BUSINESSEUROPE

POSITION PAPER

18 April 2011

RESPONSE TO GREEN PAPER ON MODERNISATION OF PUBLIC PROCUREMENT POLICY

Executive Summary

In this paper BUSINESSEUROPE sets out its views in response to the Commission's Green Paper on the Modernisation of Public Procurement Policy.

As mentioned in the Commission's Communication on the Single Market Act in October 2010 this assessment of European public procurement legislation will be followed in 2012 by legislative proposals.

BUSINESSEUROPE would like to highlight some issues for the Commission's consideration, in particular:

- There is no pressing need to revise the European public procurement legal framework (the 2004 Directives). Efforts should instead concentrate on more uniform enforcement of the existing rules given that legal certainty for business is crucial.

- Public procurement is primarily about procuring a work, product or service at the best value compared with the required quality and about getting economic value for taxpayers' money through a competitive tendering process. Above all, public procurement should safeguard a fair, transparent and efficient purchasing procedure and the proper furtherance of the internal market.

- The existing legal framework provides sufficient legal certainty on how to introduce environmental/innovative/social aspects in procurement procedures. The wider use of green public procurement for instance should be encouraged through soft measures, not necessarily through obligations.

- In connection with the above, BUSINESSEUROPE is particularly concerned about the Commission's questions that explore the possibility of softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject-matter of the contract. In our view, the fundamental principles of non-discrimination and transparency would be at great risk, jeopardising not only the basic principles of public procurement but of the Single Market as a whole.

- The Commission should be cautious when attempting to simplify and provide for more flexibility in public procurement procedures. This should not inflict competition and transparency problems. In this context, the negotiated procedure, in its present form, is not suited to be a regular procedure.

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- No changes are needed to the way in which public contracts are currently classified – in works contracts, supply contracts and service contracts.

- BUSINESSEUROPE welcomes the Commission's intention to publish a staff working document to provide guidance on the interpretation of the case law in the context of public-public cooperation.

- Contracting authorities should increase their efforts to promote concrete SME strategies to improve SME access to public procurement.

- Regarding access of third-country suppliers in the EU market, BUSINESSEUROPE recommends: (1) the need to embark on a legal clarification exercise from the Commission to public procurement authorities across Europe on the international commitments that the EU has undertaken; (2) address challenges associated with securing rules against bribery and corruption or ensuring the full protection of intellectual property rights in EU market access rules; (3) reflect on new instruments, such as the creation of anti-subsidy instrument applicable to goods and services used in procurement, to restore a level playing field.

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Introduction

Public procurement is an essential component of the economy with total annual expenditure on the public procurement of goods and services in the European Union amounting to EUR 1,500 billion, or more than 16% of EU GDP.

The European public procurement market is currently regulated by two directives[1]: **Directive 2004/18/EC** covers public works contracts, public supply contracts and public service contracts. **Directive 2004/17/EC** covers the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

These two directives, only in force since 2007, are based on the fundamental principles of fair competition, non-discrimination and transparency, and strive for simplification, harmonisation and modernisation. They introduced a series of new elements, such as the promotion of the development of electronic procedures and specific references to the possibility of including environmental and social considerations in the contract, amongst others. They also stress the objective assessment of the tenders to determine which one offers the best value for money. This is particularly important today as the financial leeway of states and regions decreases and public deficits rise.

BUSINESSEUROPE has been supportive of this relatively new legal framework. Accordingly, apart from some amendments in certain specific areas to reflect practical experience in recent years, BUSINESSEUROPE sees no pressing need to revise it. Efforts should instead concentrate on more uniform enforcement of the existing rules given that legal certainty for business is of paramount importance.

If despite existing sound and sufficient legislation and clarifying court cases, a revision of the current legislation is envisaged BUSINESSEUROPE urges the European Commission to make sure:

- It complements the existing directives
- It safeguards transparency, market openness and competitive tendering which are vital to support economic growth, ensure quality and (environmental) innovation, as well as combating corruption
- It ensures coherence with other EU law
- It does not lead to a fragmentation of EU rules for public procurement
- It avoids any rules which would make the legal framework more complex and would create new dangers for fair competition and adequate access of SMEs to public procurement markets.

[1] These two directives are accompanied by a Remedies Directive 2007/66/EC stipulating the right of a bidder to ask for effective remedies in case of an infringement of the provisions regarding the procurement procedure as established by directives 2004/18/EC and 2004/17/EC.

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What are public procurement rules about?

European public procurement rules apply to all public contracts (above certain thresholds) that are of potential interest to operators within the Internal Market, ensuring equal access to and fair competition for public contracts within the European procurement market.

The questions in this section of the Green Paper relate to purchasing activities, public contracts and public purchasers.

Purchasing activities

BUSINESSEUROPE believes that it would be inappropriate to explicitly limit public procurement to purchasing activities only. Directives 2004/17/EC and 2004/18/EC cover, with some exceptions, all procurement activity, not just purchasing. That definition should remain in order to provide a comprehensive basis for the directives.

Public contracts

The Green Paper states that the current classification of public contracts – in works contracts, supply contracts and service contracts – is in part the result of a historical development and that the need to classify public contracts in one of these categories at the very outset can result in difficulties. However, BUSINESSEUROPE believes that a change to the current structure would entail considerable adaptation problems creating great legal uncertainty for companies. The 2004 Directives have already widely consolidated the public procurement legal framework which had previously been divided into separate Directives for each kind of procurement.

As the Green Paper rightly states, the purchase of certain products such as software applications could be regarded as either supply or service contracts, depending on the circumstances. However, Directive 2004/18/EC contains specific rules for mixed contracts, which have been further developed by the case law. In the view of the Court, where a contract contains elements relating to different types, the applicable rules have to be determined by identifying the main purpose of the contract. With this in mind, BUSINESSEUROPE urges the Commission to keep the present categories and also to preserve the definition of a 'works contract'.

Under this same section BUSINESEUROPE also advocates keeping the status quo on the current provisions on excluded contracts. Where BUSINESSEUROPE could support some change relates to the coverage with regard to service contracts.

In this context, the Commission's Communication from October 2010 'Towards a Single Market Act' underlines the essential role of public procurement legislation for a Single Market and the importance of the services sector in the Union's economic recovery. The current Directives make a distinction between A-services[2] and B-services[3].

BUSINESSEUROPE believes that the division of services into two categories can be confusing and create legal uncertainty. For some of the services explicitly mentioned in the 'B' list, such as water transport services, hotel services, personnel placement and supply services or security services, it appears difficult to assume that they represent a lesser cross-border interest than the services in the 'A' list. In this context,

[2] Services listed in Annex II A of Directive 2004/18/EC or Annex XVII A of Directive 2004/17/EC.
[3] Services listed in Annex II B of Directive 2004/18/EC or Annex XVII B of Directive 2004/17/EC.

BUSINESSEUROPE believes that the public procurement directives should in principle apply to all services of a commercial value. In any case, the present legal framework for A-services should be kept as it is with any modifications concentrating on B-services, including the option to treat B-services like A-services in future.

With regard to social services, there is no reason to exclude them from the scope of the Directives.

Public purchasers

Directive 2004/18/EC applies to contracts awarded by the State, regional or local authorities and bodies governed by public law, as well as associations formed by one or more of these entities.

The Green Paper states that the concept of 'bodies governed by public law' is rather complex as it is intended to cover legally independent organisations that have close links with the State and fundamentally act like State entities (e.g. public broadcasting bodies, universities, municipal enterprises, etc.) and therefore raises the question of whether the current approach in defining public procurers is appropriate.

In BUSINESSEUROPE's view, the present way of defining procuring entities remains by and large appropriate and the precedent of the ECJ should be deemed sufficient guidance. The Commission could possibly contribute with further guidance through an interpretative document. If legislation were to be considered, it should not go further than consolidating the Court decisions into the Directive and should under no circumstances further diminish the scope of public procurement, to the detriment of the Internal Market.

In addition, BUSINESSEUROPE believes that there is still a need for EU rules on public procurement with respect to the utilities sector. Directive 2004/17/EC remains necessary because of the residual risk that utilities, notably those which are State-owned or otherwise dominant, will resort to anti-competitive practices thanks to their quasi-monopoly status. Article 30 of Directive 2004/17/EC is an appropriate and necessary provision as it offers the possibility to exclude fully liberalised sectors from the scope of the Directive, but rightly stipulates that such an exclusion is dependent on the proof of effective market openness in the relevant sector.

Improve the toolbox for contracting authorities

Contracting authorities sometimes complain that the regulatory instruments provided by the EU rules are not fully adapted to their purchasing needs. In particular, they claim that leaner and/or more flexible procedures are needed. They further argue that, in certain cases such as in the case of procurement by very small contracting authorities, application of the full set of rules is not practical. They also believe that other situations (certain forms of public-public cooperation) should be exempted from the application of these rules. In addition, the Green Paper states that there are also areas of public purchasing where the instruments provided by the EU procurement rules might not be sufficient (joint procurement, specific problems arising after the contract award).

