



Twelve levers for the development of the Single Market – Developments on public procurement

Ms Kristin SCHREIBER
Deputy Head of cabinet of Commissioner Barnier

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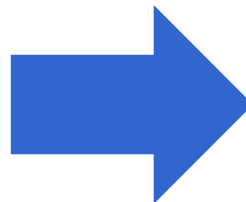
Rationale for Single Market Act II

- **Potential:** from 1992 to 2008 the Single Market generated an 2.77 million extra jobs and an 2.13% extra GDP
- **Single Market Act I :** 12 key proposals to further develop Single Market: Parliament and Council to adopt
- **More is needed:** potential unexploited, economic crisis >>>Single Market Act II

Single Market Act II

12 levers

1. Rail transport
2. Maritime transport
3. Air transport
4. Energy
5. Citizen mobility
6. Access to finance
7. Business environment
8. Services
9. Digital Single Market
10. E-invoicing in procurement
11. Consumers
12. Social cohesion & social entrepreneurship



4 drivers

- Integrated networks*
- Mobility*
- Digital economy*
- Social entrepreneurship, cohesion and consumer confidence*



Delivery of SMA Actions

- Quickly adopt SMA I proposals
- Commission to table SMA II proposals for all legislative key actions by spring 2013 and non-legislative by end-2013
- European Parliament and Council called upon to adopt SMA II legislative proposals by spring 2014

Public procurement in figures

- **Public procurement in the EU = 2.200 billion euros in 2009 (19% of the European' Union's GDP)**
- **Contracts falling under EU Directives = 420 billion euros (3.5% of the European Union's GDP), of which:**
 - works: 39%
 - Services: 38%
 - Supplies: 23%



Preparatory works

- Comprehensive **evaluation** of the impact and effectiveness of EU public procurement legislation (published 24.06.2011)
- Public **consultation** by Green Paper on the modernisation of EU public procurement policy (over 620 replies; synthesis published 24.06.2011)
- **Conference** on the modernisation of EU public procurement policy (30.06.2011)

Objectives of the Reform

**1. Simpler /
more flexible
procedures**

2. Strategic use

**3. Better access
(SMEs, cross-
border trade)**

**4. Sound
procedures**

5. Governance / Professionalisation of procurement



1. Simplification

Measures proposed by the Commission:

- **broadening the existing negotiation possibilities,** with safeguards needed to protect against abuse.
- **reduced documentation requirements,** in particular through:
 - use of self-declarations from bidders (only the winning bidder has to provide formal certificates)
 - extension and, in the medium term, the generalisation of electronic communication in public procurement: 100 billion euro savings per year expected

2. Strategic use of public procurement (a)

- introduction of **'life-cycle cost' concept**: to encourage public authorities to consider the full life-cycle of the products/services they want to purchase;
- contracting authorities might also take into account the **production process** of the specific works, services or supplies to be purchased, such as the **inclusion of vulnerable and disadvantaged people** or the **use of non-toxic substance**, in their award decisions;



2. Strategic use of public procurement (b)

- **labels**: specific labels might be requested by contracting authorities provided requirements are linked to the subject-matter of the product;
- **innovation partnership**: new procedure for developing products and services not yet available on the market;
- **specific simplified rules for social, health, cultural and assimilated services**:
 - higher threshold – EUR 500 000;
 - below threshold: typically no-cross-border interest
 - Member States free to decide on procedures, only requirement: ex-ante (and ex-post) publicity + non-discrimination principle.



3. Better access to SMEs

60% of the contracts falling under the European public procurement Directives are awarded to SMEs.

SMEs will benefit from:

- **general simplification measures** (reduction of documentation requirements and e-procurement)
- **specific SME-friendly measures:**
 - subdivision into lots ('apply or explain');
 - maximum turnover cap (=3x estimated contract value)

In addition:

- **Reporting on the success of SMEs**

4. Sound procedures

- **"conflicts of interests"** clarified + Member States have to take measures to effectively prevent, identify and remedy them;
- **exclusion grounds** strengthened and extended e.g. to cases of undue influence on the decision process or serious misrepresentation in providing information on the absence of grounds of exclusion;
- **rules on abnormally low tenders** strengthened: compulsory exclusion in case of abnormally low tender in particular due to non-compliance of EU law in the field of social and labour law and environmental law and international social and environmental law;
- **rules for contract modifications during execution**: substantial modifications of contract shall lead to new tender procedure.



5. Governance

- **increase monitoring at national level**: Member States have to take ownership of monitoring the correct application of the Directives;
- **reporting** to the Commission on monitoring (e.g. information on sources of wrong application, legal uncertainties, level of SMEs participation);
- through monitoring, **enhance the prevention and detection of procurement fraud, corruption and conflicts of interest.**



State of play

- **Commission** adopted proposals on 20 December 2011
- **Council:**
 - Examination (Council Working Group) almost finished; negotiation mandate to be adopted soon
 - Twice discussed in Competitiveness Council (February and May 2012)
- **European Parliament:**
 - Draft Report issued by Rapporteur in IMCO (Internal Market and Consumer Affairs) – more than 2500 amendments
 - IMCO vote on report planned on 29 November (public procurement Directive) and 18 December ('utilities' Directive)
- **Adoption of the directives planned under Irish Presidency beginning of 2013 (March or April)**



Proposal for a Directive on the award of concession contracts

What are concessions?

