EUROPEAN COMMISSION
Internal Market and Services DG

PUBLIC PROCUREMENT

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DRAFT MINUTES OF THE MEETING OF 25 APRIL 2012

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Meeting of the Commission Government Experts Group on Public Procurement

25/04/2012

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The Chairman started the meeting by welcoming delegations and giving information on practical arrangements regarding the meeting.

1. Adoption of the agenda

The agenda was adopted with and additional part on point 3: tour de table on collection of statistical data.

2. Adoption of the minutes of the meeting of 7 December 2011

Minutes were adopted with a change: Page five, third paragraph: correct abbreviation for Sweden is SE.

3. Annual Public Procurement Report

COM: Pursuant to an internal audit which took place on the application of the procurement Directives in the Member States **COM** decided to increase efforts to better monitor the EU procurement markets in very close collaboration with the Member States in view of seeing what can be learned from one another's best practices and to bring the proportion of efficient and sound procurements to an even higher level. In that light **COM** decided to start an annual reporting cycle which should compare best practices in Member States and bring together data in the field of procurement and all sorts of valuable information if there are gaps in the mapping of what is taking place on the ground. This annual report will prove to be a useful tool not only to the Commission services but certainly also to the Member States. It will gear up their efforts to spend public money in a better and more transparent way. In the Working Group of 22 November and in the Committee meeting of 7 December the structure and data collection methodology of the future reports were already discussed. On 9 December a questionnaire to prepare for this report was sent and **COM** would like to thank all the Member States who replied for their constructive and pro-active participation process. A number of Member States missed the opportunity in this exercise by not replying back which is very regrettable, and hopes are that on the basis of today's presentation and discussion other Member States will come on-board for next year's exercise, to avoid any gaps in the report. **COM** shared the draft which was submitted at the very last moment, due to the fact that it received very rich information from the 21 Member States. Heavy workloads maybe the reason why some Member States did not actively participate in the questionnaire.

The report follows the structure of the questionnaire received earlier on. **COM** will go through the text received, highlighting the most important findings and issues in some of the sections and the chapters. The structure follows the questionnaire with one minor modification regarding the fourth chapter of the questionnaire which contained miscellaneous information gathered by **COM** services. The input for this chapter has been used in other parts of the report. The first chapter contains basic statistical information; the

second chapter contains information on national procurement structure, e-procurement and centralized procurement; the third outlines problems of implementation on EU and national levels and problems with EU funded projects. About the second chapter it is worth mentioning that e-procurement and centralized procurement are sections which **COM** considers to be thematic in the sense that these topics might not be part of the report every year, but may be changed to other topics of importance. About chapter A, 1 section on values and economic indicators, the report presents the key economic data about the size of the procurement market and its structure. Two main sources of data at **COM'**s disposal are used here: the statistical reports and the data estimated and calculated by **COM** services. These two sources do not provide the same total. The Commission estimate is about one fourth higher than what is reported by the Member States. The sources of these discrepancies are multiple and will be discussed in the statistical group in the afternoon. The section also provides some key data about the split between goods and services, and gives a typical contract value per sector which can be interesting in the context of SME's access to public procurement. The typical contract value is around 345,000 € which should be within the reach of SME's. The other important finding of this section is that the transparency ratio has become fairly stable. The gap between contract notices and award notices has been stable for the last three years. The open procedure remains the most important one in terms of both value and number but as for individual high value contracts it is the restricted procedure that attracts most bidders. About page 11 on exempted utilities markets: here, a stock of all the exemptions granted on Article 30 of the utilities Directive was taken (granted only in the postal and energy sectors). In the future, **COM** may reach some conclusions based on the size of these markets and whether any trends can be derived from these figures. The exploration of oil and gas pursuant to the exemption granted under Article 30 procedure has been sufficiently exposed to competition, and therefore in the Reform proposal is not featured as one of the fields covered by that Directive. About procurement below threshold in the 2 section of page 13: this was a section where comprehensive information was seldom available from the Member States. For instance, based on the sixteen contributions that **COM** could consider for the purpose of this section, 84.5 billion € was the amount of public procurement procedures under the threshold which is way below the Commission's estimates and also the statistical reports and reports from the Member States via the other reporting channels. This is the reason why only sixteen Member States replies could be taken into consideration. Also, in some Member States there are quite high national thresholds above which the procurement values are taken into consideration for this reporting. About concessions, on page 14: this was a section where information was the scarcest among Member States. There are great differences between some Member States. In some of them there are no concession contracts awarded at all; in other Member States this practice is widely spread. One of the findings of the impact assessment for the concession initiative points out that there might be confusion regarding the definition of concessions, but a clear cut conclusion could not be reached. From the data at hand it cannot be told whether this difference is due to diverging interpretations, or simply due to the different contracting arrangements in the Member States. On page 16, the last section of this chapter, concerns the number of contracting authorities and entities. Here, the number of contracting authorities per capita is used to reflect on how concentrated the contracting arrangement in a certain Member State is. In future, **COM** will probably take other factors into account such as the size of the administration in a given Member State, and how the aggregation of demand contributes to these differences between the number of contracting authorities and entities, and whether there are other factors such as some contracting authorities not being defined as such in a Member State. Chapter B is an overview of the national structure for procurement and national arrangements for reviews, central purchasing and procurement. Section 5 on national structures: this is a section to which every Member State having