Modernise procedures

BUSINESSEUROPE urges the Commission to tread with caution when it looks into modernising and simplifying procurement procedures. Above all, any attempts to simplify and provide for more flexibility should not inflict competition and transparency problems.

Generally speaking, BUSINESSEUROPE believes that there is no need to change the current procedures. Under the current Directives procurers have a free choice between the open and the restricted procedure. Currently the open procedure is the most widely used, accounting for nearly three quarters of all procedures within the scope of the Directives, and is considered to be the most transparent.

In connection with the above, BUSINESSEUROPE does not see the need for a generalisation of the negotiated procedure. In its present form the negotiated procedure is not suited to be a regular procedure which could be allowed on an equal footing with the open or the restricted procedure. The main reason is that the negotiated procedure is considered to be the least transparent among all procedures.

However, the Commission could further explore how dialogue and negotiation could be used without creating inflexible rules and inflicting competition and transparency problems, bearing in mind that at this point in time the negotiated procedure does not provide enough protection for the supply side. The Commission should in any case put adequate limits and safeguards in place to cover the risk of discriminatory behaviour attached to the use of the negotiated procedure.

With regard to the Commission's question on whether a more flexible approach should be taken to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure, BUSINESSEURPE strongly believes that the status quo should be maintained, with award criteria always coming after the selection criteria, as this guarantees transparency and equal treatment of bidders.

Specific instruments for small contracting authorities

It is important for small contracting authorities to be adequately supported to carry out their procurement procedures and Member States are responsible to see that the necessary resources are put at the purchasing authority's disposal. However, in BUSINESSEUROPE's view all layers of government should follow the same procedures.

Public-public cooperation

The principle of fair and open competition prevents contracts concluded between public authorities from being automatically excluded from the scope of application of the EU public procurement Directives. It may be true that for certain forms of cooperation between public authorities, the application of the public procurement rules is not appropriate.

However, BUSINESSEUROPE does not see any particular need for the establishment of legislative rules at EU level regarding the scope and criteria for public-public cooperation. A substantial amount of ECJ case law exists to clarify when the application of the public procurement rules is or is not appropriate and offers a basis for its definition.

Any clarification of the scope of public-public cooperation should be done through interpretative documents. In this context, we welcome the reference made in the Green Paper to a Commission staff working document to be published in 2011 to provide guidance on the interpretation of the case law.

If legislation in this field were to be seriously considered under no circumstances should it end up with the area of public procurement becoming substantially restricted as this would considerably damage the Internal Market.

A more accessible European procurement market

The purpose of the Public Procurement Directives is to open up the public procurement market for all economic operators, regardless of their size.

BUSINESSEUROPE supports the objective of improving SME access to public procurement. SMEs are the backbone of the European economy, and facilitating their access to procurement opportunities can allow them to strengthen their competitiveness enabling them to contribute more towards growth, employment and innovation.

In BUSINESSEUROPE's view the current Directives are adequate and provide a good basis to ensure a level playing field for SMEs bidding for public contracts. The problems that SMEs encounter when accessing public procurement opportunities are for the most part not linked to the procurement directives themselves. Instead they often relate to the excessive demands made by the public purchasers (e.g. disproportionate financial guarantees, references or certifications).

BUSINESSEUROPE strongly believes that it is up to contracting authorities to promote concrete SME strategies. In this context, the contracting authorities should:

- Encourage small enterprises to bid for contracts
- Divide contracts into lots where suitable
- Encourage (but not oblige) subcontracting of larger contracts
- Apply well balanced contracts to avoid unbalanced risk
- Apply suitable qualification criteria
- Debrief unsuccessful candidates
- Encourage partnering/consortia
- Abstain from unnecessarily high levels of proof and financial guarantees

- Ensure that insurance/indemnity levels reflect the value of the contract more closely
- Ensure greater transparency e.g. website advertising; use of prior information notices etc

The European Institutions themselves should be 'model' or 'flagship' public purchasers. They should provide not only case studies but also interpretive guidelines on how to achieve the points raised above.

In addition, BUSINESSEUROPE believes advanced education and training is key in, amongst other things, adapting contracting authorities to SME needs. Civil servants in charge of public procurement will need highly developed skills to enable them to choose the most economically appropriate procedures and to optimise their project planning. We believe suppliers also need advanced knowledge and training on how to participate successfully in modern procurement procedures.

It is important that the Commission aims to reduce administrative burdens for business as a whole, not just SMEs. In this context certain measures could be taken to reduce the burden on all businesses. For instance self-declarations may be an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, followed up by evidence from the winning bidder only. This applies to procurement in general but to environmental and social criteria in particular. Equally, selection criteria should be proportionate to the subject matter of the contract. However, there is no need to regulate this at European level.

Strategic use of public procurement in response to new challenges

BUSINESSEUROPE agrees that public authorities can to a certain extent make an important contribution to the achievement of the Europe 2020 strategic goals, by using their purchasing power to procure goods and services with high 'societal' value in terms of fostering innovation, respecting the environment and fighting climate change, reducing energy consumption, improving employment, etc.

However, public procurement is primarily about procuring a work, product or service at the best value compared to the required quality and about getting economic value for taxpayers' money through a competitive tendering process. Above all, public procurement should safeguard a fair, transparent and efficient purchasing procedure and the proper furtherance of the internal market. Addressing common political aspects in public procurement that are not related to the subject matter of the contract would not contribute to the Europe 2020 goals but would instead have a negative impact on the primary aspects of public procurement, i.e. guaranteeing an efficient public purchasing in the interest of public authorities, business and taxpayers.

'How to buy' in order to achieve the Europe 2020 objectives

With the adoption of the new public procurement directives in 2004 Member States were bound to implement new public procurement procedures. The use of the "economically most advantageous" award criterion, consistent with relevant case law from the European Court of Justice, leaves room for public purchasers to include, in addition to price, other criteria (e.g. green or social criteria) provided that these are directly linked to the object of the contract. Environmental aspects may be used, under certain conditions, in the specifications of the contract, in the award criteria and in the performance of the contract if they are linked to the object of the contract. There is also

wide room for social criteria to be considered according to existing EU procurement law.

In BUSINESSEUROPE's view, the existing legal framework for public procurement provides sufficient legal certainty on how to introduce other criteria in public procurement and so no changes are needed. The Commission, in line with its better regulation efforts, should instead shift its attention towards developing a better understanding of how to include environmental/innovative/social aspects in procurement procedures. In this context, BUSINESSEUROPE welcomes the range of policy initiatives that have been launched in recent years, at both European and national level, to clarify the use of public procurement in support of the above outlined policy objectives, especially the ongoing work on Green Public Procurement (GPP). In particular, we welcome the Commission's recent invitation to BUSINESSEUROPE to participate in the GPP Advisory Group to have a closer dialogue with business on GPP future policy developments, and on the setting of GPP criteria for certain products and services. If properly defined and targeting the right products/services/works, these EU-wide voluntary-based GPP criteria could be an important catalyst for taking environmental considerations into account in public procurement practices across Europe. In particular, we see a need to intensify this dialogue with industry and also involve the different industry sectors in GPP development discussions.

In light of the above, BUSINESSEUROPE is particularly concerned about the Commission's questions that explore the possibility of softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract. In our view, softening or dropping this link would open up for opportunities to steer contracts to certain suppliers. The fundamental principles of non-discrimination and transparency would be at great risk, jeopardising not only the basic principles of public procurement but of the Single Market as a whole. Furthermore, it would represent inappropriate interference with national laws, labour market relations and other conditions. In this context, BUSINESSEUROPE would ask the Commission to abstain from any such possibilities.

'What to buy' in support of Europe 2020 policy objectives

BUSINESSEUROPE considers that public procurement rules must refer firstly and mainly to "how to buy" with the aim of creating transparent and non-discriminatory procedures.

BUSINESSEUROPE supports a continuous improvement of production processes, a wide choice of sustainable products and new business opportunities for European companies. However, it is essential to choose carefully the most effective combination of policy instruments to bring about the desired changes in the market towards sustainability without creating collateral damage to EU industry's competitiveness and its ability to innovate in Europe. BUSINESSEUROPE asks policy-makers to avoid overlap or duplication of regulatory instruments and to pursue a voluntary approach to sustainable development wherever possible. Companies are after all continuously optimising production processes to improve environmental performance and cut costs for energy, resource (raw material) input and waste management.

As noted by the Green Paper quite an array of European sector specific legislation exists already which has introduced a series of obligations on contracting authorities to

take into account various environmental requirements in their public procurement processes. The need for sector specific legislation with EU obligations on “what to buy” must always be assessed very cautiously. It is vital to draw up an appraisal of the opportunities and possible risks. On the opportunities side, it could provide legal certainty (a level playing field through uniform rules is preferable to varying national schemes) and promote the good functioning of the internal market. On the risks side, EU-level obligations on “what to buy” could create high compliance costs or reduce the demand-push effect if criteria are not properly defined.