- Partnerships between the public and the private sector
- Contractual arrangements, usually for big infrastructure projects or for provision of services of public interest
(e.g. building and managing motorways)
- Private partner is remunerated by being permitted to exploit the work or service
(e.g. in the case of motorways the remuneration is received in the form of tolls paid by the users)
- Private sector bears risk, traditionally born by the public sector
(e.g. risk that the motorway will not be used)

! Over 60% of all public-private partnerships qualify as concessions.






Why concessions are important?

- Important share of the economic activity in the EU

(e.g. in 7 Member States in the water, waste, health and transport sectors, concessions were estimated to be worth € 138 billion annually).

- Mobilisation of private capital and know-how for large projects of long duration
- Ensure efficient spending of taxpayers' money.




Current EU regime on concessions

Finding investment opportunities: 
Competing on equal footing 
Reviewing unlawful practices 

Works concessions (Dir. 2004/18)

how to publish notices for such contracts

how to award a contract – ???
how to appeal

Finding investment opportunities 
Competing on equal footing 
Reviewing unlawful practices 

Services concessions (EU Treaty principles)

???

???

???

Why a directive on concession contracts?

- *The current situation is not satisfactory*
 - *Legal uncertainty which discourages the public and private sector to use concessions*
(no clear definition of concessions or how to conduct bids/select the best offer).
 - *Existence of entry barriers*
(disparity of national rules; awarding contracts without any competition).
 - *Insufficient legal protection of tenderers in case of unlawful practices.*

! As a consequence - no real EU single market in the area of concessions.



Therefore rules are needed

- Single, clear «rule book» for concessions.
- Simple set of rules for all sectors where concessions exist.
- Increased flexibility because of the complexity of these contracts.



Content of the Proposal – main elements

- Clear definition on what is a concession.
- Publication of notices in the Official Journal of the EU.
- Procedural guarantees when conducting a procedure.
- General requirements on how to select & exclude candidates.
- Extension of judicial protection (Remedies Directives) to service concessions and works concessions in vital sectors like water, energy and gas.



International Procurement Instrument

*Proposed Regulation, adopted by the European Commission
(21 March 2012)*



Economical context

- EU's public procurement market open to third countries (up to 85% in the GPA, in practice even more).
- But lack of market access in non-EU countries for EU companies, goods and services + lack of fair competition in the Internal Market
- Our trading partners do not commit to open their own markets to the same extent and/or apply restrictive measures to their public procurement. Emerging economies, with rapidly increasing procurement markets, are also moving towards strong restrictive industrial policies



Overarching problems

- Loss of potential EU exports between €4 and 12 billion.
- Limited capacity for EU companies to create economies of scale due to protectionist measures in third countries
- Distorted business decisions (not based on economical reasoning but on third countries policies)
- No fair competition – no level playing field



Objectives

- Boost EU exports in public procurement markets outside EU
- Increase EU leverage in negotiations
- Increase legal certainty regarding third country access to EU procurement market
- Ensure EU international commitments are respected



Public procurement in the EU

- Total estimated EU public procurement market was +€2.4 trillion in 2010
- Total estimated EU PP market under scope of EU Directives was almost €420 billion or 18% of the total PP market in 2010
- The EU market guarantees access to GPA covered goods and services at all levels of government



Proposed regulation: clarification of rules

- **Article 4** confirms that covered goods and services are granted equal treatment as EU goods and services
- **Article 5** establishes principle of openness of EU procurement market unless application of Articles 6 or 8-10.



1st tool: article 6

- **Possibility for contracting authorities to exclude foreign (non-covered) bids**
 - Above the threshold of 5 million Euro, contracting authorities may ask the Commission for authorisation to exclude a foreign (non-covered by EU international commitments) bid if there is a lack of substantial reciprocity or if we have negotiated reservations;



2nd tool: article 8-10

- **Investigations by the Commission** of repeated discriminatory policies in non-EU countries against EU suppliers, goods or services
- **Consultation and negotiation with non-EU countries with a view to solve concerns and open their markets**
- Possibility for the Commission, if all attempts to open their market have failed, **to adopt proportional restrictive measures against the concerned non-EU country (market access restrictions, price penalties)**



Additional tool (Article 7): abnormally low tenders

- Commission proposal for modernisation Directives: **Articles 69/79**
- In case of abnormally low tender: **obligation to ask explanation** (e.g. state-aid, compliance with social/environmental legislation)
- If, for tenders with more than 50% non-covered goods/services the contracting authority **intends to accept the justifications provided, the contacting authority should inform the other tenderers**, including the reasons for the abnormally low character of the price