

PUBLIC PROCUREMENT ACTION PLAN

In the context of the use of ESI Funds

2013-2020

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1. Introduction

Improving the quality and transparency of public procurement (PP) is a high priority for the Commission. Around one sixth of EU GDP (or around EUR 2 trillion) is spent on goods, works and services by different levels of government and utilities of which some 15% are contracts with a value above the thresholds set in the EU Procurement Directives¹. Efficient, effective and competitive public procurement is both a touchstone for a well-functioning internal market² and an important opportunity for vital public sector efficiency gains. Particularly in Member States that joined the EU after 2004 (EU-12), a significant proportion of that public expenditure is supported by grants from different EU funds.

However, according to the Annual Report of the ECA on the implementation of the budget concerning financial year 2015, the errors in Cohesion Policy spending related to Public Procurement accounts for 14% of the estimated level of error. Even though this constitutes a significant improvement compared to previous years (for example in 2014: 48%) there is no room for complacency. The Commission should continue its initiatives aiming at tackling the causes on these errors.

In order to coordinate actions more effectively, the four Directorate-Generals (DGs)³ managing ESI Funds and the main policy lead DG for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), together with the European Investment Bank (EIB) have decided to create a special Working Group. One of its first key actions was to elaborate the present Public Procurement Action Plan in the context of the use of ESI Funds (hereinafter also the Action Plan). The Action Plan was politically endorsed by the responsible European Commissioners and is regularly updated. It serves as a positive example for the coordination and exchange of information within the Commission and for improving the access to and extending the information available. This update of March 2017 includes a revised state of play of the actions, updates related to the transposition of new Public Procurement directives, has a stronger focus on strategic procurement and transparency. The intervention strands *((a) compliance with legislative rules in Directives; (b) stimulating efficiency and transparency and (c) strategic outlook)* have been revised accordingly.

The actions are implemented by the Commission services, in cooperation with other EU institutions, the Member States and other International Organisations, as necessary. For instance, the European Court of Auditors (ECA) has important role to play, thanks to its vast knowledge related to the type, severity and

¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.094.01.0065.01.ENG) If utilities and defence are included, the percentage rises to almost 20%.

² Procurement chapter of the Single Market Scoreboard:

http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm

³ Directorate-General for Regional and Urban Policy (DG REGIO), Directorate-General for Employment, Social Affairs and Inclusion (DG EMPL), Directorate-General for Agriculture and Rural Development (DG AGRI), Directorate-General for Maritime Affairs and Fisheries (DG MARE).

frequency of PP errors. EIB finances projects furthering EU policy objectives, many of which are co-financed by ESI Funds. Every investment appraisal includes an assessment of the procurement practices of the promoter and provides technical assistance, e.g. via JASPERS working with several new Member States to develop PP capacity. Also the EBRD and the World Bank remain active lenders and follow public procurement for the projects.

2. Main challenges

2.1. Strengthening administrative capacity in public procurement

ESI Funds are implemented under a system of shared management, which implies that implementation tasks are delegated to individual MS administrations. Under this system, the MS are responsible for ensuring that these tasks are managed correctly and effectively, and that operations are systematically controlled for irregularities and fraud according to EU rules and regulations. The compliance of the process with the respected legislative framework is of high stake as Managing Authorities are to procure value for money in the best interest of the EU tax payer. Next to these compliance aspects, it is further important to focus on how public procurement can contribute to efficient implementation. The 'Budget focused on Results' (BFOR) initiative⁴, highlights the importance of the EU Budget as an investment instrument that can deliver most effectively on the ground in the MS.

According to the Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, or the Common Provision Regulation (CPR)⁵, one of the implementation tasks is procurement, i.e. the process by which Contracting Authorities award contracts to provide supplies, services and public works, as well as utilities and concessions, to economic operators such as private sector enterprises.

Contracting Authorities (in the sense of Directive 2014/24/EC) for works, services or supply contracts using EU funds may be Managing Authorities, Intermediate Bodies or Beneficiaries. Responsibility for checking on the regularity of that expenditure rests first of all with the Managing Authorities (management verifications) followed with Certifying Authorities and Audit Authorities for each operational programme.

