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COMMISSION STAFF WORKING PAPER
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Proposal for a Directive of the European Parliament and of the Council
on Public Procurement
and
the Proposal for a Directive of the European Parliament and of the Council
on procurement by entities operating in the water, energy, transport and postal sectors

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1. BACKGROUND

Public procurement (PP) is the process used by government institutions and public sector organisations (CAEs) to buy supplies, services and public works. Such expenditure is a significant and influential component of the economy. In 2009, contracts governed by EU PP rules accounted for 3.6% of EU GDP (€420 billion).

Several recent reports and policy statements highlight a need to review these Directives. Reviewing the PP framework is a priority of the Single Market Act.

This Impact Assessment analyses the current challenges facing EU PP policy and explores the options to support and adapt Directives 2004/17/EC and 2004/18/EC.

2. STAKEHOLDER CONSULTATION

This report builds on the extensive external expertise, consultation and analysis that underpins the 2011 evaluation of PP and the 2010 evaluation of the 2004 Action Plan for e-procurement. It draws on the findings of 2 Green Paper consultations on:

- (a) the modernisation of EU PP policy (over 620 replies)
- (b) expanding the use of e-procurement in the EU (77 replies).

Both Green Papers were supported by well-attended conferences in Brussels where stakeholders had a further opportunity to express their views.

Member State (MS) representatives were consulted via the Advisory Committee for Public Contracts (ACPC).

3. PROBLEM DEFINITION

3 key problems have been identified:

- Insufficient cost-efficiency — current EU rules generate estimated savings of approximately €20 billion on €420 billion p.a. but procedures may be unduly burdensome as the associated cost is around €5.6 billion.
- Missed opportunities for society — current rules may not always allow stakeholders to optimise the use of their resources and/or make the best purchasing choices.
- National rather than EU PP market — over 98% of contracts awarded according to EU rules are won by national bidders (approximately 96% of total value).

Further analysis has identified the following causes of these problems, classified into 5 main areas.

3.1. Scope

Cause: complex rules

Complex and unclear EU rules defining scope and coverage generate uncertainty, lead to risk-averse circumvention and ‘box-ticking’ behaviour by public purchasers to the detriment of the quality of procurement outcomes. Costly regulatory apparatus is applied to large populations of purchasers or transactions without sufficient countervailing benefit. There are many ‘grey zones’ regarding the activities covered by the Directives (e.g. form of public-public cooperation) and the rules that apply to different types of contract. Such complexity creates litigation costs, falling mainly on CAEs, who require advice on how to achieve compliance.

3.2. Procedures

Causes: disproportionate and inflexible procedures

Disproportionate procedures generate excess costs, especially for smaller contracts. A typical procedure costs nearly €28 000 (average CAE cost €5 500; 5.9 firms bid at a cost per firm of €3 800). At the lowest EU threshold (€125 000) such costs represent 18-29% of the contract value. Further evidence is given by the significant variations noted in MS' performance (e.g. the difference in time taken from dispatch of the contract notice to award spans a range of 180 days).

Many stakeholders complain that the current procedures are inflexible and limit their ability to negotiate. In particular CAEs cannot make the best use of non-standard procurement solutions (e.g. innovative purchasing).

3.3. Strategic procurement

Causes: uncertainty and insufficient provisions on the integration of strategic goals

Despite several communications to clarify how to integrate other policy objectives (e.g. green, social, innovative) when applying PP rules, many stakeholders find that problems remain. They also feel that more can be done to help CAEs who wish to spend public money in a more strategically responsible manner. A fear of litigation (due to non-compliance) has led to low take-up of such options and a general lack of

monitoring prevents the identification of successes and wider promotion. There is also a lack of convergence in the way MS use the available measures and the resultant different standards / labels actually risk fragmenting the market further along national lines.

3.4. Access

Causes: regulatory and 'natural' market barriers

Difficulties affecting market access across Europe lower the involvement of SMEs and reduce cross-border bidding. Many bidders have never attempted to bid in another country, due to a mix of natural (e.g. language, geographic) and regulatory administrative barriers. Both SME and cross-border bidders are hampered by administrative requirements (e.g. provision of evidentiary documents) and problems in obtaining information. The share of SMEs winning PP contracts has not changed significantly since 2002, nor have cross-border participation rates improved. The most significant factor affecting SME participation is contract value — SMEs have problems bidding for or fulfilling contracts over €300 000.

3.5. Governance

Causes: different models and administrative capacities across MS

Significant differences in the administrative organisation put in place by MS have led to inconsistent application, control and monitoring across the EU. This has resulted in errors, an increased risk of fraud and sub-optimal management of resources. Recent audits of EU-funded projects found significant error rates due to incorrect application of PP rules and in some instances, incorrect transposition of EU Directives. Analysis of the infringement procedures launched by the Commission since 2005 identified a similar range of errors and issues, implying that such mistakes are not one-offs but occur repeatedly.

3.6. Consequences

Taken together, these 3 key problems lead to the conclusion that the Internal Market is not achieving its full potential in PP. Without action, this situation will at best continue and could even get worse as differences become more marked and the lost opportunity costs of a sub-optimal framework are taken into account.