Sector specific legislation with EU obligations on “what to buy” may certainly be first explored for those areas where cost-effective measures already exist, such as energy efficiency improvements in the building sector.

As stated already previously BUSINESSEUROPE would like to remind the Commission of the advantages of the 2004 public procurement legislative framework which greatly clarified how public purchasers can include other considerations (e.g. environmental, social criteria) in their procurement processes. The wider use of green public procurement for instance should be encouraged through soft measures, not necessarily thorough obligations.

Innovation

BUSINESSEUROPE believes that public procurement can play an important role in promoting innovation. The largest obstacles to contracts promoting innovation are the risk aversion of many public authorities and the lack of competence in assessing the best technical solution.

BUSINESSEUROPE believes that the Commission should primarily focus its attention on soft measures, including guidance, sharing of best practice and enhanced dialogue between the public and private sectors. In addition, BUSINESSEUROPE underlines that technical specifications must not be too prescriptive, recalling that innovation and research results cannot be dictated. Instead, functional requirements are more appropriate, as these are technology-neutral and leave more room for innovative solutions.

BUSINESSEUROPE does have some concerns with regard to the often reported lack of legal protection for innovative solutions. They could be exposed to a third party in the course of a procurement activity, e.g. a competitive dialogue, in the case where a procedure is not adequately run, to the detriment of the originator. This can be particularly detrimental for SMEs and affects many types of industry: construction, public works, machinery, engineering, information and technology, etc. Such an issue is particularly sensitive as regards the search for solutions favourable to the environment and sustainable development.

Although BUSINESSEUROPE believes that the current public procurement legal framework is generally adequate providing public authorities with sufficient freedom and options to be innovative in their public procurement procedures, it is imaginable that the rules be extended to include strict liability for the public authority which during competitive dialogue (or any other procurement activity) divulges the solution of one party to a third party (the precise form of such a liability must however be left to national legislation).

As regards public procurement contracts, Article 13 of Directive/17 and Article 6 of Directive 2004/18 set forth that those entities that award contracts may not disclose the information that traders have communicated to them in a confidential capacity. However, these provisions do not specify the duration of this protection and in particular whether such protection applies in connection with subsequent bidding procedures.

Indeed, the risk that must be avoided is that of re-utilisation of the confidential data in connection with a further call for tenders or upon the re-commencement of the call for tenders.

BUSINESSEUROPE believes that pre-commercial procurement of R&D services by public authorities should be further encouraged as it can stimulate innovation. However, pre-commercial procurement has to be performed within the existing legal framework of EU procurement law and the principle of non-discrimination has to be fully respected. In this context, practice sharing and benchmarking would facilitate the use of the method. To stimulate the development of new goods and services it would be necessary for procuring entities to use to a much larger extent performance and functional requirements, and not bind themselves to certain technical solutions in their specifications.

Ensuring sound procedures

BUSINESSEUROPE believes that effective mechanisms to prevent unsound business practices in public procurement are important to ensure fair competition on an equal basis. We also share the view that procurement markets are exposed to a certain risk of corruption and favouritism.

However, the EU has no competence in penal law and it is our firm belief that these issues should be resolved at national level.

BUSINESSEUROPE does however have some specific remarks with regard to Article 45 of Directive 2004/18/EC concerning the exclusion of 'unsound' bidders. This Article has the potential to represent a major step forward in combating corruption. The threat of being excluded from tendering for a public procurement contract across Europe introduces a strong economic disincentive to engage in corruption. The actual impact of Article 45 depends however on the strength of implementation and the harmonisation of implementation across Europe.

Some challenges in relation to the content of the article exist that are likely to result in varying practices across Europe.

An important aspect is the issue of 'self-cleaning', which refers to the possibility that an undertaking that might otherwise be excluded from a procurement because of some kind of wrong doing should be admitted to the process, on the basis that it has taken all necessary measures to ensure that the wrongdoing of the past will not occur in the future. Given the serious legal uncertainty in this area, BUSINESSEUROPE sees the need for a legislative amendment where it is clarified in the Directive that a company can regain reliability in spite of prior wrong doing if it can circumstantiate that it has undergone an efficient self-cleaning process (see details in the answer to Q 106).

In addition, BUSINESSEUROPE believes that to improve the application of Article 45 it would be in the interest of contracting authorities and suppliers to get some – non-legislative – guidance on the following issues:

- Possible linking of corruption by employees (i.e. CEO/CFO/members of the subordinate staff) and/or board members to the company in which they are engaged
- Problems related to period of time between conviction and end of disqualification period (period of exclusion/cross-border situations/ wrongdoing, etc.)
- Identification between the corrupt supplier and the parent or subsidiary company
- Definition of a court conviction
- Geographic area of exclusion and harmonisation of the definition of corruption among EEA member states
- How to avoid conflict of interest between the efficiency of the procurement process and the decision to exclude companies for corruption.

It is also important to state here that European businesses that have been convicted inside Europe can be tracked and sanctioned according to Article 45 but monitoring the behaviour of non-European companies operating on the European market over allegations of corrupt practices is more difficult, creating an uneven playing field. While it is of course illegal under national and European law to engage in corrupt practices, some non-European companies do not face the same degree of scrutiny, notably as regards internal corporate regulations. In this context, non-European companies operating on the EU market should aim to comply with the obligations on bribery and corruption, as well as the voluntary principles and standards of the OECD Guidelines for Multinational Enterprises. Public authorities should monitor the extent to which non-European companies comply with these rules.

Access of third-country suppliers in the EU market

EU public procurement markets are among the most open in the world. This openness has stimulated the creation of highly competitive companies in large public procurement markets in the EU. However, BUSINESSEUROPE has some concerns regarding the openness of the EU market when compared with the many external markets that operate restrictive public procurement practices which exclude EU companies.

Firstly, the openness of the EU market weakens its ability to negotiate market access in the Government Procurement Agreement (GPA) and free-trade agreements. Secondly, there are concerns that Member States and other procuring entities are not fully informed about the precise international commitments that the EU has undertaken.

Whilst BUSINESSEUROPE strongly favours an open EU market for trade, investment and procurement as a tool to boost our global competitiveness, EU companies need to operate under fair trading conditions with their non-EU counterparts.

In its position paper 'Striking the right balance: clarifying, improving and reflecting on market access rules for the EU public procurement market'[4], BUSINESSEUROPE makes a series of recommendations on ways to strengthen the EU's leverage in procurement negotiations and international trade agreements and improve symmetry. These recommendations, the full details of which can be found in Q112 in the annex, concern the need to:

- Clarify the EU Procurement Directives regarding certain aspects, including the examination procedure for abnormally low bids
- Improve market access rules in the context of public procurement, addressing the challenges associated with securing rules against bribery and corruption and ensuring the full protection of intellectual property rights in EU market access rules
- Reflect on new instruments, such as the creation of an anti-subsidy instrument applicable to goods and services used in procurement, to restore a level playing field.

Concerning the last bullet, rules to control state aid are more and more essential not only at European level – i.e. to avoid Member States' intervention unduly distorting trade to a degree which is incompatible with the good functioning of the single market – but also at international level. In this context, the logic of state aid rules as applied within the single market should be transposed to international trade with the EU emphasising in its international agreements with partner countries, provisions and mechanisms to provide for the effective control of state aid.

As noted in the Green Paper, Article 58 of Directive 2004/17/EC introduces a Community preference for procurement of goods, and Article 59 of the same Directive allows the possibility of restricting access to the EU utilities procurement market. Although some of the mechanisms set out in Articles 58 and 59 appear to be relatively timid when compared to the approach of some of Europe's commercial partners, the extension of these rules to e.g. the Classical Directive would need to be very carefully assessed, not only in relation to the international commitments already made by the EU but also in relation to EU trade policy as a whole.

[4] http://www.businesseurope.eu/DocShareNoFrame/docs/3/NNAKLPKDHOLEGJEEIAFNMNKHPDWD9DPYBW9LTE4Q/UNICE/docs/DLS/2010-02108-E.pdf

ANNEX 1 – RESPONSE TO THE QUESTIONS

1. WHAT ARE PUBLIC PROCUREMENT RULES ABOUT?

1.1. Purchasing activities

Q1. Do you think that the scope of the Public Procurement Directives should be limited to purchasing activities? Should any such limitation simply codify the criterion of the immediate economic benefit developed by the Court or should it provide additional/alternative conditions and concepts?

A: No. Directives 2004/17/EC and 2004/18/EC cover, with some exceptions, all procurement activity, not just purchasing. That definition should remain. Therefore the current scope of the Directives should not be amended.

1.2. Public contracts

Q2. Do you consider the current structure of the material scope, with its division into works, supplies and services contracts, appropriate? If not, which alternative structure would you propose?

