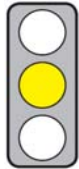


## MAIN ISSUES

**Objective of the Green Paper:** A reform of EU public procurement rules is to make public procurement more efficient and to instrumentalise it for “policy objectives”.

**Parties affected:** Business, public institutions.



**Pros:** Greater flexibility in procurement procedures, for instance through more room for manoeuvre when negotiating the terms of contract, increases the efficiency of public procurement.

**Cons:** Instrumentalising public procurement in order to reach the targets of the Europe 2020 Strategy is detrimental to the efficiency of both public procurement and the achievement of said targets.

## CONTENT

### Title

**Green Paper COM(2011) 15** of 27 January 2011: On the **modernisation** of EU **public procurement policy** – towards a more efficient European Procurement Market

### Brief Summary

#### ► Background and targets

- The public demand for public works, supply and service contracts is covered by the award of public contracts (“procurement”). According to the Commission, public procurement accounts for 17% of EU GDP (Internal Market Scoreboard No. 19, p. 23).
- Where awards exceed a certain volume, the EU procurement regime obliges contracting authorities to apply EU-wide procurement procedures. This is to ensure transparent, non-discriminatory procedures targeted towards competition.
- The major EU public procurement rules are laid down in:
  - the Directive on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (2004/18/EC) and
  - the Directive coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (2004/17/EC).
- The Commission wishes to reform “existing tools and methods” in order to
  - increase the efficiency of public spending,
  - implement “policy objectives” to promote, in particular, innovation,
  - facilitate cross-border participation in EU-wide procurement procedures,
  - improve the access of European undertakings to third country procurement markets, and
  - prevent and fight corruption and “favouritism”.
- In addition, the Commission is considering changing “certain basic notions and concepts” to ensure better legal certainty. This would affect, for instance, the classification of public contracts in works contracts, supply contracts and service contracts (p. 7).
- Citizens, organisations and authorities may comment on the Green Paper and its 114 concrete questions by 18 April 2011. At the beginning of 2012, the Commission wishes to submit amendment proposals relating to EU procurement rules.

#### ► More efficient public spending

- The current procurement procedures are to be reviewed with the aim of
  - increasing flexibility in negotiations, for instance, through greater room for manoeuvre when negotiating the terms of contract during procurement procedures;
  - alleviating the administrative burden on undertakings in tender procedures;
  - reducing transaction costs and
  - reducing the duration of procurement procedures.

At the same time, results with the “best value for money” must be ensured (p. 14).

- A “lighter procedural framework” is being considered, in particular, for smaller local and regional contracting authorities, for instance through less strict publication requirements (p. 19).
- The Commission refers to the “considerable positive effects” of such an “aggregation of demand” highlighted by those in favour and to the “coordination of public procurement between contracting authorities”. In order to promote this, it argues in favour of “more specific EU-level instruments”, though without actually substantiating these in any detail (p. 23).

- The Commission wishes to clarify under which conditions the EU procurement rules could be applied to procurement between authorities (so-called public-public cooperation). To date, this form of cooperation has been covered by comprehensive ECJ legislation. In 2011, the Commission wishes to publish guidelines on the interpretation of this case law (p. 22).

► **Inclusion of “policy objectives” in public procurement**

- Public procurement can make “an important contribution to the achievement of the Europe 2020 strategic goals” [COM(2010) 2020; see [CEP Policy Brief](#)] (p. 33). For instance, this applies to
  - fostering innovation,
  - environment,
  - health and social conditions,
  - increasing resource and energy efficiency and combating climate change; for instance, the promotion of renewable energy and “smart grids” could be used as procurement criteria [Communication Energy Strategy COM(2010) 639; see [CEP Policy Brief](#)]; in purchasing products and services the lifetime operational costs should be included – to be identified by a “general methodology” (p. 42).
- The Commission places particular emphasis on the promotion of innovation: “Public procurement of innovative products and services is crucial to improve the quality and efficiency of public services at a time of budget constraints” (p. 44).