replied to the questionnaire provided an answer. Here the difference is about the amount of details submitted by the Member States. Almost every Member State replied, but it was problematic to establish the exact tasks attributed to some institutions, because several Member States simply replied by affirming that the tasks listed are in fact covered by a certain institution, without detailing the exact nature of the tasks. Section 6 on national arrangements for reviews: here **COM** attempted to see whether any conclusion can be reached regarding the use of judicial or an administrative first instance review for procurement remedies. It is not a decisive differentiation, because the difference between the type of review body chosen by the Member States is less acute than the terms administrative or judicial would suggest. This is due to two factors: 1) in many of the Member States, the administrative bodies are close to being to judicial in nature. Their statutes and procedures are closer to that of a regular court than to an administrative authority. This is the case probably in more MS than what is listed under footnote twenty-six. 2) from the other point of view, in Member States where the review body is judicial, often there are special rules applicable to these judicial bodies dealing with procurement, such as shorter deadlines for example. Regarding section 7 on e-procurement: in many countries e-procurement solutions already exist, though take-up is slowed down by stakeholders, there is a sort of inertia to change their habits. The use of e-procurement is most widely spread in **MS** and **MS**, also because of a legal obligation to use e-procurement. This contrasts with the growing evidence that the procurement process can be made easier, faster and decrease process costs for contracting authorities. Moreover, the increased transparency and easier access to tender opportunities provided by e-procurement results in higher participation in tenders, which automatically leads to lower prices. In order to address the slow level of up-take, and to enjoy the benefits offered by e-procurement, **COM** identified a need for a comprehensive strategy for e-procurement, including both legislative and non-legislative actions. The strategy elaborated in the Communication of 20 April 2012 presents the strategic importance of e-procurement and sets out the main actions through which the Commission intends to support the transition towards e-procurement in the EU. **COM** considers Chapter C, on the application of procurement law at European and national levels on page 24 to be the core section of the report, where **COM** sought to take stock of the status of the implementation of the procurement rules in the Member States. Section 9 of on infringements dealt with at EU level starts the chapter. The most important figures in this section about the actual material infringements show that in the last three years - excluding the cases for non-communication - 61 infringement cases were open, part of which have been closed since. Out of this figure, 50 cases were based on complaints and 11 were based on investigations of the Commission's own initiative. Out of this total of 61 cases, 53 concern incorrect application of the rules, 6 the transposition of the Directives and 2 concern violating provisions of the Treaty. During the same period, 205 cases were opened in EU Pilot. Regarding the cases of wrong application, as of 1 November 2011, 97 cases were opened either in EU Pilot or in the NIF database managed by the Commission. A number of these cases concern legal basis which question the very applicability of the Directives (as opposed to some detailed procedural rule), such as direct awards, the illegal use of the negotiated procedure without publication or the incorrect application of the in-house rules. The negotiated procedure is the one most affected by infringements, even excluding from the count the cases of direct award. Infrastructure is the sector most concerned by application errors. There are no significant differences regarding the geographical level concerned by infringements: central and sub-central levels seem to be equally concerned. There were 18 cases of incorrect transposition during the same period. With regard to voluntary compliance, in 59 cases further proceedings were avoided in this manner. The complaints regarding infringements come mainly from aggrieved bidders: at one end of the spectrum there are the Member States where all the infringements are all complaint driven, and there are two Member States at the

