a clear exception for contracts between public authorities and the taking into account of past performance. As a practical simplification measure he advocated the introduction of a “procurement passport” – a

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<sup>2</sup> Full text available at:

[http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/conference062011/speech-2\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/conference062011/speech-2_en.pdf)

standardised document that provides evidence that a company fulfils a basic set of qualification criteria.

**Kamil Rudolecky, Vice-Chairman of the Czech Republic Office for the Protection of Competition**, agreed on the need for modernisation of public procurement law and argued that Member States have a great deal of responsibility in that respect. He stated that the Czech Republic had simplified its procurement rules last year. However, in his view, modernisation should not be exaggerated and simplification of procedures has to be balanced by appropriate safeguards, in particular with respect to transparency by requirements such as record-keeping and publication.

**Petter Haas Brubakk, Executive Director for Industrial Affairs at the Confederation of Norwegian Enterprises, representative of BusinessEurope**, cautioned against reform excesses. In his view, there is no reason for a major overhaul. Any changes should be made with great caution so as not to jeopardise competition and transparency. Problems with access for SMEs are not due to bad legislation, but to excessive demands from public purchasers.

**Joost Van Iersel, Rapporteur of the European Economic and Social Committee Report on Modernising Public Procurement Policy**, opposed radical reforms. He reminded that the current Directives were the result of four years of difficult negotiations. In his view, difficulties in application are not so much due to the directives themselves which are not extremely complicated but rather to differences in implementation by Member States and national gold-plating. He would nevertheless support some changes such as the possibility of self-certification for bidders and a more general use of the negotiated procedure. Finally, he emphasised the importance of professionalisation of public procurement.

**Janet Meissner Pritchard, Senior Lawyer, Climate and Forests Programme, ClientEarth**, took the view that using procurement strategically is not at odds with simplification. EU citizens are demanding more from the Internal Market, especially in terms of greater sustainability. So, all parties should take on the full agenda and find ways to build on best practices by “leaders”.

Asked specifically about the issue of thresholds for application of the EU Directives, Mr **Brubakk** insisted that thresholds should be kept at the present level. What is really needed would be more efficient implementation of EU rules at national level, not a raise of thresholds.

Mr **Schwab** acknowledged that there are problems with contracts just above the thresholds and that the Internal Market is not working properly. However, in his view, one should tackle these problems instead of simply raising the thresholds. Increased interoperability of e-procurement-systems could reduce contract award costs and make cross-border participation more attractive.

Mr **Kool** argued that higher thresholds would avoid many problems for SMEs. For him, it is a fact, that a lot of contracts have no cross-border interest. Subjecting these contracts to the Directives will only increase formalities for bidders.

**The discussion with the floor** resulted in calls for radical simplification, but also warnings against excessive modernisation. The issues of professionalisation of procurers and more negotiation were brought up again.

Asked for a final statement and a hard proposal, Mr **Brubakk** reiterated that revolutions are costly for business and that much can be done within the existing framework. He proposed to further explore dialogue and negotiation without jeopardising the basic principles of EU public procurement law.

Mr **Van Iersel** agreed that a lot can be done for SMEs within the existing framework. He emphasised also that the Economic and Social Committee supports strongly the EU2020 objectives in its report on the Green Paper. His proposals were to keep it simple, avoid risk-aversion by contracting authorities and enhance professionalism of procurers.

Ms **Meissner Pritchard** considered that there might be scope for change within the current Directives, but the fact remains that there is a great deal of legal uncertainty, particularly with regard to pursuing EU2020 goals. She proposed to modernise the Directives to bring greater legal certainty.

Mr **Rudolecky** pointed out that SMEs have certain options, such as subcontracting or banding together in associations. He cautioned against excessive centralisation of procurement, arguing that aggregation might be appropriate on a regional level. He proposed to generalise the use of declarations on the honour.

Mr **Kool** insisted that more negotiation in contract award procedures would be a major improvement for SMEs. He strongly advocated the creation of a European Procurement Passport which would be a more efficient solution for the documentation problem than the “solemn declaration” proposed by Commissioner Barnier.

Mr **Schwab** recognised that there are needs and possibilities for improvement and that it would be important to get concrete, balanced proposals for amendments of the existing rules. While he is against a wider access to the negotiated procedure, he would propose to make increased use of market consultations before launching procurement procedures. His proposal was to further promote the award criterion of the most economically advantageous tender.

## **Panel II: Strategic use of public procurement in support of other policies**

**Barbara Weiler, MEP**, argued that the support of strategic goals is compatible with simplification and called on the Commission to include strategic political objectives into its proposal. She also stressed that ecological requirements are actually widely used and that SMEs are capable of meeting them. On the other hand, procurement legislation should not be overloaded by social criteria although the respect of collective agreements remains a major concern. She underlined, however, that existing possibilities of the directives to pursue strategic goals are not sufficiently used and called on the Commission to intensify its information and monitoring activities. Some things should be “a little more obligatory” and the concrete extent would have to be subject to the discussions in the legislative process. Finally, she stressed that the decision how far a public authority is ready to bear the cost of additional social or ecological requirements will have to be taken locally and not at EU-level.