A: The present categories should not be changed

Q3. Do you think that the definition of "works contract" should be reviewed and simplified? If so, would you propose to omit the reference to a specific list annexed to the Directive? What would be the elements of your proposed definition?

A: BUSINESSEUROPE does not believe it necessary to review the definition of 'works contract'.

A/B-services

Q4. Do you think that the distinction between A and B services should be reviewed?

A: The division of services into two categories can be confusing and appears to be creating legal uncertainty. In this context, BUSINESSEUROPE believes that the public procurement directives should in principle apply to all services of a commercial value. In any case, the present legal framework for A-services should be kept as it is with any modifications concentrating on B-services, including the option to treat B-services like A-services in future.

Q5. Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why.

A: The public procurement directives should in principle apply to all services. If special reasons are found for exempting some services from this general rule it would not be impossible to do so as long as they do not carry considerable commercial value.

Thresholds

Q6. Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

A: In general, BUSINESSEUROPE believes that the existing levels should be maintained.

Exclusions

Q7. Do you consider the current provisions on excluded contracts to be appropriate? Do you think that the relevant section should be restructured or that individual exclusions are in need of clarification?

A: Yes, the current provisions on excluded contracts are in the main still suitable.

Q8. Do you think that certain exclusions should be abolished, reconsidered or updated? If yes, which ones? What would you propose?

A: No.

1.3. Public purchasers
Procurement by entities belonging to the State sphere

Q9. Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of "body governed by public law" should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?

A: On the whole the present way of defining procuring entities remains appropriate and the precedent of the ECJ must be deemed sufficient guidance. The Commission could possibly contribute with further guidance through an interpretative document. If legislation were to be considered, it should not go further than consolidating the Court decisions into the Directive and should under no condition further diminish the scope of public procurement, to the detriment of the Internal Market.

Public utilities

Q10. Do you think that there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer.

A: Yes. The Directive remains necessary because of the residual risk that Utilities, notably those which are state owned or otherwise dominant, will resort to anti-competitive practices thanks to their quasi-monopoly status.

10.1. If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please explain which sectors should be covered and give the reasons for your answer.

A: Article 30 already provides for exclusion of appropriate sectors. See Q13.

13. Does the current provision in Article 30 of the Directive constitute an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets?

A: Yes. As noted in the Green Paper, where competition has arisen such that the risk of anti-competitive behaviour is of no importance, those industries can under Article 30 be released from being subject to the Directive.

2. IMPROVE THE TOOLBOX FOR CONTRACTING AUTHORITIES

Q14. Do you think that the current level of detail of the EU public procurement rules is appropriate? If not, are they too detailed or not detailed enough?

A: Overall the level of detail in the Directives is adequate.

2.1. Modernise procedures

General procedures

Q15. Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not: How should the procedures be improved in order to alleviate administrative burdens/reduce transaction costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?

A: BUSINESSEUROPE believes that there is no urgency to change the procedures (please see further comments on p.6).

With regard to pre-procurement dialogue, there is no prohibition in the Directive to have an open dialogue with market before a tender procedure. In many situations there is a need for the contracting authority to have a dialogue with potential bidders before starting the procedure to design the tender documents. Such a dialogue has to be open to all potential bidders, and it has to be notified in the market. Currently there is a lot of hesitancy among contracting authorities to have such a dialogue in the fear of breaking the procurement rules. There is no need to expand the possibilities for such a dialogue, but to clarify that such a pre-tender dialogue is allowed. In this way, contracting authorities will be better able to align their procurement material to the technologies and services offered in the market. If any clarification is undertaken, it should also make clear that a pre-procurement dialogue must not lead to discriminatory measures against other bidders, e.g. by restricting information to the 'preferred' bidder only or limiting the circle of competitors.

With regard to reducing administrative burdens for the contracting authority, by all means it could occur that a very small public body lacks the resources necessary for the proper discharge of a demanding purchase. However, in such a case it is for the Member State to ensure that adequate resources are put at the purchasing authority's disposal.

Q16. Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

A: BUSINESSEUROPE has no suggestion at present for any such procedure. Any alternative procedure would have to be tested not only in relation to the sought-after balance between transaction costs and practical results but also in relation to its possible influence on the functioning of the internal market.

Q17. Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnerships (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?

A: The existing directives are from 2004 and have only recently been implemented in the Member States. In this context, it is difficult to judge whether or not at this stage the above-mentioned tools and procedures should be changed or abolished due to limited experience.

However, BUSINESSEUROPE does have important concerns relating to dynamic purchasing systems and electronic auctions. With regard to the latter, an important concern is that e-auctions often result in decisions based purely on price, without quality considerations being taken into account. Also, insufficient specification at times means that there can be confusion about the kind of commodity or service required particularly when the requirements are complex or technical.

Q18. On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances? Would this be possible in your view without jeopardizing the quality of offers?

A: No, deadlines for companies to present their tenders should not be shortened. This would result in there being fewer and less advantageous bids, and would further decrease the share of cross-border contracts.

More negotiation

Q19.Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?

A: Please see comments on p.6.

Q20. In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain conditions?

A: Some goods and services are standardised and so the negotiated procedure would not be appropriate in these cases. If the negotiated procedure with prior publication is optional (in any case it would have to be amended by adequate legal guarantees, see

p.6), it should be clear from the very beginning of the procurement process that the contracting authority has chosen this procedure.

Q21. Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination? In addition to the safeguards already provided for in the Directives for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?

A: It is obvious that generalised use of the negotiated procedure would entail great risks for abuse and discrimination, which is why BUSINESSEUROPE believes that the Commission first needs to seriously reflect on what safeguards should be put in place if steps are taken to allow for more use of the negotiated procedure with prior publication.

Commercial goods and services

Q22. Do you think that it would be appropriate to provide simplified procedures for the purchase of commercial goods and services? If so, which forms of simplification would you propose?

A: The use of simplified procedures for the purchase of goods and services is already possible under joint procurement. Establishing a specific set of simplified procedures for the purchase of certain types of goods and services (e.g. standardised products) would lead to increased complexity and considerable new legal uncertainty in relation to what 'commercial goods' are.

Selection and award

Q23. Would you be in favour of a more flexible approach to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure? If so, do you think that it should be possible to examine the award criteria before the selection criteria?

A: No, BUSINESSEUROPE believes that the status quo should be maintained as the order of the procedure guarantees transparency and equal treatment of the bidders.

Q24. Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, in which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

A: In general no, as this would increase the risk for special treatment and irrelevant concerns coming into play.

Specific tools for utilities

Q26. Do you consider that specific rules are needed for procurement by utilities operators? Do the different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement?

A: There is no change needed to the present rules here.

2.2. Specific instruments for small contracting authorities

A lighter procedural framework for local and regional contracting authorities for the award of contracts above the thresholds of the Directives
Q27. Do you think that the full public procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.

A: It is generally appropriate. All layers of government should follow the same procedures. It could occur that a very small public body lacks the resources necessary for the proper discharge of a demanding purchase. However, in such a case it is for the Member State to ensure that adequate resources are put at the purchasing authority's disposal.

Q28. If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?

A: BUSINESSEUROPE is not in favour of a simplified regime for local and regional authorities. The fact that not every public contract can be subjected to the same set of rules has already been taken into account through the threshold values. Furthermore, local and regional authorities together represent a far greater share of public procurement than central government. So to suspend or ease the demand for publication would obstruct the development of cross-border contracts.

More legal certainty for awards below the thresholds of the Directives

Q29. Do you think that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives? Or would you consider that additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which points would you deem this relevant or necessary?

A: BUSINESSEUROPE in principle does not see any major need to develop additional guidance on this issue.

2.3. Public-public cooperation

Q30. In the light of the above, do you consider it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation?

A: BUSINESSEUROPE believes that any clarification of the scope of public-public cooperation should be done through interpretative documents. In this context, we welcome the reference made in the Green Paper to a Commission upcoming staff working document to be published in 2011 to provide guidance on the interpretation of the case law.

Under no circumstances should a legislative initiative in this area end up with the area of public procurement becoming substantially restricted as this would considerably damage the internal market.

2.4 Appropriate tools for aggregation of demand / Joint procurement

Q34. In general, are you in favour of a stronger aggregation of demand/more joint procurement? What are the benefits and/or drawbacks in your view?

A: Aggregation of demand through joint procurement can have a positive impact on the effectiveness of public purchases and at the same time generally leads to downward pressure on price. However, this form of procurement tends to favour larger companies over smaller ones and so SME participation should be further encouraged through the division of contracts into lots, where applicable. SMEs have the possibility to form a consortium for a procurement project of a bigger size.

Q35. Are there in your view obstacles to an efficient aggregation of demand/joint procurement? Do you think that the instruments that these Directives provide for aggregating demand (central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?

A: Procedures in place today seem to be adequate.

Q38. Do you see specific problems for cross border joint procurement (e.g. in terms of applicable legislation and review procedures)? Specifically, do you think that your national law would allow a contracting authority to be subjected to a review procedure in another Member State?