other end of the spectrum, where 50% of the complaints come from civil society or from citizen's independent from bidders. The public sector is more concerned than the utilities sector; the division of infringement cases between the two sectors reflect the proportion of the number of award procedures. During the three years preceding the report, 16 cases were closed by **COM** because the contract under examination was fully executed and another 13 cases were not pursued further because parallel appeals had been launched at national levels. Section 10 on page 28 is about reviews at national level. The second paragraph features the proportion of the review procedures to the total number of procurement procedures carried out by the Member State authorities. The average of the countries replying is 8.5% (meaning 8,5 tendering procedures are appealed out of 100), which **COM** does not find to be particularly high. In some of the Member States this proportion stays below 5%, but in all the countries which replied it is below 20%. On page 29 is another important piece of information regarding some cases, where the complainant was given right and the review body found that the contracting authority made an error at some stage of the procedure: this happens in one third of the cases in most of the Member States. In some Member States this ratio is significantly higher and in four Member States the figure is below this ratio. On page 30, first paragraph, the sectors which are more infringement prone according to the Member States are listed. Most of these sectors correspond to the findings of the Commission, with the exception of the sewage and waste management services. Information was also asked about review by the contracting authority before the actual formal review procedure in Court or administrative review body. This is obligatory in four Member States, two of which could provide data on the success rate of these procedures. This figure is particularly impressive in **MS**, where 91% of complaints are not being carried forward to any formal procedure and are settled in this manner. This is a best practice that is worth following up. Regarding the second instance procedure, this ratio is not exceptionally high anywhere. The contrary would be a reason of concern because it might indicate that there is a diverging interpretation of the law between the first and second instance review bodies. Regarding the swiftness of the procedure, most of the Member States which replied handle all such cases between one and three months. Except for **MS**, all Member States who could reply to this part of the questionnaire have administrative review bodies. For section 11 on the procurement errors detected in the course of audits of EU funded projects, three spending DGs were asked to report to DG MARKT: DG AGRI, DG EMPL and DG REGIO. DG AGRI and DG EMPL find that procurement is not an issue for their funds because of the nature of the contracting authorities and the value of the contracts: they usually do not come under the scope of the Directives. This is not the case for the cohesion and the regional funds, where many problems were pointed out (see details on page thirty-two on the nature and the proportion of the problems found by the audits). The reason for the inclusion of this chapter is that this kind of information which the spending DGs obtain by undertaking detailed audits for their projects is one of the most important sources of information for the **COM** services in this field. The shortcomings found by the spending DGs are not specifically linked to EU co-funded projects, they give a good indication of compliance with procurement rules in general. Pursuant to these findings, there are specific measures undertaken to combat these problems. The measures include training sessions, the drafting of conditions on public procurement management in the proposal for the revision of the new regulation on cohesion funds and finally, the inclusion of a governance chapter for the reform of procurement Directives.

MS remarked that while **MS** finds this a useful exercise, it also finds it very regretful that **COM** pulled the exercise at such a late stage. The questionnaire was sent to the Member States on 19 December; on 21 December the Member States saw the message from **COM**, and then had a few weeks' time to respond. The Member States were not expecting a

questionnaire at the end of December and the time to answer was very short. As far as **MS** is concerned, the data submitted is not precise. **MS** had to guess for the figures below thresholds and covered only 50% of potential volume of contracts. Procurement in the utilities sector and by the local municipalities was not covered. **MS** has 2,357 municipalities and did not have time to collect the data. The conclusion that can be drawn is that **COM** cannot publish the information on below threshold procurement for **MS**. Regarding the number of contracting authorities, the approximation made by **MS** is 4,500 – 5,000. **MS** pointed out that on page 13 the figure of 8,085 billion EUR for below threshold procurement is not correct. Regarding e-procurement: **MS** would have preferred to see what the actual rate of use of e-tendering is, what is the actual up-take of availability of documents, and actual e-tendering. **MS** introduced e-procurement ten years ago. Contrary to the assessment by **COM, MS** doubts that it would be so easy, but **MS** will be able to have e-submission obligatory in a few years. Regarding chapter C, the part on incorrect transposition: **MS** expressed its doubts that the number of infringement cases gives an actual impression on what is really going on in real life in a Member State. **MS** is reticent to use this kind of figure to draw any conclusions. About review procedures at a national level: according to **MS**, **COM** drew conclusions from the **MS** reply that it should not have: the number for delivering a decision in the Voralberg Federal State refers to a single case, which was a rejection. Regarding the conclusions in the Report, **MS** expressed its opposition to obligatory information collection on regulatory basis. Regarding the annex to the report, **MS** opposed that the view from the Federal Court of Auditors would be taken up by **COM. MS** urged **COM** to delete all problems listed and to just mention the existence of the particular report from the Court of Auditors.

COM noted that **MS** agreed with the idea of drafting this type of report, but also noted **MS**'s concern for specific points will be taken into account. Regarding the figures, contrary to what **MS** commented on, the table states that below threshold procurement is 8,085 million €, not billion. Since **MS** stated that the figure in million € is not correct either, **COM** replied that the figure would be checked again. Regarding the duration of the procedure, **COM** asked for information regarding the average duration of the procedure, not of individual cases, and took the **MS** reply as such. Regarding the annex of the report, **COM** explained that the Report is not stating that these are the problems in **MS**, but merely quoting from the document issued by the Court of Auditors, but took note of the concern.

MS appreciated the efforts in making the report and also agreed with **MS** on several points. Acquiring homogenous information across all the countries, as there are different legal arrangements in different Member States is difficult and it will not be possible to compare across the EU all the time. The **MS** can learn from one another and can adopt best practices to the extent that they are relevant to one country. Statistics can help comparison between markets and understand the way markets work. **COM** is on the right track.

