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**COMMISSION STAFF WORKING PAPER**

**IMPACT ASSESSMENT**

*Accompanying the document*

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

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This report commits only the Commission's services involved in its preparation and does not prejudice the final form of any decision to be taken by the Commission

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## Introduction

In 2009, the public sector spent over € 2,200 billion on goods, services and works – amounting to around 19% of EU GDP. The efficient and strategic management of public purchasing is an issue of paramount policy importance on a number of levels: the sound management of increasingly scarce public resources; the daily administration of the 250,000+ government departments, agencies and public bodies involved in the award and management of public contracts; the impact on the supplier base, many of whom are heavily dependent on public sector business; the role of the public sector as a buyer of 'first resort' for innovative or environmentally superior solutions.

The EU public procurement Directives seek to support the emergence of open and efficient markets for public procurement contracts and thereby facilitate the best use of public resources. They do this by applying common principles of transparency, open competition and sound procedural management to higher-value public procurements which are likely to be of most interest to suppliers across the single market. In 2009, EU legislation applied to 150,000 procedures, involving a total estimated expenditure of € 420 billion or 3.5% of EU GDP.

The design of EU public procurement disciplines has very significant and tangible repercussions given the economic significance of the activities concerned, the large numbers of public purchasers and the time and resource involved. EU public procurement Directives must provide an enlightened framework for the organisation of public procurement which responds to the most pressing challenges of the time. A number of critical reports from the European Parliament and other stakeholders testify to a widespread concern that the current EU public procurement rules can be enhanced in a number of important respects. Businesses often find the procedures to be a “big irritant”<sup>1</sup>. These concerns have prompted the Commission to undertake a profound evaluation of the rules and a widespread consultation on possible adjustments to the legislative framework (620 respondents).

Reflecting these concerns, the Single Market Act<sup>2</sup> foresees the publication of Commission proposals before the end of 2011, paving the way for adoption of revised legislation before the end of 2012. The revision should *'underpin a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs'*. This impact assessment identifies the shortcomings of the existing legislative framework, and evaluates the key options for

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<sup>1</sup> The draft report of the Consortium indicates that European public procurement rules cost European businesses around € 188 million. It is stressed that in spite of this modest sum businesses often refer to public procurement as a “big irritant”. This can be partly explained by the fact that firms perception is also based on compliance costs and other business costs and the frequent legal procedures; source: The High Level Group of Independent Stakeholders on Administrative Burdens, opinion of 10 December 2008; available at: [http://ec.europa.eu/enterprise/policies/smart-regulation/files/hlg\\_opinion\\_on\\_ppfinal\\_en.pdf](http://ec.europa.eu/enterprise/policies/smart-regulation/files/hlg_opinion_on_ppfinal_en.pdf); page 2

<sup>2</sup> Commission Communication (COM(2011)206 of 13.04.2011) to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: "A Single Market Act: 12 levers to boost growth and strengthen confidence".

tackling them. It aims to help the Commission services in identifying possible improvements to the existing legislation.

## **1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES**

### **1.1. Procedural issues**

The project was led by Directorate C of the Directorate General Internal Market and Services. It was assisted by an inter-service steering group containing representatives from 16 other Directorate Generals, which met four times<sup>3</sup>.

### **1.2. External expertise and consultation of interested parties**

#### *1.2.1. Overview*

This impact assessment builds on the extensive external expertise, consultation and analysis supporting the evaluation of public procurement published on 24 June 2011 (hereafter: the evaluation report) and the 2010 evaluation of the 2004 Action Plan for e-procurement (hereafter: the e-procurement evaluation). It also draws on the findings of two Green Paper consultations on:

- (a) The modernisation of EU public procurement policy (hereafter: the GP);
- (b) Expanding the use of e-procurement in the EU (hereafter: the e-procurement GP).

Both of these Green Papers were supported by well attended conferences in Brussels (on 30.06.2011 and 26.11.2010, respectively), where stakeholders had a further opportunity to express their views<sup>4</sup>.

Both these evaluations and the Green Paper findings have been presented and discussed with Member State's (hereafter: MS) representatives at meetings of the Advisory Committee for Public Contracts (hereafter: ACPC) and the e-procurement working group. A special meeting of the ACPC was held on 6.07.11 to discuss the emerging findings and possible implications for the reform. A similar agenda was discussed with a wide range of Directorates General at an internal Commission meeting on 15.07.11.

#### *1.2.2. Summary of the findings from the 2011 evaluation of public procurement rules*

The evaluation found that the Directives have had positive impacts: transparency has increased and there are good levels of competition for many public procurement contracts (on average 5.4 bids per invitation). This has resulted in a net increase in benefits - the total cost of the procurement process (including all the bidders' costs plus those of the contracting authorities and entities (hereafter: CAE) for those

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<sup>3</sup> For a full list of participating DGs see: section 8.1.1).

<sup>4</sup> A summary report of the 30.06.2011 conference and various speeches are available at: [http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/conferences/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/conferences/index_en.htm).

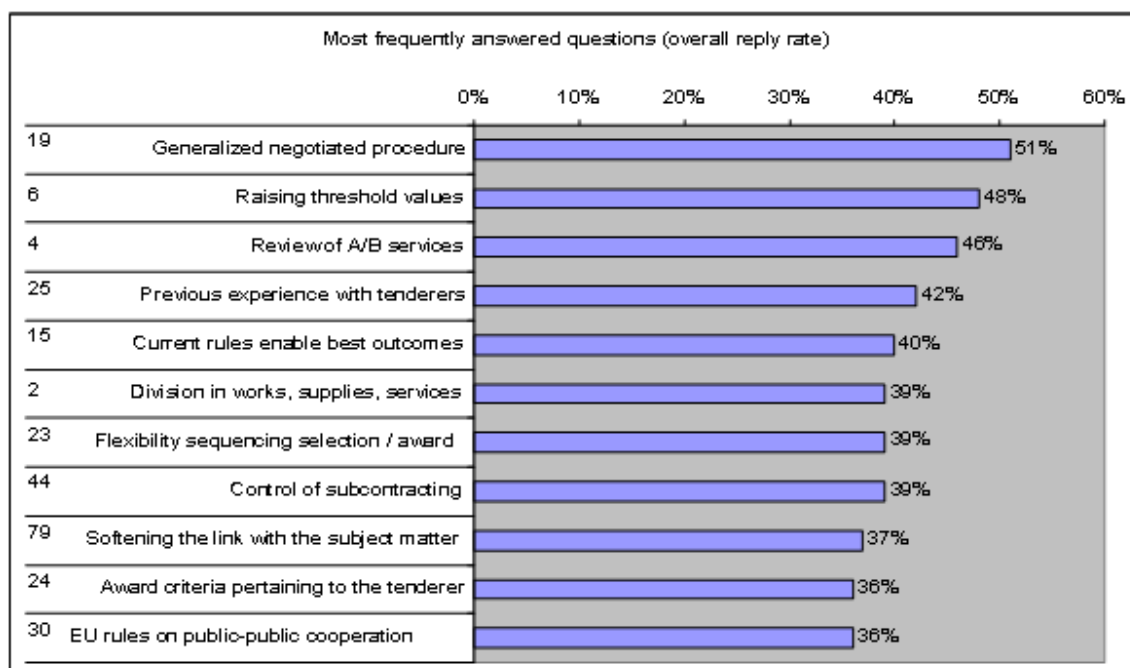
A summary report of the 26.11.2011 conference and various speeches are available at: [http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement/consultations/open\\_hearing\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement/consultations/open_hearing_en.htm)

procedures covered by the EU Directives has been estimated at €5.6 billion per year or 1.3% of the total value of contracts published. This is more than offset by the estimated savings, which are around 5% of the total i.e. €20 billion in 2009, without making any allowance for improvements in quality and wider environmental or social benefits. However there is some evidence that the current procedures are not as efficient as they could be (average cost of an above threshold procedure is approximately €28,000) which sometimes leads to higher costs for certain parties. Cross-border procurement is still not as high as had been expected, accounting for around just 1.6% of contract awards (3.5% of total value)<sup>5</sup>.

### 1.2.3. Summary of the synthesis of responses to the GP on the modernisation of EU public procurement policy

A focussed and very broad GP consultation of stakeholders was held between 27 January and 18 April 2011. Over 620 replies were received and whilst responses reveal diverging views on the priority which should be given to different areas, there is strong support for simplification, improving market access (particularly for SMEs) and fostering innovation. There is a certain consensus that the existing procedures should be streamlined and made more flexible. The issue of using public procurement to support other policies provoked mixed reactions but it was possible to identify certain basic orientations and identify certain concrete measures<sup>6</sup>. The issues which attracted the most responses are shown in Figure 1).

**Figure 1): Most frequently answered questions in the GP consultation**



<sup>5</sup> The full report on the evaluation of the public procurement rules, executive summary and supporting studies can be found at:

[http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/evaluation/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_en.htm)

<sup>6</sup> A synthesis document, summarising the replies received to the modernisation of EU public procurement policy Green Paper and the responses authorised for publication can be found at:

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

#### 1.2.4. *Summary of the findings from the 2010 evaluation of the 2004 Action Plan for e-procurement*

The e-procurement evaluation found that the technology to conduct e-procurement is now ready to be used and that the replacement of paper-based public procurement procedures by automated processes can, as expected, deliver faster and more streamlined procurement administration. However, e-procurement take-up across Europe was fairly low and whilst one or two countries have made significant progress (often due to mandatory use), generally no more than 5% of procurement procedures above the EU thresholds involved electronic processing. Public authorities were often deterred by the significant costs and challenges of the switch-over (administrative, organisational and technical) whilst economic operators faced difficulties due to different systems and interfaces making different demands (not just if trying to operate across borders, but also within a single Member State)<sup>7</sup>.

#### 1.2.5. *Summary of the synthesis of responses to the e-procurement GP*

Across the 77 replies received, there is broad support for EU level action to improve the legislative and policy environment and provide support to CAEs and firms which choose to use e-procurement. This included use of legislation to facilitate the use of standardised e-procurement solutions. A large majority (76%) of respondents call for changes to EU public procurement legislation in order to integrate better the use of ICT in procurement procedures. 85% of respondents considered that EU intervention is needed to avoid the emergence of unnecessary or disproportionate barriers to cross-border participation in e-procurement. Particular attention is needed to resolve access barriers linked to e-signatures and identification. A small majority (53%) of respondents support the imposition of EU level requirements to use e-procurement<sup>8</sup>.

#### 1.2.6. *External expertise*

Both the evaluations were supported via the following studies conducted by external consultants.

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<sup>7</sup> The report on the evaluation of the 2004 Action Plan for electronic public procurement and supporting study can be found at:

[http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement/documents/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement/documents/index_en.htm)

<sup>8</sup> A synthesis document, summarising the replies received to the e-Procurement Green Paper and the responses authorised for publication can be found at:

[http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement/consultations/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement/consultations/index_en.htm)

**Table 1): External expertise – list of studies**

<b>Title of a study</b>	<b>Consultant in charge, date</b>
“Cross-border procurement above EU thresholds“	Rambøll Management, 2011
"Public Procurement in Europe – Procedures and techniques – A study on the cost and effectiveness of procurement regulation“	PricewaterhouseCoopers, London Economics and Ecorys, 2011
"Strategic use of public procurement in Europe"	Adelphi, Belmont, PPRC, 2011
"Estimating Benefits and Savings from the Procurement Directives"	Europe Economics, 2011
"Taking stock on utilities procurement"	Europe Economics, 2011
"Evaluation of SMEs’ Access to Public Procurement Markets in the EU"	GHK, 2010 (for DG Enterprise and Industry)
"Study on the evaluation of the Action Plan for the implementation of the legal framework for electronic procurement "	Siemens Time.lex, 2010

### 1.2.7. *Impact Assessment Board*

The Impact Assessment Board discussed a draft of this report on 7 September 2011 and requested a resubmission, based on which a final opinion was issued on 23 September 2011. The draft report was significantly amended to address both sets of comments from the IAB. In particular, the following changes were implemented:

- The problem definition has been modified to identify more clearly the specific issues in the legislative framework which need to be addressed. More effective use has been made of the available empirical evidence and more examples have been included both in the problem statement and more generally throughout the report.
- Greater detail has been provided on the content of the options under discussion, indicating the specific problem areas which they should address. A "long list" of actions considered in the context of legislative reform has been added (annex 8.5) and for each legislative option, 1-3 headline actions have been identified and further explained (see chapter 4, tables 2-6 and annex 8.6).
- A deeper cost-benefit analysis of the selected headline actions has been included, where possible (chapter 5 and annex 8.7). This includes extensive reworking of the discussion relating to the legislative options for strategic procurement (section 5.3). Whilst a more detailed analysis of some aspects, particularly in relation to the options for strategic procurement, would have been desirable, it has not proved possible given the limited information available at this point;

- stakeholder views have been integrated more systematically, both in the problem definition (section 2.3) and to complement the analysis of impacts (sections added for each legislative option discussed in chapter 5);
- a more systematic treatment of administrative burden has been introduced for each legislative option (sections added for each legislative option discussed in chapter 5);
- Conclusions regarding the preferred options for the content of the legislative reform have been integrated in the report (section 6.1). This preferred option reflects the opinion of DG MARKT Services and does not prejudice the final form of any decision to be taken by the wider Commission Services. It is based on the vertical combination of the optimal solutions identified for each given (horizontal) problem theme. Whilst the IAB recommended that alternative packages of options should be compared, this has not been done as part of the main impact assessment, since the influencing factors would generally be of a more political nature. Alternatives have however been discussed during the inter-service consultation process and the main resultant changes are identified in section 6.2.

## **2. POLICY CONTEXT, PROBLEM DEFINITION AND SUBSIDIARITY**

### **2.1. Policy context**

The first EU legal acts relating to public procurement date back to the early seventies. The Directives establish common disciplines which regulate the way that CAEs organise purchasing procedures above designated thresholds by respecting the principles of transparency, regularity / fairness of procedures to ensure openness and non-discrimination. Through subsequent developments further aims were added and the scope was extended (e.g. utilities sectors, services), resulting in legislation intended to:

- promote efficient EU-wide and trans-border competition for contracts;
- deliver best value for money; and
- Aid the fight against corruption.

Public procurement policy has been and remains a key element of the Internal Market. However, a wide range of recent reports and policy statements have highlighted a need to review the current Directives. Key amongst these are: the Europe 2020 strategy (hereafter: Europe 2020), "A new strategy for the Single Market" (hereafter: Mario Monti's report) and the European Parliament's report on new developments in public procurement (hereafter: EP Report). Responding to these calls, the Single Market Act (hereafter: SMA) announced in April 2011 that by the end of the year, proposals will be made for a: *"Revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and*



*more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs".*

### *2.1.1. Scope of the review and this impact assessment*

This impact assessment will analyse the specific challenges which public procurement policy faces today and explore possibilities to adapt and support Directives 2004/17/EC (hereafter: the Utilities Directive) and 2004/18/EC (hereafter: the Classic Directive) in order to better respond to its current objectives and new challenges. The Remedies Directive (2007/66/EC)<sup>9</sup> and the Directive on Defence and Sensitive Security procurement (2009/81/EC)<sup>10</sup> are not included in this review. Equally, concessions are addressed through a separate initiative and impact assessment. A future impact assessment will consider the access of third country companies and goods to the EU public procurement markets. It should also be noted that the scope of any possible legislative change analysed here may be affected by constraints arising from both existing and future EU international commitments defined in the Government Procurement Agreement (hereafter: the GPA) and other bilateral agreements.

### *2.1.2. Overview of legislative framework*

The first public procurement Directive (71/305/EEC) coordinated the procedures for the award of public works contracts. Over time, the field of application has gradually increased to include services and goods as well as procurement in certain utilities sectors and has been complemented by flanking measures to ensure that the rights given to firms by the EU rules were observed (i.e. the Remedies Directives). The most recent reforms took place in 2004 and were intended to simplify and modernise the framework. Public procurement legislation is supplemented by rulings by the European Court of Justice (hereafter: ECJ). The EU is also party to a range of international agreements, most importantly, the GPA. For further detail on the public procurement legislative framework, see: section 8.2.4).

## **2.2. Background**

### *2.2.1. What is public procurement?*

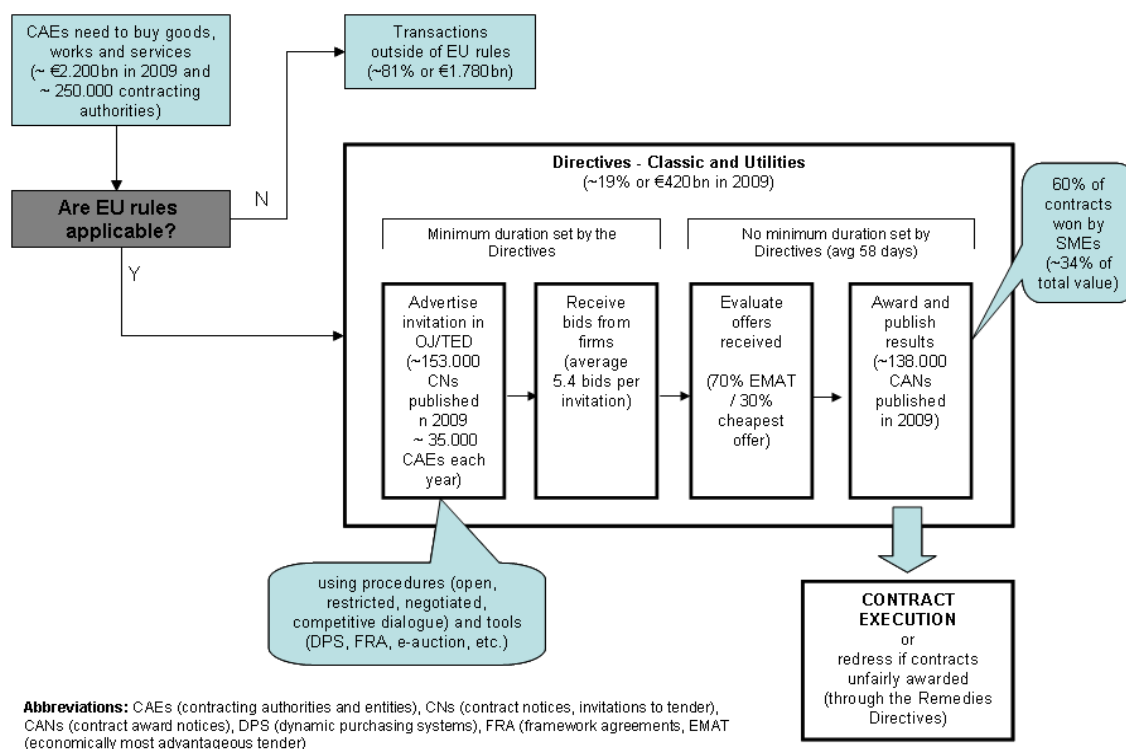
Public procurement is the process used by government institutions and public sector organisations to buy supplies, services and public works. Some key elements of the process are highlighted in Figure 2) below.

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<sup>9</sup> Directive 2007/66/EC relates to the procedures that a business can follow if they consider a contract has been awarded unfairly

<sup>10</sup> Directive 2009/81/EC covers the rules for the procurement of arms, munitions and war material (plus related works and services) for defence purposes.

**Figure 2): Public procurement rules – overview of general principles**

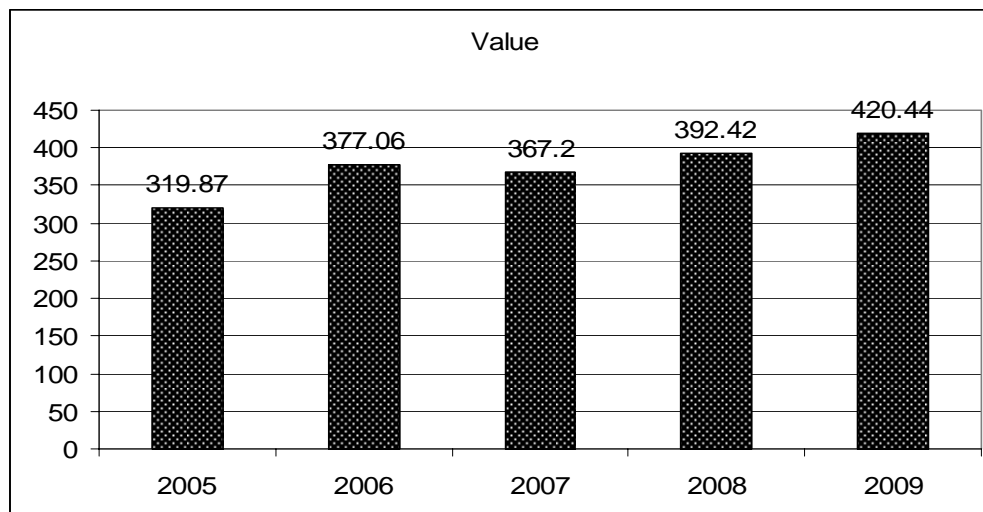


### 2.2.2. Nature and size of the market concerned

Government expenditure is a significant and influential factor in the economy - over €2,200 billion<sup>11</sup> (19% of EU GDP) is spent annually by different levels of government (central, sub-central, bodies governed by public law) to procure goods, works, and services. Almost a fifth of this total is spent on purchases whose value exceeds certain thresholds<sup>12</sup> and which should therefore be awarded according to the rules set out in the public procurement Directives. In 2009, the value of the contracts governed by EU public procurement rules was approximately € 420 billion<sup>13</sup> (3.6% of EU GDP). Of this total, approximately 39% (approx. € 165 billion) was spent on works, 38% was spent on services (approx. € 160 billion) and 23% on goods (approx. € 95 billion)<sup>14</sup>.

<sup>11</sup> See: Table 17) in section 8.2.1).  
<sup>12</sup> See: Tables 21 and 22) in section 8.3.1).  
<sup>13</sup> See: Table 18) in section 8.2.2).  
<sup>14</sup> See: sections 8.2.1) and 8.2.2).

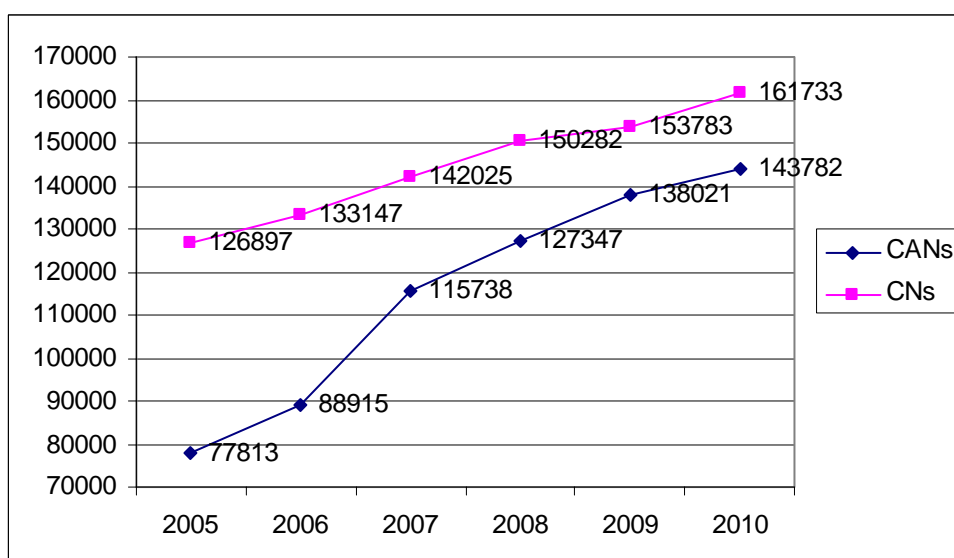
**Figure 3): Estimated value of tenders published in OJ/TED by EU MS in €bn**



Source: DG MARKT estimates based on OJ/TED data

Transparency in these markets is improved by the publication of a variety of standardised notices relating to contracts in OJ/TED<sup>15</sup>. This single point of access makes information on contracts above the EU thresholds easily available to any interested company. The two most important notices are the: Contract Notice (hereafter: CN)<sup>16</sup> which contains information on possible contracts and details how to bid; and the Contract Award Notice (hereafter: CAN) which provides details of the award process and winner. Significant improvements have been observed in the transparency rate over the last five years - the ratio of CANs published relative to the number of CNs has grown from 60% to almost 90% (see: Figure 4).