A: As highlighted in the Green Paper questions of applicable law may arise, which may well be problematic. Looking at the number of large projects that cross the borders of two or more Member States, there is reason to tackle the issue of cross-border procurement.

2.5 Address concerns relating to contract execution

Substantial modifications

Q39. Should the public procurement Directives regulate the issue of substantial modifications of a contract while it is still in force? If so, what elements of clarification would you propose?

A: BUSINESSEUROPE does not believe this is necessary.

Changes concerning the contractor and termination of contracts

Q41. Do you think that EU rules on changes in the context of the contract execution would have an added value? If so, what would be the added value of EU-level rules? In

particular, should the EU rules make provision for the explicit obligation or right of contracting authorities to change the supplier/ terminate the contract in certain circumstances? If so, in which circumstances? Should the EU also lay down specific procedures on how the new supplier must/ may be chosen?

A: No. Such rules might undermine the general rules. According to experience, such rules might also be misused to the disadvantage of transparency and competition.

Q42. Do you agree that the EU public procurement Directives should require Member States to provide in their national law for a right to cancel contracts that have been awarded in breach of public procurement law?

A: No, the consequences under civil law of a public procurement contract losing its validity must be dealt with according to national law.

Q43. Do you think that certain aspects of the contract execution – and which aspects – should be regulated at EU level? Please explain.

A: No (please see answer above). The Directives apply only to tendering and finish (apart from possible Remedies) upon contract award. They are not concerned with contract execution, nor should they be.

Subcontracting

Q44. Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?

A: No, the decision on whether to subcontract or not is up to the contractor. The relationship between the contractor and the subcontractor should not be dealt with in the public procurement contract.

3. A MORE ACCESSIBLE EUROPEAN PROCUREMENT MARKET

Q45. Do you think that the current Directives allow economic operators to avail themselves fully of procurement opportunities within the Internal Market? If not: Which provisions do you consider are not properly adapted to the needs of economic operators and why?

A: The current Directives are adequate. The focus should be on the promotion of SME strategies (consideration of size of contracts, market dialogue, fair financial checks, etc.) by the contracting authorities not on changing the current legislative framework. Also SMEs should develop the skills and resources to address their chosen markets.

3.1. Better access for SMEs and Start-ups

Reducing administrative burdens in the selection phase and Other suggestions

Q46. Do you think that the EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

A: The rules themselves do not discriminate against SMEs. Problems regarding access to public sector markets rather originate from too far reaching demands of public purchasers (see reply to question 48). Apart from that, SMEs could benefit from some help in identifying relevant co-bidders.

Q47. Would you be of the opinion that some of the measures set out in the Code of Best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subject to certain caveats)?

A: No. The Code of Best Practices should remain voluntary.

Q48. Do you think that the rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

A: There are many cases where procurement practices create burdens for SMEs and for larger enterprises. Public authorities need to be encouraged to reduce administrative burdens for all businesses. If the directives are well applied in the context of an efficient micro and macro management approach, this ought not to create any significant administrative burden for a bidder. However, it is often the case that public authorities make unnecessarily burdensome or more far-reaching and complicated demands than those prescribed by the directives. This can be illustrated by two examples:

- Pre-qualification questionnaires differ from country to country, and even within one and the same country (it can happen that each national administration has its own questionnaire). This increases the cost of making a tender. Public authorities and/or Governments should be encouraged to explore ways for standardising the pre-qualification questionnaires, at least at national level;
- In the past, BUSINESSEUROPE has asked that contracting authorities abstain from requesting unnecessarily high levels of proof and financial guarantees. The situation is not yet satisfactory in this area and needs attention.

These examples show that there are shortcomings in the way the Directives are implemented by public authorities, a situation which is not related to the content of the rules themselves.

Q49. Would you be in favour of a solution which would require submission and verification of evidence only by short-listed candidates/ the winning bidder?

A: Yes, only for the winning bidder and independently of the size of the company.

Q50. Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declarations be useful (particularly facts in the sphere of the undertaking itself) and on which not?

A: In some cases, self-declarations may be sufficient, followed up by evidence from the winning bidder only. However, this would need to be further looked into as the answer to this question is dependent on what specific criteria are to be evidenced.

Q51. Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

A: Selection criteria should be proportionate to the subject matter of the contract. It would not make sense to regulate this at European level.

3.2. Ensuring fair and effective competition

Q53. Do you agree that public procurement can have an important impact on market structures and that procurers should, where possible, seek to adjust their procurement strategies in order to combat anti-competitive market structures?

A: Public procurement can negatively impact market structures, but this should be monitored by competition authorities and corrected by competition regulation.

Q54. Do you think that European public procurement rules and policy should provide for (optional) instruments to encourage such pro-competitive procurement strategies? If so, which instruments would you suggest?

A: No, this should be left to the competition authorities.

Q55. In this context, do you think more specific instruments or initiatives are needed to encourage the participation of bidders from other Member States? If so, please describe them.

A: More intra-EU bidding is important. Standard forms and mutual recognition of certificates may facilitate participation of bidders from other Member States.

Q56. Do you think the mutual recognition of certificates needs to be improved? Would you be in favour of creating a Europe-wide pre-qualification system?

A: BUSINESSEUROPE believes that the mutual recognition of certificates needs to be improved.

Q58. What instruments could public procurement rules put in place to prevent the development of dominant suppliers? How could contracting authorities be better protected against the power of dominant suppliers?

A: Dominant suppliers misusing their position are an issue for the competition authorities.

Preventing anti-competitive behaviours
Q59. Do you think that stronger safeguards against anti-competitive behaviours in tender procedures should be introduced into EU public procurement rules? If so, which new instruments/provisions would you suggest?

A: No. That competition works in the internal market is of fundamental importance. However, we already have a set of rules to counteract anti-competitive behaviour and there is therefore no reason to create new instruments specifically for procurement markets.

3.3 Procurement in the case of non-existent competition/exclusive rights

Q60. In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?

A: N/A

Q61. If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?

A: Instruments and regulations to guarantee fair competition are already available: competition law. There is no need for additional legislation. No, EU procurement rules should not allow the award of contracts without procurement procedure. The holder of the exclusive rights holds a special position which is close to that of a contracting public authority. To comply with the principle of transparency a procurement procedure is necessary.

Contracting authorities are obliged to comply with EC Treaty: free movement of goods; right of establishment; freedom to supply services; non-discrimination and equal treatment; transparency; proportionality; mutual recognition; environmental considerations etc. Furthermore, the European Court of Justice has developed basic standards for the awarding of public contracts that stress transparency (e.g. advertising).

4. STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

4.1. "How to buy" in order to achieve the Europe 2020 objectives

Describing the subject matter of the contract and the technical specifications

Q62. Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

A: BUSINESSEUROPE believes that the rules on technical specifications are amply sufficient to allow public authorities the freedom of considering other policy objectives.

Q63. Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

A: Defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better. It may especially help to enhance opportunities for bidders offering innovative products which might otherwise not be accepted because their products would not fit into traditional specification specifications. However, functional requirements may not always be applicable/justifiable and so whilst they should be recommended they should not be mandatory. Where relevant, performance-based specifications should be promoted through, e.g. best practice, guidelines, etc.

Q64. By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility criteria for persons with disabilities or design for all users? If not, what needs to be done?

A: BUSINESSEUROPE is of the opinion that no changes are needed with the current legislation.

Q66. What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the respect of the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?

A: No changes are needed. As for innovative information and communication technologies, BUSINESSEUROPE believes that electronic procurement is a vital tool in simplifying cross border procurement and if used properly it can generate substantial savings to the benefit of the public procurer, the contractor and the taxpayer[5].

[5] More specific information on BUSINESSEUROPE's views on e-procurement can be found at http://www.businesseurope.eu/content/default.asp?PageID=568&DocID=27954

Q67. Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?

A: BUSINESSEUROPE is strongly opposed to this idea. In order to realise a good functioning internal market public authorities must not advantage local and regional suppliers.

Q68. Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

A: Please see comments on p.6.

Requiring the most relevant selection criteria

Q69. What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

A: Selection criteria are linked to the suitability of the supplier and these criteria can be established on the basis of the exhaustive list of criteria mentioned in the public procurement Directives. Where appropriate other criteria, such as environmental criteria can be included to prove technical capacity to perform the contract. In this context, examples can be found in the Buying Green handbook.

Using the most appropriate award criteria

Q70. The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):

Q70.1.1. to eliminate the criterion of the lowest price only;

Q70.1.2. to limit the use of the price criterion or the weight which contracting authorities can give to the price;

Q70.1.3. to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

A: At present we cannot envision any third alternative for contract award than the existing two on lowest price and the economically most advantageous offer.

Q71. Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

A: No, this should be left to the contracting authorities but the criteria should be linked to the subject of the contract.