MS is of the view that statistical data gathering has two dimensions, the first one is the good governance dimension, and the second is the bureaucracy dimension. Even for reforms of the national law under the thresholds, there is no sufficient statistical information and there is a need to improve things. In principle, **MS** is very much in favour of data gathering. The question is how it is done and in which structure. **MS** has a problem on the bureaucracy side concerning what is common **COM** practice and what is proposed in the framework of the revision of the Directives, because the approaches are divided on three pillars: the first pillar being tenders electronic daily where **MS** have to transmit the notices, the second pillar is the annual data gathering exercise where for exactly the same data, which is not collected via the contracting authorities but via the central government which then has to go down to the

contracting authorities over the Länder over the local. **MS** supposed that **COM** is thinking about is cementing this two pillar structure: on both sides there is insufficient and unreliable data: it is a useless exercise, but it is a very bureaucratic exercise because a lot of people are involved. For **MS** the only solution is to get rid of this imperfect structure of two imperfect pillars and go to a structure with only one pillar but make this pillar workable and that should be tenders electronic daily. **MS** would favour putting in place a system to collect data below thresholds that would feed into TED. The **MS** and **COM** need to think about carrots and sticks to incentivise the contracting authorities to report their data via TED to the **COM**. **MS** would be very grateful to get the data back for further analysis for national legislative action. **DE** is also interested in knowing what is happening under the thresholds. **DE** was surprised when **COM** said in the Council Working Group that based on the TED data at the end of the year gives a result of 50% of the EU GDP, and therefore it is obvious that the data cannot be correct. **MS** suggests making the data correct by dropping the second pillar, because people in **MS** are not reporting back and willingness is really decreasing. **MS** is addressing this issue here and it will address the same issue in the statistical working group and **MS** is also in touch with **MS** MEPs on the issue and will make this point again in the Council Working Group. **MS** invites the Member States to give this a thought and maybe support the thinking of making TED more effective. Regarding the Report, **MS** made two points: 1) there are a lot of tables some of which say "information not available for some countries". Distinction should be made between the Member States who did reply and those which replied "information not available". 2) on the annex: there is a point concerning **MS** that says main findings are to simplify rules and raise thresholds. It is not the EU thresholds. **MS** does not want to increase the thresholds; it is the so-called thresholds at the very low national level which decide whether there should be a tender at all. Thresholds are a very highly politically charged issue; it should be made clear which thresholds are referred to.

COM confirmed that there is no intention to open here a debate on the issues being discussed in the Council; debate in the Committee is restricted to the annual report and **COM** welcomes **MS**' sympathy for this exercise. **COM** took note of the **MS** comments and will try to redraft where appropriate. **COM** stated that it does not see this report as a statistical report; it is a report that should indicate trends in procurement compare best practices and improves performance Union-wide on procurement. In times of austerity and economic crisis one of the issues which comes back at every Summit is procurement, so this report has value and importance.

COM finds that some of the ideas that **MS** has put forward are very constructive. The idea of putting in place a system to collect data below thresholds is very interesting: it is a very good step forward. **COM** agrees with the need to improve the data quality in TED. Regarding carrots and sticks and **COM** focus at the moment is on carrots, though at some stage decision to reach for the sticks may be made, because in a number of **MS COM** sees 70% of contract award notices that have no value field: It is a mandatory requirement in the Directive and potentially this could become a legal issue. **COM** requires both practical help trying to give incentive to contracting authorities, but also at some stage it may be needed to discuss with Member States how to ensure proper enforcement of provisions at national level.

MS supported the comments made by **MS** and **MS**. **MS** encountered a few problems on information collection and bureaucracy: if some work could be done more effectively that would be useful and sensible for TED. **MS** pointed out that while according to **COM** the Expert Group should not interfere with negotiations in Council, on page 33 of the Report there is a suggestion "specific measures like specific chapter on governance on the revised

public procurement Directive" with which **COM** itself is making the link in the Report. **MS** pointed out that on page 6 a difference between statistical reports in the Member States and **COM** estimates can be seen, but difference is not explained. **MS** asked for it to be made available for all Member States. On page 19, in the part on the bodies responsible for reviews, **MS** pointed out that in **MS** review for procurement is in fact both judicial and administrative, depending on the nature of the awarding authority. **MS** also encouraged **COM** to take notice of the fact that for some Member States the requested data was not available and why it was not available, whether or not that was due to the fact that data collection was particularly difficult, or administratively burdensome, or nearly impossible. **MS** suggested to update the questionnaire in the future towards a direction where the burden of data collection is more proportionate compared to the added value of the report.

Similarly to **MS, MS** enquired about the methods for the **COM** estimates (pages 6 and 7, table one). For most countries **COM** estimate is higher than the figures in the statistical reports from the Member States except **MS** and **MS**. **MS** is the biggest exception in the other direction.

COM reiterated that this was one of the points on the agenda for the afternoon. The methodology has been communicated to the Member States in the past and has been discussed with them, and is also available on DG MARKT's website. Various aspects of this methodology could be modified or revised. The methodology is needed because of the poor quality of the data **COM** receives: a number of assumptions and interpretations have to be made. One of the key elements that explain the differences is that the two sources of data measure different things: the estimated volume of invitations to tender, whereas MS are providing **COM** with information concerning the volume of awarded contracts, (that not all contracts will end up with an award). The question is whether the difference of 23% is significant, or whether there are other sources of problems that result in the data being different: Regarding the data in **MS**, one of the explanations could be the fact that **MS** is among the countries that have the lowest proportion of contracts that are published with useful information on price, and therefore the probability of a mistake in the **COM** estimate in much higher than for the other Member States which have approximately 90% of notices including information about value.