**Figure 4): Number of CNs and CANs published in OJ/TED in 2005 -2010 by EU MS**

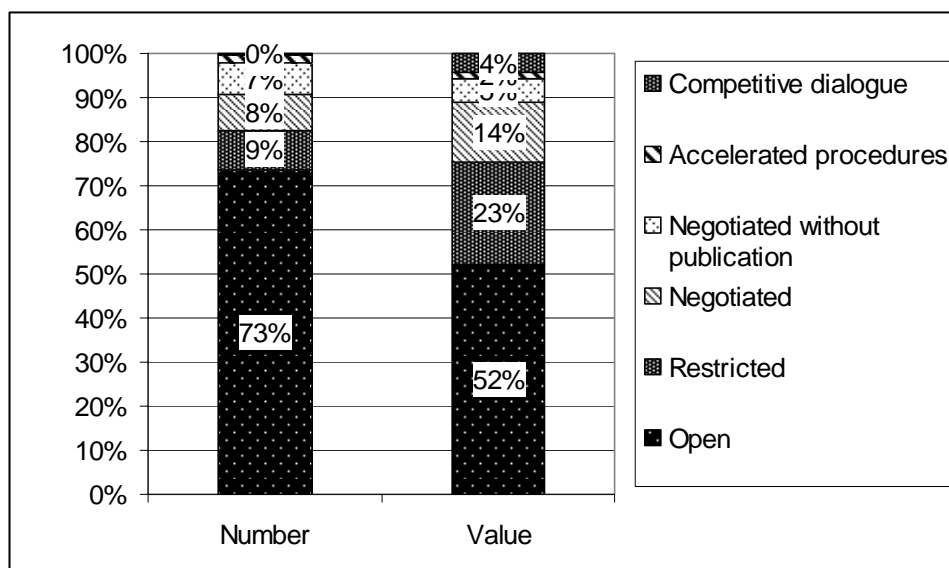


<sup>15</sup> TED is the online version of the 'Supplement to the Official Journal of the European Union'.  
<sup>16</sup> Also sometimes referred to as an Invitation to Tender (ITT).

On average between 5 and 6 offers are submitted for each CN published in OJ/TED, meaning that firms prepare an estimated 870,000<sup>17</sup> offers each year. The open procedure remains the most commonly used procedure, accounting for approximately 73% of all CANs but only 52% of published value. The second most popular procedure is the restricted, which is used in contracts of much higher value (9% of CANs, 23% of the total value).

An increasing trend to aggregation has also been observed. Strong growth in the use of framework agreements means that in 2006-2010 they accounted for around 11% of the number of transactions and 17% in value terms. The various forms of joint purchasing<sup>18</sup> accounted for just 4% of number of contracts, but are worth 12% of the total value<sup>19</sup>.

Figure 5): Procedures by use and value in 2006-2010 in percentages



Source: PwC study

These budgets are managed by over 250,000 CAEs, which vary significantly in size and possess different administrative capacities. The organisation of procurement, and notably the extent of centralisation/decentralisation, varies considerably across MS, generally reflecting the way public administration is organised.

<sup>17</sup> 161,733 CNs published in 2010 \* 5.4 bid per offer.

<sup>18</sup> Including formally established Central Purchasing Bodies (hereafter: CPBs), but also various less formal forms of cooperative purchasing.

<sup>19</sup> "Public procurement in Europe – Cost and effectiveness", PwC, London Economics, Ecorys, March 2011 (hereafter: PwC study), page 22.

## 2.3. Problem definition

### 2.3.1. Key problems and problem drivers

The evaluation of the Directives confirms that they have encouraged a high level of competition, enhanced transparency in public procurement markets and achieved measurable savings, generating associated increases in employment and GDP of between 0.08-0.12% after one decade (164-240,000 jobs<sup>20</sup>). However, the evaluation, taken together with other recent information and the results of the GP consultations, points to three areas where there may be opportunities to improve further the existing public procurement environment and enable the full potential of the Internal Market for public procurement to be realised. These three areas and their associated problem drivers are presented below<sup>21</sup>:

#### (1) Sub-optimal cost-efficiency of procurement

Overall it appears that the cost-efficiency of public procurement procedures is sub-optimal. This is driven by the following issues:

- (a) **Disproportionate procedures** defined in the EU rules, which generate excess costs (especially for smaller contracts). CAEs generally consider that costs are higher for procedures above threshold compared with below. A clear majority of respondents to the GP have misgivings about the level of detail of the EU public procurement rules; Member States and business representatives tend to have a more positive opinion, whilst CAEs, legal experts, citizens and civil society organisations are more negative. The typical (above threshold) procurement procedure costs nearly € 28,000. This cost can be split between CAEs who typically have costs amounting to € 5,500 per tender launched and firms whose costs are around € 3,800 per offer submitted<sup>22</sup>. While larger contracts are generally associated with higher costs, there appears to be a substantial element of fixed costs<sup>23</sup>. For the low value contracts close to the threshold of €125,000 this means total costs can amount to between 18-29% of the contract value. In total, the cost for all procedures covered by the Directives is some €5.6 billion p.a. or 1.3% of the total value of contracts published<sup>24</sup>. These typical costs reflect also the **significant differences across Member States** in the time taken to conduct procurement. There was a difference of 180 days between the top and bottom performers (MS) in terms of time taken from the dispatch of a CN to the award of a contract, across all procedures, (minimum:61

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<sup>20</sup> Based on an estimate of savings of 5% realised for the €420 billion of public contracts which are published at the EU level would translate into savings or higher public investment of over €20 billion. source: the Evaluation Report. See: L.Vogel, "Macroeconomic effects of cost savings in public procurement" Economic Papers 389, 2009.

<sup>21</sup> The problem drivers are highlighted in bold. For more detailed discussion of these drivers, see: annex 8.3.

<sup>22</sup> See: section 8.8.4.

<sup>23</sup> PwC study, page 91, "It turns out that procurement costs are almost invariant across a wide range of contract values."

<sup>24</sup> Source: PwC study, page 89.

and maximum:241 days). There is also considerable support among stakeholders for measures to alleviate administrative burdens related to the choice of bidder e.g. reducing the evidence required from bidders. Whilst much of this documentation is specified under national legislation, the EU could set stricter limits on the documents which can be requested.

- (b) **Complex EU rules defining scope and coverage** which generate **uncertainty, lead to risk-averse and 'box-ticking' behaviour** by public purchasers to the detriment of the quality of procurement outcomes. The EU provisions lay down prescriptive requirements governing the organisation of procedures, subsequent communication with all participants and the running of the evaluation of tenders. There are many 'grey zones' regarding the activities covered by the Directives (e.g. form of public-public cooperation) and the rules that apply to different types of contract. Problems are also experienced in relation to the concept of "bodies governed by public law" contained within the Directives, which has resulted in a series of judgements by the ECJ. This is fertile ground for error and uncertainty, 'gaming' of the system or circumvention behaviours. Analysis of TED data shows that in 30% of the CNs published a CAE classifies itself as "other" reflecting either its confusion, or a potential desire to benefit from a more favourable, but possibly incorrect, regime. The other side of the coin is that this complexity is a source of litigation risk.
- (c) The absence of clear counterparts at national level with responsibility for strategic oversight of public procurement administration and the effective implementation of EU procurement legislation has led to the emergence of **different models and fragmented national procurement administration and resource dispersion, resulting in inconsistent application, control and monitoring across the EU**. At present, the EU rules do not touch on national arrangements to perform these tasks (other than specifying some information requirements that Member States should meet). Confronted with the complex challenges implied by public procurement policy, some (generally smaller and newer) MS (e.g. Slovenia, Lithuania, Portugal) have established well resourced central procurement organisations, able to provide training and advice to individual CAEs. These Member States are better able to track and direct public procurement spend. Others have dispersed responsibility for the organisation of public procurement procedures across myriad CAEs who are poorly resourced, entrusted with responsibility for procurement procedures on a part-time basis, and will only rarely undertake a procurement procedure following EU rules. This context is ripe for administrative error, and inconstant application of the principles and provisions of EU law.<sup>25</sup> **The varied degree of professional procurement training and advice available in many countries** may have resulted in errors, an increased risk of fraud and a less than optimal management of

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<sup>25</sup> Source: the Evaluation Report, page 62 and pages 95-101.

resources, which would leave considerable scope for further cost efficiency savings. Recent audits of projects funded by Community funds have found around 40% error rates due to the wrong application of public procurement rules and, in some instances, the incorrect transposition of the Directives into national legislation<sup>26</sup>. Three major weaknesses were identified:

- Inadequate assessment of bids;
  - Absence of tendering or award of contract based on inappropriate procedure and award of supplementary contracts without competition;
  - Non-compliance with publication requirements.
- (d) Such errors mean that certain high value purchases are not being opened to EU wide competition. As a result CAEs may not be obtaining optimal outcomes. Some businesses are being excluded from competing for these contracts or are not competing on an equal footing to others. Errors of this nature are more often related to the conduct of a procurement process and a lack of knowledge rather than to the procedures set out in legislation and therefore **improvements could be expected as a result of better monitoring and control at Member State level**, combined with the provision of greater support. An analysis of the infringement procedures launched by the Commission since 2005 identified a similar range of errors and issues to the above audits, implying that such mistakes are not "one-offs" but occur repeatedly. It is extremely unlikely that the errors identified by the Commission's audits are limited to Community funded projects.

## (2) Missed opportunities for society

The current rules may not always allow stakeholders to make the best use of the resources at their disposal and/or the best (or optimal) purchasing choices. This generates missed opportunities for society which appear mainly as the result of:

- (a) Problems and uncertainty affecting the ability of purchasers to legally and consistently utilise public procurement rules to achieve strategic policy goals<sup>27</sup>. Despite a number of communications from the Services of the Commission intended to clarify the practicalities of how to integrate other policy objectives when applying the public procurement rules<sup>28</sup>, many stakeholders find that problems of legal

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<sup>26</sup> "The non-respect of public procurement rules alone accounts for 43% of all quantifiable errors and makes up for approximately three quarters of the estimated error rate [for the Structural Funds]", source: The European Court of Auditors' annual report for the financial year 2009, available at: <http://eca.europa.eu/portal.pls/portal/docs/1/7158724.PDF>

<sup>27</sup> For example, addressing issues such as green public procurement or greater energy efficiency; supporting social policies such as fair trade and employment conditions; developing new, innovative products and technologies.

<sup>28</sup> An interpretative communication explaining how environmental considerations could be integrated within procurement practice (2001); The Commission Communication on Integrated Product Policy

certainty remain. More significantly, some consider that the provisions of EU directives do not leave sufficient latitude to permit other policy considerations to be taken into account when awarding contracts. Whilst many MS have undertaken national or regional initiatives to achieve other policy objectives via public procurement, it is not yet clear how successful these policies have been. In some cases, where the integration of some strategic objectives incurs additional costs that are directly linked to the life-cycle and can be reliably estimated and verified, they can be evaluated through the use of economically most advantageous tender (EMAT) criteria using a well understood life cycle costing methodology. There is, however, considerable difficulty in evaluating the trade-off between some other strategic objectives and value for money in other cases, where there may be no widely agreed or reasonable method of estimating, verifying or comparing the actual additional costs involved.

- (b) Inflexible procedures, defined at EU level, that do not allow CAEs to make the best use of non-standard procurement solutions (e.g. purchasing innovative goods and services<sup>29</sup>, ability to integrate other strategic goals, etc). As a result, many respondents to the GP call for more flexibility in the conduct of procedures (with suggestions including: greater ability to negotiate; a less rigid sequencing of examination of selection and award criteria; ability to take into account previous experience with a bidder<sup>30</sup>, greater use of life cycle costing approaches, etc.) A clear majority of respondents advocate further promoting and stimulating innovation through public procurement. The impact of green procurement in three major areas which offer the greatest potential environmental benefit (as covered by the current defined Green Public Procurement (GPP) criteria) - construction, transport and IT equipment - would extend to contracts worth more than €100 billion.<sup>31</sup> Socially responsible criteria could be relevant to at least all works and service contracts or some 77% of above threshold procurement.
- (c) Risk averse behaviour by authorities afraid of litigation (legal uncertainty) – there is some evidence that CAEs apply the full EU rules, when they might not have to, out of fear that their interpretation of the applicable regime could be wrong. For example, 18% of all contracts published in OJ/TED are below threshold, but have nonetheless been subjected to the full procedure applicable to contracts above the thresholds. Also around 7% of transactions which

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(2003); A handbook on environmental public procurement (2004); The Commission Communication on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan (2008), A Guide to Taking Account of Social Considerations in Public Procurement (2010), etc.

<sup>29</sup> A lack of flexibility has been linked to reasons which prevent CAEs from taking advantage of more innovative commercial offers; source: "*The impact of EU procurement legislation on councils*", Local Government Group (UK), December 2010 page 13.

<sup>30</sup> The current Directives permit two award criteria: the use of lowest price or economically most advantageous tender (hereafter: EMAT).

<sup>31</sup> Evaluation report page 77.



follow the full regime related to services are actually B services which should have followed a lighter regime. Similarly, many authorities have not considered switching to e-procurement as they are uncertain of what it means and fear that any errors they commit would result in legal proceedings being brought by firms<sup>32</sup>. Many smaller CAEs will never have awarded a contract above the thresholds and without this experience or appropriate legal resources, they will be extremely aware of the dangers of getting it wrong when they do so for the first time.

- (d) Insufficient instruments at (national and) EU level to efficiently protect against possible violations of public procurement law, which may generate less favourable outcomes. Again, the different governance models and administrative capacities developed by MS may be affecting the timely identification of and reaction to possible bad practices<sup>33</sup>. Several respondents to the GP suggested that there was a need to build additional competence amongst CAEs and improve monitoring arrangements.
- (e) Due to a combination of these two problems (sub-optimal cost-efficiency of procurement and missed opportunities for society) it is not possible for the economy in general to obtain "best value for money", a key public procurement objective.

### **(3) National rather than European public procurement market**

Despite nearly 40 years of public procurement legislation one of the key objectives – the creation of a single market - has yet to be achieved. The evaluation found that direct cross-border procurement accounts for 1.6% of awards or roughly 3.5% of the total value of contract awards published in OJ/TED during 2006-2009<sup>34</sup> and that 50% of contracts above EU thresholds are awarded within the distance of 100 km<sup>35</sup>. Indirect cross-border procurement through subsidiaries or foreign affiliates makes up another 11.4% of awards or 13.4% by value, but in many respects, public procurement markets remain national rather than European<sup>36</sup>.

In particular, this lack of integration is affected by:

- (a) **A lack of convergence in the rules concerning the integration of strategic goals in public procurement.** The 2004 Directives allowed strategic and environmental criteria to be taken into account;

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<sup>32</sup> Source: the Evaluation of the 2004 action plan for e-procurement and findings from the open hearing held in Brussels on 26 November 2010.

<sup>33</sup> A recent impact assessment carried out for DG HOME found that whilst only a small proportion of total corruption costs (estimated across the EU to amount to 1% of EU GDP) can be attributed to public procurement, it also estimated that in one MS, the cost of organised public procurement corruption in terms of fiscal and public welfare loss accounted for around "€ 0.7 billion losses to public procurement misappropriations in 2007-2008".

<sup>34</sup> Source: "Cross-border procurement above EU thresholds", Rambøll Management, May 2011 (hereafter: Rambøll study), page 38.

<sup>35</sup> Source: Rambøll study, pages 39 and 80.

<sup>36</sup> See sections 8.3.4.1 to 8.3.4.3.

subsequent EU action has concentrated on the provision of soft law measures. At present, much discretion is left at national level and even where similar national objectives have been identified, they are being implemented through different commitments/means and to a different extent across the EU. For example, businesses moving between contracts often face different green criteria for the same product group. A certain fragmentation of the market already exists (within countries as well as between. In most cases national action plans are recent, so the actual fragmentation is still small and the risk could still be avoided if appropriate action were taken.

- (b) **Regulatory and "natural" market barriers** (e.g. requirements stemming from both inside and outside the EU Directives and other EU law and language, geographic location) **cause asymmetric market access across Europe**, lowering involvement of SMEs in particular, and cross-border procurement in general. As mentioned above, procurement contracts awarded directly across borders are still limited. This can be explained by both supply and demand factors. Low levels of import penetration may be due to the composition of public demand, which is dominated by services that are sourced locally. However, recent survey data shows that companies are also reluctant to tender cross-border. In a recent large scale survey around 73% of firms, otherwise active in public procurement, said that they have not made any cross-border tenders in the last three years<sup>37</sup>. The fact that the average success rate when bidding abroad is lower than when bidding at home may go some way to explain this behaviour. Additionally, a recent survey highlights inertia/lack of experience and language barriers as the two main obstacles preventing cross-border bidding, whilst legal barriers were ranked fourth<sup>38</sup>. Some of these issues are technical and result from a certain lack of recognised standards e.g. electronic signatures. The most significant factor affecting SME participation is the size of a contract – SMEs do not have the resources or capacity to bid for or fulfil requirements of large public contracts and in general, contracts above €300,000 seem to be beyond their capacity (50% of contracts are below €390,000<sup>39</sup>). Both SME and cross-border bidders are also hampered by certain administrative requirements (e.g. provision of evidentiary documents, where the EU legislation outlines the key types of document but where many additional requests are added at national level) and problems in obtaining information.
- (c) The fact that public procurement markets are not fully integrated is also a source of missed opportunities for the wider economy – the counterfactual, as discussed in the late eighties, was that "*the failure to*

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<sup>37</sup> Source: Rambøll study page 87.

<sup>38</sup> The share of SMEs winning public procurement contracts has not changed significantly since 2002; in 2006-2008 they won between 58-61% of above threshold contracts, representing between 31-38% of the total value of contracts – source: "*Evaluation of SMEs access to public procurement markets in the EU*", GHK, September 2010 (hereafter: GHK study), page 22.

<sup>39</sup> Source: PwC study page 91.

*achieve a single market has been costing European industry dearly in unnecessary costs and lost opportunities"*<sup>40</sup>. Although savings have been achieved since then, Europe 2020 and Mario Monti's report both point out that much more could still be done. Strictly comparable figures are not available but the figures for total public sector import penetration remained 11 percentage points below private sector import penetration between 1995 and 2005. Some but not all of this may be accounted for by the structure of public sector demand or natural barriers.

- (d) Taken together, these three key problems lead to the conclusion that the Internal Market is not achieving its full potential in public procurement. All three problems are important and affect the functioning of the Internal Market in different ways, making it difficult to identify one of them as the primary issue to be addressed.

### 2.3.2. Graphical representation of problem drivers

These three main problems might be generated by various factors related to the functioning of public procurement regime (e.g. procedural issues, policy choices, market failures, etc). The problem drivers identified above as the origin of these three key problems have been grouped under the following five headings:

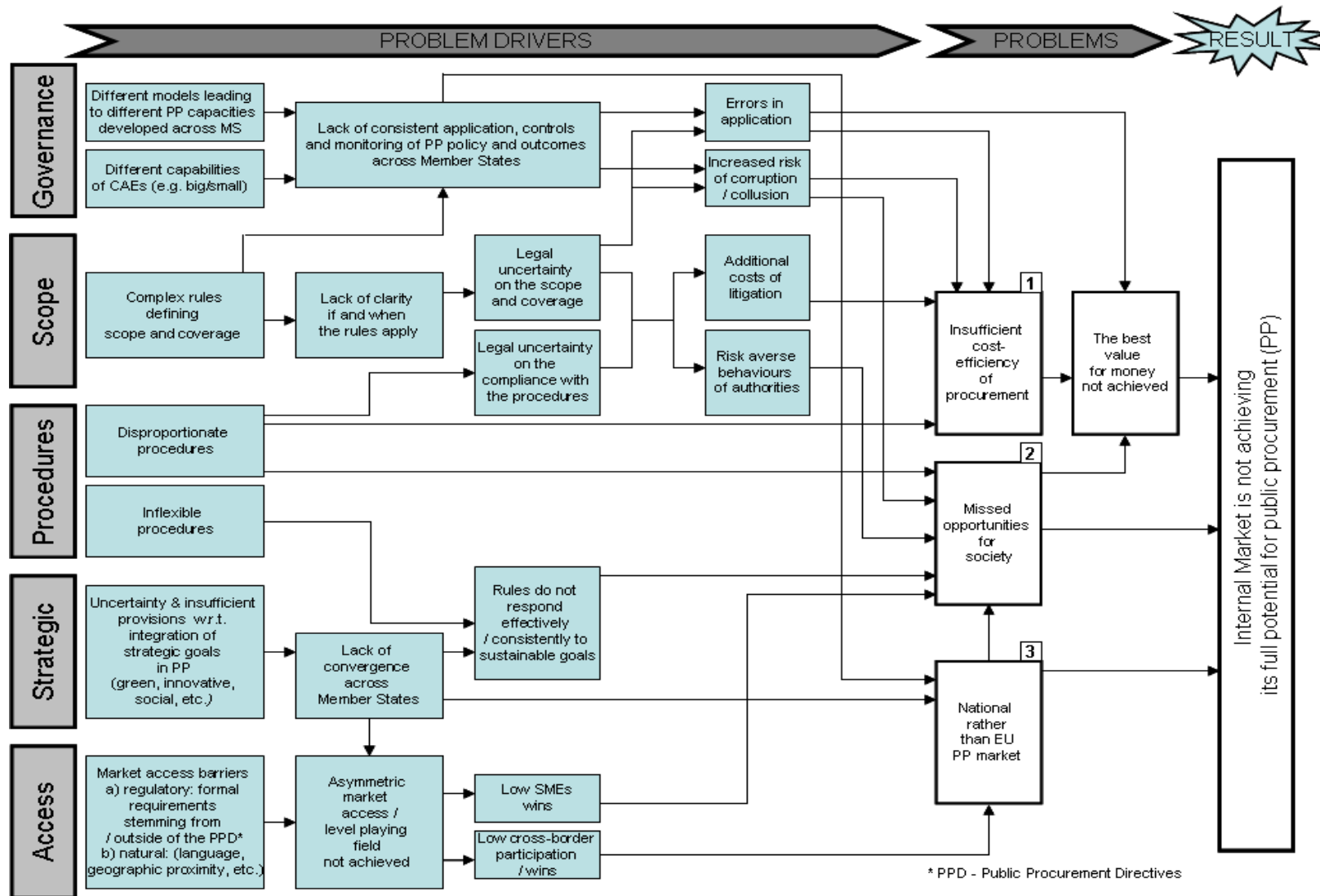
- Scope and coverage of public procurement rules;
- Procedures;
- Strategic public procurement;
- Access to public procurement markets;
- Governance (MS administrative organisation).