Q72. Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

A: BUSINESSEUROPE believes that there is no need for any further clarification in the Directives themselves. Better training of public authorities, exchange of best practices should be the way forward.

BUSINESSEUROPE takes the opportunity to emphasise the importance of linking the award criteria to the subject-matter of the contract, and only be included if relevant in that context. Some examples of this kind can be found in various guides that the Commission has published, helping public authorities to understand how they can include these aspects in public procurement, while ensuring equal access to all interested bidders and guaranteeing an efficient use of public money (e.g. the 'Buying Green' handbook, etc.). With regard to environmental challenges, BUSINESSEUROPE recognizes that the development of GPP criteria for some products and services is beneficial. However, caution is necessary as the development of such criteria is complex and a series of general principles needs to be fully respected, such as:

- Criteria must be objective, science-based, verifiable and not too prescriptive
- There should be an economic rationale behind any new criteria ideas, taking into account the whole life-cycle of a product
- In devising the criteria for products and services it is also necessary to take into account national and sectoral market specificities
- A sound technical feasibility check is needed before GPP criteria are adopted

In addition, GPP criteria should be established and updated together with business in a transparent and efficient process. It is vital to ensure this so that all stakeholders – contracting authorities and industry alike – have confidence in the process.

Q73. In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

A: BUSINESSEUROPE believes that it is certainly important to take life-cycle cost into account, for example when considering energy efficiency measures. While mandatory requirements appear as too premature, the 'life-cycle costing' approach should be further promoted, in particular by using a methodology that is objective, standardised, measurable and considers potential specificities of the relevant sector. This would be crucial to avoid additional bid costs and uncertainty. National contracting authorities should be encouraged to use such a methodology.

Imposing proper contract performance clauses

Q74. Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

A: Social considerations regarding labour conditions are generally more appropriate to be included in the contract performance clauses, as in general they do not qualify as technical specifications or selection criteria, within the meaning of the Procurement Directives. Therefore, the existing rules and precedent work better than allowing for such demands being made earlier in the process so should be left as they are.

Q75. What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

A: The clauses should be measured or considered in an objective way and should not provoke discriminatory situations.

Q76. Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

A: No, such circumstances are already and sufficiently regulated through national legislation or collective agreement.

Verification of the requirements

Q78. How could contracting authorities best be helped to verify the requirements? Would the development of "standardised" conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

A: Testing, demonstration and documentation are best suited for verification of requirements. Labelling will either be too general and hence not useful, or too detailed, thus creating an administrative burden as well as a significant entry barrier.

Moreover, experience with national and European type I ecolabels has shown that the extreme level of performance requirements render compliance with the criteria technically and economically very difficult or even impossible. Therefore, it is essential that technical and market feasibility of the criteria are checked and that not only the very ‘first class’ products, works or services are eligible: the competent authorities should prove that a compulsory minimum share of products on the market actually fulfils the criteria. National and sectoral market specificities would therefore have to be thoroughly assessed.

Link with the subject matter/ with the execution of the contract

Q79. Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter

of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?

A: BUSINESSEUROPE believes that the link with the object of the contract is essential. Softening or dropping the condition that requirements imposed by the contracting authorities must be linked to the subject matter of the contract would open unlimited possibilities for arbitrary behaviour and corresponding opportunities to steer contracts to favoured suppliers. The fundamental principles of non-discrimination and transparency follow from the Treaty and would be at great risk if the present condition was changed as suggested. It would not make sense from an economic point of view and would result in inappropriate interference with national laws, labour market relations and other conditions.

Q80. If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?

A: We are strongly against dropping or loosening this link with the subject matter and believe that no corrective mechanisms exist to correct the loss of competition and creation of discrimination.

Q82.1. Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

A: No.

Q82.2. Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

A: No.

Q82.3. Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

A: No.

Q82.3.1. Award criteria other than the lowest price/ the economically most advantageous tender/ criteria not linked to the subject-matter of the contract might

separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

A: Yes loosening the link with the subject-matter of the contract might lead to more state aid. It is important to maintain the link of the award criteria with the object of the contract.

Q82.4. Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and services in question (e.g. requiring the contractor to put in place child care services for the his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

A: No.

4.2. "What to buy" in support of Europe 2020 policy objectives

Q 83. Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice. Please give examples of Member State procurement practices that could be replicated at EU level.

Q84. Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

A (83&84): BUSINESSEUROPE considers that public procurement rules should refer firstly and mainly to ‘how to buy’ with the aim of creating transparent and non-discriminatory procedures. BUSINESSEUROPE supports a continuous improvement of production processes, a wide choice of sustainable products and new business opportunities for European companies However, it is essential to choose carefully the most effective combination of policy instruments to bring about the desired changes in the market towards sustainability without creating collateral damage to EU industry’s competitiveness and its ability to innovate in Europe. BUSINESSEUROPE asks policy-makers to avoid overlap or duplication of regulatory instruments and to pursue a voluntary approach to sustainable development wherever possible. Companies are after all under continuous competitive pressure to continuously optimise production processes to improve environmental performance and cut costs for energy, resource (raw material) input and waste management.

As noted by the Green Paper, quite an array of European sector-specific legislation exists already which have introduced a series of obligations on contracting authorities to taken into account various environmental requirements in their public procurement processes. The need for sector specific legislation with EU obligations on “what to buy” must always be assessed very cautiously. It is vital to draw up an appraisal of the

opportunities and possible risks. On the opportunities side, it could provide legal certainty (a level playing field through uniform rules is preferable to varying national schemes) and promote a well-functioning of the internal market. On the risks side, EU level obligations on “what to buy” could create high compliance costs or reduce the demand-push effect if criteria are not properly defined.

Sector-specific legislation with EU obligations on “what to buy” may certainly be first explored for those areas where cost-effective measures already exist, such as energy efficiency improvements in the building sector.

As stated already previously in other questions, BUSINESSEUROPE would like to remind the Commission of the advantages of the 2004 public procurement legislative framework which greatly clarified how public purchasers can include environmental considerations in their procurement processes. The wider use of green public procurement should be encouraged through soft measures, not necessarily through obligations.

Q85. Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

A: If obligations on “what to buy” is assessed as a suitable alternative for specific sectors or product/service groups this would automatically result from thorough impact assessments – the EU level is the right one in order to avoid fragmentation of the internal market.

With regard to GPP, BUSINESSEUROPE recognises that, if developed well, a more uniform application of common GPP criteria across Europe could stimulate innovation, respond to environmental challenges and give companies legal certainty (please refer to Q 72 to see further views on GPP).

Q86. Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

A: With regard to GPP, BUSINESSEUROPE recognises, in principle, that the development of voluntary common GPP criteria for some product and service groups could be beneficial. We also recognise the Commission’s efforts in aiming to simplify GPP criteria and developing criteria documents which can easily be used by public purchasers. If properly defined and targeting the right products/services/works, a more uniform application of common GPP criteria across Europe could stimulate innovation, respond to environmental challenges and give companies legal certainty (please refer to Q 72 to see further views on GPP).

Q86.1. What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

A: In principle, it should remain at the discretion of the public authority to, within the limits imposed by current EU and national laws and the political directions this would

allow, choose to buy whatever is considered the most appropriate to fulfil the public task.

Q87. In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?

A: Contracting authorities should leave it to the tenderers to suggest advanced technologies. Therefore, contracting authorities should not specify technology, but should focus on intended outcomes and objectives and then leave it to tenderers to propose the best solutions to these problems. These solutions will involve the latest and best technologies where appropriate. An entity monitoring the development of technology would not have the technical know-how for the different branches. Therefore and for further reasons such an entity is not appropriate.

Q88. The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

A: The economic benefit of such a remarkable limit to competition is very questionable. BUSINESSEUROPE would not support the idea of arbitrary introductions of mandatory criteria or targets on what to buy. The introduction of obligations on “what to buy” should be carefully assessed (see answer question 84).

Q90. If you are not in favour of obligations on "what to buy", would you consider any other instruments (e.g. recommendations or other incentives) to be appropriate?

A: The introduction of obligations on “what to buy” should be carefully assessed (see answer question 84). BUSINESSEUROPE supports the exchange of best practices between contracting authorities on how to buy more sustainably. In order that contracting authorities make the best use of existing policy, additional training and exchange of best practices as well as devoted tools will be required. Intensified monitoring of the uptake on GPP practices in the Member States will help to benchmark.

4.3. Innovation

Q91. Do you think there is a need to further promote and stimulate innovation through public procurement? Which incentives/measures would support and speed up the take-up of innovation by public sector bodies?

A: BUSINESSEUROPE believes that public procurement can play an important role in promoting innovation. However, the current public procurement legal framework is adequate in this respect as it provides public authorities with sufficient freedoms and options. The largest obstacles to contracts promoting innovation are the risk aversion of many public authorities and the lack of competence in assessing the best technical solution, amongst others. Instead the focus should be on soft measures, including guidance, sharing of best practice and enhanced dialogue between the public and

private sectors. In addition, BUSINESSEUROPE underlines that technical specifications must not be too prescriptive, recalling that innovation and research results cannot be dictated. Instead, functional, results-oriented requirements are more appropriate, as these are technology-neutral and leave more room for innovative solutions. Last but not least the promotion of variants can be a good tool to promote innovation.