MS described the result of a pilot project that was undertaken in six Member States as part of the PPN, suggested by **MS**. According to their practice taken up in the ambit of the project, people need to get in touch with a contact point of the contracting authority to discuss whether there has been any infringement. This project brought a number of benefits: for example **MS** has been able to resolve 91% of cases before they became a formal complaint.

MS mentioned that the correct figure for contracts below thresholds is EUR 44 million in **MS.**

MS pointed out a problem in the annex: **MS** does not find it important to publish information regarding the year 2009 or 2010 – the Deloitte report. **COM** commented that the report in question was produced in 2011, therefore it is fairly recent.

MS commented on the figures for below thresholds procurement: when preparing the Reform package there was a study done by one of the consultants, which focused on this issue. The report came to the conclusion that this volume was approximately 80% of all procurement. **MS** therefore was of the view that the figures on pages thirteen and fourteen

cannot be correct, so **MS** questioned their inclusion in the Report. The number of transactions below thresholds is staggering and **MS** does not have any source showing how many procurement procedures are actually taking place. This covers direct awards for very small amounts up to 4.9 millions just below the EU thresholds. Keeping track of the figures is not possible because of the high number of transactions. At the moment, **MS** can only provide approximations. **MS** tried with samples from Ministries, from large companies, from small utilities, but neither worked out, which is a huge practical problem.

COM clarified that the intervention was about **MS,** not the **MS** in general. **COM** recognized that there are differences between the Member States, but this exercise just started and all those concerned should make their best efforts to improve. Some of the points made by the **MS** have been well taken by **COM**. The **COM** intention was never to ask to provide a comprehensive account, and indeed a number of Member States below thresholds are using samples based techniques, and are using them very successfully. In those Member States there are national thresholds and the information collected for contracts above thresholds. The idea is to finally come up with a reasonable figure, because it is in the common interest. For this reason, in order to evaluate the relevance and the effectiveness of the Directives, the proportion of the market is caught by the Directives should be known. It is difficult to believe that Member States would not have the data, or do not have an interest in getting the data. Even vis-à-vis the Court of Auditors or the European Parliament budgetary control committee **COM** cannot say that it has no idea how much is spent on procurement. If one Member State has difficulties in putting together a realistic figure on below thresholds, it can learn from other Member States who seem able to do so.

MS pointed out that one more element to this discussion is the autonomy of the Member States. While **MS** fully agrees that it is of common interest to get this data, the question is whether it is the Commission's task to get this data for the **MS** or to force the **MS** to get the data. This is a very general comment which does not mean that the **MS** and the **COM** should not work together on data collection. **MS** supports the **MS** position: **MS** has also been looking into the volume of procurement under the thresholds in order to assess whether they want to introduce remedies in this area, because they think it is a very important thing to know. **MS** has engaged in a 6-month exercise with a study and they had to cancel the study because in discussions with Hamburg **MS** came to the conclusion that under the current circumstances it was impossible for the experts to determine the value of below threshold procurement. So **MS** confirms that there is a problem but it is the Member States who are primarily responsible for solving it.

COM repeated that the members were not there for a confrontation; **COM** is seeking to do what is good for Europe and procurement is one of the key policy instruments for creating jobs and ensuring growth. **COM** is of the view that there is a joint interest altogether to get the things right and to ensure that **MS** learns from each other's best practices; which is what Report is about, not about **COM** imposing to Member States to provide data. If the **MS** are not ready to do so, **COM** will accept this situation but it will have to be mentioned in our report.

MS commented that there are methods that allow to determine the volume of contracts below threshold. **MS** makes sure that they have full details of all the contracts awarded below that threshold. **MS** has the tools at their disposal, they just need to set up the system accordingly. There are two different information systems: there is the contract system which is based on expenditure: anyone who wants to award a contract for any amount is required to provide all the basic information about that contract and that information goes into a

database available to the statistics unit. The second source of information is based on payments that have been authorised, if anyone makes any kind of payment that is subject to a contract when that is entered into the accounts, the authorities know what kind of contract it is and the value of the contract. **MS** uses these two systems to identify information.

COM explained its intentions with the report and its intentions to publish it, since **COM** has committed itself to do so. **COM** realises that to a certain extent it is in a learning phase. **COM** is trying to find a way to work in the most constructive manner with the Member States. It will take the comments that the **MS** made on board to the largest possible extent, and before moving further towards the finalisation of the report, **COM** invited the **MS** to provide it with their comments in writing before the end of May. **COM** highlighted that it was the very first exercise, that there was little time available, and that not all information is complete. **COM** committed to make all the necessary reservations and to avoid naming Member States on specific issues. **COM** pronounced its intention publish the first annual report by the end of June 2012 and asked for the help of the **MS** to improve the quality and the liability of it with positive comments.