Relationships between these problems and relevant drivers are summarised graphically in the problem tree (Figure 6) below. Further detail and information on the problem statement and drivers is provided in section 8.3).

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<sup>40</sup> "Europe 1992 - The overall challenge", Commission of the European Communities, SEC (88) 524 final, Brussels, 13 April 1988.

Figure 6): Problem tree for the modernisation of public procurement Directives



## 2.4. How would the problem evolve, all things being equal?

If no changes were introduced, the current trends in transparency and competition would probably remain high and could even increase slightly, with an associated “knock-on” benefit to prices. However, despite these positive influences, some less promising developments could be expected.

- The current **scope** of the Directives captures certain categories of transactions, actors or markets for which such rules may not be proportionate or productive (e.g. contracts relating to arrangements between two public entities or low value contracts). Continuing this approach would prolong uncertainty about the treatment of certain common forms of procurement (public-public co-operation, shared services etc). Continued uncertainty about the scope of application could also result in the non-application of procurement disciplines to certain markets or transactions where they would be appropriate (by allowing circumvention behaviour or maintaining loopholes).
- If no change is made to the existing **procedures**, any disproportionate costs of procedures (especially for lower value contracts) would persist. The continuing lack of flexibility for CAEs and firms could get worse, as could the consequences if they become more frustrated by their inability to adapt to changing markets or incorporate strategic criteria. This could ultimately result in lower compliance rates. Also, no increased take-up of e-procurement could be expected. If no improvements or clarification of rules defining the aggregation of demand (e.g. CPBs, framework agreement, DPS) are introduced, lost opportunities (for example due to savings that could have been generated because of the economies of scale) would persist and accumulate.
- The status quo would restrict the scope for CAEs to use public procurement to achieve **strategic** goals. Within the limits imposed by the legislation, MS would continue to implement uncoordinated national action plans or approaches, with the associated risks of creating legal or policy barriers to cross-border procurement.
- The current rates of cross-border and SMEs **access** have been stable for the past five years or so and are unlikely to change if no action is taken. Similarly, there would be no real incentive to change the different models for **governance**, leading to a perpetuation of the current level of procedural failure, missed opportunities and sub-standard procurement administration in those MS which do not, of their own volition, take steps to overhaul their national procurement administration.

To conclude, if no action is taken in the five above mentioned problem areas, cost-inefficiency will at best stay as it is, and could even deteriorate. The fear of litigation which has led to a tick-box approach to compliance, rather than outcome driven could further increase costs and continue the trend of legal uncertainty. Administrative costs that are the source of missed opportunities for society<sup>41</sup> would

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<sup>41</sup> For example, administrative costs borne by businesses due to an obligation to provide documents and certificates during public procurement procedures would accumulate (all bidders). Usually, four out of

continue. Sub-optimal choices, particularly in strategic terms, would continue due to limits on, and inconsistencies in, approaches, which could also prevent convergence. Markets would continue to remain predominantly national and hence it seems reasonable to assume that the full benefits of the Internal Market for public procurement would not be achieved.

## **2.5. The EU's right to act and justification**

The EU competence to take action on public procurement matters comes from the articles of the Treaty on the Functioning of the European Union (TFEU). Whilst this Treaty does not contain any specific provisions regarding public procurement, it lays down the fundamental principles which are generally applicable and which have to be observed by contracting authorities and entities when awarding all contracts. These principles are: the freedom of movement of goods (Article 34 *et seq.* TFEU), the freedom to provide services (Articles 56 *et seq.* TFEU) and the freedom of establishment (Articles 49 *et seq.* TFEU).

Finally, the right of the EU to act is already established by the existence of the Directives. Given that many of the problems identified above are the result of actions and interpretations resulting from these Directives, it follows that the EU level action is required to address these issues.

## **3. OBJECTIVES**

The evaluation finds that the general objectives of existing public procurement policy are still relevant. Indeed, given the current strained public finances, they may be even more relevant since they seek to ensure that public procurement policy fulfils its potential and delivers value for money to society. As a result of the issues identified in the problem statement, the following objectives have been identified for the three different hierarchical levels (i.e. general, specific and operational).

### **3.1. General objectives**

The evaluation shows that the overall objectives of existing public procurement policy are still relevant. Indeed, given the current strained public finances, they may be even more relevant given that that they seek to:

- Promote EU-wide and cross-border competition for contracts (i.e. creating a fair / non-discriminatory and level playing field for all suppliers, so that the EU public procurement market is accessible to companies from across the EU);
- Deliver best value for money whilst achieving the best possible procurement outcomes for society (and hence, ultimately, making the best use of taxpayer's money);
- Aid the fight against corruption.

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five bidders are not successful, so the time and effort that they invested in fulfilling administrative requirements is basically lost for the economy. Similarly, time and cost spent currently by firms and CAEs on fulfilling publication requirements (filling in the standard forms) would continue to be high, if no simplification measures are implemented.

### **3.2. Specific objectives**

Given the problems outlined in Section 2.3 above (Problem definition), the specific objectives identified for this intervention are to:

- Improve the cost-efficiency of EU public procurement rules and procedures;
- Take full advantage of all opportunities to deliver the best possible outcomes for society;
- Create European rather than national markets for procurement.

### **3.3. Operational objectives**

Five different problem themes have been highlighted. To address these individual themes and deliver focussed solutions, the following operational objectives have been set:

#### 1. Scope and coverage

- Ensure that the rules capture the appropriate actors and subject-matter of procurement;
- Provide clarity and legal certainty with respect to said scope and coverage.

#### 2. Procurement processes/procedures

- Streamline and simplify procurement procedures to (i) reduce operational costs (ii) ensure proportionality and (iii) provide for more legal certainty;
- Improve the flexibility of procedures to better respond to purchasing needs of authorities.

#### 3. Strategic public procurement

- Help public procurers to use public procurement to support other policy objectives (e.g. environmental, social, initiatives related to the innovative economy) in a legally compliant and fair manner.

#### 4. Market access

- Simplify the rules and introduce instruments to increase the transparency of EU public procurement rules and open-up the markets to greater cross-border competition;
- Ensure that the rules facilitate participation by SMEs.

#### 5. Administrative organisation

- Ensure consistent application, controls and monitoring of public procurement policy and outcomes across MS;

- Reduce errors and problems with compliance with EU public procurement rules.

The table presented in section 8.4) summarises the different levels of objectives which have been identified, mapping them to the three key problems and the associated problem drivers which have been identified. It is clear that there are tensions between these objectives, and as a result, certain trade offs will need to be considered<sup>42</sup>. The content of any amended rules and the concrete measures proposed should aim at making life easier for CAEs and firms whilst at the same time continuing to guarantee a high level of transparency and efficient safeguards for equal treatment of bidders. These tensions and trade-offs will be highlighted further in the discussion of impacts presented in chapter 5.

## **4. POLICY OPTIONS**

The problems identified above manifest themselves in many and diffuse ways. Tackling them comprehensively could entail a large number of changes affecting many different aspects of the legislation. The GP invited stakeholder comment on approximately 120 adjustments to the current legislation. This chapter proposes an approach for structuring this extensive set of possible adjustments under a number of options which will then be analysed in chapter 5.

Before considering the range of possible concrete adjustments to the Directives Section 4.1 presents some more radical options – including outright abolition of the Directives or the application of fully harmonised rules to a larger set of public purchasing procedures including some below-threshold procurement.

### **4.1. Radical options**

When initially considering all the possible alternatives, four broad types of action were identified. At one extreme, consideration was given to abolishing the EU directives, whilst action at the other end of the spectrum would lead to full harmonisation or the creation of a single, pan-European system for public procurement. In between these two extremes fall two other categories of action: to keep the Directives as they are (no change) or to introduce changes within the current framework (some change). This section considers the two radical options - abolition of the Directives and full harmonisation.

#### *4.1.1. Abolition of the Directives*

One radical option would be to abolish the existing EU public procurement legislation and apply only the principles identified in the TFEU (i.e. move to a "principles based" set of procurement rules). However, the evaluation found that whilst improvements were possible, the Directives deliver benefits that significantly outweigh costs. The transparency and procedural regulation introduced by the

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<sup>42</sup> For example: simplifying the rules and procedures should not jeopardise essential guarantees for the open and free access of all European firms to public contracts in Europe. Depending on how it is done, the integration of wider policy objectives could lead to further checks and considerations which might, at least at first glance, complicate the rules or the process of their application.



Directives have boosted competition, which in turn has yielded the hoped for improvements in procurement outcomes (both savings and qualitative performance). The Directives are conservatively estimated to deliver cash savings of around €20 billion on the €420 billion advertised in accordance with the Directives. The total cost for purchasers and suppliers of organising public procurement procedures in compliance with the requirements of the legislation is around €5.6 billion per annum – and we estimate that 2/3 of this cost would remain even if the Directives were abolished. Therefore, the abolition of EU public procurement legislation would be self-defeating. Removing the Directives would also create a "vacuum" in relation to the EU's international obligations. Each MS is a signatory to these treaties and would have to individually put in place measures to comply with the conditions to which they have agreed.

Many of the varied stakeholders at the Conference on 30 June commented that "*the Directives have proved their worth*", whilst nonetheless going on to identify areas for further improvement. Although not an explicit question in the Green Paper, it could be inferred from many replies that such an approach was not supported.

In view of the above, this option has not been considered further.

#### 4.1.2. *Full harmonisation*

An alternative broad approach would be to propose a full harmonisation of the public procurement rule-book across the EU. This could entail deeper and more prescriptive harmonisation of the current rules which currently leave considerable latitude to MS regarding their implementation. It could also entail extension of EU procurement procedures to some of the estimated 2 million public procurement procedures for purchases below the thresholds of the Directives (an action likely to prove unpopular with stakeholders, even if a majority of GP respondents recognised a need for additional guidance on below threshold procurement). This could ensure greater consistency and legal certainty, increase transparency, and increase the leverage effect of EU procurement legislation in support of other policy goals. It would however run directly counter to the concerns regarding the over-intrusiveness of EU regulation and disproportionate costs resulting from the imposition of strict procedural disciplines. Moreover, it is not clear to what extent such an approach would yield countervailing benefits given the limited cross-border interest in small-value procurement procedures.

Given that this approach would exacerbate some of the critical problems identified above without a strong probability of delivering compensating benefits, this option has not been considered further.

#### 4.1.3. *Conclusions on radical options*

Neither of these radical options is examined further since this initial analysis suggests that the disadvantages would clearly outweigh any benefits.

## 4.2. Development and screening of possible options

The rest of the Impact Assessment analysis will concern itself with policy options ranging from "no change", through a menu of options which vary in terms of the level of change to the current legislation.

In impact assessment terms, an option is defined by its content e.g. possible action(s) and the means by which that content will be delivered e.g. soft law, legislative change. This section summarises how the options / option packages presented in Tables 2 to 6 were constructed.

### 4.2.1. "No change" options

Preserving the current situation would perpetuate a system that gives rise to unintended consequences, missed opportunities and high costs. However, this solution can only be finally ruled out after measuring the impacts of any other proposals against the baseline of doing nothing. It could yet be possible that the status quo provides the best solution for a particular problem area. Hence five no change options have been defined – for scope, procedures, strategic procurement, access and governance. The consequences of following this course of action are discussed in more depth in section 2.4.

### 4.2.2. Non-legislative / soft law options

Non legislative approaches may constitute a viable and proportionate response to certain issues. There may be possibilities for soft-law solutions providing further guidance and explanation on particular aspects of the existing rules. For example, benchmarking and best practice sharing between MS may be an effective means of improving public procurement administration and practice.

#### 4.2.2.1. Narrowing down the soft law options

Considerable guidance has already been provided addressing many aspects of the Directives. The Commission services have also provided additional training and assisted in the development of training related to the existing public procurement rules. Some of the main initiatives and documents are listed in the following box.

**Interpretative documents, guidance and soft law relating to the implementation of EU public procurement legislation:**

Interpretative Communication on "Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement" (COM(2001) 274);

Buying Green! – A Handbook on environmental public procurement (2004);

"Buying Social - A Guide to Taking Account of Social Considerations in Public Procurement" (SEC(2010) 1258 final);

"Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest" (SEC(2010) 1545 final);

Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement (COM(2001) 566 final);

Pre-commercial procurement “Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe” (Commission Communication – 2007);

Risk management in the procurement of innovation - Concepts and empirical evidence in the European Union, Expert Group Report 2010 (24229 EN), Directorate-General for Research, European Research Area;

E-procurement: functional requirements for conducting electronic public procurement under the EU framework, January 2005, produced by European Dynamics S.A. on behalf of the European Commission; <http://ec.europa.eu/idabc/servlets/Doc1ad3.pdf?id=22191>

While this guidance has helped to clarify how the existing provisions can be implemented, it cannot compensate for gaps or shortcomings in the legislation. Many of the problems in these areas stem from the absence of a sufficient legal treatment of the issues, or restrictive provisions which prevent authorities from pursuing alternative policy approaches (e.g. as it is the case for some potentially legitimate approaches for strategic procurement). By their very nature, interpretative documents or guidance cannot overcome problems which are inherent to the current legal framework. After considering in more detail the possible content of the five soft law options initially identified, it was decided that no significant benefits were likely to be achieved through the provision of further guidance/training/clarification in the areas of Scope, Procedures and Strategic procurement. Thus only soft-law options for Access and Governance will be considered further.

#### 4.2.3. *Framing the legal options*

The two recent GPs on public procurement asked over 120 questions, each relating to a potential issue for modification or inclusion. Whilst very extensive, these two consultations were not necessarily exhaustive. Further concerns or areas for improvement were identified through the evaluation and other independent sources and reports.

Even after grouping together similar/related questions and issues over 70 possible changes to the Directives have been identified, which are listed in full in section (annex) 8.5.

A detailed and separate analysis of all these possible changes to the Directives would not be proportionate. It is not possible to undertake a meaningful analysis of the impacts of each and every legislative adjustment that could be envisaged, on the basis of existing information, with the resources available and within the guidelines for impact assessment reports. The subsequent sections of this chapter explain in two steps the approach followed to permit a concrete assessment of such a wide number of different possible concrete changes to the Directives.

### ***Step 1: Framing the critical strategic options***

The principal changes, identified through consultations and evaluation, are grouped in terms of their relevance in tackling the key problems described above. These strategic options centre on the critical choices to be made in terms of the ambition and impact of the legislative change, and the degree of change compared to the existing legislation. This leads to a menu of options for each problem area, ranging from 'soft law' through evolutionary/incremental legislative change to a more fundamental departure from the current scope or regulatory approach. These strategic options are mapped out in tables 2 - 6.

Two broad categories of legislative change have been identified, reflecting the different levels of ambition possible. In general, the first legislative option presented considers changes and improvements, which build on current principles and provisions (i.e. the left-hand side column under LEGI options). Such actions would clarify existing legislation or introduce new possibilities, but not constitute a fundamental change to the scope or approach. In broad terms, stakeholders would continue to operate within a familiar framework. This corresponds to an incremental evolution of existing principles to respond to changing market conditions or new policy challenges.

The second legislative option for each problem area considers changes which seem more fundamental in nature compared to the approaches within public procurement legislation until now (i.e. the right-hand side column under LEGI options). Such options consider more prescriptive action e.g. making compulsory a certain type of purchase or behaviour on the part of CAEs (e.g. moving away from "how to buy" and considering "what to buy") or actions which entail a departure from core principles of existing legislation (e.g. that recourse to negotiated procedure is exceptional). The classification of a particular legislative adjustment in one or other category is based on an appreciation by DG MARKT of how radical a change is, in relation to both the current and previous acquis. The evaluation of options will abstract from the precise form of the legislative instrument at this stage. Further discussion of the regulatory form is provided in section 5.6.

### ***Step 2: Identification of headline actions under each legislative option for deeper analysis***

Once this grouping was established, we have identified within each strategic option, one or two headline actions from the full menu of actions. The headline actions identified are expected to be the most significant changes under each option and the ones most deserving of deeper analysis in terms of the expected impacts in the subsequent chapters.

The "headline actions" have been selected from the extended list of around 70 possible changes after assessment against the following criteria (the results of this are set out in annex 8.5):

- Economic impact, in the sense of the size of the market affected and the potential change to the transaction process (scored 1 – 5, where 1 was Low, and 5 was High);

- Relevance to tackling implementation problems with the EU legislation (identified in chapter 2);
- Ability to improve the functioning of public procurement markets (scored High, Medium, Low);

For each action, the balance of stakeholder opinion, as expressed through responses to the GP, is also presented. (Annex) 8.6 provides a more detailed description of the content of each headline action.

The analysis of the impacts in subsequent chapters will refer primarily to the expected impacts of the headline actions. The discussion will therefore be framed primarily in terms of these measures, but the analysis and reflections will provide a basis for drawing general conclusions on the critical choice and the related issues.

The following acronyms are used to describe the legislative options discussed:

SCO.LEGI.TARGET: targeted adjustments & clarification of boundaries under Scope

SCO.LEGI.REDUCE: significant reduction of Scope

PRO.LEGI.DESIGN: improve design of Procedures

PRO.LEGI.FLEXIB: increase choice available to CAEs in Procedures

STR.LEGI.FACILIT: facilitate Strategic public procurement, leaving the choice of action to Member States / CAEs

STR.LEGI.ENFORC: enforce Strategic public procurement at an EU level

ACC.LEGI.FACILIT: facilitate Access to EU public procurement markets

ACC.LEGI.ENFORC: enforce at an EU level certain tools for Access

GOV.LEGI.TARGET: optimise the use of resources to improve Governance

GOV.LEGI.ENHANC: enhance control & responsibility to improve Governance

#### 4.2.4. Detailed mapping of options

**Table 2): Scope**

SCO.NC	SCO.SOFT	SCO.LEGI.TARGET	SCO.LEGI.REDUCE
Maintain the status quo	Guidance / training / clarification	<p><b>Critical choice:</b> Targeted adjustments to current scope of public procurement legislation</p> <p><b>Problems addressed:</b> - Complex and unclear rules defining scope and coverage lead to uncertainty, circumvention behaviour, and arbitrary inclusion/exclusion of some transactions – all at margins.</p> <p>The actions under this option should simplify the identification of who and what is covered by the EU public procurement rules.</p>	<p><b>Critical choice:</b> Far-reaching change to scope of the current rules involving exclusion of entire groups of purchasers or transactions.</p> <p><b>Problems addressed:</b> - Complex and unclear rules defining scope and coverage lead to uncertainty, circumvention behaviour, and arbitrary inclusion/exclusion of some transactions. - Application of costly regulatory apparatus to large populations of purchasers or transactions without sufficient countervailing benefit. Greater certainty and clarity should result from the exclusion of particular groups or purchases where there are reasons to doubt that the current rules should apply,</p>
		<p><b>Headline actions(s)<sup>43</sup>:</b> - Higher threshold for social services , with a special regime for social services above this threshold - Inclusion of all former B-services (except for social services) in the regular regime</p>	<p><b>Headline actions(s):</b> - Raise the thresholds</p>
		<p><b>Examples of other (possible) actions:</b> - Establish conflict of laws rule to determine the applicable national law and jurisdiction - Clarify exemptions (e.g. for public-public cooperation and other); - Clarify notion of bodies governed by public law; - Clarify exclusion grounds.</p>	<p><b>Examples of other (possible) actions:</b> - Radically modify the material scope of the Directives by excluding sub-central authorities; - Radically modify the material scope of the Directives by exclusion of B services; - Exclude the utilities from procurement rules altogether; - Extending scope to below thresholds procurement.</p>

<sup>43</sup>

For a more detailed description of the content of each headline action, please refer to section (annex) 8.6.

**Table 3): Procedures**

<b>PRO.NC</b>	<b>PRO.SOFT</b>	<b>PRO.LEGI.DESIGN</b>	<b>PRO.LEGI.FLEXIB</b>
Maintain the status quo	Guidance / training / clarification	<p><b>Critical choice:</b> Correct and enhance existing procedures.</p>	<p><b>Critical choice:</b> Expand menu of procedural options available to public purchasers and alleviate procedures where they result in disproportionate costs.</p>
		<p><b>Problems addressed:</b> - Disproportionate and inflexible procedures; - Legal uncertainty;</p> <p>The actions proposed under this option are intended to streamline many of the existing provisions, reducing administrative burden, procurement costs, and ensuring more efficient outcomes. By specifying when or how a procedure should be used, concerns about the legal requirements and conditions should be addressed.</p>	<p><b>Problems addressed:</b> - Disproportionate and inflexible procedures for certain types of actor; - Legal uncertainty;</p> <p>The actions proposed under this option should address the inability experienced by some CAEs to tailor procedure to characteristics of market or purchase, which can lead to inefficient outcomes. The actions should where possible streamline the process, reducing administrative burden and procurement costs and clarify exactly when or how a procedure can be used.</p>
		<p><b>Headline actions(s):</b> - Improve tools for repetitive purchasing (DPS, framework agreements, e-Catalogues); - Increase use of electronic communication tools (e-procurement).</p>	<p><b>Headline actions(s):</b> - Greater freedom for CAEs to use negotiated procedure; - New lighter publication regime for sub central authorities (possibility to use the prior information notice as a means of calling for competition).</p>
		<p><b>Examples of other (possible) actions:</b> - General shortening of time limits for tender procedures - Implementing legislation to ensure open/accessible e-procurement solutions; - More flexibility in selection and award (possibility for contracting authorities to examine selection before award; experience of staff taken into account in the award phase ) - Clarification of the notion of special or exclusive rights</p>	<p><b>Examples of other (possible) actions:</b> - Allow MS to eliminate the lowest price only criterion; - Mandatory full use of electronic communication to be phased in by set deadline; - Mandatory transmission of notices in electronic form; - Mandatory electronic availability of tender documents; - Impose fully electronic communication on CPBs.</p>

**Table 4): Strategic procurement**

<b>STR.NC</b>	<b>STR.SOFT</b>	<b>STR.LEGL.FACILIT</b>	<b>STR.LEGL.ENFORC</b>
Maintain the status quo	Guidance / training / clarification	<p><b>Critical choice:</b> Enable CAEs to frame procurement needs in ways that integrate other policy goals.</p>	<p><b>Critical choice:</b> Remove discretion from CAEs: they must award (all or part) contracts on the basis of performance in respect of other policy goals.</p>
		<p><b>Problems addressed:</b> - Legal restrictions or ambiguity which prevent CAEs from explicitly introducing performance on range of other policy into selection, award process or contract. This approach would permit CAEs to reorient spending towards solutions. Whilst the EU would clarify and improve the possibility to conduct strategic procurement, it would stop short of imposing such policy goals on MS and CAEs. It should remove legal uncertainty and risk which prevents some CAEs from integrating their policy choices into their public procurement strategy.</p>	<p><b>Problems addressed:</b> - Legal restrictions or ambiguity which prevent CAEs from explicitly introducing performance on range of other policy into selection, award process or contract. This approach would ensure that public purchasing is redirected towards solutions / technologies that are more beneficial/less harmful for society as a whole. It should remove legal uncertainty and risk which prevents some CAEs from integrating their policy choices into their public procurement strategy</p>
		<p><b>Headline actions(s):</b> - Allow consideration of entire life-cycle costs in award criteria - Allow inclusion of factors directly linked to production processes in award criteria and technical specifications - Introduce the "Innovation partnership": a new, special procedure for purchases not yet available on the market</p>	<p><b>Headline actions(s):</b> - Introduce obligations on "what to buy" (quotas); - Require CAEs to use certain defined award criteria and / or technical specifications</p>
		<p><b>Other (possible) actions:</b> - Possibility for contracting authorities to explicitly require certain labels (certification schemes), but safeguard that equivalent labels must also be accepted; - Violation of obligations from EU environmental or social law or from certain international labour law provisions = ground for exclusion of bidders; - Tenders which are abnormally low because of non-compliance with obligations from EU environmental or social law, including throughout the supply chain, must be rejected.</p>	<p><b>Other (possible) actions:</b> - Allow CAEs to source only from local or regional suppliers to limit emissions, support local culinary traditions; - Mandatory use of life-cycle costing when determining the economically most advantageous offer or lowest cost - Allow CAEs to take considerations having no link to production/performance to be taken into account (e.g. gender balance on company board); - Incentives/measures to further promote and stimulate innovation through public procurement (obligatory use of performance related technical specifications and/or variants).</p>