All MS face challenges in consistently complying with EU and national rules. One of the main reasons for that is the lack of adequate administrative capacity on the side of contracting authorities and oversight bodies, inadequate systems and tools in place, and ineffective governance structures. Errors are detected at each level, nationally, by EU fund managing DG, and by the European Court of Auditors. Weaknesses in administrative capacity to manage PP processes vary between Member States and can occur at all levels, but are frequently weakest at the level of local authorities.

Irregularities also affect all stages in the procurement process including the planning phase (e.g. inappropriate choice of procedures), publication of the contract or award notice, disproportionate or discriminatory criteria, contract modifications and failure to tender additional works. The resulting ex-post financial corrections can impose a heavy burden on public administrations that made procedural or judgement errors, but were acting in good faith. [Guidance](#) on public procurement to help

⁴ http://ec.europa.eu/budget/budget4results/index_en.cfm

⁵ Regulation (EU) No 1303/2013, available at : <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:347:0320:0469:EN:PDF>

administrations and beneficiaries identify and avoid such irregularities detected e.g. from audits is disseminated in order to improve practice (Action 13-01).

Administrative capacity affects directly the overall performance of the public procurement system. In fact, the focus of administrative capacity building relating to procurement lies on the objective to procure value for money. Value for money refers to the ability of the Contracting Authority to obtain the best bidder from the market, through efficient and well run competition, that has the required expertise and with best technical and economic offer, in order to implement the procured project in good conditions (time, quality and budget). It relates to available human resources and their professionalization and training, well-designed governance structures as well as the systems and tools they have at their disposal. An important source of information about existing good practices and recommendations both for the Member States and the Commission is the stocktaking study on administrative capacity in the field of public procurement, carried out for the European Commission, DG REGIO⁶ (Action 14-01).

2.2. A new legislative framework

A package of new EU Procurement Directives covering public procurement and utilities entered into force and had to be transposed by Member States by 16 April 2016. The 3 new directives are an important legislative package given their economic impact and potential for efficiencies. The 2014 Directives include new possibilities to develop innovation partnerships, further encourage SME participation, enlarge the scope of e-procurement (Action 13-02). The overall aim is to simplify and shorten procedures. A coordinated effort is needed to support Member States transpose and apply correctly the new Directives, even more so, if most of the practitioners identify the complexity of the rules and regulations covering procurement procedures as a major difficulty. At EU level there is also a need for updating and harmonisation of audit practices (Action 16-03) and for greater clarity in terms of ESI Funds guidance (Action 14-01).⁷ Different Member States can learn from each other about how to implement new approaches in practice. Exchange of good practice and peer learning are also encouraged and supported (Action 15-01 and 14-05).

However, attention should additionally be paid as many ongoing contracts involving ESI Funds were contracted under former Procurement Directives of 2004. Compliance with the new Directives is therefore not a given for all current projects. This poses challenges both from an implementation point as well as a financial control point of view to apply the correct set of rules for the different projects.

Moreover, the delays in transposition of new directives on public procurement and concessions in some Member States create a situation of legal uncertainty for contracting authorities and economic operators. This may result, in some cases, in breaches of EU public procurement rules and irregular expenditure of the EU Funds.

⁶ http://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/study/

⁷ Public procurement – a study on administrative capacity in the EU: http://ec.europa.eu/regional_policy/en/policy/how/improving-investment/public-procurement/study/

2.3. Transparency

Public procurement is also a corruption risk hotspot⁸. In fact, the risk of corruption linked to the funding of political parties or individuals abusing public office for private gain are high and well documented⁹. Both the European Commission and the European Parliament have highlighted public procurement as a critical area for action against fraud and corruption.¹⁰ Better control systems, greater transparency and more competition are critical tools for combatting such practices. The OECD, the World Bank and Transparency International are working on developing indicators and good practice guides to reduce corruption in public procurement. DG REGIO in cooperation with Transparency International has launched initiative "Integrity Pacts - civil control mechanisms for safeguarding EU funds" which aims to explore and promote the use of Integrity Pacts (IP) for safeguarding EU funds against fraud and corruption, and as a tool to increase transparency and accountability, enhance trust in authorities and government contracting, contribute to a good reputation of contracting authorities, bring cost savings and improve competition through better procurement (Actions 14-02, 15-01, 14-04 and 16-04).