MS intervened that given the difficulties that have been highlighted by other **MS**, **MS** has not given a response to **COM** yet, but they intend to do so in the coming months.

4. Study on SME participation in procurement contracts and impact of aggregation of demand

COM introduced a study to be launched shortly, which is a joint effort of DG ENTR and **COM**. The study is intended to gather new information on SMEs access to public procurement markets and the use made by the Member States of the provisions regarding aggregation of demand, and on the other hand is intended to constitute a baseline for the future evaluation of the new directives on public procurement.

MS requested clarification on the definition to be used for SMEs (and if there will be difference made between medium and micro enterprises) and on the methodology to be employed to study the market bellow threshold.

COM confirmed that the definition of the SMEs is the standard definition used by the Commission, as in accordance to the relevant Commission Communication and that a difference will be made between medium, small and micro enterprises. As regards the methodology, it was explained that for below threshold only global estimates for EEA will be requested, the methodology is to be elaborated by the Contractor. Among the available sources of data it was mentioned OJ TED database, national databases for bellow threshold, which are publicly available, probably a commercial database to identify the profile of the company.

MS also fully supported the idea of the study, however pointed out that in **MS**, SMEs are defined as companies with less than 100 employees.

COM took note of the information, however for the purpose of the study and in order to ensure comparability, the standard definition for the SMEs will be used.

MS asked how the authorities will be involved; will there be questionnaire to be filled in? It also mentioned and made available a study on aggregation, at national level, which show

indeed that aggregation is associated with savings. There was however no information on SMEs available in **MS** and this is why a study on this subject would be interesting, in particular it was mentioned the impact on SMEs of the splitting into lots.

MS pointed out that some **MS** have SMEs policies such as obligation to split into lots and that, in view of the negotiations/adoption of the new public procurement directives which include such SMEs measures, it would be interesting to differentiate in the analysis between Member States who have such policies in place and whose who do not have in order to see if splitting into lots have a positive impact on SMEs.

COM confirmed that the relationship between splitting into lots and SMEs success rate will be studied.

MS suggested also studying the cost incurred by CAEs when applying the splitting into lots.

5. State of play on e-procurement

COM informed the participants about the Commission Communication on a strategy for e-procurement adopted on 20 April 2012. The Communication is available on the DG MARKT website.

COM stated that there are convincing economic arguments for pursuing e-procurement. In its Communication it refers to concrete examples in the **MS** demonstrating that e-procurement has significant economic benefits and advantages. The Communication also touched upon the mainly non-legislative **COM** initiatives intended to provide help to the **MS** and individual contracting agencies that are making the transition towards e-procurement, among them an on-going study aiming to identify best practices in the e-procurement and spread them across the EU. Another project is an expert group working on specific recommendations on how to balance different requirements in terms of ease-of-access, usability, security, etc. The draft report is expected at the end of 2012 and the final version in early 2013.

Furthermore, **COM** highlighted that it has committed itself to move to full e-procurement by mid-2015, which is a year before the **MS** are invited to do so according to the Commission legislative proposal. Both pre-award and post-award are concerned. In post-award, **COM** has is already using e-invoicing, mainly in IT related contracts and intends to extend it to other types of contracts. In pre-awards, COM is developing a project to make all its tender documents available via a single portal that is also linked to TED. A new pilot project for electronic submission of tenders should be launched by the end of 2012.

A number of other aspects are dealt with by the communication, among them international aspects of e-procurement.

MS is not in favour of full e-tendering since it will significantly affect the SMEs. In **MS**, e-procurement legislation was put in place almost 10 years ago, and although there are some benefits, there are also a number of negative effects. Most of the public procurement by Central Purchasing Bodies involves SMEs as a result of framework agreements. However, there has been significant reluctance by SMEs and micro enterprises to move to full e-tendering: people are reluctant to use their electronic signature cards, they have problems with uploading tender documents are not used to the tender software, and have difficulties in

developing the personnel resources. In addition, e-procurement will only be really effective if it is used for both below and above threshold tenders. In **MS**, 95% of procurement transactions are below threshold. However, at the local level, there is also great reluctance by the purchasing bodies to switch to e-procurement.

MS suggests that **COM** develops an easy, inexpensive system and provides templates to be used across the EU. At the moment, companies are taken aback by the different requirements of contracting authorities and forms to be filled in. The companies do not want to and cannot invest time in trainings on various electronic procurement systems.

COM hopes that the distinction between above and below threshold public procurement can be avoided when e-procurement is being used. Although the communication only talks about above-threshold procurement, ideally there will be a trickle-down effect to below-threshold procedures, since using two separate systems is not economically sound or practical. There are some contracting authorities who already do that as it helps them save money.

The **COM** points out that the market is much more mature now than it was 10 years ago, and that there is now a wide range of solutions available. Nowadays, small contracting authorities do not need to develop their own system but can instead buy services out of the cloud computing for 500 EUR a year or 50-100 EUR per procurement procedure. Contrary to **MS**' experience, in other countries SMEs are one of the biggest supporters of e-procurement as it makes their life easier and they do not have to travel to the capital to pick up the tender documents. All the steps can now be done electronically, which simplifies matters greatly.