Given that many of the problems identified are the result of action and interpretations stemming from 2 EU Directives, it follows that EU level action is justified and could be required to address these issues.

4. OBJECTIVES

The evaluation recognised that the general objectives of existing PP policy remain valid, particularly given the current financial strain in many MS. Hence the EU will continue to promote fair, non-discriminatory and EU-wide competition in order to deliver the best value for money whilst achieving the best possible procurement outcomes for society. It will also remain active in the fight against corruption.

Specific objectives have been identified to respond to the main problems identified above. They are to:

- (1) improve the cost-efficiency of EU PP rules and procedures;
- (2) take full advantage of all opportunities to deliver the best possible outcomes for society;
- (3) create EU rather than national markets for PP.

9 operational objectives have also been identified to address the causes of the problems. Achieving these operational objectives should help achieve the specific objectives and lead to improved performance against the overarching goals.

5. OPTIONS

A wide range of options have been considered, although radical action (either complete abolition or full harmonisation of EU legislation) was quickly discarded. Using the operational objectives as a guide, a range of non-legislative (SOFT) and legislative (LEGI) options, based on certain critical choices, was developed to address each of the 5 main problem areas. A high-level approach has been adopted, since microscopic examination of all the possible legislative changes would produce a document of several hundred pages.

After further screening, 12 options were selected for further analysis against the baseline (no change) scenario. 2 LEGI options were retained for each problem area, differing in their degree of ambition, and soft law options for problems in access and governance.

For a given problem area, it is not always an ‘either/or’ choice in favour of one option. For the solutions proposed relating to scope, procedures and governance, the best solution could be to combine both LEGI options or LEGI and SOFT.

6. IMPACTS AND COMPARISON OF OPTIONS

The key impacts of these options are summarised below. In general, the most immediate impacts are economic with limited social and environmental effects, except for the options relating to strategic use which are, by their very nature, intended to create (positive) social and environmental impacts.

6.1. Scope

Options

SCO.LEGI.TARGET: targeted adjustments to scope of PP legislation

SCO.LEGI.REDUCE: significant amendments to exclude certain purchasers/purchases

Impacts

Both these options should improve clarity and hence improve cost-efficiency. SCO.LEGI.TARGET should address the current grey areas and improve legal certainty without triggering any expected international consequences. Creating a new lighter regime for social services contracts above €500 000 and applying the full regime to all other services should improve clarity and the application of EU rules.

The impacts, and hence benefits, of SCO.LEGI.REDUCE would be limited to the excluded procurement and are based on the assumption that any substitute national regime is lighter than the EU one. While national (below EU thresholds) procurement rules may be less prescriptive, a substantial regulatory cost would remain for such exempted purchases and the inherent and unavoidable costs of sound management of PP. Exclusions would also reduce transparency at EU level, but probably also nationally, with the associated negative impact on competition and price paid. Depending on the exact exclusions, additional costs may be incurred if they contravene international obligations, triggering the foreclosure of partner country markets with potentially significant negative impacts for EU firms trading with these countries.

Improving legal clarity (SCO.LEGI.TARGET) would not address issues affecting the capture of stakeholders and transactions. The decision as to whether the right stakeholders and subject matter would be covered is more complicated (and to a certain extent political given the possible international consequences).

6.2. Procedures

Options

PRO.LEGI.DESIGN: correct and enhance existing procedures.

PRO.LEGI.FLEXIB: expand menu of procedural options available to CAEs and alleviate procedures that result in disproportionate costs.

Impacts

PROC.LEGI.DESIGN would improve the design of certain procedures, and give greater legal clarity on what was required. This should improve cost efficiency and the overall proportionality of the PP process. Whilst greater use of repetitive purchasing techniques should have overall positive benefits for CAEs, there are some concerns about market closure and the longer-term access of firms to such tools. This would have to be addressed to ensure transparency and non-discrimination and prevent a restriction of competition. Enforcing tools and measures that can facilitate up-take of e-procurement should significantly improve cost-efficiency and strengthen the integration of EU PP markets, although there would be set-up costs and technical barriers to be overcome (to avoid market fragmentation).

PROC.LEGI.FLEXIB would increase the choice and flexibility available to CAEs which could also improve procurement outcomes, particularly through the use of greater negotiation (although with certain caveats relating to appropriate use and potential costs of developing negotiating expertise). A lighter regime for contracts tendered by sub-central authorities should improve cost efficiency and, assuming

certain minimum transparency requirements (use of a Prior Information Notice), there should be no marked drop in competition and no international consequences.

6.3. Strategic procurement

Options

STR.LEGI.FACILIT: enable CAEs to frame their PP needs in ways that integrate other policy goals.

STR.LEGI.ENFORC: remove discretion from CAEs. They must award (all or part of) contracts on the basis of performance on other policy goals.