2.4. Ex ante conditionalities and the added value

The CPR has introduced the new element of ex ante conditionalities ('ExAC'), which should ensure that the framework conditions are in place in order to guarantee the efficient and effective investments of the ESIF funds. One of the general ExACs¹¹ is related to public procurement which required the existence of arrangements for the effective application of Union public procurement law in the field of the ESI Funds which helped to remove barriers to the functioning of the Single Market, through ensuring among other things transparent procedures for the award of public procurement contracts.

At the time of the adoption of the Partnership Agreements, followed by the operational programmes, 12 Member States did not fulfil the ExAC on Public procurement. They committed to an action plan in order to fulfil the ExAC at the latest by end 2016. The Commission has actively supported the Member States (including tailor-made and specifically targeted assistance to improve administrative capacity in public procurement) and closely monitored their action plans (Actions 13-03, 13-02, 14-02, 15-01 and 15-02).

The ExAC conditionality on public procurement has brought considerable value added the EU, Member States and regions, and for the citizens and businesses operating in the EU. They triggered strategic, regulatory and institutional/administrative changes that will lead to more effective and efficient spending of ESI Funds. Had it not been for the provisions on ex ante conditionality in the CPR, these changes might not have happened in some Member States or they would have happened at a much slower pace. These benefits are not limited to the ESI Funds, but have a positive impact on the delivery of structural changes and on improving the investment environment in the EU.

⁸ Transparency International (2012). Money, Politics & Power: Corruption Risks in the EU. p39-42

⁹ See [OCED \(2007\). Bribery in Public Procurement: Methods, Actors and Counter-Measures](#) and [Transparency International \(2012\) Public procurement Topic Guide](#).

¹⁰ A 2013 study funded by OLAF found that the overall direct costs of corruption for 5 sectors in 8 Member States was between 1.4 to 2.2 billion euro. PWC (2013). Public Procurement: the costs we pay for corruption - Identifying and Reducing Corruption in Public Procurement in the EU. http://ec.europa.eu/anti_fraud/documents/anti-fraud-policy/research-and-studies/pwc_olaf_study_en.pdf

¹¹ See also the Guidance on Ex Ante Conditionalities for the European Structural and Investment Funds – part II: http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/eac_guidance_esif_part2_en.pdf

2.5. Value for money and innovation

Public procurement is not only a source of problems, but is also an opportunity. There is strong evidence that value for money, degree of competition, duration and quality of documentation in public procurement could be significantly improved in some Member States, with benefits for EU funds' performance and better value-for-money to EU taxpayers.¹² The DG BUDG initiative 'Budget for Results (BFOR)' further emphasises this need of rebalancing compliance with the specific performance.

Additionally, PP is an important instrument for proactively pursuing President's Juncker EU policy objectives, through new approaches to improve efficiency and competition via smart e-procurement, and through green and social procurement and public procurement that encourages innovation and greater involvement of SMEs (Action 15-03). E-procurement and digitalisation are also an important prerequisite for improving transparency and efficiency of public procurement but also for both collection and publication of relevant data (including in open source format) (Actions 15-04 and 15-05).

Innovation procurement means that the specifications are more demanding than the current state of the art type of products would allow. It requires the bidders to do some further research and development or prototyping activities, or offers firms an opportunity to find a first client for the innovative solutions that they have developed. Innovation procurement has been used by the member states in a range of fields, in particular health, energy, environment, transport and security. It was for instance used to obtain significant savings on energy costs for public street lighting. Experts estimate that up to 10% of all public procurements hold a potential for procuring innovations. It does, however, require significant administrative capacities to properly manage the procurement processes and to avoid legal pitfalls.