6. Benchmarking

Point 6 was skipped

7. Proposal for a regulation establishing rules on the access of third-country goods and services to the European Union's internal market in public procurement

COM made a presentation on the proposal that was adopted by **COM** on 21 March 2012. The proposal, established in close cooperation between DG MARKT and DG TRADE, contains clear internal market and trade policy provisions that are interlinked. **COM** informed the members of the ACPC that the discussions on the proposal will take place in the context of the TPC-Trade Questions working party. The exercise will bring together public procurement and trade experts.

COM stressed that this proposal is nothing like Buy American, Buy China, or Buy European etc. The proposal does not close any procurement contract for foreign bidders. It just provides a toolkit for the EU in case this appears necessary. There is no obligation for contracting authorities to exclude any foreign bid; they are fully free to accept foreign tenders. Nobody will control them or to tell them that they cannot do that. There is however a means for contracting authorities to exclude foreign bids in specific circumstances. The objectives of the proposal are to increase leverage for the EU in the international negotiations, since currently the EU has no means to use any sticks to convince third countries in our negotiations. Moreover, in the internal market we see a different treatment of foreign tenders by Member States. Therefore **COM** feels that there is an urgent need to harmonise the practices in the EU.

COM underlined that the proposal is highlighting openness. In the public consultation there were basically two camps: one advocated a full closure of the market with possible exceptions to open up, while the other camp advocated do nothing. After much reflection **COM** decided to steer for a middle course. With the proposed policy the EU has nothing to be ashamed of. The response of third countries is fairly muted; they are mainly interested. It is not comparable with the reaction that the US had when introducing Buy America.

COM then gave a presentation on the draft-Regulation and informed the Committee on the economic and legal context of the proposal and its objectives. It also presented the two tools that are proposal contains: **COM** tool and the decentralized tool for contracting authorities. **COM** concluded that the EU would go from a situation of absence of a comprehensive EU external public procurement policy, a fragmented internal market, an enlarged risk of protectionism, to a situation of a real comprehensive EU external public procurement policy, with a key role for **COM** that ensures leverage of the EU in the international negotiations: More «fair play» within the EU, thus putting small and large countries on an equal footing.

MS announced that it has lots of questions on the proposal and that it is not very happy with the proposal. It requested **COM** to clarify whether this regulation will establish full or partial harmonisation.

On the centralized approach (Articles 8-10) **MS** asked what kind of measures could be adopted by **COM** : regulations or decisions. Do they imply that there will be an obligation for contracting authorities to exclude bids that are covered by such a measure? Could this obligation also cover contracts with a value below EUR 5 million (the threshold under Article 6)?

On Article 10 of the proposal (investigation and restrictive procurement measures) **MS** asked whether the coverage of international instruments (for example GPA) could be touched (e.g. state-level in US). Will it be an instrument to force negotiating partners back to the negotiating table to have a better coverage of the international agreement?

On the decentralized approach (Article 6) **MS** asked **COM** whether there will not be an obligation for contracting authorities. Moreover, it asked whether a contracting authority that intends to use this instrument needs to tell this in advance in the contract notice (Article 6). Does this imply that a contracting authority that has not announced it cannot use it? **MS** explained that in **AT,** when there is no obligation to accept to foreign bids since there is no international obligation, these bids can be refused. If it now would be harmonised and **MS** would lose the ability to kick them out, **MS** would not be very happy. On the origin of the good or services it puzzled **MS** that **COM** estimates that it would receive some 35 notifications a year. Could **COM** elaborate on how it comes to this number?

COM thanked **MS** for its comments. The list given in Article 10(3) gives some idea of the measures that could be adopted by **COM**. The measures could be limited to certain categories of contracting authorities; certain categories of goods or services or certain thresholds. It would be a **COM** decision subject to comitology. The decision would therefore not be adopted in a vacuum. Recital 23 states that the measures should be proportionate to the problem, since the idea is to get something that is enough to get the trading partners back to the negotiation table. It would not be per se be limited to contracts with a value above 5 million. It is not an instrument to deal with individual procurement procedures that have gone off the rails for whatever reason; it deals with persistent market access problems in third countries. **COM** would look for something that is proportionate to

the problem, so there would be some kind of de minimis rule, so contracting authorities will not be bothered with this for all kinds of small contracts. If **COM** however adopts such a measure it would not be optional, but would be applicable in the entire EU. This is needed since only then the EU would get the necessary leverage and would evade that the Member States will be subject to serious lobbying from the third country concerned. A restrictive measure is however not the desired outcome, since that is that the EU would receive market access.