**Maris Pukis, Senior Adviser, Latvian Association of Local and Regional Governments,** considered that the public procurement system had failed in the ongoing crisis and had not sufficiently contributed to the fulfilment of the EU2020 objectives. Seen from the angle of the principle of proportionality the system is not in balance and has led to inefficient procedures preventing bargaining and tending to exclude innovative ideas while creating very heavy administrative burdens. The system should therefore be rethought, introducing more honesty into it. He stressed that the EU should establish the goals while the measures would have to be taken locally.

**Catherine Bergeal, Director Legal Affairs, French Ministry of Economics,** saw no choice: Strategic goals have to be pursued and have been pursued for a long time. She underlined that there is no "neutral" public procurement policy and that public purchasers by their simple economic weight exercise important influence on the economy as a whole. In view of the fact that the system has become mature over the last 40 years and that it has been evident for some time that the lowest price is not the best buy it would now be time to move to a real "policy of public procurement". She, however, expressed scepticism as to the possibility to achieve this through legislation; other incentives and motivations are needed for a change of attitude.

**Peter Kurth, Member of the Executive Board, Federation of German Industries,** argued that the existing directives have proved their worth and that there is no need for a substantial reform. Enterprises would, on the contrary, need a stable framework. However, he also stressed that the sheer volume of public procurement requires seeing the link to other policies. In this respect he considered that the obligation to respect social legislation provided a sufficient tool. In order to foster ecological goals it would be desirable to move further away from the lowest cost to the most economically advantageous tender which should increasingly take life cycle costs into account. He warned, however, that other political goals should not be mixed with public procurement legislation. Finally, he reminded the audience that society as a whole profited from competition and that maintaining and encouraging competition was vital. The private sector was concerned at the prospect of unchecked growth of in house procurement, and especially about horizontal cooperation.

**Arnaldo Abruzzini, Secretary General, Eurochambres,** was most concerned about the possibility that EU public procurement legislation would not support other EU policies. For him, the necessity to support those goals is an obvious consequence of coherence. Nonetheless, he strongly opposed additional legal barriers. It would in any case be possible to play "smart" and especially foster innovation.

**Carola Fischbach-Pyttel, Secretary General, European Public Service Union,** strongly supported the use of public procurement to pursue strategic goals. She presented the concept of the "Sustainably Most Advantageous Rated Tender (SMART)". In her view, the definition of the subject matter should include environmental and social criteria. It would therefore be necessary to avoid the award of contracts exclusively on the basis of price. The use of public money should be tied to public policy objectives. In addition, she reminded that not everything can be bought through the market and that in-house cooperation therefore should not be hindered but encouraged.

The **discussion with the floor** touched the issues of accessibility, responsible business, quality criteria and the problem of evaluating social criteria. Most interveners advocated a change of attitude and increased awareness of values.

**Speech: The Reform – a view from the European Parliament**

**Malcolm Harbour, MEP, Chair of the Internal Market and Consumer Protection Committee**

Mr **Harbour** stressed the great interest that the Internal Market and Consumer Protection Committee takes in the reform and in public procurement policy in general. For him, the current procurement Directives are not successful enough in opening markets for all European undertakings, in particular in a cross-border context. They are seen as too bureaucratic and discourage (innovative) companies from participating in tender procedures. In reality, procurement markets are only open to those undertakings that exactly know the complex rules or can afford external advice for the procurement process. Mr Harbour highlighted the strong potential of public procurement as a booster for innovation, which is currently underexploited. Public procurers should focus more on procurement outcomes than on procedural questions, with the aim of buying innovative products and services with a high growth potential. Mr Harbour called on the public to actively participate in the debate and not refrain from considering radical changes in the current rules.

**Speech: Views from a future Council Presidency<sup>3</sup>**

**Michael Dithmer, Permanent Secretary of State, Danish Ministry of Economics and Business Affairs**

Mr **Dithmer** announced that the public procurement reform will be one of the top priorities of the upcoming Danish Presidency of the EU in the first half of 2012, given the central role of public procurement in creating growth and revitalising European economies. For Mr Dithmer, the most important objective of the reform should be smarter procurement regulation: simpler and more flexible rules, to make procurement procedures less costly and burdensome for both public authorities and companies, notably SMEs. In this context, the level of the thresholds for application of the EU Directives should be looked at. Mr Dithmer also advocated increasing the possibilities for dialogue between contracting authorities. Furthermore, the framework conditions for innovative, resource efficient and green public procurement should be improved. This should not be done through mandatory requirements at EU level, but rather by increasing the flexibility for contracting authorities to include sustainability criteria in their procurement strategies. Finally, Mr Dithmer highlighted the great potential of electronic procurement to minimise transaction costs and create efficient procurement.