Table 5): Access

ACC.NC	ACC.SOFT	ACC.LEGI.FACILT	ACC.LEGI.ENFORC
Maintain the status quo	Guidance / training / clarification  In particular, possible training campaign on doing business abroad	<p><b>Critical choice:</b> Remove administrative barriers to SME participation &amp; cross-border access. Adopt non-coercive measures to increase SME participation &amp; cross-border access at reduced costs, whilst maintaining high levels of transparency.</p>	<p><b>Critical choice:</b> Introduce prescriptive measures to reserve parts of public procurement markets for SMEs or require structuring of purchases in way that favour SME participation.</p>
		<p><b>Problems addressed:</b> - Regulatory and administrative market access barriers leading to asymmetric market access; - Insufficient participation of SMEs in public procurement markets and low cross-border participation/access. Under this option, many of the burdensome and sometimes difficult to fulfil (especially in the cross-border context) requirements placed on business would be reduced by EU level action limiting and standardising the information requested and only asking for original proof to be provided by the winning bidder. This should have particular benefits for SMEs and firms interested in bidding across borders.</p>	<p><b>Problems addressed:</b> - Insufficient participation of SMEs in public procurement markets and low cross-border participation/access. Under this option actions would be proposed to use public spending to support diversity of the economic base and support start-ups and SME innovators. The actions foreseen here would force Member States and CAEs to take action to ensure that public procurement markets are made accessible to SMEs and non-national firms.</p>
		<p><b>Headline actions(s):</b> - Mandatory acceptance of self-declarations as prima-facie evidence for selection; - Introduction of a European Procurement passport: a standard document, validated at MS level, which confirms that a bidder is compliant with certain, frequently requested criteria.</p>	<p><b>Headline actions(s):</b> - Impose mandatory use of lots for all above threshold contracts - Introduce quotas for share of procurement contracts/budget awarded to SMEs</p>
		<p><b>Other (possible) actions:</b> - List of possible requirements for selection of candidates made exhaustive - Turnover cap: CAEs may not require that economic operators have a turnover greater than e.g. 3 times the contract value in order to participate in the procedure - Increased use of lots under certain circumstances - Obligation for MS to feed e-Certis (an electronic repository of certificates required for selection criteria)</p>	<p><b>Other (possible) actions:</b> - Obligation to subcontract a certain share of the main contract to third parties; - Obligation to draw up tender specifications for high-value contracts in a second language; - Instruments to prevent the development of dominant suppliers (e.g. obligation to cancel the procedure if only one or two valid bids received)</p>

**Table 6): Governance**

<b>GOV.NC</b>	<b>GOV.SOFT</b>	<b>GOV.LEGILTARGET</b>	<b>GOV.LEGIENHANC</b>
Maintain the status quo	Guidance / training / clarification  In particular, guidance on better monitoring and control; possible introduction of peer review and/or benchmarking (perhaps through MS committees)	<p><b>Critical choice:</b> Leverage achievement of economies of scale and optimal outcomes for CAE through the use of specialised, professional bodies which aggregate purchasing where appropriate.</p>	<p><b>Critical choice:</b> Oblige MS to identify a national authority in charge of implementation, control &amp; monitoring of public procurement which reports annually on performance</p>
		<p><b>Problems addressed:</b> - Different capabilities of CAEs; (possible limited improvement to the different models leading to different public procurement capacities developed across MS).  This option should lead to further improvements in the professionalisation of bodies which can either perform procurement on behalf of a CAE or offer advice. This should improve the consistency of application across the EU and reduce non-compliance with the EU rules. In particular, it should benefit smaller CAEs who may have little/no experience of conducting large procurements and following EU rules.</p>	<p><b>Problems addressed:</b> - Different models leading to different public procurement capacities developed across Member States; - Different capabilities of CAEs  Under this option the EU would oblige MS to take action to monitor and control the application of EU rules. National oversight bodies would be responsible for controlling public procurement, checking for and re-acting to any problems in a timely and efficient manner. This should improve the overall application of EU rules, increase consistency and ensure firms operate in a single market.</p>
		<p><b>Headline actions(s):</b> - Establish clear rules for purchases made through CPBs (inc. safe haven concept; small contracting authorities could transfer responsibility for procurement to CPBs).</p>	<p><b>Headline actions(s):</b> - Obligatory designation of central national oversight body by Member States, with clear obligations on monitoring, enforcement and reporting.</p>
		<p><b>Other (possible) actions:</b> - EU definition of conflict of interest in public procurement; - Safeguards to prevent, identify and resolve conflict-of-interest situations; - Better assistance to CAEs and businesses ("knowledge centres").</p>	<p><b>Other (possible) actions:</b> - Better administrative cooperation between MS, using IMI for information exchange; - Additional instruments to tackle organised crime in public procurement; - Annual report of oversight body shall include reporting on SME success in public tenders.</p>

### 4.3. Summary of options to be analysed further

The probable consequences of the five "no change" options have already been presented in section 2.4. So, the next section will look at the advantages and disadvantages of the remaining 12 different option packages in global terms, using the headline actions identified to discuss the expected impacts and changes.

This analysis may lead to the conclusion that it is not always an "either/or" choice in favour of one of the options. In some instances, the best solution could combine different options within a particular problem group. For example, while concluding that the more ambitious approach is justified, it would also be possible to implement the incremental improvements in the areas covered by Scope, Procedures and Governance/administrative capacity. For Strategic procurement and Access, the legislative options are essentially alternatives and address the same problems. Under these headings, one option relates to the adoption of a permissive approach (which enables contracting authorities to pursue certain purchasing preferences) whilst the other one is coercive (the revised directives would impose an obligation on CAEs to favour a particular procurement outcome).

**Table 7): Summary table of retained options for the analysis of impacts (retained – marked in grey)**

<b>Options Problem groups</b>	<b>No change options (NC)</b>	<b>Soft law options (SOFT)</b>	<b>Legislative – generally within current framework (LEGI._)</b>	<b>Legislative – new or significant change (LEGI._)</b>
Scope (SCO)	<i>SCO. NC</i>		<i>SCO.LEGI.TARGET (targeted adjustments &amp; clarification of boundaries)</i>	<i>SCO.LEGI.REDUCE (significant reduction of scope)</i>
Procedures (PRO)	<i>PRO. NC</i>		<i>PRO.LEGI.DESIGN (improve design)</i>	<i>PRO.LEGI.FLEXIB (increase choice)</i>
Strategic (STR)	<i>STR. NC</i>		<i>STR.LEGI.FACILIT (facilitate strategic public procurement)</i>	<i>STR.LEGI.ENFORC (enforce strategic public procurement)</i>
Access (ACC)	<i>ACC. NC</i>	<i>ACC. SOFT</i>	<i>ACC.LEGI.FACILIT (facilitate access)</i>	<i>ACC.LEGI.ENFORC (enforce tools for access)</i>
Governance (GOV)	<i>GOV. NC</i>	<i>GOV. SOFT</i>	<i>GOV.LEGI.TARGET (optimise the use of resources).</i>	<i>GOV.LEGI.ENHANC (enhance control &amp; responsibility)</i>

## 5. ANALYSIS OF IMPACTS

In general, the most visible impacts resulting from the options set out above are economic in nature. They will take the form of changes in supplier and purchaser operating conditions and behaviours with consequent impacts on market conditions (competition, transparency). In many instances, the immediate social and environmental impacts are limited. The exception is for the options addressing the problems relating to a more strategic use of public procurement policy and which are, by their very nature, intended to affect (in a positive way) the social and environmental impacts. None of the policy options analysed are expected to have impacts affecting fundamental rights.

The global impacts of each option are analysed below, grouped by the five previously defined problem blocks. For each option, the effects on four main

categories of stakeholder have been identified – CAEs, businesses (including SMEs), MS and the Internal Market.

As explained, in section 4, the impacts of every possible legislative adjustment are not analysed here for presentational and feasibility reasons<sup>44</sup>. The approach adopted (and discussed in the Steering Group) is to concentrate on a high-level analysis of the critical policy choices that will determine the thrust and content of the future policy initiative. Each of the options as framed in chapter 4) is discussed as a whole. Further detail is provided through analysis of the impacts of the individual headline actions.

For these options in particular, the time period within which any changes would be adopted is very important. In general, the shorter the time allowed, the more unfavourable the trade-off between costs and benefits<sup>45</sup>.

Finally, some of the measures proposed under various options discussed in this Impact Assessment might influence the administrative costs and burden<sup>46</sup>. The expected effects of such measures are summarised for each of the options discussed.

## 5.1. Scope

### 5.1.1. Impacts of SCO.NC option

The expected consequences of the "no change" scenario are presented in section 2.4.

### 5.1.1. Impacts of SCO.LEGI.TARGET option

**Critical choice:**

*Targeted adjustments to current scope of public procurement legislation.*

**Headline action(s):**

*- Higher threshold for social services, with a special regime for social services above this threshold;*

*- Inclusion of all former B-services (except for social services) in the regular regime.*

#### 5.1.1.1. Impacts for CAEs

Clearer definition of the Directives' boundaries should make it easier for CAEs to identify which rules apply when they want to buy something. This should in turn reduce the perceived risks and incidence of litigation. Reducing the costs of legal assistance associated with avoiding (perceived) legal uncertainty, managing risk and dealing with legal challenges should generate budgetary savings. Around 350,000

<sup>44</sup> Where data permits, more detailed analysis of some actions is provided in section 8.7.

<sup>45</sup> In the very short-term transitional or switchover costs need to be absorbed by purchasers and suppliers; the benefits of the policy change may take longer to materialise (e.g. positive externalities following a shift of production technologies to more sustainable/innovative solutions in response to policy driven changes in public procurement).

<sup>46</sup> Recent research estimates administrative burden associated with the implementation of the Directives at €216 million, see: 8.8.56.

person days are spent annually across Europe on managing complaints and litigation for government authorities<sup>47</sup>, with an estimated associated cost of up to €54 million per year<sup>48</sup>. To this must be added the costs of risk-avoidance behaviour which are more difficult to measure.

Clarification (through targeted legislative intervention) of the applicability of EU rules could bring valuable support to the development of public-public cooperation in procurement. These types of collaborative purchasing between groups of public purchasers (often for purposes of achieving scale or administrative efficiency) seem set to increase as local authorities look for ways to optimise the use of scarce public resources. Improved clarity could also help to reduce the unnecessary application of EU procurement disciplines. Many below threshold contracts are published in OJ/TED, sometimes because of a lack of knowledge and misunderstanding of what is and is not covered by the EU rules and a desire to minimise exposure to legal risk. These problems may be particularly acute for small CAEs, who may not apply such rules very often and as a result may not achieve optimal outcomes when they do. In 2010, 14,000 local contracting authorities published notices in OJ/TED; of these, over half (8,000) published only one notice in that year. It is these inexperienced and often under-resourced purchasers who are most likely to suffer from lack of clarity surrounding the scope of Directives.

Under this option, the current separation of services into two categories – A-type, which are assumed to be more tradable across borders and to which the full rules apply; and B-type which are less tradable across borders and as a result, covered by a lighter regime - would be altered. Analysis of the classification of services according to these two categories points to many errors which result in the wrong regime being applied. The catch-all category of 'other services' is unclear and consequently improperly used by CAEs resulting in non-compliance with the rules in over 30% of cases (see 8.3.1.3 for more detail). Revising these lists would therefore remove unnecessary costs and risks currently faced by CAEs i.e. if they follow the full regime when it is not appropriate or the light regime when they should be compliant with the full set of rules. Equally, recent research shows that several of the B type services exhibit higher rates of cross-border tradability than originally expected (e.g. legal services<sup>49</sup>) and hence it would be more appropriate and consistent to submit them to the same rules as A-type services.

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<sup>47</sup> PwC study, page 80.

<sup>48</sup> See: section 8.8.3.

<sup>49</sup> Ramboll study, page 64.

**Table 8): Economic importance of potential intervention targets**

Intervention target	Number of CANs removed (% of CANs )	Value of CANs removed (% of total value)
All service contracts	68,000 (49%)	€160 billion (38%)
B-type service contracts	20,000 (14%)	€40 billion (10%) of which approx. €18 billion covered by social services

Source: DG MARKT estimates based on OJ/TED data

Several "services to the person" or "social services" (hereafter: social services) are characterised by very low tradability<sup>50</sup> and a general absence of cross-border interest<sup>51</sup>. For these services, it would therefore be appropriate to maintain a lighter regime. However in the interests of transparency and to ensure that potentially interested bidders are at least aware of possible opportunities, greater publication requirements could be introduced than currently exist. Whilst this might increase slightly their related workload, such change should be offset by the increased legal certainty it provides in terms of the general transparency obligations that a CAE must meet under the Treaty.

#### 5.1.1.2. Impacts for businesses (including SMEs)

Excessive regulatory requirements and complicated rules can be an important barrier in accessing public procurement markets. Around 60% of firms consider that participation in EU-regulated procurement procedures is more, or much more, time-consuming and costly than supplying the private sector. This is particularly valid for SMEs. Whilst most of the changes relating to this option would affect CAEs, a better definition of scope should help firms to identify confidently valid opportunities and organise themselves accordingly. It should also increase the consistency with which such rules are applied and ensure markets of interest are open to firms across the EU.

Currently, problems arise from the unclear and sometimes arbitrary allocation of services between the A and B lists. Related issues arise from the "fuzziness" of the border-line between works and services or mixed services/works contracts. Greater clarity and confidence around these issues, coupled with increased transparency may help suppliers to maximise their bidding and could even lead to greater competition in some areas, including social services, where increased transparency requirements could make it easier for firms to identify opportunities (both national and cross-border).

#### 5.1.1.3. Impacts on Member States

Greater legal certainty about the rules applicable to public-public cooperation, or to certain common classes of "body governed by public law" would allow national

<sup>50</sup> See: section 8.7.1.

<sup>51</sup> For example, in 2009 only 0.1% of social services contracts were awarded cross-border.

authorities to implement EU legislation more effectively, and work with CAEs to this end. The targeted adjustments to services and the creation of a new regime for social services should simplify the identification of the rules applying to a key area of government expenditure.

#### 5.1.1.4. Impacts on the Internal Market

Overall, we could expect that increasing the clarity of the Directives would improve the functioning of the Internal Market, as clarity improves efficiency and reduces regulatory burden. It would also reduce the likelihood that risk-averse CAEs would follow more burdensome rules than needed.

A review of the categorisation of services as tradable or non-tradable could help to re-align the scope of the Directives to economic/commercial reality. It would also reduce the number of anomalies due to misclassification. The new, higher threshold for social services should ensure that such contracts remain open and transparent, where there is a probable cross-border interest<sup>52</sup>. Increasing the number of services under category A would increase the markets open to third countries under the GPA; reciprocal changes from other partners would then have to be discussed.

#### 5.1.1.5. Summary of stakeholder views on this option

A slight majority of stakeholders responding to the GP support the idea of reviewing the distinction between A and B services although almost 2/3 reject the idea of applying the same regime to all services. The most frequently repeated arguments in favour of reviewing the two lists refer to the fact that some of the B-services might not merit differentiated/lighter treatment (for example restaurants, legal services). Stakeholders argue that the market in a number of services classified as category B is now developed and these should now be moved to category A (whilst new or emerging services could be classified as B, until the markets mature).

In relation to social services, there is again some disparity between the different stakeholder groups. Civil society organisations and a slight majority of contracting authorities call for a special procurement regime to better take into account the specificities of social services. Many of them consider that the procurement of these services should be less regulated at EU level.

Businesses are generally not in favour of a special regime for social services, and clearly oppose further reducing the density of EU regulation for the procurement of these services, as does the clear majority of MS. Many civil society organisations and providers of social services are also in favour of prohibiting or limiting the use of the lowest price criterion for the procurement of social services. Other stakeholder groups are sceptical about this idea.

#### 5.1.1.6. Impacts on administrative burden and simplification

No change in terms of information obligations would be expected under option SCO.LEGI.TARGET (i.e. the administrative burden for businesses should neither

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<sup>52</sup> The level of such threshold could be established for example by analysing the value of contracts that in the past were awarded cross-border, for example by taking their median value

increase nor decrease). However, this option seeks to clarify and simplify public procurement rules and therefore it is expected to optimise the way procedures are carried out. For example, improved clarity and reduced legal uncertainty should also lower "business as usual" costs. Equally, CAEs should find it easier to identify whether a particular contract warrants application of the EU rules, with less checking or need for specialised legal advice, hence reducing their administrative costs.

#### 5.1.2. *Impacts of SCO.LEGI.REDUCE option*

***Critical choice:***

*Far-reaching changes to scope of the current rules involving exclusion of entire groups of purchasers or transactions.*

***Headline action(s):***

*- Raise the thresholds.*

##### 5.1.2.1. Impacts for CAEs

In countries where approximately the same rules apply for procurement following the EU or national rules, no change (to any aspect) would be expected as a result of excluding certain contracts from the scope of the EU rules. However in MS where these national rules are "lighter" and less burdensome for CAEs, exclusion would be expected to reduce complexity and allow more proportionate procedures, making the process easier for CAEs. In these countries there should be a net reduction in the operational cost, as CAEs could be more flexible, choosing the process which suits them best. Based on the findings of a recent survey<sup>53</sup> they should also take less time to procure. However, regulatory costs for these procedures would not fall to zero. On the contrary, a number of MS are progressively strengthening transparency and procedural requirements for below-threshold procurement.

The impact on the price paid by CAEs is likely to be negative: transparency at both EU and national level would drop as a result of the different country-defined publication methods which would apply. Given the clear finding from the evaluation, that transparency triggers competition which in turn yields savings, this reduction in transparency would lead to higher prices being paid by CAEs. However in the medium to longer term, this option is, on balance, expected to deliver efficiency benefits for the CAEs concerned. The efficiency case is stronger if any envisaged exclusions are targeted at smaller CAEs or small value procurement procedures where running full procedures is found to be demanding and can generate disproportionate costs.

The exact impact on CAEs of increasing the EU thresholds would be determined by the degree of increase introduced. Other than to reflect currency fluctuations, the current thresholds have not been adjusted for some 20 years despite inflation. Doubling the existing thresholds would remove around 20,000 contracts from the current scope. The exact impact on individual CAEs would vary – some would not

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<sup>53</sup> See: section 8.7.1. and 8.7.2.



be affected either because their contracts remained in scope or because their national rules were not so different to the EU ones. Smaller CAEs, which in general let smaller value contracts, would benefit most from such a move.

#### 5.1.2.2. Impacts for businesses (including SMEs)

As a number of contracts would no longer be advertised EU-wide in a single source (OJ/TED), firms would need to check other sources to identify business opportunities. This would take more time and make participating in public procurement more costly. Firms operating across borders would clearly be affected, but there could also be national level consequences, depending on how centralised publication is within a given country. For some (often incumbent) firms, reduced transparency could have a positive impact, lowering the level of competition they might face, and possibly allowing them to raise prices. Overall there would be an expectation that for the excluded markets the rates of cross-border bidding would probably drop. Nowadays, even if foreign firms do not win a contract, the fact that they can enter domestic markets at any time, influences the behaviours of domestic firms (contestability of markets) and again, without this pressure, prices could rise.

If the exclusions broke international agreements, firms active on those markets could also lose out on international trade, as partner countries would exclude some of their target contracts from international competition.

The consequences for SMEs could be relatively greater as they do not have the same resources to address the additional costs of finding opportunities or adapting to new rules. In particular, higher thresholds would increase the market entry barriers for SMEs since contract value is a key factor in determining SMEs' chances of winning a public procurement contract<sup>54</sup>.

SMEs win a relatively high share of contracts close to or just above EU thresholds. Doubling the thresholds would remove around 20,000 contracts from the scope of the current rules and could have a significant and negative impact on SMEs competing in these markets. Reducing the visibility of these opportunities and not applying the EU rules could reduce transparency and reduce guarantees of fairness and objectivity in award of these contracts. This could be to the detriment of successful SMEs.

#### 5.1.2.3. Impacts on Member States

At MS level, excluding certain contracts should reduce the administrative and regulatory overheads linked to public procurement. Firstly national rules are expected to be cheaper than EU rules. A study for the evaluation found that overall CAEs and firms consider that the above threshold procedures are more or much more costly than below thresholds<sup>55</sup>. However, the additional cost due to the Directives is limited – it accounts for perhaps one third of the €5.6 billion estimated cost of the procurement regulatory apparatus or around € 1.7 billion (divided between MS as a function of the size of their procurement governed by the Directives). The

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<sup>54</sup> The results of a recent econometric analysis show that as the contract value rises, the probability that an SME wins the contract falls "[...] increasing the contract value by 172% decreases the chance of SMEs winning by 8%", source: GHK study, page 39.

<sup>55</sup> See: section 8.7.1 and 8.7.2.

regulatory/administrative savings are likely to be offset by higher prices due to the lower transparency, which may reduce the average number of bids submitted. This reduced competition is also expected to reduce the total savings to the economy. There could also be some negative impacts on the integrity of procedures, as the below threshold systems may have weaker procedural safeguards against fraud.

A significant additional complication for MS would result from the market access compensations due to violating any international obligations. For MS with firms which win contracts in these partner countries, the implications could be quite considerable. Losing contracts could lead to reduced profits and might cause firms to lay-off staff, with a subsequent cost to society of supporting them. The current thresholds in place at EU level are derived from the GPA (the values are set in Special Drawing Rights or SDR) and any changes, other than those specifically agreed to reflect currency fluctuations over a given period, would lead to re-negotiation and possible sanctions.

#### 5.1.2.4. Impacts on the Internal Market

Any exclusion reduces the size of the Internal Market covered by the EU rules. Within the wider public procurement market, cross-border procurement would be likely to reduce and many markets would remain (or even become more) national.

**Table 9): Impacts of exclusions (number and volume of CANs is based on 2009 data)**

Exclusion	Number of CANs removed (% of CANs)	Value of CANs removed (% of total value)	Internat. consequences	Comments
Double thresholds	around 20,000 <sup>56</sup>	Around €20 billion <sup>57</sup> (5%)	Yes	Could be less – depends on CAEs reaction <sup>58</sup>
Exclude sub-central authorities	45,000 (33%)	€116 billion (28%)	Yes	Could be more – "other" or "bodies governed by public law" not counted
Exclude all services	68,000 (49%)	€160 billion (38%)	Yes	
Exclude B services	20,000 (14%)	€40 billion (10%)	No	

Source: DG MARKT estimates based on OJ/TED data (except "double thresholds" – see: footnotes 56 and 57)

Transparency and competition, two cornerstones of EU public procurement policy, would be reduced, leading to lower savings which might not be off-set by lower costs. From the table above it can be seen that a doubling of the current thresholds would reduce the number of CANs advertised at EU level by around 14%. This level of reduced transparency could have significant effects on competition and procurement outcomes in the markets affected.