On the scope of investigation **COM** clarified that it is not limited to non-GPA countries, since it is to deal with problems wherever they occur. However, **COM** stressed we are not calling into question any legal commitment of any international agreement (GPA/FTAs). It is also unlikely that **COM** would revert to the centralized instrument when we are already talking to the third country. It is more to get the attention of the trading partners where we have very serious market access problems and the relevant authorities have so far not been willing at all to entertain the idea of increasing the access of EU companies.

On the question of harmonisation **COM** underlined that we are speaking about a Regulation with direct and binding effect and not about a Directive. It establishes a default rule of openness of the EU market for foreign bidders and it harmonises and establishes uniform conditions for access and procedures for excluding bidders. These are exhaustive. There are of course possibilities for interpretation (e.g. "substantial reciprocity") and it is the Court of Justice that has the final word on the interpretation.

In view of its optional character Article 6 leaves contracting authorities/Member States a certain scope of manoeuvre. However, **COM** clarified that in case contracting authorities want to use certain tools it should be honest and transparent to our trading partners and put this in a contract notice. Contracting authorities should think about what they want before starting the tendering procedure.

On the number of notifications **COM** clarified that it is based on several elements. In view of the threshold only 7% of all contracts will potentially be covered by this tool. Moreover, **COM** estimated that the tool would be used in some 25% of all cases. Furthermore, the tool can only be applied in case of tenders in which the value of non-covered goods or services exceeds 50% of the total value of the goods or services constituting the tender. In view of the fact that most of the contracts in the EU are for services and the fact that for services there is less cross-border trade, there are not so many contracts that could be covered. In this respect **COM** pointed also to the rules of origin for services. These are based on a double standard. On the one hand GATS (General Agreement on Trade in Services) and on the other hand a Community standard. On the basis of the latter foreign companies established in EU and having a direct and effective link with the EU economy are considered to be the EU companies and their services therefore originate in the EU. Economically this is justified since these companies have production facilities in the EU or provide the services in the EU, while not being merely a postal box. This applies of course also to Chinese and Indian companies.

MS asked **COM** to explain the purpose of the rules on abnormally low tenders. Is it an invitation to the evaluation procedure or is it an incentive to launch a Court procedure?

MS stated that their basic position is to prefer open markets. Furthermore **MS** fears retaliation. It wondered moreover whether the instrument should not be used in other areas of trade policy than public procurement. The EU shouldn't be opening up the public procurement market to tackle other aspects of trade policy.

COM clarified that the rules on abnormally low tenders in the proposal of **COM** takes over all rules from the modernisation package and adds only element if the contracting authority intends to accept the abnormally low bid - it is free to do that- it should inform the other tenderers of this intention and explain why the tender is abnormally low. The reason for this additional rule is that it is difficult for contracting authorities to assess the explanations of the tenderer why the bid is so abnormally low because more than 50% of the tender contains foreign content. The additional element therefore helps contracting authorities to assess the abnormally low tender and increases transparency. It does not change any substantial rule in comparison with the Reform package and is fully in line with the objectives of the rules on abnormally low tenders. It protects the contracting authority against abnormally low bids that look cheap, but that finally result in a disaster.

COM underlined with regard to the **MS** question that on the issue of retaliation it has given quite some thoughts to this. Responses of trading partners cannot be entirely excluded, but this potential risk is mitigated by the fact that we do not call into question the EU's international commitments. Moreover, measures will be taken in the Union interest, so the possibility of "pain" for the EU, would be factored in the equation when thinking about taking measures. **COM** moreover clarified that **COM** tool does not deal with individual procurement procedures and does not to deal with other trade problems and focuses on public procurement issues.

8. GPA: state of play

COM informed Member States about next steps towards ratification of the GPA agreement. After the Policy Declaration in December 2011, a legal review of the text was carried out by **COM** in cooperation with Member States. On 13 March 2012 the negotiators in the GPA Committee proclaimed the formal conclusion of the negotiations resulting in a revised text, the extended market access annexes and a series of work programs. The next step is the ratification of the GPA. The ratification system in the EU is foreseen in art 218 TFEU where the Council shall take a Decision on ratification after it obtains assent of the European Parliament. In practical terms, **COM** prepares a draft Decision and presents it in the Council after finalising translations in all official languages. Once the Council and the European Parliament are able to take a decision on the ratification, the EU will deposit an instrument of ratification with the WTO. Once 2/3 of all GPA Parties have deposited the instrument of ratification, the new GPA text will come into effect for those Parties that deposited an instrument of ratification. This process could take up to two years.

MS asked whether it would be possible to start already preparatory work on the work program before the GPA text comes into force. It also enquired about the position of China regarding the International Procurement Instrument.

COM clarified that even though **COM** would also like to start work in the working groups as soon as possible, according to GPA rules this can only start after the GPA enters into force. **COM** could suggest it to the other GPA Parties but given the difficult negotiations to get an agreement the working groups, it would not be likely that they would support **COM.**

COM informed Member States that it received no negative feedback from any third county so far on the International Procurement Instrument.

Closing remarks

The Chairman ended the meeting after having indicated that the next regular meeting of the Experts Group was scheduled for 19 September 2012.