It deems the following particularly important:

- “pre-commercial procurement” contributing to the development of new, not yet available products and services [for more details see the Communication on the Innovation Union COM(2010) 546; see [CEP Policy Brief](#)],
- a sufficient protection of intellectual property rights and of innovative solutions in the procurement procedure.
- There are two possible ways to include policy objectives into public procurement (p. 34):
  - “how to buy”: public authorities take into account the policy objectives under procedural public procurement rules (e.g. by defining certain selection criteria when evaluating the candidates or by imposing contract performance clauses).
  - “what to buy”: “mandatory requirements” are imposed on contracting authorities or “incentives to steer their decisions” provided as to which goods and services should be procured.
- The Commission refers to the conflict of objectives (“trade-offs”):
  - The inclusion of “policy considerations” in public procurement might conflict with the principle of “the most efficient use of public funds” (p. 39).
  - Politically motivated requirements as to public procurement, e.g. a women's quota in companies, can “run counter” to other policy objectives, e.g. the promotion of innovation
  - Politically motivated requirements can increase the administrative burden for companies and in particular discriminate small and medium-sized undertakings (SMEs).

► **Increase competition on procurement markets**

- Procurement markets often have “anti-competitive structures” with oligopolistic traits. Therefore, they are particularly “prone to” anti-competitive conduct, e.g. collusive tendering and market segmentation. At the same time, only 1.7% of public contracts are being awarded to contractors from other Member States (Internal Market Scoreboard No. 19, p. 27). The Commission sees “considerable untapped potential” here.
- In order to increase competition on procurement markets, the Commission proposes:
  - The conditions for cross-border participation in public procurement should be improved, e.g. through the mutual recognition of certificates.
  - SME access to procurement markets should be facilitated, for the comprehensive verification requirements during the selection phase of procurement procedures and demanding selection criteria have a negative impact on SMEs. As a solution, the Commission proposes:
    - A reduction in the administrative burden on SMEs when participating in tendering procedures and
    - Non-binding quota for the participation of SMEs in public procurement; binding procurement quota for SMEs, however, are rejected by the Commission.

► **Access to procurement markets in third countries**

The Commission is aiming for an improved “reciprocal” access to procurement markets in third countries, as the “EU procurement market is more open than the procurement markets of our international partners” [for further information see Communication on trade policy COM(2010) 612; see [CEP Policy Brief](#)] (p. 54 et sqq.).

► **Fighting corruption and favouritism**

- Public procurement is a “risk area” for corruption, “favouritism” (e.g. favouritism shown to local candidates) and personal, professional and financially motivated “conflicts of interest” (p. 49 et sqq.).

- The Commission is considering integrating “procedural guarantees” into EU public procurement legislation in order to improve the “European common standard of protection”. In so doing, it must be taken into account that:
  - the mentioned problems are characterised by “national and business cultures” and
  - additional safety requirements bear the risk of increasing the administrative burden and thus would run counter to cutting red tape in procurement procedures as intended.

### Statement on Subsidiarity by the Commission

The Commission does not address the principle of subsidiarity.

### Policy Context

In the third quarter of 2011, the Commission wishes to publish a White Paper on modernising public procurement and, at the beginning of 2012, submit amendment proposals regarding EU procurement rules. The results of the consultation to the Green Paper and a Commission analysis of the effectiveness and cost-efficiency of the ruling EU procurement legislation are to be presented at a conference on 30 June 2011 in Brussels.

In 2010, the Commission published a Green Paper on public e-procurement of [COM(2010) 571] and carried out a consultation on concessions.

In a Communication of 2008 on Green Public Procurement (GPP), the Commission already established EU-wide harmonised environmental criteria in procurement [COM(2008) 400; see [CEP Policy Brief](#)].

### Options for Influencing the Political Process

Leading Directorate General: DG Single Market and Services

Consultation procedure: Each citizen may submit his or her statement. The procedure ceases on 18 April 2011;

[http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/consultations/index\\_de.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_de.htm)

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

EU rules for public procurement are basically appropriate: In private business, the competition on the goods markets sets strong incentives to buy outlays at the lowest costs possible. For the more expensive the outlays, the more expensive is the end product. Public institutions, however, do not have to sell their goods on competitive markets. Often a market price does not even exist. By virtue of this, there is no supervisory authority that ensures that contracting authorities choose the best solution in terms of economic criteria. This is problematic, as taxes and levies become higher than necessary as a result. In order to ensure an efficient use of public means, it is therefore necessary to prescribe binding criteria to the public purse so as to guarantee that the most cost-efficient offer in the EU is being chosen. Such criteria comprise particularly the transparency of public procurement and the non-discrimination of its bidders. They are reflected in the obligation to put larger contracts out to public tender. However, it is equally important to keep the resulting administrative burden on both sides – the bidders and the public contractors – as low as possible.