Impacts

Broadly speaking, the measures under both these options are very similar. Their impacts would differ mainly according to whether a permissive or a coercive approach was adopted at EU level. Both would aim to improve the ability of CAEs to achieve wider strategic goals. The strategic impacts of the FACILIT option would generally be lower than for ENFORC, due to likely variations in implementation across MS depending on choices taken. However, national authorities and CAEs would retain the ability to make choices depending on actual circumstances and available resources, which is particularly important in the current financial climate. ENFORC would ensure greater consistency and uptake across the EU. Both options have costs to CAEs and firms due to the increased information requirements and the need for greater knowledge and controls across a range of policies. Both options could, in the short term at least, increase complexity and the administrative burden.

6.4. Access

Options

ACC.SOFT: further EU guidance and training on access e.g. to facilitate cross-border buying and selling.

ACC.LEGI.FACILIT: remove administrative barriers to SME participation and cross-border access.

ACC.LEGI.ENFORC: introduce prescriptive measures to reserve parts of PP markets for SMEs or require structuring of purchases in ways that favour SME participation.

Impacts

Again, the 2 LEGI options contain similar content and the main difference in impact relates to whether a permissive or coercive approach is adopted. Whilst coercive measures should lead to more SME and possibly cross-border access and generally improve the internal market for PP, it is not necessarily clear that this would streamline and simplify the rules. Increasing information requirements could increase complexity and the administrative burden for CAEs and firms. Some of these costs could be lower under a permissive approach, which could be more targeted to local needs.

Instruments that aim to facilitate access to EU PP markets e.g. by reducing the evidentiary requirements for bidding, should result in simpler and less burdensome processes for SMEs and cross-border bidders. Adopting the winning bidder approach to providing documentary evidence would reduce administrative costs by 80%. Use of lots for contracts with a total value above certain thresholds would also increase the number of contracts accessible to SMEs.

The ACC.SOFT option would have a minor positive impact on access rates but is low cost.

6.5. Governance

Options

GOV.SOFT: identify and provide guidance on areas of recurrent difficulty affecting governance e.g. ‘best practice’ learning and benchmarking.

GOV.LEGI.TARGET: leverage economies of scale and optimal outcomes for CAEs by using specialised professional bodies that aggregate purchasing, where appropriate.

GOV.LEGI.ENHANC: oblige MS to establish a national authority responsible for PP implementation, control and monitoring and that reports annually on performance.

Impacts

Increasing the availability and role of specialised purchasing bodies should significantly help the many CAEs that rarely conduct high value procurement and are uncertain of how to comply with EU rules. Whilst greater aggregation raises concerns about possible market closure which would need to be addressed, GOV.LEGI.TARGET should have overall benefits for CAEs and firms. GOV.LEGI.ENHANC should create similar conditions and architecture for control, monitoring and application of PP rules at national and EU level, improving consistency and certainty across the EU and strengthening the internal market. Although MS and CAEs would probably incur some additional costs, many already have the necessary structures and should make savings due to improved coordination and monitoring.

Similar, but lesser impacts could be expected from GOV.SOFT which, due to its voluntary nature, would be unlikely to achieve the same degree of adoption and consistency.

7. PREFERRED OPTIONS

Based on this analysis, the following package of solutions is proposed (shaded grey):

Options Problem groups	No change options (NC)	Soft law options (SOFT)	Legislative — generally within current framework (LEGI.)	Legislative — new or significant change (LEGI.)
Scope (SCO)	<i>SCO. NC</i>	<i>SCO. SOFT</i>	<i>SCO.LEGI.TARGET</i> (clarify boundaries)	<i>SCO.LEGI.REDUCE</i> (significant re-scoping)
Procedures (PRO)	<i>PRO. NC</i>	<i>PRO. SOFT</i>	<i>PRO.LEGI.DESIGN</i> (improve definitions and design)	<i>PRO.LEGI.FLEXIB</i> (Increase choice, increase e-proc)
Strategic (STR)	<i>STR. NC</i>	<i>STR. SOFT</i>	<i>STR.LEGI.FACILIT</i> (facilitate strategic public procurement)	<i>STR.LEGI.ENFORC</i> (enforce strategic public procurement)
Access (ACC)	<i>ACC. NC</i>	<i>ACC. SOFT</i>	<i>ACC.LEGI.FACILIT</i> (facilitate access)	<i>ACC.LEGI.ENFORC</i> (enforce tools for access)
Governance (GOV)	<i>GOV. NC</i>	<i>GOV. SOFT</i>	<i>GOV.LEGI.TARGET</i> (optimise the use of resources)	<i>GOV.LEGI.ENHANC</i> (enhance control & responsibility)

8. FUTURE MONITORING AND EVALUATION

A lack of consistent and comparable data hampers current efforts to monitor PP achievements and identify areas for further action. Certain improvements to monitoring arrangements are implicit under several measures considered e.g. improving governance and e-procurement. Better statistics and monitoring methodologies should be considered to monitor:

- Compliance costs;
- Use and savings/costs of switching to e-procurement and delivering strategic goals;
- SME and cross-border access rates;
- Measures to address fraud, corruption and non-competitive behaviour.

The draft text would include a commitment to evaluate any new legislation.