Q92. Do you think that the competitive dialogue allows sufficient protection of intellectual property rights and innovative solutions, such as to ensure that the tenderers are not deprived of the benefits from their innovative ideas?

A: In general, the Competitive Dialogue is a suitable procedure for large complex projects. Nevertheless, BUSINESSEUROPE does have some concerns regarding the often reported lack of legal protection for innovative solutions. They could be exposed to a third party in the course of a procurement activity, e.g. a competitive dialogue, to the detriment of the originator. This may be particularly detrimental for SMEs and may affect many types of industry: construction, public works, machinery, engineering, information and technology etc. This issue is particularly sensitive as regards the search for solutions favourable to the environment and sustainable development.

It is conceivable that the rules be extended to include strict liability for the public authority who during competitive dialogue (or any other procurement activity) divulges the solution of one party to a third party (the precise form of such a liability must however be left to national legislation).

As regards public procurement contracts, Article 13 of Directive/17 and Article 6 of Directive 2004/18 set forth that those entities that award contracts may not disclose the information that traders have communicated to them in a confidential capacity. However, these provisions do not specify the duration of this protection and in particular whether such protection applies in connection with subsequent bidding procedures.

Indeed, the risk that must be avoided is that of re-utilisation of the confidential data in connection with a further call for tenders or upon the re-commencement of the call for tenders.

Q93. Do you think that other procedures would better meet the requirement of strengthening innovation by protecting original solutions? If so, which kind of procedures would be the most appropriate?

A: The Competitive Dialogue procedure should be kept for large and complex projects but the protection of IPR rights and solutions should dealt with in more detail in order to overcome existing problems.

Q94. In your view, is the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, suited to stimulating innovation? Is there a need for further best practice sharing and/or benchmarking of R&D procurement practices used across Member States to facilitate the wider usage of pre-commercial procurement? Might there be any other ways not covered explicitly in the current legal framework in which contracting authorities could request the development of products or services not

yet available on the market? Do you see any specific ways that contracting authorities could encourage SMEs and start-ups to participate to precommercial procurement?

A: BUSINESSEUROPE believes that pre-commercial procurement of R&D services by public authorities needs to be further encouraged as it can stimulate innovation. However, pre-commercial procurement has to be performed within the existing legal framework of EU procurement law with the principle of non-discrimination being fully respected. In this context, practice sharing and benchmarking would facilitate the use of the method. To stimulate the development of new goods and services it would be necessary for procuring entities to use to a much larger extent performance and functional requirements, and not bind themselves to certain technical solutions in their specifications.

Q95. Are other measures needed to foster the innovation capacity of SMEs? If so, what kind of specific measures would you suggest?

A: Not within the framework of public procurement

4.4. Social services

Q97. Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?

A: BUSINESSEUROPE believes that social services should not be given special treatment, but instead treated as any other service. Any attempt to shelter social services even further from competition through the rules on public procurement would be at the expense of the internal market.

Q97.1. Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services?

A: No. The quality of social services is a matter for national law.

Q97.1.1. Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?

A: There is no need to regulate this.

Q97.1.2. Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?

A: No – the focus should be on who can provide the best and most cost-effective service to citizens.

Q97.1.3. Loosening the award criteria or reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure

acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?

A: Yes.

Q97.2. Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or de minimis type rules for such services)? What would be the justification for such special treatment of social services?

A: No. With time it is likely that an increased interest in cross-border contracts for these types of services will take place, which implies from an internal market perspective that they should not be treated differently.

5. ENSURING SOUND PROCEDURES

5.1 Preventing conflicts of interest

Q98. Would you be in favour of introducing an EU definition of conflict of interest in public procurement? What activities/situations harbouring a potential risk should be covered (personal relationships, business interests such as shareholdings, incompatibilities with external activities/ etc.)?

A: No – this should be left to national legislation.

Q99. Do you think that there is a need for safeguards to prevent, identify and resolve conflict-of-interest situations effectively at EU level? If so, which kind of safeguards would you consider useful?

A: No. Transparency is the best safeguard to prevent conflicts of interest.

5.2 Fighting favouritism and corruption

100. Do you share the view that procurement markets are exposed to a risk of corruption and favouritism? Do you think EU action in this field is needed or should this be left to Member States alone?

A: Yes – BUSINESSEUROPE shares the view that procurement markets are exposed to a risk of corruption and favouritism. However, the EU has no competence in penal law and it is our firm belief that this problem must be left to the member states.

101. In your view, what are the critical risks for integrity at each of the different stages of the public procurement process (definition of the subject-matter, preparation of the tender, selection stage, award stage, performance of the contract)?

A: Risk of corruption exists at all stages of a public procurement process. Therefore, it is difficult to generalise on where it might be greatest.

103. What additional instruments could be provided by the Directives to tackle organised crime in public procurement? Would you be in favour, for instance, of establishing an ex-ante control on subcontracting?

A: The struggle against organised crime is primarily not a task for public procurement.

5.3 Exclusion of "unsound" bidders

Q104. Do you think that Article 45 of Directive 2004/18/EC concerning the exclusion of bidders is a useful instrument to sanction unsound business behaviours? What improvements to this mechanism and/or alternative mechanisms would you propose?

A: Article 45 in Directive 2004/18/EC, potentially represents a major step forward in combating corruption. The threat of being excluded from tendering for a public procurement contract, across Europe, significantly increases the cost of corruption, thus introducing an economic disincentive to engage in it. The actual impact of Article 45 will however depend on the strength of implementation and the harmonisation of implementation across Europe.

In addition, Article 45 contains several challenges with relation to the content of the article and is likely to result in varying practices across Europe. There are a number of practical challenges with relation to Article 45, in which it will be in the interest of both contracting authorities and suppliers to be guided and to get a homogenous interpretation, such as:

- Possible linking of corruption by employees (i.e. CEO/CFO/members of the subordinate staff) and/or board members to the company in which they are engaged
- Problems related to period of time between conviction and end of disqualification period (period of exclusion/cross-border situations/ wrong doing etc)
- Identification between the corrupt supplier and the parent or subsidiary company
- Definition of a court conviction
- Geographic area of exclusion and harmonization of the definition of corruption among EEA-member states
- How to avoid conflict of interest between the efficiency of the procurement process and the decision to exclude companies for corruption

In this context, whilst we do not see the need for an extension of the rules, some guidance from the Commission (of a non-legislative nature) taking into account the above points would improve the application of Article 45.

It is also important to state here that European businesses that have been convicted inside Europe can be tracked and sanctioned according to Article 45 but monitoring the behaviour of non-European companies operating on the European market over allegations of corrupt practices is more difficult, creating an unlevel playing field. While it is of course illegal under national and European law to engage in corrupt practices, some non-European companies do not face the same degree of scrutiny, notably as regards internal corporate regulations. In this context, non-European companies

operating on the EU market should aim to comply with the obligations on bribery and corruption, as well as the voluntary principles and standards of the OECD Guidelines for Multinational Enterprises. Public authorities should monitor the extent to which non-European companies comply with these rules.

Q106. Do you think that the issue of "self-cleaning measures" should be expressly addressed in Article 45 or it should be regulated only at national level?

A: While the problem of self-cleaning is well known in different legal systems like in US case law as well as in a number of national laws across Europe, industry faces serious legal uncertainties regarding this important issue in the EU. In some Member States (e.g. Austria) explicit legal provisions exist. In some Member States self-cleaning is at least recognised by the courts. However, in others uncertainty is encountered which negatively affects the internal market.

Until now Directive 2004/18/EC does not mention the concept of self-cleaning, either in relation to the mandatory exclusion or in relation to the discretionary exclusions. In view of the existing serious legal uncertainties, the issue of self-cleaning should be expressly addressed, not only in relation to Art 45 but also in relation to the discretionary exclusions in the Directives. In this context, it should be clarified in the Directive that a company can regain reliability in spite of prior wrong doing if it can substantiate that it has undergone an efficient self-cleaning process.

Q107. Is a reasoned decision to reject a tender or an application an appropriate sanction to improve observance of the principle of equality of treatment?

A: Yes

Q108. Do you think that in light of the Lisbon Treaty, minimum standards for criminal sanctions should be developed at EU level, in particular circumstances, such as corruption or undeclared conflicts of interest?

A: No, this should be left to Member States.

5.4 Avoiding unfair advantages

Q109. Should there be specific rules at EU level to address the issue of advantages of certain tenderers because of their prior association with the design of the project subject of the call for tenders? Which safeguards would you propose?

A: No, this issue is far too complex to be regulated in a meaningful way.

Q110. Do you think that the problem of possible advantages of incumbent bidders needs to be addressed at EU level and, if so, how?