<sup>56</sup> Estimates based on PwC study, page 71.

<sup>57</sup> Estimates based on PwC study, page 71.

<sup>58</sup> Due to voluntary publication patterns, see: section 8.3.2.1.

Exclusions relating to thresholds, particular sectors or actors would have international impacts and force the renegotiation of the GPA and other individual agreements. GPA partners would be likely to demand compensation and retaliate by withholding a similar percentage of their own market and could decide for strategic reasons to restrict EU access in areas where the latter is competitive (and where a GPA partner industry is actually less competitive). Re-negotiation would be time-consuming and costly, creating uncertainty and increasing the potential for litigation during the negotiation period.

#### 5.1.2.5. Summary of stakeholder views on this option

A majority of CAEs responding to the GP supports an increase in the thresholds, whilst a slight majority of Member States would be opposed to such a change. Many CAEs argue that contracts with a value close to the existing thresholds generally attract little interest from firms based in a different Member State but that they nonetheless generate an additional administrative burden. Business representatives reject such an increase, pointing out that higher thresholds would lead to lower transparency and less cross-border business opportunities.

#### 5.1.2.6. Impacts on administrative burden and simplification

If certain transactions are excluded from the scope of the Directives, the information obligations, which currently fall on CAEs, firms and MS would be reduced in proportion to any exclusion adopted.

However, the excluded transactions would then be covered by national rules on public procurement which are also likely to be subject to some administrative requirements. Therefore it is unlikely that all information obligations would be removed, it is more likely that they would be replaced by national rules (that might be equally burdensome). Hence the overall impact of option SCO.LEGI.REDUCE in terms of the administrative burden is expected to be positive to neutral – depending on the national rules in force in each MS.

#### 5.1.3. *Summary of impacts of options in Scope against specific objectives*

Substantial revision of the scope of the Directives is sometimes advocated as a straightforward and effective way to address the issues of complex rules and disproportionate procedures. At a stroke, it is argued, it would remove certain actors or transactions from the EU regime. This reasoning assumes that exempted procedures would be subject to less costly national requirements (or none at all). While national procurement is generally subject to less prescriptive requirements, there will continue to be a substantial regulatory cost for any exempted regulation resulting from national provisions, and the inherent and unavoidable costs of sound management of public procurement. More importantly, the exclusion of certain transactions or purchasers from the scope of the Directives will also entail costs – in terms of reduced transparency and weaker competition. Extensive re-scoping of the Directives may be an effective but very blunt instrument whilst clarifying the boundaries and improving definitions would remove the grey areas. However, neither option provides a direct response to the underlying policy problem of excessively onerous or disproportionate requirements for some types of procurement.

**Table 10): Summary of impacts of all options in Scope**

<b>Specific objectives Option</b>	Improve cost efficiency	Realise opportunities to achieve best outcomes for society	Create EU wide rather than national markets
SCO.NC	0	0	0
SCO.LEGI.TARGET	(+)  Elimination of grey zones and better targeting of rules improves outcomes for transactions concerned	(+ / ≈)  Scope remains largely constant: greater transparency on former B type service contracts and rules on social services better suited to their specificities	(+)  Improves the consistency of how the market is defined across all EU countries
SCO.LEGI.REDUCE	(++)  Based on assumption national measures are “lighter” and easier to apply; if necessary, might need to offset international consequences	(-)  Smaller scope reduces leverage of EU legislation in implementing strategic procurement	(--)  More/less significant exclusions from scope of EU legislation: increased scope for nationally driven policy/market fragmentation

## 5.2. Procedures

### 5.2.1. Impacts of PRO.NC option

The expected consequences of the "no change" scenario are presented in section 2.4.

### 5.2.2. Impacts of PRO.LEGI.DESIGN option

**Critical choice:**

*Correct and enhance existing procedures.*

**Headline action(s):**

- *Improve tools for repetitive purchasing (DPS, framework agreements, e-Catalogues);*
- *Increase use of electronic communication tools (e-procurement).*

#### 5.2.2.1. Impacts on CAEs

Improved design is expected to facilitate the achievement of better procurement outcomes by CAEs and lead to cost efficiencies during the procurement process. Savings generated by better use of repetitive purchasing and more widespread use of e-Procurement tools should above all improve the proportionality of procedures and their cost efficiency.

Under this option, provisions to improve design by more frequent use of repetitive purchasing would be envisaged, also through a more intense use of e-Procurement tools (e.g. DPS, e-Catalogues). The latter can create savings and reduce operational costs for CAEs, who would be able to procure more quickly and efficiently<sup>59</sup>. This could generate significant savings for CAEs both in terms of lower prices paid for contracts<sup>60</sup> and in operational costs. Some trials have reported price reductions of 20% or more and reduced transaction costs (both in time and monetary terms). In addition, e-procurement can open up cross-border opportunities, reduce information barriers and streamline document exchange.

Making e-procurement mandatory at EU level would ensure the critical mass and force the pace of change. It would also remove any uncertainty on the part of CAEs as to whether paper procedures still have to be permitted and remove the "risk averse" culture of conducting double circuits (i.e. both paper and electronic) which has evolved. However, there are risks to blanket imposition of e-procurement on all CAEs for all procedures. Although the technology to undertake e-procurement is now widely available and its use is steadily gaining ground, only around 5% of procurements involve e-tendering/e-submission. Full switchover, will involve investment in the capacity to organise procedures electronically, and training CAEs to use these possibilities<sup>61</sup>. Therefore, a phased or targeted imposition of e-procurement would currently appear most appropriate at CAE level, allowing them greater choice to make the transition at a time which is appropriate to them.

For professional bodies such as CPBs, who are already strong users of e-procurement and repetitive purchasing techniques, there may be reasons to move more quickly to a mandatory use of electronic communication – allowing them to make better use of repetitive or aggregation techniques whilst also involving more suppliers thereby keeping the competition higher. The DPS is a fully electronic procedure (albeit one requiring some adjustment); framework agreements may be organised on paper but also electronically. In the latter case there would be little additional cost involved in running a framework with many operators as the bulk of the administrative work could be automated.

#### 5.2.2.2. Impacts for businesses (including SMEs)

Improving the design of the current system and making procedures more proportionate should also lead to benefits for businesses. Whilst there may be some initial costs in adapting to such change, in general the expected savings should outweigh the benefits. Increased use of e-procurement has the potential to create savings and reduce the costs of procedures for all types of suppliers. 50% of companies replying to the e-procurement GP were in favour of its mandatory use.

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<sup>59</sup> Examples of such savings obtained by practitioners see: section 8.7.3.

<sup>60</sup> "E-procurement increases the number of potential bidders, forcing them to cut prices" source: Deutsche Bank Research paper, February 2011 (hereafter: Deutsche Bank Research).

<sup>61</sup> In view of the risks and potential costs linked to blanket imposition of e-procurement, the legislative review could consider making e-procurement mandatory for: certain types of contracting authority or entity (e.g. CPBs), for certain types of purchasing method (DPS, catalogue based purchasing of commonly bought goods and services), and certain phases of e-procurement e.g. the notification phase, or the provision of access to bid documents. In addition, regulatory incentives to encourage CAEs to use e-procurement could be examined.

They consider that e-procurement would increase transparency and access to on-line tender opportunities. Action to reduce technical fragmentation via the specification of clear standards and norms would reduce entry barriers for firms. However in the current situation where there are many systems with different technical requirements, many businesses face high learning costs in relation to using these systems which would need to be addressed, possibly through the development of EU level standards and/or templates. These problems are not just limited to would-be cross border procurers; even within a single country, many different systems and interfaces may exist. In Germany, the X-Vergabe project is seeking to create a common interface, irrespective of the actual system being used, thereby facilitating supplier access.

The risk that e-procurement could exclude SMEs, because they have less access to this technology, is not borne out by experience. A recent study<sup>62</sup> shows that many SMEs are already "e-procurement savvy" and taking full advantage of the opportunities it provides. Some MS/countries (Portugal, Wales) that have made the transition have found that SMEs can increase their share of market for public contracts.

Many businesses are interested in participating in repetitive purchasing arrangements and competition for such contracts is generally high. However there is general recognition that such practices may close the market, particularly to SMEs and so there would be a need to build in safeguards and ensure that wider use of such tools was not abused.

#### 5.2.2.3. Impacts on Member States

Improving the cost efficiency of public procurement procedures by redesigning procedures to make them more proportionate could bring significant net savings for Member States. As mentioned before, *"a full switch to e-procurement may save between € 50 to 75 billion on public procurement in the EU per year. On top of that are increases in transparency and public accountability which are arguably the most interesting categories but also the hardest to quantify"*<sup>63</sup>. Increasing the uptake of e-procurement could increase the visibility of how money is spent as it allows clear monitoring of spend and easy benchmarking. This could also enable MS to track "socially responsible" and "environmental friendly" spending and improve their planning.

Some proportion of the fixed costs linked to the introduction of greater e-procurement at EU level would be incurred by MS or their principal procurement agencies. As a result, this option can have budgetary consequences, although, based on recent experience such investment costs (i.e. in terms of building e-procurement capacity) are important but manageable and can generally be recouped in a fairly short period of time. The costs to CAEs and suppliers of adapting to the new communication processes present a greater and more diffuse set of costs for the economy. The time-frames involved before new technology is bedded down and market participants have become familiar with it can be relatively long. However,

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<sup>62</sup> Source: GHK study, chapter 5.

<sup>63</sup> Source: Deutsche Bank Research.

this reflects costs in experimental 'first-movers'; time-frames and the cost benefit trade-off should be more favourable for MS which implement proven solutions.

Greater use of repetitive purchasing techniques can generate economies of scale and also reduce transaction costs associated with purchasing/supplying. Often repetitive methods can be opened to several CAEs allowing the purchaser to maximise the benefits and share them out over a wider circle of users. Where such contracts are let by CPBs, who have greater experience and knowledge, procurement should be done to higher standards, ensuring greater compliance with the EU rules and reducing the risks associated with poor capability and uncertainty.

#### 5.2.2.4. Impacts on the Internal Market

Better designed, efficient procedures should incentivise greater and more correct use of the EU rules by CAEs and attract more suppliers, ensuring high competition with the associated benefits. Increased use of e-procurement should reduce information barriers in procurement markets and provide less cumbersome on-line methods for compliance with documentary and procedural requirements. On both counts, e-procurement can be expected to reduce the transactional impediments to cross-border tendering – particularly if cheap solutions to e-signatures/e-identification are introduced. The removal of these barriers would not in itself remove underlying structural or economic barriers to entering new markets – language, logistic and competitive obstacles to market entry may still discourage bidders. However, over time, greater use of e-procurement could be expected to erode these natural and economic barriers.

Care should be paid to ensuring repetitive purchasing techniques which can also lead to greater aggregation do not close the market to competition nor take contracts out of the reach of SMEs. The DPS which is designed as a fully open procedure should combine the best of both electronic and repetitive purchasing, ensuring open, competitive and cost efficient procedures. Additional safeguards on the use of framework agreements should permit similar benefits to be achieved.

#### 5.2.2.5. Summary of stakeholders views on this option

In the e-Procurement GP consultation 65% of respondents believe that EU procurement legislation should clarify the possibility for individual MS to impose the use of e-Procurement. Many believe that MS already have, implicitly, the possibility to impose e-Procurement but would welcome making this possibility explicit. Those who do not support such clarifications believe either that this is not necessary or they prefer the mandatory imposition of e-Procurement at EU level. Alternatively, they believe that CAEs should be the ones to decide to use e-Procurement.

A vast majority (76%) of respondents to the e-Procurement GP also believe that the EU legislative framework should be modified with respect to the way it handles e-Procurement issues. The remaining 24% believe that the EU legislative framework is adequate and sufficient or believe that new legislation should be undertaken with caution. Changes are proposed in the following four main areas: 1) e-signatures, 2) DPS, 3) e-Catalogues and 4) attestation/selection criteria. Virtually all respondents (80%) propose legislative changes in the area of e-signatures and DPS, with a view to simplifying their use.

#### 5.2.2.6. Impacts on administrative burden and simplification

Option PRO.LEGI.DESIGN probably contains some of the most important measures in terms of reducing administrative burden. In particular, the various e-procurement solutions presented as part of this option should improve the ease with which CAEs and firms can track and audit data. As such, it should be possible to introduce automated reporting at all levels, reducing the time taken to produce reports. Depending on the individual solutions adopted, the administrative burden placed on the CAEs or firm should reduce – for example, more ambitious e-Catalogue solutions, whilst creating a certain set-up and familiarisation cost, should facilitate the process of bidding for suppliers, standardising the data required and the format for submission. Equally evaluating bids and providing information back to suppliers should be easier for CAEs due to a standardise recourse to electronic means.

Finally, the reporting efficiencies possible via increased use of e-procurement could equally improve the collection of other data which might be required under other options analysed in this impact assessment (e.g. strategic targets, SME wins), in some way mitigating or even negating any potential increases.

#### 5.2.3. *Impacts of PRO.LEGI.FLEXIB option*

***Critical choice:***

*Expand menu of procedural options available to public purchasers and alleviate procedures where they result in disproportionate costs.*

***Headline action(s):***

- *Greater freedom for CAEs to use negotiated procedure;*
- *New lighter publication regime for sub central authorities (based on use of annual or Periodic Information Notices).*

#### 5.2.3.1. Impacts on CAEs

Simpler, streamlined and more flexible procedures would provide greater legal clarity and improve the cost-efficiency and proportionality of procedures. For example, greater freedom to use negotiations is expected to directly improve the flexibility of CAEs to achieve better procurement outcomes.

In the GP consultation, a majority of stakeholders called for greater freedom to use the negotiated procedure as they believed that this would allow them to get a better match between their desired procurement outcome and solutions offered by the market<sup>64</sup>. CAE' staff would have to acquire higher expertise to validly conduct negotiations. Big CAEs could be expected to possess the necessary skills and buyer power to negotiate “smartly”, but smaller CAEs may lack the necessary resources. This option could also generate certain positive strategic impacts as the increased flexibility would facilitate the purchase of innovative (e.g. eco-innovative) goods and services.

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<sup>64</sup> Replies to question 19 of the GP.



However, there would be a need for more clarity and stricter rules governing the increased use of the negotiated procedure to guard against potential risks of misuse and to avoid problems with inequality of treatment and discrimination<sup>65</sup>. Increased negotiation could potentially reduce the opportunity for cartels, as the less predictable behaviour of a CAE during negotiation prevents collusion between participants beforehand.

In terms of cost-effectiveness, as far as increasing the flexibility of procedures is concerned, the example of the negotiated procedure shows that it is marginally more expensive for CAEs than the open procedure, but cheaper than the restricted procedure<sup>66</sup>. Additionally, CAEs may pay higher prices per purchase as in general the negotiated procedure is less efficient in generating savings than the open and restricted procedures<sup>67</sup>. This evidence would seem to contradict the views of CAEs, who generally claim that they can achieve better outcomes through increased negotiation.

Another example – giving sub-central authorities the possibility to use a lighter regime - should be the source of significant savings for CAEs in terms of the costs of procedures. This procedure would simplify the way smaller CAEs announce their willingness to award a contract as, for instance, the award of contracts would be made without publishing an individual contract notice (provided that the contracting authority has announced its intention and published specific information in a periodic indicative notice). Increased choice and simplification through the introduction of a PIN-based procedure for (usually smaller and less-professional) sub-central contracting authorities would nonetheless maintain some common elements of transparency to sustain wide supplier involvement and competition.

#### 5.2.3.1. Impacts for businesses (including SMEs)

Many firms who replied to the GP favoured increasing the possibility to negotiate with CAEs<sup>68</sup>. However, such procedures usually take much longer than open contests<sup>69</sup>. More negotiation would permit suppliers to present their offers and address more efficiently the needs of CAEs. Finally, as prices in the negotiated procedure are estimated to be higher than in the open contest<sup>70</sup> suppliers may be able to secure better terms for their delivery. Generally, wider use of negotiation would not incur any major costs in terms of learning new processes, since, by and large, suppliers have some experience with these concepts from supplying the private sector.

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<sup>65</sup> In particular, there would need to be strong transparency around all communications with the actors involved at the different steps of the procedures. Based on the responses to questions 19-21 of the GP, a distinct majority of respondents favours the introduction of additional safeguards for transparency and non-discrimination in order to compensate for the higher level of discretion.

<sup>66</sup> € 5,800 for CAE per transaction in the negotiated procedure compared to € 5,100 in the open procedure; see: section 8.8.4.

<sup>67</sup> *"Using the open procedure is associated with benefits of a 3 % lower award value when compared to cases where non-standard procedures were used"*, source: Europe Economics study, page 52.

<sup>68</sup> Replies to question 19 of the GP.

<sup>69</sup> As mentioned previously, awarding a contract under the negotiated procedure takes more than twice as long as under the open procedure; see: section 8.7.5.3.

<sup>70</sup> Source: Europe Economics study, page 52.

Depending on the design of the lighter procedure, suppliers and particularly SMEs would benefit from being able to transact more easily with sub-central CAEs, particularly if there are less onerous procedural or documentary requirements. However, this procedure could reduce procedural guarantees and possibly the redress/remedy procedures available to suppliers in the event of problems. The design of the transparency requirements would also need to be carefully conceived to avoid depriving suppliers of access to information of potential interest to them.

#### 5.2.3.2. Impacts on Member States

Almost all MS favour greater flexibility in public procurement and measures which make it easier to meet individual country/CAE needs. They are generally in favour for example, of greater freedom to use the negotiated procedure<sup>71</sup>. This possibility is also compatible with the GPA. While using negotiations, CAEs should find it easier to make purchases which meet their precise needs - at the MS level this could result in more effective use of public funds. If the negotiated procedure with publication was more easily available, there could be less incentive to circumvent the Directives (e.g. by direct awards) and again, this could result in more effective use of public funds. Such measures could also generate some reduction to the total cost of procurement, as this procedure is globally cheaper than the open procedure<sup>72</sup>.

A new lighter regime for sub-central authorities would be in line with international obligations (GPA), therefore no significant negative impacts on the international level are expected.

#### 5.2.3.3. Impacts on the Internal Market

More flexibility and increased choice in procurement is expected to generally improve procurement outcomes. The typical negotiated procedure attracts fewer tenders than the corresponding open procedure. However, a higher proportion of negotiated contracts are awarded to cross-border suppliers.

The impacts of a lighter regime would depend on the details of provisions to be introduced – if for example publication obligations were to be lighter for certain actors (e.g. publication of a PIN instead of a CN), transparency would diminish. This measure could also have implications on the international level.

#### 5.2.3.4. Summary of stakeholders views on this option

The GP replies have shown that there is broad support for the suggestion to allow more negotiation in public procurement procedures and/or generalising the use of the negotiated procedure with prior publication of a contract notice. With the exception of citizens and, to a certain extent, SME representatives, all stakeholder groups favour more negotiation in award procedures for all types of contracts and contracting authorities. However, stakeholders are well aware that an increased use of negotiated procedures can have negative consequences in terms of transparency, non-discrimination and fair and objective proceedings. A clear majority of

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<sup>71</sup> Replies to question 19 of the GP.

<sup>72</sup> Negotiated procedure - €26,000, compared to €27,200 for the open procedure, mainly due to lower number of bidders; see: section 8.8.4.

respondents share the view that a generalised use of the negotiated procedure might entail risks of abuse and discrimination and that additional safeguards for transparency and non-discrimination would be necessary in order to compensate for the higher level of discretion.

The GP analysed the possibility of providing a lighter procedural framework for local and regional authorities allowed under the GPA rules for sub-central authorities. Responses on such suggestions are mixed. A majority of public authorities and civil society organisations support such a regime while all other groups of stakeholders are against it. Some respondents – mainly public authorities – question the appropriateness of a special treatment for local and regional authorities, arguing that it would be preferable to simplify the rules for all contracting authorities instead of creating new classes and distinctions.

#### 5.2.3.5. Impacts on administrative burden and simplification

The new lighter regime proposed under PRO.LEGI.FLEXIB option would simplify procedural steps in procurement of goods, works and services by sub-central contracting authorities. It would reduce the level of detail and frequency of publication requirements, thereby making the procedures less time-consuming and involving less paperwork. Some positive impacts could be also expected with regards to limiting administrative burden for companies - as a result of the introduction of a new lighter regime the information obligations during the bidding phase should generally be less burdensome (less detailed, as a shorter PIN would replace a CN as a means to announce a call for competition).

Enhanced flexibility of procedures (for example by permitting unlimited recourse to the negotiated procedure with publication) could also be the source of some improvements in terms of lessening the administrative workload for companies – if the negotiated procedure is used, tender documents could be more general (than for example in restricted and open procedures) and more information could be transmitted to CAEs via non-paper based means (i.e. through negotiations).

#### 5.2.4. *Summary of impacts of options in Procedures against specific objectives*

Improving the design of certain tools and procedures, together with the provision of greater legal clarity on their appropriate use would improve the overall cost-efficiency and proportionality of procedures. Introducing changes that would increase choice and improve the flexibility of procedures could also improve procurement outcomes, although certain safeguards would be necessary.

**Table 11): Summary of impacts of all options in Procedures**

Specific objectives Option	Improve cost efficiency	Realise opportunities to achieve best outcomes for society	Create EU wide rather than national markets
PRO.NC	0	0	0
PRO.LEGI.DESIGN	(++) Aggregation/repetitive purchasing can improve proportionality of procedures & makes the most of economies of scale; e-procurement and other modifications should streamline & simplify provisions on procedures	(+) Aggregation can facilitate strategic procurement; e-proc can reduce time taken and allow greater monitoring of strategic procurement	(+) Joint cross-border procurement facilitates/strengthens EU public procurement markets; Greater use of paperless procurement removes some geographic barriers and strengthens EU public procurement market
PRO.LEGI.FLEXIB	(+) Increases flexibility and provides more legal certainty	(+) Increases flexibility of CAEs to address strategic issues (innovativeness, eco-innovativeness)	(+ / ≈) Better / more flexible procedures improve the functioning of IM in general

### 5.3. Strategic public procurement

#### 5.3.1. Impacts of STR.NC option

The expected consequences of the "no change" scenario are presented in section 2.4).

#### 5.3.2. Impacts of STR.LEGI.FACILIT option

**Critical choice:**

*Enable CAEs to frame procurement needs in ways that integrate other policy goals.*

**Headline action(s):**

- Allow consideration of entire life-cycle costs in award criteria
- Allow inclusion of factors directly linked relating to production processes in award criteria and technical specifications
- Introduce the "Innovation partnership"(new, special procedure for purchases not yet available on the market)

##### 5.3.2.1. Impacts on CAEs

Under the first headline action, contracting authorities would be able to use performance on environmental and other dimensions as a valid criterion for making their purchasing decision. Many contracting authorities report that they have tried to

integrate environmental or other considerations into performance related technical specifications, contract clauses and other indirect routes. Such action would permit them to use measurable performance in respect of these considerations as a possible criterion for distinguishing between offers. This would provide new possibilities and legal certainty to those CAEs which spontaneously or under the impetus of national or EU initiatives, wish to favour procurement outcomes which perform better on environmental or welfare grounds.