**Panel III: The future of public procurement – new challenges, new tools, key priorities for the legislative proposal**

**Heide Rühle, MEP, rapporteur of the EP Report on Modernisation of Public Procurement**, argued that public procurement is characterized by a culture of distrust which needs to be replaced by a culture of dialogue and cooperation. There is clearly

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<sup>3</sup> Full text available at:

[http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/conference062011/speech-3\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/conference062011/speech-3_en.pdf)

something wrong if a contracting authority is challenged in court because it requires that the meat it intends to buy has to come from species-appropriate agriculture. This kind of criterion as well as the question of whether the product has been manufactured using child or forced labour should be admissible because it concerns the production process which is an intrinsic part of the product itself. The negotiated procedure should become a general procedure because it provides higher flexibility while guaranteeing transparency. Ms Rühle also called on the Commission to show more political leadership on e-procurement.

**Jacek Sadowy, President, Polish Public Procurement Office**, considered that no revolution is needed. Revolutions tend to eat up their progeny. It would, however, be important to have fewer formalities, but not at the price of weakening the system which has helped to fight the economic crisis. Any reform should increase competitiveness, transparency and better access for SMEs. However, he underlined that the main problems do not lie in the legislative framework but in its application.

**Damien Verdier, Group Executive Vice President Marketing, Sodexo Group**, considered that most problems in implementing public procurement have their roots in misunderstandings caused by a lack of dialogue between the two parties prior to launching the procedure. In addition, while private companies spend most time in their purchasing activities on preparation this would rarely be the case for public purchasers which are therefore lacking knowledge about the market. Therefore a strategic dialogue between the contracting authorities and the companies has to be established before any procurement procedure.

**Andrea Benassi, Secretary General, European Association of Craft, Small and Medium-sized Enterprises**, also considered that the problems in public procurement do not lie in the existing legislation but in its application. A better management and professionalisation are needed. He advocated that parts of the code of best practices for SMEs should be made compulsory, for instance the sub-division of contracts into lots.

**Anders Knape, President, Swedish Association of Local Authorities and Regions, Executive President, Council of European Municipalities and Regions**, considered that SMEs often complain about a tendency by small contracting authorities to avoid public tenders. He therefore advocated a simpler procedure because this would serve both parties. Municipalities need much more room for manoeuvre which would allow them to take into account gender issues or transport costs and to engage into a dialogue with suppliers.

**Rob Cameron, Chief Executive Officer, Fairtrade International**, took the view that a revolution is not needed in procedures but in outcomes. We would have to consider that we are living beyond our means, causing a global crisis (climate change, water scarcity, threat to biodiversity). Society would consider products produced through slave labour in the 18th century as unacceptable. Today, products obtained e.g. through child labour should also be deemed unacceptable. Public procurement has to support these societal goals. Going for the cheapest product would entail externalising additional costs to society as a whole. A notion of sustainability therefore has to be built into public procurement. A preventive dialogue could prove very useful as would the consequent use of already available tools.

The **discussion with the audience** concerned a whole range of issues, reaching from generalisation of the negotiated procedure, interpretation of the concept of body governed by public law, e-procurement to the need for dialogue to foster innovation and creativity and the proposal of an EU procurement passport.

Asked to provide one key word for the upcoming reform process the panellists named the principle of "apply or explain" (**Benassi**), prior strategic dialogue (**Verdier**), openness and competitiveness (**Sadowy**), flexibilisation (**Rühle**), innovation (**Harbour**), sustainability (**Cameron**) and trust (**Knape**).

## **Conclusions**

### **Jonathan Faull, Director General Internal Markets and Services**

In his closing speech, Mr **Faull** underlined the need for change and notably for procedural simplification. He reassured those worried about a possible "revolution" that the achievements of the current Directives will be safeguarded. With regard to the discussion on raising the thresholds, Mr Faull indicated that the issue will be looked into from all angles. The discussions have also shown that there is scope to use public procurement in support of the Europe 2020 objectives. However, many of the interventions during the conference suggest that a change in mind-set of public procurers is needed more than changes in the rules, possibly flanked at EU level by enabling – but not mandatory – measures. Supporting innovation seems to be seen as a clear priority by a number of speakers. Last but not least, Mr Faull also highlighted that a recurrent theme of the day was the need for more professional public procurement and better implementation of the rules on the ground. Finally, Mr Faull thanked the experts and the audience for the valuable input. The manifold ideas and opinions expressed throughout the day will feed into the work on the legislative proposal, which has been announced in the Single Market Act for the end of 2011.