A: No.

6. ACCESS OF THIRD COUNTRY SUPPLIERS TO THE EU MARKET

Q111. What are your experiences with and/or your views on the mechanisms set out in Articles 58 and 59 of Directive 2004/17/EC?

A: Article 58, in particular paragraph 2, giving the possibility to reject a tender, exclusively refers to supply contracts. Paragraph 5, asking the Commission to submit an annual progress report, refers to 'the fields covered by this Directive'.

Article 59, in its title, refers to works, supplies and service contracts, and in its body, exclusively to service contracts.

As there does not seem to be any logical reason for not taking the same rules for all activities procured by utilities BUSINESSEUROPE considers that both these articles should cover works, supplies and services contracts awarded by utilities.

Regarding §2 of Article 59, BUSINESSEUROPE believes that the reports published by the Commission should be more systematic (annual basis) and possibly cover more countries.

Q111.1. Should these provisions be further improved? If so, how? Could it be appropriate to expand the scope of these provisions beyond the area of utilities procurement?

Although some of the mechanisms set out in Articles 58 and 59 appear to be relatively timid when compared to the approach of some of Europe's commercial partners, the extension of these rules to e.g. the Classical Directive would need to be very carefully assessed, not only in relation to the international commitments already made by the EU but also in relation to EU trade policy as a whole.

Q112. What other mechanisms would you propose to achieve improved symmetry in access to procurement markets?

A: In its position paper 'Striking the right balance: clarifying, improving and reflecting on market access rules for the EU public procurement market' BUSINESSEUROPE makes a series of recommendations on ways to strengthen the EU's leverage in procurement negotiations and international trade agreements and improve symmetry. These recommendations concern the need to:

a) Clarify EU public procurement directives

A number of BUSINESSEUROPE's concerns over public procurement markets can be adequately addressed through a legal clarification exercise from the Commission towards national and sub-national procurement authorities across the EU. These clarifications could take the form of a Commission declaration or explanatory guidelines addressed to Member States.

i. **Examination procedure for abnormally low bids**: To avoid a situation where subsidised companies might gain an unfair advantage on the EU market, public authorities could be asked to establish benchmarks for procurement tenders by requiring public authorities to examine bids which are abnormally low. Article 55 of Directive 2004/18/EC already authorises procuring entities to investigate "*abnormally low bids*". However, the Commission should clarify this term by establishing an averaging test to determine an abnormally low bid. In such a test,

the procuring authority would first calculate the average of all submitted bids. Subsequently, the authority should require abnormally low bidders (x% below the average) to provide additional documentation to explain how the bid can be so low. This would still enable authorities to allow the lowest priced bid (provided adequate documentation justifies the low bid), while also guarding against predatory practices and illegal state aid. In order to determine the threshold of an abnormally low bid careful consideration would need to be given to previous experiences of different sectors. In the context of the EU's Remedies Directive unsuccessful companies should be informed of instances of abnormally low bids to allow them to determine if there are valid grounds for initiating a review procedure.

ii. **Participation of companies from countries that have not signed the WTO GPA or do not have a bilateral agreement covering procurement with the EU**: Under EU law, national and sub-national procuring entities may decide to reject bids from companies originating from countries that have not signed the WTO GPA or do not have a bilateral procurement arrangement with the EU. This right should be communicated more clearly by the Commission to procuring entities. The EU could for instance require that non-EU companies participating in tenders on the EU territory indicate in their application whether or not they originate from a GPA signatory country, whether they have a bilateral trade agreement with the EU covering procurement or whether their domestic market is open to EU companies in some other way (e.g. the company may be required to present an official statement delivered by an official body or entity). Furthermore, the Commission could establish a database which would inform contracting authorities and entities that have to apply EU public procurement rules of the countries that have not signed the WTO GPA, do not have bilateral procurement commitments or are not open to the EU in some other way. Database updates, for example as part of the Commission's Market Access Database, could be sent periodically to the contracting authorities.

iii. **Information on the EU's General Notes and Derogations to the GPA:** With regard to the general notes and derogations to the GPA, when making its GPA commitments, the EU only granted access to the EU market to trade partners when they "*give comparable and effective access for [EU] undertakings to the relevant markets*." The Commission should clarify the extent to which national and sub-national procuring authorities may directly invoke this derogation or whether its entry into force requires transposition into EU and/or national legislations. This will require the EU to review to what extent GPA partners give comparable and effective access to EU companies in the relevant markets. A Commission information point (phone number, e-mail, website) could provide procuring entities with advice in complex cases (e.g. joint ventures or consortia involving GPA and non-GPA originating companies, information on the precise commitment of the EU regarding the sectoral coverage opened to competition and exceptions in each sector, etc.). These clarifications should enable the EU to promote the effective implementation of GPA members' obligations whilst keeping the EU market open.

b) Improve market access rules in the context of public procurement

To address challenges associated with securing EU rules against bribery and corruption or ensuring the full protection of intellectual property rights, the EU will need to reflect on the introduction of additional market access requirements:

i. **Apply OECD rules against bribery and corruption**: EU companies operating in Europe and abroad must comply with their legal obligations under the OECD convention on bribery and corruption and the principles set out by the OECD Guidelines for Multinational Enterprises. Non-EU companies operating on the EU market should aim to comply with the obligations on bribery and corruption, as well as the voluntary principles and standards of the OECD Guidelines for Multinational Enterprises. Public authorities should monitor the extent to which non-EU companies comply with these rules.[i]

ii. **Addressing IPR violations through customs mechanisms:** To address the growing concern of non-EU companies entering EU procurement markets using stolen EU technology, the EU should boost customs mechanisms to secure companies' intellectual property rights. The review of the customs Regulation 1303/2003 provides a good opportunity to address the role of customs in preventing IPR violations. The EU should examine instruments used in other OECD countries, such as Japan or the United States.

iii. **Develop relations with public sector organisations in third countries that promote excellence in public procurement:**
BUSINESSEUROPE believes that the EU should play a stronger role in encouraging the professionalisation of public procurement in third countries, for instance by providing training and advice for public sector organisations involved in public procurement in the interest of the public good. The EU's public procurement laws ensure transparent procedures ensuring fair conditions of competition for suppliers. This benefits taxpayers, provides value for money and boosts competitiveness.

c) Reflect on new instruments

The imbalance in international trade negotiations on public procurement will not be easily redressed. Consequently, existing instruments should be used consistently and more effectively and the EU should begin reflecting on new instruments that may be used to restore a level playing field. To guard against protectionist abuses, this reflection should be pursued in close cooperation with BUSINESSEUROPE.

i. **Identify an anti-subsidy instrument applicable to goods and services used in procurement:** EU anti-dumping and anti-subsidy rules can be applied to procurement cases. However, in practice recourse to trade defence presents a major challenge because remedies can only be applied to imported goods associated with a procurement project. To address this situation, the EU should examine the possibility to create an updated anti-subsidy instrument that would, in remedy terms, cover both goods and services associated with procurement. From a legal perspective, the WTO leaves open the possibility to apply anti-subsidy to services as the General Agreement of Trade in Services (GATS) has never addressed the issue.
ii. **Outline options for an instrument to address the EU's negotiating leverage problem:** BUSINESSEUROPE does not support a reintroduction of the so-called External Procurement Instrument which was proposed in 2006. This proposal,

which focused on imported goods in procurement, would create legal uncertainty for EU companies that rely on complex global industrial production chains. Provided there would be adequate safeguards against protectionist abuses, BUSINESSEUROPE is prepared, however, to examine new proposals from the Commission that would aim to exclude entities (not products) from countries that patently refuse to open their public procurement market to the EU in international trade negotiations. The new proposals must be targeted, avoid creating new burdens for EU companies, and be certain to achieve a negotiating objective within a reasonable time-frame.

With regard to state aid, rules to control state aid are more and more essential not only at European level – i.e. to avoid Member States intervention unduly distorting trade to a degree which is incompatible with the good functioning of the single market – but also at international level. In this context, the logic of state aid rules as applied within the single market should be transposed to international trade with the EU emphasising in its international agreements with partner countries, provisions and mechanisms to provide for the effective control of state aid.

Q113. Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

Concessions

BUSINESSEUROPE is against creating new counterproductive bureaucratic burdens in the innovative field of concessions, but favours more transparency, i.e. EU-wide publication of concessions.

Accordingly, given the considerable jurisdiction of the European Court of Justice in this field, BUSINESSEUROPE could support in principle a legislative clarification on services concessions provided that:

- It is presented as an amendment to the existing 2004 public procurement directive
- A 'light approach' is adopted (we would not favour a stand-alone legislative initiative on service concessions)

Electronic Procurement

While the existing legal framework for electronic procurement is generally well-reflected, it is of utmost importance to create more interoperability amongst the numerous electronic platforms in the EU. Electronic procedures should not be made mandatory as this would not solve the underlying basic problems of interoperability.

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