To make use of these possibilities, CAEs would need off-the-shelf methodologies for measuring and comparing costs generated by the different tenders. Life cycle costing (LCC) is an established methodology which allows the evaluation of the costs of an asset throughout its entire life-cycle. The calculation of life cycle costing is highly dependent on the training and experience of the staff involved in tender specification and evaluation and based on the current levels of experience and use, increased use, even drawing on standardised (EU provided) methodologies could reasonably be expected to trigger learning and application costs. Also, the results of a survey of contracting authorities in the Adelphi study indicate that few currently have the skills or systems in place to be able to verify whether the goods or services provided by a contractor actually meet the specifications required.

However, experience with some of these approaches has been growing quickly. Under Directive 2009/33/EC contracting authorities are required to take into account the energy and environmental impacts of vehicles over their life time and an appropriate methodology is provided to calculate the LCC for such vehicles. On a voluntary basis, examples of environmental criteria have been established for a set of 18 product and service groups (see the GPP training toolkit<sup>73</sup>), which, to the extent possible, take into account life cycle costing considerations. There is already a considerable amount of information available, including estimates in monetary terms of the costs of emission of green house gasses and particulate matter and fact sheets on how to apply life cycle costing. However many issues such as applicable discount rates and transport costs would need to be considered further before a complete common methodology for the calculation of life cycle costs for procurement purposes would be ready for adoption.

There would be a need for clear and competent execution of procedures under this option. In the event of question-marks over the objectivity and fairness of procedures, CAEs may be confronted with increased legal challenge.

According to a recent survey of CAEs, 48% seek innovative products, solutions or services in their tender documents on at least some occasions; 7% indicate that they aim to do this as much as possible and 10% indicate that they do so regularly<sup>74</sup>. The idea of a tailor-made procedure (the innovation partnership) is to allow CAEs to support the development and subsequent purchase of innovative solutions. The CAE could clearly indicate their interest in such proposals, while retaining broad competition and ensuring that the procedure could be conducted in stages and reviewed as the solution approached full scale production. There would be an onus on the contracting authorities to frame desired outcomes as clearly as possible at the

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See [http://ec.europa.eu/environment/gpp/toolkit\\_en.htm](http://ec.europa.eu/environment/gpp/toolkit_en.htm)

<sup>74</sup>

Source: Adelphi study page 82, for complexity (below) see page 140.

outset, and engage in iterative rounds of negotiation with suppliers. Experience with comparable procedures (e.g. competitive dialogue) shows that these procedures entail longer periods and higher cost. However, their growing use testifies to the fact that they respond to a real need of CAEs and help purchasers and suppliers explore promising solutions prior to investment / commitment which may ultimately deliver significant financial savings and/or strategic benefits.

Whilst there would be some costs associated with adapting these measures, the voluntary approach proposed would allow CAEs to retain a greater choice on whether to adopt such measures or not and thereby better reflect their immediate needs and situation. This would allow them to balance the (generally financial) implementation costs against the achievement of wider policy goals, which may also translate into financial as well as more societal benefits.

Strategic procurements are perceived to cost more than traditional procurements, more often than vice versa. To the extent that CAEs are subject to a fixed budget constraint, this may imply lower volumes of purchasing. However there is some evidence from green procurement that strategic procurement can deliver lower costs as well as higher environmental benefits. For example, the draft revised Buying Green Handbook (to be published during 2011) reports that:

- The City of Vienna saved €44.4 million and over 100,000 tonnes of CO<sub>2</sub> between 2004 and 2007, through its EcoBuy programme.
- £40.7 million (€47.2 million) could be saved in the UK if the proposed Government Buying Standards (GPP criteria) are applied by all central government departments and executive agencies, according to a cost-benefit analysis which monetised the potential impacts.

#### 5.3.2.2. Impacts on businesses (including SMEs)

Under this option, suppliers would be faced with more sophisticated and demanding procurement specifications from public authorities – expressed in new award criteria, or framed over the course of new procedures. This might prompt them to adopt one of two strategies:

- Develop their proposals and capacity to respond to these demands, and in so doing contribute to a transition of production/supply base towards superior technologies;
- Exit these markets and focus on supplying less demanding purchasers.

The decision would vary from supplier to supplier, and market to market as a function of the demands of public purchaser. Generalised exit from markets could reduce the intensity of competition for individual contracts. However, this is likely to be a transitional phenomenon, as suppliers would probably re-enter the market after an adaptation period. In the absence of comprehensive and consistent guidance on how to provide information relating to LCC or the production process, suppliers could be expected to respond in a range of potentially very different ways, providing different levels of detail. They would often incur costs in collecting and processing such data. It could also make it difficult for CAEs to assess the bids.

There may be direct costs for suppliers which take the form of acquisition of labels, or certificates to demonstrate compliance with certain requirements. These costs and challenges could be more significant in situations where demands relate to aspects of the supply chain beyond the direct control or responsibility of the bidder (such as compliance of inputs from third countries with requirements). These costs could be onerous for SMEs. Also, longer and iterative procurement procedures are likely to discourage suppliers who do not have 'deep pockets'.

The operating environment for suppliers would become more challenging if they are faced with more varying demands and approaches from different contracting authorities (e.g. competing labels, or different certification methods).

78% of respondents to the Green Paper consultation were of the view that SMEs in particular would encounter difficulty in responding to these requirements. This view was particularly pronounced amongst CAEs whereas Member States and representative bodies were more sanguine about the prospects for SMEs.

Innovation partnerships would provide research oriented economic operators with a structured long-term partnership with CAEs enabling them to understand the specific needs of CAEs and to develop new personalised innovative solutions to be delivered to agreed performance levels and costs. The framework of the innovation partnership would guarantee a sufficient degree of competition during the innovation partner selection phases and should provide for the necessary IPR transfer and protection arrangements depending on the individual circumstances. The structure of the innovation partnership and the possible participation of multiple CAEs should provide the necessary "market pull" for innovative solutions enabling the economic operators to reach the thresholds of economic profitability without foreclosing the market.

### 5.3.2.3. Impacts on Member States

Strategic procurement can be expected to shift consumption and supply towards welfare-improving outcomes. There is anecdotal evidence from across the EU of how properly conceived and executed procurement procedures have led to the selection of promising offers and helped improve performance against strategic goals. In Italy, for example, fifteen major projects for central government websites and hardware procurement (worth €71 million) were assessed to evaluate their compliance with laws on accessibility in 2006. Construction contracts awarded by the National Road Administration contain a standard clause placing an obligation on the contractors to comply with certain (core ILO) conventions when performing contracts in Sweden<sup>75</sup>.

However, 68% of surveyed CAEs admitted that they did not verify whether the promised performance was actually delivered. Moreover, expectations must be tempered by awareness that the public sector is not the dominant purchaser in any market (except defence). The impact would vary from product group to product group; for some products, the impact would be low, whereas in other cases (e.g. copy machines, street lighting), the public sector has a strong power to steer the market.

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<sup>75</sup> Source: Buying Social, pages 33 and 45.

However, it is likely that 'voluntary' strategic procurement would change outcomes at the margins and only progressively.

As mentioned above, CAEs would need operational and reliable methodologies for implementing these approaches. They cannot be expected to invent these methodologies independently. Central guidance – ideally from the EU, but possibly also from national procurement authorities – would be needed if contracting authorities are to implement these possibilities. There would therefore be a cost to Member States of developing and disseminating these techniques.

It is crucial for Member States to support innovation in order to keep their infrastructure at the upper edge of technological efficiency. Apart from R&D funding by traditional means in form of grants and financial incentives, public procurement budgets present an important financial 'market pull' that can provide for a sensible effect when oriented to specific direction. Member States therefore need clear and efficient tools enabling them to seek for innovative solutions in their public procurement procedures.

#### 5.3.2.4. Impacts on the Internal Market

To the extent that the pattern of consumption and production moves towards more sustainable patterns, the benefits (particularly environmental) may also spill-over to other Member States. The transition could also stimulate the search for competitive advantages and actually stimulate greater competition in particular clusters or markets. Survey responses from seven vanguard Member States suggests that 45% of the value of expenditure on 10 product groups frequently purchased by the public sector was oriented towards green contracts<sup>76</sup>.

The possibility for contracting authorities to introduce additional considerations into their purchasing decisions would increase the complexity of the award decision. In the absence of operational and fairly implemented methodologies, there is a risk that award decisions would involve a greater degree of subjectivity. If methodologies are not common and widely understood, suppliers from partner Member States may be disadvantaged – for example if jurisdiction specific labels or certificates were required, or methods for calculating externalities led to different valuations.

In particular, the decision to permit environmental impacts linked to transport costs could penalise suppliers from remote regions of the single market. There would be a need to ensure a proportionate and objective approach to valuing these costs, and adopting common positions on how such results were taken into account for purposes of award decision.

It would, to the greatest extent possible, be necessary to mitigate this risk through the definition of common valuation and measurement methodologies. This has already been done in the case of clean vehicles. If life-cycle costing is chosen as part of the award criteria by a CAE, a provision to enforce the use of a common methodology (when it has been adopted by a legislative act of the European Union), could be designed to allay these concerns. The use of life-cycle costing would thereby be

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<sup>76</sup> Source: PwC 2009 study.



encouraged and facilitated, but remain voluntary, so that certain contracting authorities retain the choice to apply it or not.

Greater encouragement of innovation could lead to the development of new solutions which could change the market. Whilst this is unlikely to happen in all markets, even a small change could lead to significant benefits to the internal market.

#### 5.3.2.5. Summary of stakeholders views on this option

Opinions were divided on whether EU procurement legislation should allow considerations other than strict price/quality to be taken into account. 41% of respondents supported this approach, while 59% opposed. 80% Of Member State and 50% of contracting authorities opposed this idea while representatives of civil society (NGOs) were strongly supportive.

There was a certain degree of support for concrete measures such as allowing directly linked externalities in production/performance of goods or services to be taken into account particularly in the award phase (including clearer acceptance of life cycle costing). Contracting authorities are not in favour of making the consideration of life-cycle costs mandatory and many respondents emphasise that such measures presuppose the establishment of a clear and agreed methodology and common criteria to ensure correct assessment of the life-cycle cost.

Stakeholders clearly advocate further promoting and stimulating innovation through public procurement. They recommend for instance a greater use of procedures particularly suited for innovative procurement such as competitive dialogue, design contests and in particular the negotiated procedure, as well as a wider allowance of variants and performance requirements in technical specifications. Another idea brought up by some stakeholders is that contracting authorities should be given the possibility (framed in the procurement rules) to react to unsolicited proposals. 69% of stakeholders supported the idea of tailor-made procedures (as an alternative to competitive dialogue) to promote innovative responses to procurement needs. MS, CAEs and representative bodies were uniformly supportive of this approach.

In a recent Eurobarometer (363), a clear majority of respondents were willing to accept that CAEs did not choose the cheapest bid for a public contract when social aspects, such as job creation, were taken into consideration. Similar high levels of support were expressed in relation to the consideration of environmental (green) factors.

#### 5.3.2.6. Impacts on administrative burden and simplification

The obligations under option STR.LEGI.FACILIT would not be greater than under the more prescriptive STR.LEGI.EFNFORC option and could be less, depending on the level of take-up by MS. The main difference between the impacts on administrative burden between the two legislative options is that up-take of strategic procurement would be voluntary under STR.LEGI.FACILIT. Each CAE would be allowed to make its decision on whether or not the benefits of strategic procurement outweigh more burdensome procedures in the short-term.

As far as firms are concerned, once a CAE makes a decision that it wishes to pursue strategic goals using the enhanced toolbox that would be put at their disposal under option STR.LEGI.FACILIT, firms would anyway face additional administrative burden (information obligations). While submitting offers in response to invitations to tender that involve strategic requirements, firms would have to provide more detail on their costs and processes (e.g. to fulfil life-cycle costing methodologies). As a result, the costs of bidding would probably increase. However there may be some mitigating solutions, which could decrease these costs – for example, provision of a limited set of methodologies, databases containing standardised cost information e.g. CO<sub>2</sub> offsets, transport costs (that this option envisages).

### 5.3.3. Impacts of STR.LEGI.ENFORC option

**Critical choice:**

*Remove discretion from CAEs: they must award (all or part) contracts on the basis of performance in respect of other policy goals.*

**Headline action(s):**

- Introduce obligations on "what to buy" (quotas);
- Require CAEs to use certain defined award criteria.

#### 5.3.3.1. Impacts on CAEs

The imposition of EU level quotas or the definition of certain award criteria could have a powerful effect in ensuring that certain considerations were given greater weight in individual purchasing decisions. It would however tie the hands of CAEs when it came to defining their purchasing needs or eligible solutions. The regulatory imposition of such requirements, without regard to the real needs, circumstances, and resources available to CAEs could lead to sub-optimal procurement, reduce allocation efficiency and complicate sourcing of inputs to support public service delivery. Renewable energy sources, for example, can cost three or four times as much as their non renewable equivalents and not all are equally available across the EU. The estimates made by different models gave a range of €24–31 billion to the additional production cost in the year 2020 of achieving a 20% share of renewable energy<sup>77</sup>.

Many contracting authorities report that strategic procurements entail greater risk or cost than traditional procurements. When stipulating environmental requirements, for example, 37.9% of the survey participants experience cost increases, whereas costs remain constant for 33.2%. Only 1.7% report no increase in cost<sup>78</sup>. To the extent that this perception is borne out, it suggests that strategic procurement may entail higher costs which may impose choices on CAEs who may not have budgets which allow them to meet the costs involved without affecting their other purchases/operations.

<sup>77</sup> Source: The renewable energy impact assessment SEC(2006)1719, page 15-18.

<sup>78</sup> 27.1% had no opinion on the change in cost.

There would be a need for investment in monitoring and quota management capacity at the level of CAEs. In the case of award criteria, CAEs would need to demonstrate that the rating of different tenders against the additional criteria had been conducted fairly and properly, and that scoring rules (weighting) had not distorted the outcome of the procedure. Despite the simplicity of the legislative approach, the imposition of obligatory award criteria would present considerable implementation challenges for CAEs.

#### 5.3.3.2. Impacts on businesses (including SMEs)

Under a system of quotas, certain parts of the market would be reserved to suppliers being able to propose solutions embodying particular characteristics. Other suppliers would be excluded from these markets. Depending on how lucrative these markets are, this could lead to extensive investment by suppliers in qualifying to participate in these markets, or in demonstrating the eligibility of their tenders.

A system where multiple considerations were introduced as award criteria could compromise the ability of suppliers to respond to public tenders. The framing of award criteria, and their accumulation, should have close regard to the feasibility of the supply side to respond to these demands. Absent this, the over-specification of mandatory award criteria could undermine competition for public contracts.

#### 5.3.3.3. Impacts on Member States

The introduction of reserved budgets would give a strong impetus for CAEs and suppliers to adopt production/performance methods capable of meeting these demands. In addition, it is likely to lead to appreciable investment in demonstrating formal compliance with qualification requirements. It could lead to over-investment in certificates or labels demonstrating that suppliers meet certain requirements. However it could, over time, deliver significant strategic benefits and advances against wider policy objectives.

The fixing of operational and meaningful quotas would be a challenging process for policy-makers. They would at the same time need to be meaningful – the market should be capable of supplying the aggregate needs of all public purchasers subject to the quotas. They should also be set high enough to encourage suppliers to shift resources in order to benefit from privileged access to reserved markets, and change consumption/production patterns. Setting such quotas in EU public procurement legislation would require quotas affecting a range of different policy areas to be grouped under this one umbrella policy. This could lead to problems in terms of updating and ensuring consistency with sector specific developments, or Member States' individual strategies.

There would be a need to implement a system for compliance monitoring and measurement, both to assess procurement practice and to measure the strategic impacts.

#### 5.3.3.4. Impacts on the Internal Market

The use of firm regulatory requirements or quotas should be framed and implemented in a way that does not foreclose tender procedures to suppliers from

other Member States. The means for demonstrating compliance with award criteria would need to be comparable and viable. They should not emerge as a technical trade barrier.

The way in which quotas and award criteria were employed should be monitored to avoid their manipulation to restrict competition from non-domestic suppliers. The need to meet quotas should not become a pretext for exempting procedures from compliance with open tendering requirements for example. In particular, the decision to take account of environmental impacts linked to transport costs could penalise suppliers from remote regions of the single market. There would be a need to ensure a proportionate and objective approach to valuing these costs and taking results into account for purposes of award decision.

#### 5.3.3.5. Summary of stakeholders views on this option

68% of responses to the Green Paper opposed the imposition of obligations on what to buy through EU legislation. Around 80% of responses from Member States, contracting authorities, and all responses from EU level organisations and citizens took this view. Only representatives of civil organisations took the opposite view (65%). The most frequently raised arguments against such obligations are: the fear of too much interference from the EU in the decisions of public purchasers; increased complexity of the legal framework; the risk of affecting contracting authorities' ability to adapt their purchasing decisions to their specific needs; risks of price increases and of disproportionate administrative costs for public purchasers and businesses, particularly SMEs.

#### 5.3.3.6. Impacts on administrative burden and simplification

To a large extent, the impact on the information requirements that would result from option STR.LEGI.ENFORC would depend on the degree to which strategic quotas are set or the detail involved in defining and applying certain award criteria and the associated necessary monitoring. Under this option, EU obligations would follow from mandatory targets or quotas and MS would have to provide information on their progress against these objectives. Quota monitoring obligations imposed on MS would also generate additional reporting obligations on each and every public purchaser who awarded a contract involving strategic goals.

Increased administrative requirements and obligations linked to the selection and award stages of procurement would almost certainly affect CAEs, who would also have to verify and validate the information provided by firms when checking if they complied with particular criteria or technical specifications. As these new requirements would be based on complex methodologies (e.g. to monetise externalities), they might be burdensome to CAEs (if not even beyond the capacities of smaller, less professional buyers).

For firms, the new provisions proposed under STR.LEGI.ENFORC would be the source of significant additional administrative burden (information obligations) as bidders would have to provide more detail on their costs and processes (e.g. to fulfil life-cycle costing methodologies or to prove fulfilment of certain social criteria). The costs of bidding would probably increase.

As mentioned in section 5.3.2.6), there may be some mitigating solutions, which could decrease these costs – for example, provision of a limited set of methodologies, databases containing standardised cost information e.g. CO<sub>2</sub> offsets, transport costs.

#### 5.3.4. Summary of impacts of options in Strategic against specific objectives

The strategic impacts of the facilitative option would generally be lower than under a mandatory approach, as there would probably be some variation in the degree of implementation across MS. However, it would permit buyers to make choices depending on their individual circumstances and available resources, which could be considered particularly important in the present environment of financial strain.

The coercive approach could potentially have strong impacts in achieving strategic goals as CAEs across the EU would be compelled to purchase in accordance with these rules. The principal drawback is that the coercive option would remove discretion from the CAE to frame its procurement needs in the areas covered by the requirements. This could potentially lead to inferior procurement outcomes and, over time, possibly have the perverse effect of locking public procurement into outdated preferences. At the present time, the different countries, sectors and actors exhibit widely different levels of maturity. Forcing the pace of change through changes to the EU public procurement rules setting quotas or targets would not appear desirable. However, there is no reason to discontinue the current approach of using sector specific legislation, which can be targeted at specific markets, based on more detailed information and analysis.

**Table 12): Summary of impacts of all options in Strategic public procurement**

Specific objectives Option	Improve cost efficiency	Realise opportunities to achieve best outcomes for society	Create EU wide rather than national markets
STR.NC	0	0	0
STR.LEGI.FACILIT	(≈/-)  Variable take up could limit impacts of more complex evaluation methodologies and potential greater costs of strategic purchases	(++)  More consistent use of pp to achieve strategic goals; differences across MS lower the impact but better adaptation to local specificities	(+≈)  Effort needed to develop and implement common metrics and approaches to limit possible complexity and fragmentation (due to permissive nature of change)
STR.LEGI.ENFORC	(-)  In the short term lower cost efficiency due to lack of experience and knowledge; improving over the long term, depending on availability of standardised methodologies	(+)  Public procurement used more forcefully to achieve other policies objectives – however deprive CAEs of possibility to frame outcomes, lock society into certain preferences	(+≈)  Strategic objectives more convergent across the EU: but detailed supporting metrics and measurement needed

## 5.4. Access

### 5.4.1. Impacts of ACC.NC option

The expected results of the "no change" option have been discussed in section 2.4.

### 5.4.2. Impacts of ACC.SOFT option

The impacts of soft-law instruments to improve access are difficult to estimate, since the uptake of such actions would be voluntary and vary from MS to MS. Broadly speaking, non-legislative instruments should result in increased cross-border participation and higher SMEs success rate in public procurement, but their ultimate impacts might vary (e.g. if trainings on doing business abroad are organised, participation will remain voluntary and effects in increased cross-border participation cannot be guaranteed) and are generally expected to be lower than similar actions which are introduced via legislation.

New guidance relating to selling abroad could go some way to addressing the current inertia identified as affecting many firms and help them design strategies to identify and enter new markets. This could benefit both SMEs and cross-border procurement.

### 5.4.3. Impacts of ACC.LEGI.FACILIT option

**Critical choice:**

*Remove administrative barriers to SME participation & cross-border access.*

**Headline action(s):**

- *Mandatory acceptance of self-declarations as prima-facie evidence for selection;*
- *Introduction of a European procurement passport.*

#### 5.4.3.1. Impacts on CAEs

This option would have predominantly positive impacts for CAEs as it would provide operational solutions to key barriers which may be reducing competition, but would not impose their use, hence allowing CAEs to exercise choice and judgement based on individual circumstances. If measures reducing the information obligations placed on firms were to be implemented (e.g. through generalising the "winning bidder provides"<sup>79</sup> provisions), this could theoretically reduce the efficiency of the evaluation process for CAEs if, in some cases, a firm identified as a winner fails the evidentiary tests (and the CAE would have to go to their second choice or repeat the process). From the information available, such instances are not that common, and in most cases CAEs should save time by accepting self-certification of compliance from bidders who ultimately do not win the contract. Also, if more firms feel able to bid, competition could increase, which could lead to greater price savings or improvements in quality for the CAE.

<sup>79</sup> Rather than all bidders providing the requested evidentiary documents, these would be only requested from the winner i.e. when submitting a bid, suppliers could include a self-certification of compliance.

Introducing a new generation of IT tools for the publication of notices would further enhance transparency at EU level, leading to more competition that could lower the price paid. New IT tools could also be the source of important savings for CAEs, introducing further automation and hence, consuming less time and effort. In a new generation of standard forms<sup>80</sup>, data would become re-usable and input would be more frequently limited to tick-boxes (rather than text fields), reducing the costs to CAEs. Other tools, such as a more widespread use (accompanied by more consistent updating by MS) of e-Certis or the introduction of an EU public procurement passport would also help CAEs to carry out procurement involving the participation of non-national bidders. The EU public procurement passport would contain information, validated at Member State level, confirming that a business is compliant with certain, frequently requested criteria. Such measures would remove any uncertainty relating to the validity or appropriateness of a given piece of evidence, even when written in an unfamiliar language. They should also make the process more efficient for the CAE, especially as it would not have to approach different national entities to request or validate particular evidence.

#### 5.4.3.2. Impacts on businesses (including SMEs)

Increasing the use of self-certifications could significantly reduce administrative burden for firms<sup>81</sup> and result in cost savings of around €169 million, since approximately 4 firms per bid would not have to provide the detailed information requested. Similarly, using a European public procurement passport should be simpler for firms who would have a document whose validity would have to be recognised by all CAEs, including those in other Member States. Mutual recognition of such passports should also reduce the need for translation, thereby reducing cost. This could encourage greater participation in public procurement contracts, both in their domestic markets as well as in those of other countries.