3. Recent and ongoing initiatives

In the context of improving the use of the Structural Funds, the DGs most concerned have been tackling the issue of improving efficiency and transparency of PP for more than 10 years now, notably by thoroughly carrying out audit work and training for Member States authorities. Some serious financial corrections were imposed on the MS throughout this period; systems were strengthened to ensure better compliance. In 2011 the Commission made a thorough analysis of errors in Cohesion Policy 2006-2009 and actions taken by the Commission.

There are also several on-going initiatives to raise awareness and improve the quality of EU public procurement. ESI Funds are used for training by Member States and by the EC and to fund the introduction of new e-procurement systems. DG GROW published a compendium of e-procurement best practices¹³. The European Institute of Public Administration (EIPA) and other organisations run EU-level training on public procurement and several Member States publish national PP Guidance in a variety of formats. DG GROW leads an initiative on public sector innovation that includes public procurement as a major theme. On 28 October 2015, the European Commission presented a new Single Market Strategy to deliver a deeper and fairer Single Market that will benefit both consumers and businesses. One of its milestones is the creation of more transparent, efficient and accountable PP¹⁴. DG Environment has

¹² PwC/Ecorys (2011) "Public procurement in Europe: Cost and effectiveness". Study for DG GROW.

¹³ http://ec.europa.eu/archives/dgs/internal_market/studies/docs/e-procurement-golden-book-of-good-practice_en.pdf

¹⁴ European Commission, Communication on Upgrading the Single Market: more opportunities for people and business <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A550%3AFIN>

developed guidance on Green Procurement, and DG Employment on Social Procurement. On fraud and corruption, ARACHNE and other tools are being developed to assess control systems and early detection of PP fraud risk through "red flags"¹⁵. The Public Procurement Network (PPN)¹⁶ acts as an informal, European-wide co-operation network to share good practices amongst EU Member States' central public procurement bodies.

4. High level leadership

In line with a recommendation¹⁷ by the Court of Auditors in their Performance Audit on Public Procurement¹⁸ in 2015, Commissioner for Regional Policy Corina Crețu and Commissioner for Internal Market, Industry, Entrepreneurship and SMEs Elżbieta Bieńkowska decided to hold regular high-level meetings to provide political leadership and steer the process, discuss the implementation of the action plan and decide on future actions. The first meeting took place on 1 December 2015 and was also attended by Mr. Wynn Owen, Member of the Court responsible for the special report ([see 5.1](#)). The 2nd and 3rd meetings on 14 July 2016 and 23 January 2017 were dedicated to the progress of the Country specific approach (ExAC action plans, country strategies, reforms in MS due to the transposition of the new Directives) and were attended by Vice President Jyrki Katainen. It was also decided to extend those meetings to other Members of the College responsible for ESIF implementation and to external stakeholders, whenever deemed useful.

¹⁵ http://ec.europa.eu/regional_policy/what/future/pdf/preparation/guidance_fraud_risk_assessment.pdf

¹⁶ <http://www.publicprocurementnetwork.org/>

¹⁷ (d) should set up a high-level group to provide leadership in tackling the problem of public procurement errors. This group should involve relevant Commissioners or their Directors-General and include the participation of experienced, external stakeholders. The group should act as an advocate for improvements in public procurement, including, where necessary, for simplification and better regulation in this field

¹⁸ [ECA Special Report 10/2015](#)