#### Impact on Efficiency and Individual Freedom of Choice

The aim to relieve the procurement rules of administrative burdens in order to reduce costs and duration can help increase the efficiency of public procurement, in particular in the case of standardised goods procurement. Given that the price and quality of goods is known and the transparency of the procedure remains maintained, the room for abuse is relatively low.

**The negotiating flexibility can be increased if contractors are allowed to negotiate contract terms with potential bidders during the procurement procedure**, for the possibilities and demands often do not become apparent until the procedure starts. **Conversely, the latitude of public contractors increases.** This can lead to a situation where not the cheapest bidder is contracted but personal and political considerations play a role in procurement. Whether or not the additional flexibility will prevail over these disadvantages will depend on the concrete legislation design.

Whether or not EU procurement legislation is applied to public-public co-operations today depends on the ECJ’s case-by-case law. The announced Commission’s guidelines will increase legal certainty.

**The Commission’s aim to use public procurement in order to achieve the targets of the Europe 2020 strategy, however, carries two risks:**

**Firstly, there is the danger that the efficiency of public procurement is diminished**, as the Commission itself points out. This is always the case when production costs or administrative burdens increase through additional policy requirements. The administrative burdens are imposed on both the bidders, who must give

proof of complying with additional requirements, and the public contractors, who must verify such information. Moreover, the efficiency of public procurement can also be lowered if only a few companies comply with the additional requirements and thus competition between bidders is weakened. Public contractors could even take advantage of this circumstance if they wish to favour national companies which anyway fulfil the requirements. The poorly integrated internal procurement market would be even more fragmented in this case.

**Secondly, there is a danger that the “Europe 2020” targets are not being achieved in an efficient manner.** In fact, environmental policy targets can best be achieved through emissions trading [see [CEP Policy Brief](#) on green public procurement COM(2008) 400]. Therefore, this tool should be used with priority in order to reach such aims.

The only appropriate solution proposed is to include the lifetime operational costs of products with uniform criteria when awarding a public contract. For this would not only lead to more attention being paid to energy consumption, but also to increased efficiency in public procurement by buying the good which is the most cost-efficient in terms of its lifetime.

Socio-policy requirements, such as the obligation to create childcare facilities, bear the risk of disproportionately high costs. Social working conditions are generally negotiated between the collective agreement parties. This allows for a balance between costs and profits. As an employer, the state has a great power here, which should not be further increased through public procurement. Socio-policy requirements in public procurement can impose great financial burdens on undertakings. This does not necessarily mean that these requirements relate to the employees’ wishes.

**The instrumentalisation of public procurement for the promotion of innovation bears the additional danger of scarce resources being directed to the wrong areas.** Entrepreneurs should decide for themselves how best to deploy scarce resources [see [CEP Policy Brief](#) on the innovation union COM(2010) 546]. **The innovative capability of the European economy is to be strengthened by improving the framework conditions for innovative undertakings.**

#### Impact on Growth and Employment

The instrumentalisation of public procurement for policy targets leads to higher costs for public contractors. The resulting higher tax burdens have a negative impact on growth and employment.

#### Impact on Europe as a Business Location

Higher costs for public procurement can lead to an increase in state debts and the tax burden. Thus the attractiveness of Europe for investments is lowered.

## Legal Assessment

### Legislative Competence

The ruling Procurement Directives 2004/17/EC and 2004/18/EC are based on the approximation of laws competence laid down in Art. 114 TFEU (ex-Art. 95 TEC), which is relevant to amendment directives.

### Subsidiarity

EU-wide rules for public procurement beyond defined thresholds create the basis for the cross-border participation in public tenders and therefore comply with the principle of subsidiarity.

### Compatibility with International Law

Amendments to EU procurement rules should be carried out whilst bearing in mind the fact that the EU must comply with international obligations. The EU is a contract partner to the WTO agreement on the Government Procurement Agreement (GPA) and, moreover, has concluded bilateral trade agreements on public procurement.

## Conclusion

The Commission's proposal for greater flexibility in public procurement, e.g. by more room for manoeuvre in negotiating contract terms, increases the efficiency of public procurement. However, this must not lead to public contractors having discretionary powers so great that they start pursuing irrelevant goals. The instrumentalisation of public procurement for the achievement of policy objectives, in particular for implementing Europe 2020 targets, which includes the promotion of innovation, affects negatively the effectiveness of public procurement and, at the same time, prevents an efficient implementation of the pursued policy targets.