Revised tools to enhance transparency (e.g. a new generation of standard forms) would equalise access to public procurement markets for all companies irrespective of their size. Encouraging more language provision through wider translation possibilities in OJ/TED (as a minimum through greater standardisation of structured data and less reliance on free text which requires translation) would also improve access to business opportunities for all firms (including SMEs), allowing firms to decide if the opportunities presented in a particular market are worth the costs of entry<sup>82</sup>. An improved e-Certis would help firms to identify which documents and certificates they need to submit when tendering cross-border, reducing their uncertainty and speeding up their ability to bid. If the mutual recognition of such forms was introduced, firms would also incur fewer translation costs.

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<sup>80</sup> Regulation (EC) 1150/2009 defines the different forms for publishing information about public procurement opportunities in OJ/TED.

<sup>81</sup> It could reduce administrative burden for firms by over 80% (as there are on average 5.4 bidders per contract, therefore 4.4 no longer would have to provide the information). This measure alone would significantly reduce the total administrative burden, reducing the initial figure by around €169 million and far exceeding the EU's target of a 25% reduction; see: section 8.8.6.

<sup>82</sup> However, improved translation in OJ/TED can not remove the language barriers; firms would still have to operate in the language of the country and obey its laws, which are unlikely to be available in a 2<sup>nd</sup> language.

#### 5.4.3.3. Impacts on Member States

Increasing access to government markets should lead to higher competition and lower prices/improved quality. Whilst both the headline measures should increase the degree of competition national firms may face from businesses based in other Member States, these firms should also enjoy equal access to markets in other EU countries. The costs of setting up an EU procurement passport would vary depending on the format chosen (e.g. electronic vs. paper), the number of different evidences covered by the passport and the infrastructure in place to provide key information through national/central databases. Such choices would be made on a country by country basis, to reflect their own resources and policy. Whilst the set up costs of such systems could be quite large in some countries where little such infrastructure exists, the use of such passports would be beneficial both within a country as well as outside.

Improved tools for publication in OJ/TED would increase transparency and facilitate access to structured statistical information on public procurement markets that can be shared by Member States with the Commission. The widespread use of new, streamlined IT tools for publication which should be less time consuming for CAEs and firms, when aggregated, could generate important budgetary saving for Member States. Increased use of e-Certis would put some additional control and maintenance duties (in terms of updating the content of the database) on MS. This would require certain involvement from the national administrations in charge of public procurement. These costs however would be marginal from a budgetary perspective.

#### 5.4.3.4. Impacts on the Internal Market

In general, measures which improve cross-border bidding such as self-certification/winning bidder provides and the EU procurement passport, should benefit the internal market and should improve competition. Improved tools for publication in OJ/TED would significantly increase transparency as they would facilitate access to structured statistical information on EU public procurement markets.

Encouraging more language provision through wider translation possibilities in OJ/TED would generate additional costs for the Commission (i.e. the Publication Office in particular). The current yearly cost of managing OJ/TED is around €14 million. If more investment in translation functionalities was to be undertaken, these costs could increase, but should be small compared to the related benefits.

Care would need to be taken to specify the conditions under which MS could introduce SME specific measures. If this is not done, it could actually create some access barriers and decrease convergence across the EU (if Member States chose different solutions).

#### 5.4.3.5. Summary of stakeholders views on this option

Many stakeholders who replied to the GP consultation consider that SME access to public contracts should be further improved, also through changes to the EU legislative framework. Specific obstacles for SME access that are recurrently highlighted are administrative burdens and costs of participation, particularly with



regard to documentation for qualification of candidates (evidence for selection criteria).

Hence, a vast majority of stakeholders think that business and in particular SMEs, would benefit greatly from an alleviation of the administrative burden related to the choice of bidders. In particular, stakeholders from all interest groups advocate the use of self-declarations and the introduction of a rule according to which original certificates may only be required from the winning bidder.

A majority of business and public authorities – but not MS - think that additional measures are needed to strengthen the innovation capacity of SMEs, recommending for instance financial support schemes and compensation of bidding costs.

Finally, stakeholders identify a clear need for better recognition of certificates across borders and a better coordination of national systems in this context. Some respondents think that certificates should have a European-wide standardised content; others recommend a greater use of electronic databases for facilitating the use of certificates in a cross-border context, such as e-Certis. The idea of a European-wide prequalification system finds some support from business but meets opposition from contracting authorities.

#### 5.4.3.6. Impacts on administrative burden and simplification

Option ACC.LEGI.FACILIT focuses on proposals and headline actions that can significantly reduce administrative burden for companies. New provisions aimed at reducing the information obligations placed on firms, by requiring only the winning bidder to provide information, would immediately reduce the administrative burden by just over 80% (on average there are 5.4 bidders per contract, so 4.4 no longer have to provide the information) i.e. far exceeding the EU's target of a 25% reduction. Coupling this with the creation of a European procurement passport, whereby processes would be put in place to allow a national agency to provide some of the requested information could significantly reduce the information requirements on a bidder.

Similarly, simplification of publication requirements through an overhaul of the standard forms could be a milestone in the reduction of administrative burden for the thousands of firms that participate each year in public tenders above the EU thresholds. A new generation of standard forms would be expected to be (to the extent possible) automated so that a vast majority of information introduced in TED would be re-useable by the IT systems (e.g. information introduced in PIN would be re-used in a CN and a CAN). Such a new generation of standard forms would also be principally based on tick-boxes (to reduce the number of text fields), so that the time spent by the different parties on completing these procedural obligations could be limited to an absolute minimum.

#### 5.4.4. *Impacts of ACC.LEGI.ENFORC option*

***Critical choice:***

*Introduce prescriptive measures to reserve parts of public procurement markets for SMEs or require structuring of purchases in way that favour SME participation.*

***Headline action(s):***

- *Impose mandatory use of lots for all above threshold contracts;*
- *Quotas for share of procurement contracts/budget awarded to SMEs.*

#### 5.4.4.1. Impacts on CAEs

If coercive tools that seek to force an increase in market access were introduced, CAEs would lose a certain element of flexibility and not always be able to adapt to their individual circumstances at a given point in time. The time required to carry out procurement procedures would probably increase which could have some cost implications. For example, if the mandatory use of lots or SMEs quotas were to be introduced, CAEs would have to spend time ensuring compliance and checking that these conditions were met. To verify compliance, more documentation would need to be requested, analysed and evaluated in the selection stage (e.g. additional information concerning bidders to verify their SME status) or award stage (checking bids for many individual lots rather than a single contract), increasing the duration and hence procedural costs.

The introduction of the mandatory use of lots would increase the complexity of the award procedure, as each new lot could require a separate definition of requirements and a separate evaluation of offers<sup>83</sup>. Similar issues would arise in terms of verifying that quotas for SMEs were being met. There could also be some increases in price, as firms try to recuperate their resultant additional administrative expenses. Finally any coercive measures would limit the flexibility and autonomy for CAEs to determine the most appropriate way of conducting public procurement and there could be tensions between choosing the best bid and meeting certain quotas.

Excessive uniformity, which might be inherent in some of the proposed actions (e.g. a mandatory pan-European pre-qualification system) could have negative impacts on the quality of selection of bidders, as CAEs would no longer be able to ask for very specific (tailor-made to their needs) requirements, but would have to accept candidates fulfilling more general/standardised qualifications. In the case of obligatory subcontracting, CAEs would lose a certain degree of control over contract execution that could have negative impacts and reduce the cost-effectiveness of

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An alternative solution (proposed under the ACC.LEGIFACILIT option) would be to introduce the compulsory subdivision into lots only where certain conditions are satisfied, thereby alleviating some of the negative consequences discussed above. Variants of this solution are already being used in France (e.g. compulsory subdivision into lots unless it is technically difficult, expensive or purely restricts competition to local markets) and Germany (exception based on technical or economic reasons). Even with a "lighter" approach, the burden of justifying any exceptions would fall on the CAE, resulting in procedures which are potentially more complex and information intensive. CAEs might need to seek additional legal advice to ensure compliance with the rules (e.g. to judge if an obligation to split contracts into lots could be waived or not). Legal uncertainty risks would be most significant for smaller CAEs who often have less expertise/experience. In France where a similar solution operates, caveats have already given rise to quite some, sometimes contradictory, court decisions. (most important decisions: Decision of the "Conseil d'Etat" of 11.08.2009 "Communauté urbaine Nantes Métropole", Decision of the "Conseil d'Etat" of 09.12.2009 "Département de l'Eure", Decision of the "Conseil d'Etat" of 21.05.2010 "Commune d'Ajaccio" and Decision of the "Conseil d'Etat" of 24.10.2010 "Syndicat mixte d'assainissement de la région ouest de Versailles").

procurement. Some of these actions (e.g. obligatory subcontracting) could interfere in civil law relationships – again, this could be a potential source of complexity and legal uncertainty and might result in higher litigation.

Similar effects would be likely if obligatory requirements concerning the acceptance of bids in a 2<sup>nd</sup> language were introduced (and which could be counter-productive as bidders should be able to operate in the native language of a CAE if they wish to fully understand the business and legal environment).

#### 5.4.4.2. Impacts on businesses (including SMEs)

Measures proposed under this option could increase transparency and access to information for firms, as certain requirements linked to public procurement procedures would be similar/the same across all MS. For example a mandatory pre-qualification system for bidders would provide the firms with clear, pan-European requirements that they would need to meet in order to be accepted in the system.

A mandatory division of contracts into lots would lower the typical value of a single contract (lot) which should make public procurement contracts (at least from the financial point of view) more accessible for SMEs<sup>84</sup>. In the case of SME quotas, SMEs shares in the public procurement market would most probably increase, but bidding would become more information intensive as firms would be obliged to provide additional documentation (e.g. concerning their turnover, headcount, etc.). This would lower the cost-effectiveness of procedures. Obligatory subcontracting of contracts would increase competition for SMEs while acting as subcontractors, but could disadvantage them significantly as prime contractors (i.e. this measure would probably favour big undertakings, as SME would not be qualified/have the capacity to act as prime contractors and supervisors of other firms).

As far as the GP replies are concerned, SMEs are favourable to subdivision of contracts into lots, however there is much more resistance among firms with regards to all other measures potentially considered under this option<sup>85</sup>.

#### 5.4.4.3. Impact on Member States

Coercive measures considered under this option might increase administrative burden, complexity and duration of the award procedures – at the level of MS this may result in less efficient procurement procedures that lower the efficiency of public spending.

An obligation to divide contracts into lots is likely to improve SMEs' access to procurement markets (directly or indirectly). However, there is no data available on the impact of introducing a blanket obligation to use lots. However, in France, where an obligation to split contracts into lots (except in certain cases) was introduced in 2006, rates are relatively high in terms of the SME share in public procurement

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<sup>84</sup> As high contract value is an important obstacle for SMEs in accessing public procurement markets above thresholds; source: GHK study, page 39.

<sup>85</sup> Replies to questions 46 to 52 of the GP.

markets (France awards 44%<sup>86</sup> of contract value to SMEs, as compared to the EU average of 34%). Unfortunately, little other comparative data is available in this area, but further analysis is planned.

#### 5.4.4.4. Impacts on the Internal Market

Measures proposed under this option should increase transparency and access to public contracts at the EU level, but this gain would be realised at a certain cost. For example, the establishment and monitoring of compliance with such systems (e.g. SME quotas, mandatory use of lots) would have to be carried out by the Commission and involve some potentially significant budgetary cost, not just as a one-off expense, but also in regular maintenance costs (see also actions proposed under the legislative options relating to Governance). Overall the probable additional administrative burden and more time consuming and complex procedures would lead to a lower cost efficiency of public procurement markets at the EU level.

Finally, this option raises some doubts in relation to the subsidiarity principle, as it seems likely that several of the actions that are proposed to be coordinated at the EU level (e.g. mandatory subcontracting or SMEs quotas), could be performed more effectively at a more immediate or local level.

#### 5.4.4.5. Summary of stakeholders views on this option

The GP replies show mixed support for the introduction of additional measures more specifically focused on improving SME access, such as mandatory splitting of contracts into lots or turnover caps. Public authorities are in general quite sceptical about such coercive measures; business' opinions are divided.

Many stakeholders are rather sceptical about the introduction of more specific EU level measures to encourage participation of bidders from other Member States. In particular, the idea of requiring contracting authorities to draw up tenders in a second language and/or to accept bids in a different language is rejected by a very large majority of all stakeholder groups.

#### 5.4.4.6. Impacts on administrative burden and simplification

As with the prescriptive option under the strategic procurement section, impacts on the information requirements that would result from option ACC.LEGI.ENFORC would depend on the degree to which quotas are set and monitoring is required. Under this option, EU obligations would follow from mandatory targets or quotas (e.g. mandatory use of lots or quotas for awards to SMEs). Any quota monitoring obligations imposed on MS to provide information of their progress against these objectives would also generate additional reporting obligations on all public purchasers.

Increased administrative requirements and obligations linked to the selection and award stages of procurement would clearly affect CAEs, who would also have to verify and validate the information provided by firms when checking if they

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<sup>86</sup> However, according to statistics of the French *réseau de commande publique*, SMEs' market share in value terms is 35% of public purchases.

complied with particular criteria. By splitting a contract into lots, CAEs would often have to repeat the same evaluation and award process several times with the corresponding increase to both time taken and burden generated. The new procedural requirements might be burdensome and time consuming for CAEs (e.g. additional verifications to check the size of economic operators).

For firms, the new provisions proposed under ACC.LEGI.ENFORC would be the source of additional information obligations as bidders would have to provide more detail on their status (e.g. data on workforce, turnover and ownership structure), which would need to be consistently and periodically updated. However, as firms are already required to have some similar information (turnover, balance sheet, number of employees) in the context of other EU legislation, e.g. the EU's accounting Directives, the additional costs of providing this information in the context of procurement procedures may not be significant. Overall, the costs of bidding may marginally increase.

Finally, some increase in administrative burden could be seen depending on the introduction of further requirements to verify sub-contracting arrangements. This burden would be higher depending on the degree of prescription enforced.

#### 5.4.5. Summary of impacts of options in Access against specific objectives

Whilst the introduction of coercive measures should lead to more SME and possibly more cross-border access to EU public procurement markets, it is not clear that it would actually streamline and simplify the rules. The introduction of more information requirements could increase complexity and administrative burden. Non-coercive instruments which aim to facilitate access to EU public procurement markets could result in simpler and less burdensome processes for SMEs and cross-border bidders, which could encourage increased participation, although with some associated costs for CAEs and MS.

**Table 13): Summary of impacts of all options in Access**

<b>Specific objectives</b> <b>Option</b>	<b>Improve cost efficiency</b>	<b>Realise opportunities to achieve best outcomes for society</b>	<b>Create EU wide rather than national markets</b>
ACC.NC	0	0	0
ACC. SOFT	(≈)  New training and guidance neutral in terms of cost-efficiency	(+ / ≈)  Some strategic goals (incl. increasing SMEs and cross-border access) can be achieved more effectively, but a voluntary measure, so positive impacts not guaranteed	(+ / ≈)  Increased cross-border strengthens integration of EU public procurement market, but a voluntary measure, so positive impacts not guaranteed
ACC. LEGI.FAC ILIT	(++)  "Winning bidder" clearly lowers administrative burden	(+)  Differences across MS lower the impact but better	(+)  If allowed to go unchecked, differences in implementation

<b>Specific objectives</b> <b>Option</b>	<b>Improve cost efficiency</b>	<b>Realise opportunities to achieve best outcomes for society</b>	<b>Create EU wide rather than national markets</b>
	improving cost efficiency and motivates more firms to participate. Costs of other measures depend on choices made by individual MS/CAEs	adaptation to local specificities	and different policy choices across MS could generate lack of convergence in the EU, thereby negating some of the improvements to cross border
ACC. LEGI.ENF ORC	(-) Proposed obligatory measures expensive and disproportionate at least in the short term	(+) Some strategic goals (incl. increasing SMEs and cross-border access) could be achieved more effectively via coercive measures	(+) Increased cross-border strengthens integration of EU public procurement market

## 5.5. Governance

### 5.5.1. Impacts of GOV.NC option

The consequences of pursuing a "no change" policy are discussed in section 2.4).

### 5.5.2. Impacts of GOV.SOFT option

Under this option, the Commission could initiate an informal process of mapping national institutional arrangements for public procurement administration, and identify areas of recurrent difficulty in procurement policy and practice. This could evolve into a process of learning from 'best practice' and benchmarking and provide a focal point for convergence of administrative practice.

Current efforts to provide assistance to national administrative bodies (through structural fund assistance to some countries) with the correct implementation of procurement procedures could be continued or stepped up. The benefits of channelling public procurement through specialised or centralised procurement entities (such as central purchasing bodies using electronic procurement facilities) could be highlighted and promoted.

In general, new soft law options such as the provision of assistance to administrative structures for monitoring and control of public procurement, as well as for ensuring the integrity of procurement (e.g. training for the administration of MS) would be expected to have a weaker impact than those described for GOV.LEGI.TARGET. There would be no formal or legal basis for MS to cooperate in provision of information (e.g. on review and remedy procedures), and no legal basis for the Commission to give effect to conclusions drawn from the analysis. For example, article 81 of the 2004 Classic Directive provides the option for MS to create a single authority to play the above roles. However, only one MS has exercised this option. Some other MS have nevertheless taken steps in this direction with the creation of specialised services or units within existing administrative structures.

It is unlikely that a consistent approach to the policing of compliance with procurement rules across EU would be developed under this option. Differences in

the provision or severity of appropriate administrative powers to monitor and penalise non-respect of procurement rules could lead to pronounced differences in the degree of regularity, transparency and openness of MS procurement markets.

### 5.5.3. Impacts of GOV.LEGI.TARGET option

**Critical choice:**

*Leverage achievement of economies of scale and optimal outcomes for CAE through the use of specialised, professional bodies which aggregate purchasing where appropriate.*

**Headline action(s):**

*- Establish clear rules for purchases made through CPBs (inc. safe haven concept).*

#### 5.5.3.1. Impacts on CAEs

Optimisation of resources through the aggregation of demand could generate considerable positive effects for CAEs, such as diminished costs of procedures. For example running a framework agreement is associated with lower cost for CAEs than running "standard" restricted or negotiated procedures<sup>87</sup>. However, procurement techniques that involve aggregation usually take longer to award than non-aggregated procurement processes<sup>88</sup>.

Greater aggregation could also enhance the buyer power of CAEs and improve opportunities to pool skills and expertise (and thus share the procurement related costs and risks). Procedures run through CPBs should be visible to a wide range of market participants, traceable and less prone to conflicts of interest or subjectivity that may distort traditional procurement administration. They could also facilitate strategic procurement of new, innovative products and services. Since CAEs could decide on a case by case basis whether to use these possibilities or not, they would also see a certain increase in the range of choices available to them i.e. their flexibility would increase, which could be of particular benefit to smaller CAEs which rarely publish contracts with values above the EU thresholds.

Achieving more legal clarity concerning public procurement procedures and in particular, clarifying and standardising the responsibilities and roles falling to each party when using a CPB, should, from a CAE perspective, reduce the perceived risks of litigation, legal assistance costs (as external counselling would no longer be needed) and diminish the number of legal challenges. This could lower overall transaction costs in procurement. Equally, if procedures are clarified, CAEs should be less inclined to implement risk-averse procurement practices (that e.g. stifle innovation) which could be resulting in sub-optimal procurement outcomes.

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<sup>87</sup> The costs per procedure for CAEs are €5,400 in the case of a framework agreement, whereas it is €9,000 for the restricted and €5,800 for the negotiated procedures, although the framework contracts are still slightly more expensive for CAEs than the open procedure, which typically costs €5,100 per transaction; for more details see: section 8.8.4.

<sup>88</sup> 66 calendar days in case of framework agreements and joint purchasing, compared with an average of 58 days for all procurement or 53 days for non-framework contracts; see: section 8.7.4.1.

### 5.5.3.2. Impacts for businesses (including SMEs)

Aggregation of demand could have some negative impacts on transparency and opportunities for competition: as contracts are aggregated (i.e. over time and in value terms), the publication of notices would become less frequent but their value would become higher. For firms this could make access to business opportunities more difficult. In particular, SMEs might be threatened as the typical contract value rises.

Aggregation also intensifies the risks of weakening competition (e.g. reissuing consecutive frameworks might favour larger incumbents<sup>89</sup>). To remedy the above, tools such as the Dynamic Purchasing Systems (hereafter: DPS) could be used, offering an alternative that combines the benefits of aggregation with open competition between suppliers.

Aggregation of demand (e.g. through framework contracts) is expected to lower procedural costs for firms<sup>90</sup>. The use of CPBs and framework agreements could also offer suppliers more scope for economies of scale which could potentially reduce the prices offered to CAEs. More clarity with regards to definitions would undoubtedly be welcomed by firms, potentially allowing litigation and legal assistance costs to be scaled down.

### 5.5.3.3. Impacts on Member States

Better harnessing of scale benefits through aggregation<sup>91</sup> could deliver significant advantages and budgetary savings<sup>92</sup>. However, national authorities should be attentive to the potential for greater market aggregation to undermine competition between suppliers. These risks could be mitigated by clearer rules and safeguards, and by giving CAEs alternatives to framework agreements. Member States could consider a range of CPB models, adapted to their circumstances and needs – this may mean the creation of more than one CPB, to allow vertical procurement (e.g. medical and health related purchases) as well as horizontal (national, regional or local). Aggregation of demand could offer more scope for economies of scale which could potentially be passed on as reduced prices to the administration. Finally, MS could gain more leverage in achieving strategic goals in public procurement<sup>93</sup>.

### 5.5.3.4. Impacts on the Internal Market

As mentioned above, aggregation of demand could increase the typical value of contracts, thereby attracting increased attention from potential suppliers in other jurisdictions. Clarifying the rules concerning cross-border cooperation between contracting authorities from different MS could have positive impacts on convergence between EU procurement markets. Aggregation of demand can also

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<sup>89</sup> Based on 130 interviews with firms frequently active in public procurement, PwC study, page 115.

<sup>90</sup> See: section 8.8.4.

<sup>91</sup> Note, CPBs are often users of e-procurement, leading to opportunities for synergy with the actions discussed under PRO.LEGI.FLEXIB.

<sup>92</sup> See: section 8.7.4.

<sup>93</sup> Aggregation of demand can be seen as a tool that facilitates the achievement of strategic goals in procurement - CPBs are more qualified and experienced purchasers and therefore are assumed to be capable of conducting more far-reaching and complex procedures that may be necessary to achieve societal goals (e.g. innovation, social aspects).



facilitate the achievement of strategic goals in public procurement - CPBs are better resourced to implement complex or sophisticated procurement policies.

#### 5.5.3.5. Summary of stakeholders views on this option

The GP replies lead to a conclusion that stakeholders are in general in favour of a stronger and more generalised aggregation of demand. Many respondents consider that there are various obstacles to an effective aggregation of demand and that the current public procurement legal framework does not provide sufficient tools to overcome them. Nearly all stakeholders believe that the aggregation of demand implies a certain amount of risk for competition and may hinder SME access to public contracts. They also agree on the fact that some areas are more convenient for aggregation of demand than others.

#### 5.5.3.6. Impacts on administrative burden and simplification

Option GOV.LEGI.TARGET seeks to optimise the use of resources, in particular by the aggregation of demand. This has important potential in simplifying procurement procedures as less professional public purchasers could delegate the buying functions to specialised bodies (CPBs). As far as firms are concerned, centralised demand might also mean less frequent bidding (for higher value contracts) that could ultimately mean that firms spend less time on meeting procedural requirements. Less paperwork would also mean less administrative burden.