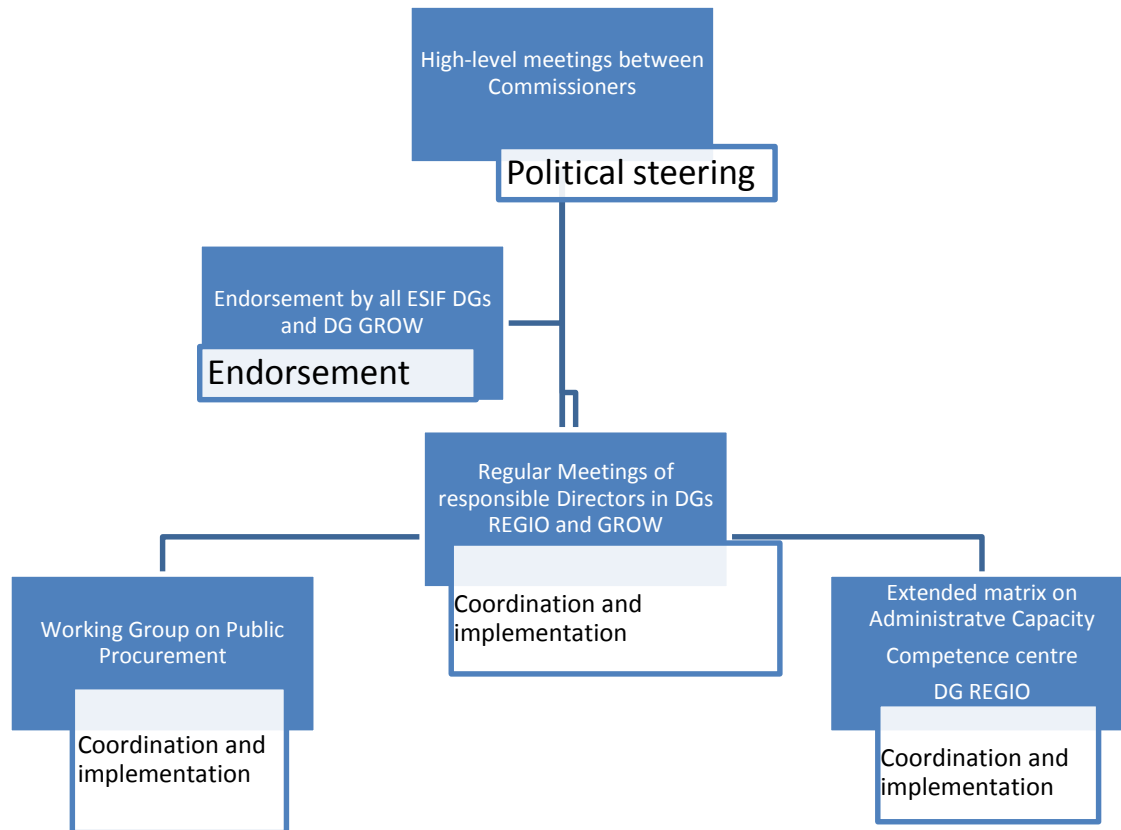


Figure1: Governance process and actors

Some actions have been completed, some are still ongoing and new ones will be launched, depending on internal capacity to manage multiple assignments. Geographical Units (GU) in DG REGIO and in other DGs alike are kept updated on progress and how they can contribute to and benefit from specific actions via enlarged Working Group meetings as well as the regular extended matrix meeting of the Administrative Capacity chaired by REGIO E1.

The action plan has been endorsed by all ESIF DGs and DG GROW by the end of 2015 and all future updates should follow the same procedure.

The regular meetings between DG REGIO E AND DG GROW G at Directors' level, that take place since July 2014 are also aimed at coordinating and facilitating implementation of the Action Plan.

5. Objectives and actions of the Action Plan

5.1. Main objectives

The Action Plan aims at supporting MS in improving the performance of both administrations and beneficiaries in applying public procurement for EU funded investments during the 2014-2020 programming period. Its objective is also to promote the quality and transparency in public procurement throughout the EU. At the same time, the action plan responds to the recommendations¹⁹ by the Court

¹⁹ [ECA Special Report 10/2015](#)

of Auditors (Actions 15-05 (a), 15-02 (b), section 4 (c-d), 16-03 (e) and 15-04, 16-01 (f)) and its implementation ensure an integrated and consistent approach of the Commission services vis-à-vis the Member States.

In doing so, it concentrates on three intervention strands which are covered by several actions. One action can include several strands.

The intervention strands are as follows:

- a) Compliance with legislative rules set up through the Directives
- b) Stimulating efficiency and transparency
- c) Strategic outlook

5.2. Actions and deliverables

Currently, the PP Action Plan contains 18 actions, some of which have already been completed, to help improve PP performance during the 2014-2020 period, covering the three intervention strands. The detailed Actions can be found in the annex.

5.3. Public Procurement working group

A permanent group to coordinate the work and steer the implementation of the action plan was created. The first priorities of the Public Procurement Working Group were to exchange experiences, share knowledge on on-going initiatives and to prepare a joint action plan (see Annex). The WG met first in September 2013 and is since then regularly meeting twice per quarter. The WG has identified the need to carry out a more systematic inventory of general and country or sector specific experiences and initiatives to evaluate collectively the lessons learned about effective tools to build PP administrative capacity.

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- (a) should set up its own database on irregularities, including those arising in public procurement. It should analyse, in a comprehensive way, the frequency, seriousness and causes of public procurement errors in the area of cohesion policy, based on appropriate data, drawn both from its own databases and provided by Member States. The Commission should publish its analysis as part of the public procurement report required by the new directives;*
- (b) if the ex-ante conditionality concerning public procurement is not fulfilled by the end of 2016, should use its powers consistently to suspend payments to Member States concerned, until such time as they have rectified the shortcomings;*
- (c) should update and publish its internal action plan on public procurement. It should report on progress annually. To this end, the Commission should improve co-ordination across its departments;*
- (d) should set up a high-level group to provide leadership in tackling the problem of public procurement errors. This group should involve relevant Commissioners or their Directors-General and include the participation of experienced, external stakeholders. The group should act as an advocate for improvements in public procurement, including, where necessary, for simplification and better regulation in this field;*
- (e) should be strict in its approach to using its full range of powers with regard to public procurement. In so doing, it should continue both to pursue infringement procedures where necessary and to impose financial corrections wherever it finds that Member States' first-level checks are insufficiently effective; and*
- (f) should do everything in its power to exploit further the opportunities provided by developments in information technology, including e-procurement and data-mining tools.*

In complement to existing initiatives, further actions are still needed at EU-level to help build administrative capacity to improve the performance of PP using ESI Funds in 2014-2020. Whereas DG GROW has the lead at EU-level on developing and enforcing PP policy and Member States have the primary responsibility to improve the quality of public procurement implementation, the DGs managing ESI Funds are in the front line in ensuring these funds are used efficiently, effectively and in compliance with EU policies. The over-arching goal of any new PP action should be to reduce risks, build national and local administrative capacity, improve value-for-money and boost competitiveness, whilst increasing real transparency towards citizens and the market.

5.4. Monitoring

Progress of the Action Plan will be monitored on a reoccurring basis. One important overall result indicator will measure the reduction of the error rate linked to public procurement irregularities for ESI funded projects and programmes. For the specific actions under the Action Plan the objectives include achievement of specific deliverables for each action (e.g. Production of the Guidance on how to avoid errors & dissemination strategy; pilot integrity pacts launched covering PP; finalisation and dissemination of indicators for ExAC assessments) The Action Plan and updated progress will be published on info REGIO website²⁰.

5.5. Communication

The communication is a powerful leverage for authorities to induce change in policy, in addition to legislation, regulation or financing. Therefore effective communication on the Action Plan is essential for (1) increasing the awareness, both inside and outside the Commission, about the Action Plan and its deliverables; (2) making available the instruments and good practices produced to the PP practitioners and (3) informing the public about what the Commission is doing and intends to do in the area of efficiency and transparency of public procurement.

Main communication channels and types of actions are as follows:

a) At the level of Action Plan:

- **Intra and inter-DG dissemination:** high-level meetings between Commissioners, meetings of responsible Directors, Public Procurement Working Group meetings, extended matrix on Administrative capacity, targeted correspondence, corporate outlets, etc.
- **Information to citizens & public procurement practitioners:** publications on DG's websites, trainings and presentations in public events, meetings with and events in the Member States, infographic.
- **Information to other stakeholders:** presentations and report on the progress (for example to REGI-CONT, etc.)

b) At the level of individual action: communication activities are part of every action (*for example, for Action 16-01 (Study on Public Procurement good practice sharing) good practices will be promoted also by practice owners to potential practice adopters, etc.*)

²⁰ http://ec.europa.eu/regional_policy/en/

It is recommended to incorporate those actions in the communication strategies of the respective DGs which complement the Commission's corporate communication campaigns.

6. Annex I – Action plan