Finally, central purchasers are often the front-runners in using e-Procurement tools – as a result the simplification and savings expected from electronic methods of procuring would be relevant also for aggregated purchases but with (potentially) more significant positive impacts achieved through the economies of scale.

#### 5.5.4. *Impacts of GOV.LEGI.ENHANC option*

***Critical choice:***

*Oblige MS to identify a national authority in charge of implementation, control & monitoring of public procurement which reports annually on performance.*

***Headline action(s):***

*- Obligatory designation of central national oversight body by Member States, with clear obligations on monitoring, enforcement and reporting.*

#### 5.5.4.1. Impacts on CAEs

CAEs (especially larger entities) would be subject to monitoring and reporting obligations from the national designated body or intermediary agencies at national level. This would entail some additional burden for CAEs in the form of keeping records and providing them (in the appropriate format) to central oversight bodies or inspectors and general reporting. Clearer (and possibly more consistent) monitoring and controls would on the other hand increase the legal certainty for CAEs, as these would serve as tools for the detection and early resolution of problems before they become litigation issues.

Clearer and more authoritative guidance, plus greater provision of the appropriate professional support would increase legal certainty as CAEs would be able to obtain clarification on scope, procedures, etc. As a consequence the number of litigations would be reduced, the time taken to run a procedure could be shortened and ultimately this would lead to increased cost-efficiency. Moreover, the possibility of regular and systematic training of personnel and sharing of best practices would lead to improved administrative capacity building, more legal certainty and increased efficiency.

#### 5.5.4.2. Impacts on businesses (including SMEs)

More professional procurement and stronger anticorruption measures would increase transparency, legal certainty and competition. Failure to publicise and administer public procurement procedures implies lost business opportunities and may result in costly litigation for suppliers. The (potentially) high level of corruption in some national markets/sectors could be distorting competition and denying opportunities to competitive suppliers. Efforts to enhance the quality and professionalism of public procurement administration would reduce friction, complexity and cost, increase legal certainty and confidence in the system. The supply side of the market would be the first beneficiary of these improvements in the operating environment.

#### 5.5.4.3. Impacts on Member States

Having in place a national body with responsibility for monitoring and strategic oversight of public procurement would provide a source of feedback on the functioning of the policy at national level, allowing for rapid identification of systemic problems. This would increase the opportunity for timely remedial actions by means of guidance or even legislative changes. This system could, within a relatively short time-frame, be expected to generate improvements in terms of overall management of public procurement expenditure – at least through the principal spending agencies and departments.

Some Member States would have to make the necessary legal and administrative arrangements to designate a single body in charge with public procurement implementation and control. This process could involve some start-up cost to create or adapt the mandate of existing entities and resource them. The monitoring and control powers could be assigned to an already existing body<sup>94</sup> which would act as a single contact point at national level. In this case the impacts in terms of cost and complexity should be limited. However, in the case where Member States decide to create a completely new body, this could generate additional cost<sup>95</sup>.

Some Member States have already established knowledge centres, or provide the services of a knowledge centre through another body in charge of public procurement meaning that these Member States would not incur additional cost (of

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<sup>94</sup> The monitoring and implementation of EU and national procurement rules is currently scattered across different institutions or different departments/offices of the same institution which are not necessarily co-ordinated.

<sup>95</sup> A yearly labour cost of €272,656 was estimated for every 10 people, by multiplying the average monthly labour cost of € 2,272.13, (calculated as average Eurostat cost of labour in the 27 MS for 2006).

labour) in setting up any such centres. However for those Member States which would have to create new knowledge centres this could generate additional costs<sup>96</sup>. In small Member States such as Ireland or the Netherlands agencies carrying out these tasks have around 25 staff of all grades.

Clear rules at national level on anti-corruption, anti-fraud, and conflict of interest or professional misconduct would increase confidence in the system and allow for better enforcement of the rules. This should result in a more attractive environment for investments in Member States and increased transparency and competition.

This option could be considered to stray into areas previously not covered due to subsidiarity concerns. However, the evaluation has shown that Member States do not consistently monitor and control public procurement policy. This is a significant impediment not only to the correct implementation of provisions stemming from the EU Directives which is a major source of cost and uncertainty in itself. The absence of effective national arrangements also undermines the capacity of national administrations to effectively account for and manage overall public procurement expenditure. Therefore, there is, in addition to the case for enhancing control of the implementation of EU rules, a strong self-interest for Member States to step up the quality of their public procurement administration.

#### 5.5.4.4. Impacts on the Internal Market

The advantage of a single central counterpart in each Member States would be in having first hand and timely information particularly in relation to different problems affecting the implementation of public procurement law. This would allow immediate feedback on the functioning of the policy; identification of the potential weak points in national legislation as well in EU legislation; and a subsequent timely pro-active approach in solving such issues (through guidance, soft law, etc).

#### 5.5.4.5. Summary of stakeholders views on this option

Whilst the GP consultation did not ask any explicit questions about national administrative capacity, there is a general view in support of further steps to increase the professionalisation of public procurement. In general, stakeholders are against the introduction of criminal sanctions to address certain violations of public procurement rules and feel that Member States should be left to determine any detailed measures or additional instruments to tackle organised crime in public procurement.

#### 5.5.4.6. Impacts on administrative burden and simplification

Increasing the controls and monitoring conducted by Member States, as suggested under this option, would probably lead to an increase in information obligations, which would affect the cost at national and CAE level. The exact costs would depend on the individual arrangements put in place compared to the existing situation. In some instances costs could be reduced as tasks which are currently spread over several departments and reports are centralised into one and made more efficient. In others, where less reporting occurs at present, costs would increase.

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<sup>96</sup> A yearly labour cost of €81,796 was estimated for every 3 people, by multiplying the average monthly labour cost of € 2,272.13, (calculated as average Eurostat cost of labour in the 27 MS for 2006).

However, the new structure of public procurement administration could be the source of simplification, as various functions which are currently performed by many organisations in some Member States would be more clearly allocated and possibly brought together.

#### 5.5.5. Summary of impacts of options in Governance against specific objectives

Whilst choices relating to greater aggregation have overall positive benefits, there are some concerns about market closure (GOV.LEGI.TARGET). The option GOV.LEGI.ENHANC considers possible actions to improve the control, monitoring and application of public procurement rules at both national and EU level. By considering actions to introduce similar conditions and architecture in all MS, it should improve the effectiveness of these functions at both national and EU level. Both the LEGI options should generate some improvements to legal certainty and effectiveness. In some instances, similar actions could be taken under the option GOV.SOFT but adoption would be voluntary and might not lead to a desired level of convergent and consistent procurement oversight and professionalisation. However, soft law action could be used to complement any legislative change, providing further detail/examples and guidance and if appropriate to support/provide training.

**Table 14): Summary of impacts of all options in Governance**

<b>Specific objectives Option</b>	<b>Improve cost efficiency</b>	<b>Realise opportunities to achieve best outcomes for society</b>	<b>Create EU wide rather than national markets</b>
GOV.NC	0	0	0
GOV. SOFT	(+ / ≈) Improvements due to new guidance, but take-up voluntary	(+ / ≈) Improvements due to new guidance, but take-up voluntary	(+ / ≈) Improvements due to new guidance, but take-up voluntary
GOV. LEGI. TARGET	(++) Increases legal certainty and reduces costs through economies of scale and lower error rates	(+) CPBs are more professional and aggregation may permit greater strategic buying power	(+) Greater transparency and ease of access for firms wishing to find business
GOV. LEGI. ENHANC	(+) Increases legal certainty and reduces likelihood of error through tighter controls	(+) Optimal choices are more likely to be made	(+ +) More uniform and EU wide monitoring & control increases cross border convergence

#### 5.6. Regulatory form

Many of the problems identified for this Impact Assessment relate to instances where the current legislation has been identified as too complex. This complexity may arise for a range of reasons, including the existence of a multiplicity of reference sources. Many of the legal options identified above would aim to simplify the current

legislation whilst reflecting any new jurisprudence or information/experience. Depending on what, if any, legislative proposals are presented, a transposition date would be set to ensure that MS have sufficient time to transpose and create new legislation. As such, when developing such proposals, consideration would be given to two key issues:

- The need to maintain two separate Directives i.e. to keep the current Classic and Utilities Directive approach; and
- The use of implementing / comitology measures to permit a later adoption of more technical or detailed rules which it may not yet be possible to specify. For example, this could include, if appropriate, regulations relating to new standards for e-procurement; methodologies and data sources for measuring costs related to production and/or life-cycle; methodologies and indicators for future monitoring.

The suggestions on the exact legal form could only be taken once any initial proposals have been fully drafted and would only be confirmed at adoption, following detailed discussion and consultation with MS. The decision about whether to maintain two separate Directives would be informed by a detailed comparison of the final proposals, assessing how different/similar their content is. Due to the nature of the reforms being discussed and the problems identified, close consideration would be paid to issues affecting clarity and simplicity, coherence with other EU policy and monitoring and control arrangements.

The Directives provide a general framework for public procurement and to-date, other sector-specific legislation has been used to set out particular strategic goals. Careful consideration would need to be given as to whether this approach would be maintained or, particularly if mandatory strategic obligations were introduced, such sectoral objectives would be included in or cross-referenced by EU public procurement legislation. This approach of tackling specific market failures or opportunities for strategic procurement in a targeted way (e.g. energy efficient public purchasing or clean cars) may remain a valid approach – subject to a coherent application of these sectoral solutions in as great accordance with the general principles and framework for public procurement as possible.

If it is decided to provide any additional soft law measures such as guidance or training, these would be developed and discussed with relevant stakeholders including through the various MS committees.

## **6. COMPARING THE OPTIONS**

Having presented the impacts on each of the five groups of problems (i.e. administrative organisation, scope, procedures, strategic public procurement and access), the following table compares the various options by assessing their overall effectiveness, efficiency and coherence with the objectives.

**Table 15): Comparison of retrained options**

<b>Specific objectives Policy options</b>	<b>Effectiveness - extent to which options achieve the specific objectives</b>	<b>Efficiency - the extent to which objectives can be achieved for a given level of resources / at least cost (cost-effectiveness)</b>	<b>Coherence – the extent to which options are coherent with the overarching objectives of the EU policy</b>
All NC options	0	0	0
SCO.LEGI. TARGET	(+ / ≈)  Expected gains in cost effectiveness, are counterbalanced by neutral effectiveness in achieving best outcomes for society and potential losses in creating EU public procurement market	(+ / ≈)  Benefits are expected to outweigh the cost of implementing new measures	(+)  Improves on but still consistent with current Internal Market policy
SCO.LEGI. REDUCE	(+)  May be cost efficient for individual procedures, but global cost-efficiency affected by possible international consequences.	(+)  Doesn't require new systems / resources to be put in place	(-)  Contradicts Internal Market policy by reducing the size of EU-wide market and could cause problems with international agreements
PRO.LEGI. DESIGN	(+)  Effectiveness from very positive (in terms of cost-efficiency) to neutral in creating EU wide market, hence overall slight positive	(+ +)  Certain tools will increase the economies of scale; benefits are expected to outweigh the cost of implementing new measures	(+ / ≈)  Improves on but still consistent with current Internal Market policy
PRO.LEGI. FLEXIB	(+ +)  Effective in achieving all three specific objectives	(+)  Significant gains expected compared to the resources invested	(+)  Improves ability to achieve Internal Market policy whilst increasing choice and modernising procedures
STR.LEGI. FACILIT	(+)  Effective in achieving best outcomes for society, but marginal effectiveness in terms of cost-efficiency and slightly negative in creating EU wide market, thus the overall score is slightly positive	(+)  Respects subsidiarity and proportionality while allowing CAE / MS to make choices that best suit their objectives and resources	(+ / ≈)  Improves on, but still consistent with current Internal Market policy whilst respecting subsidiarity and proportionality principles

<b>Specific objectives / Policy options</b>	<b>Effectiveness - extent to which options achieve the specific objectives</b>	<b>Efficiency - the extent to which objectives can be achieved for a given level of resources / at least cost (cost-effectiveness)</b>	<b>Coherence – the extent to which options are coherent with the overarching objectives of the EU policy</b>
STR.LEGI. ENFORC	(+) Slightly positive effectiveness (mainly driven by positive impacts in achieving best outcomes for society, but counter-balanced by low cost-effectiveness)	(-) Mandatory solutions would be burdensome and costly at this point in time (lack of EU-wide data, methodologies and standards tested in practice)	(-) Depends on how trade-offs between wide set of policy objectives which may sometimes conflict are managed
ACC. SOFT	(+ / ≈) Guidance has been issued and has not brought the expected results	(≈) Low costs, low impacts	(+ / ≈) Consistent with current Internal Market policy, unlikely to improve the situation
ACC.LEGI. FACILIT	(+ / ≈) Effective in achieving best outcomes for society and cost-effectiveness, but marginal / slightly negative effectiveness in terms of creating EU wide market, thus the overall score is only slightly positive	(+) Respects subsidiarity and proportionality while allowing CAE / MS to make choices that best suit their objectives and resources	(+) Improves on, but still consistent with current Internal Market policy
ACC.LEGI. ENFORC	(+) Slightly positive effectiveness (mainly driven by positive impacts in achieving best outcomes for society, but counter-balanced by low cost-effectiveness)	(-) Mandatory solutions would be burdensome and costly at this point in time (e.g. construction of new systems, lack of EU-wide data, methodologies and standards tested in practice)	(+) Supports both Internal Market policy and wider EU2020 goals
GOV. SOFT	(+ / ≈) Improvements due to new guidance, but take-up voluntary	(+ / ≈) Small investment but the take up would be voluntary (and track record suggests that little is likely to change)	(≈) Unlikely to generate large changes

Specific objectives Policy options	Effectiveness - extent to which options achieve the specific objectives	Efficiency - the extent to which objectives can be achieved for a given level of resources / at least cost (cost-effectiveness)	Coherence – the extent to which options are coherent with the overarching objectives of the EU policy
GOV.LEGI. TARGET	(+) Potential economies of scale and increased professionalisation should improve pp outcomes	(+) Most MS already have CPBs. Mandatory use of e-procurement should generate cost efficiency; Certain tools will increase the economies of scale	(+ / ≈) Aggregation/centralisation may lead to economies of scale and there is potential for increased strategic procurement, but safeguards necessary to prevent SMEs being excluded
GOV.LEGI. ENHANC	(+ +) Positive impacts in terms of all strategic objectives	(+) Possible increased monitoring costs but no major establishment costs expected as functions currently conducted (in most MS); savings through coordination and improved monitoring	(+) Greater coordination across MS strengthens application of Internal Market policy

The evidence gathered through the evaluation and the present Impact Assessment suggests that action is warranted.

Clearly there are certain tradeoffs between the different solutions, particularly across the different problem areas. The most obvious examples are in the options relating to procedures and governance or strategic procurement where cost-efficiencies and benefits realised through improvements to procedures can be used to meet the costs of certain actions. E-procurement and its inherent tracking and monitoring could offset costs related to new monitoring requirements, particularly in governance but also in addressing issues affecting access and strategic procurement. As mentioned in the impacts section, the strategic costs of adapting to new methodologies etc will reduce over time and increasing the use of concepts such as life cycle costing allow more attention to be paid to the wider cost base and contribute to achieving other policy goals, particularly those identified in the EU2020 strategy.

## 6.1. Preferred solution

Based on the analysis presented in this report, a preferred solution based on a combination of nine of the options discussed has been identified (summarised in Table 16). However, it should be noted that this package of preferred options only reflects the opinion of DG MARKT Services and does not prejudice the final form of any decision to be taken by the wider Commission Services.

### 6.1.1. Scope

The radical approach to redefinition of scope would be more simple and effective in reducing the compliance costs resulting from the application of Directive thresholds



to small-value contracts or to contracts operated by small and less procurement savvy local purchasing bodies. However, it would come at a heavy price in terms of reduced transparency and weaker disciplines on public procurement across the EU. The evaluation confirms the expectation that transparency translates into increased competition and delivers price and quality savings. Small firms are also relatively more active and successful in competing for contracts for values close to the Directive thresholds. Therefore radically reducing the scope of the Directives through significant increases to the thresholds (or the exclusion of important populations of purchasers such as sub-central authorities) would have significant unintended consequences. Increasing the thresholds would also have international consequences as it would trigger a breach of the GPA and lead to the closure of (parts of) certain 3<sup>rd</sup> country markets.

Consequently, a targeted approach to any redefinition of the Directives' scope is preferred (SCO.LEGI.TARGET). This would entail for example, exclusion of all but the very largest value contracts for social services. The special regulatory arrangements operated by Member States in respect of social services or services to the person, mean that these markets are characterised by limited tradability. Conversely, the impact assessment concludes that targeted actions to improve the definition of scope would also permit the elimination of grey areas such as the treatment of many forms of cooperative purchasing arrangements (public-public). In sum, this impact assessment concludes in favour of the targeted approach to scope redefinition.

#### 6.1.2. *Procedures*

It is necessary to correct certain shortcomings in the current legislation if the latent potential of certain procedures (DPS, competitive dialogue) is to be realised. Such changes would allow CAEs to tailor the organisation of the purchasing procedure to the characteristics of the purchase. More widespread use of e-procurement holds out the prospect of significant and enduring gains in administrative efficiency and an intensification of transparency and competition driven savings – which far exceed the switchover costs for CAEs and suppliers. Therefore, it is deemed desirable to proceed with the changes envisaged under the option PRO.LEGI.DESIGN.

The cost-benefit analysis suggests that changes to expand the freedom for CAEs to choose between procedural options and alleviate publication requirements are also worth pursuing. Removal of the presumption in favour of the open procedure would allow CAEs to make greater use of other possibilities including negotiation (as proposed under option PRO.LEGI.FLEXIB).

Hence it is suggested that both the legislative options proposed to tackle issues where the current procedures are found to be disproportionate and inflexible be taken forward.

#### 6.1.3. *Strategic procurement*

Experience from different Member States and markets suggests that strategic procurement can result in the selection of superior solutions in specific instances without undermining the provision of fair or effective award procedures. However, these approaches are still in their infancy. The jury is still out on whether strategic

procurement can have a decisive impact in supporting the general dissemination of superior technologies or solutions.

It is therefore considered inappropriate and excessively risky at this point in time to require, through changes to EU legislation, contracting authorities to allocate some part of their budget to purchases meeting certain criteria. Member States have already established national action plans (NAP) in order to set (generally non-obligatory) targets for increased levels of green public procurement within certain groups of products. These NAPs have not yet been evaluated in most MS and it is not clear whether they are having a significant impact on contracting authorities' behaviour. Establishing mandatory quotas within the public procurement legislation would seem premature while the effectiveness of voluntary measures has not yet been assessed. However there would be no reason not to advance such strategic goals via sector specific legislation as different markets mature.

Instead, it is preferred to pursue the option of allowing contracting authorities to take account of the performance of proposals in respect of a number of considerations directly linked to the production process and to provide additional procedures to support innovative procurement (STR.LEGI.FACILIT). The conclusion of the impact assessment is that there are significant risks associated with this approach – relating in particular to a more complex operating environment for CAEs and suppliers. There is also a risk of market fragmentation if implementation methods (measurement and weighting systems, labels and certificates) are developed in an inconsistent manner across the single market. However, the benefits on offer are worth striving for. Policy - both legislative and non-legislative (guidance, relating to the legislative changes introduced) - should invest heavily in measures to mitigate the risks for contracting authorities, suppliers and the single market that this approach entails.

#### 6.1.4. *Access*

The impact assessment analysis strongly supports additional actions to remove administrative barriers to participation in public procurement markets (ACC.LEGI.FACILIT). This should deliver benefits across the full spectrum of impacts – particularly for CAEs and suppliers in the form of lower administrative burden. Some of the actions (e.g. European procurement passport) could involve building the capacity to retrieve company data and issue approvals. This cost would fall on national administrations or delegated bodies rather than individual purchasers.

The impact assessment argues against the imposition of quotas for a proportion of contracts/spend to be allocated to SMEs and other prescriptive measures to increase access to public procurement markets (ACC.LEGI.ENFORC). SMEs are relatively successful in competing for EU regulated contracts and should be incited to remain competitive on their own merits: the focus should be on removing features of the legal or administrative environment which hamper their effective participation. The mandatory imposition of lots for all contracts above EU thresholds risks imposing an artificial structuring of contracts on CAEs. This could compromise the quality of cost of the procurement outcome. However, whilst the impact assessment concludes that this approach could not be imposed on a blanket basis, an increased use of lots under certain circumstances is foreseen under ACC.LEGI.FACILIT option, which should lead to improved access and participation by SMEs.

The impact assessment concludes in favour of facilitating access and removing access barriers. Such actions could usefully be supported by appropriate soft law measures (ACC.SOFT). It rejects the option of imposing outcomes in terms of market share to be reserved to certain categories of actor.

#### 6.1.5. *Governance*

The cost-benefit analysis supports the inclusion in the Directives of a clear set of provisions regulating aggregation, generally via the activities and organisation of CPBs. These structures are emerging as key hubs in the European public procurement landscape. Procedures run through these structures should be visible to a wide range of market participants, traceable and less prone to conflicts of interest or subjectivity that may distort traditional procurement administration. The most notable drawback of centralisation is the potential impact on the supplier base if contracts are too large for SMEs to bid for, or if they foreclose markets for excessive periods. These risks need to be mitigated but do not overturn the case in favour of this option (GOV.LEGI.TARGET).

The analysis also examined the need to identify a national level counterpart to assist the European Commission in ensuring the sound implementation of EU legislation, and to assist with the development of a coherent response to new procurement challenges (development of common approaches for strategic procurement, consistent design of e-procurement models). Such structures could also provide a focal point for national efforts to exercise strategic or central control over excessively fragmented public purchasing administration. Many Member States have recognised this and are moving in this direction themselves (e.g. UK Cabinet Office efforts to drive efficiency in UK public procurement). This should reduce political resistance to this direction. However, when proposing this option (GOV.LEGI.ENHANC), the impact assessment recognised that such action would require some element of institution building within some Member States, as well as investment in monitoring and reporting systems. In broad terms, the benefits of provided by such oversight bodies through improved compliance and more efficient procurement are expected to outweigh the costs of creating and running them.

The impact assessment therefore concludes in favour of actions to strengthen administrative capacity by regulating CPBs, and to require Member States to identify a national authority with responsibility for oversight of aggregate national purchasing and implementation of EU legislation. Any legislative actions proposed should be supported and complemented by soft law measures to provide further detail, guidance and if appropriate, training.

## 6.2. **Conclusions**

Taken together the proposed package of solutions should address many of the problems identified, reducing the cost of conducting public procurement and supporting the use of EU rules to achieve wider political goals, whilst still safeguarding fair and open competition. Whilst such actions are not designed to force a greater integration of public procurement markets, they should remove many of the existing barriers and improve the way these markets function. The proposed package consists of seven legislative options and two soft law options which have been identified on the basis of their ability to address the problems identified. Whilst

alternative packages could be considered, they would be composed of options that have been shown to be less effective than the proposed selection. The package proposed should optimise the synergies between the different solutions allowing savings due to one type of action to neutralise related costs due to another (e.g. possible increased information requirements under the strategic procurement actions should be partly neutralised by the reductions relating to the improved design of procurement procedures).

Many of the measures are designed to simplify and streamline the current environment and increase its cost-effectiveness. Where the checks and balances required to ensure the proper functioning of the Internal Market could run counter to this simplification, effort has been taken to reduce their complexity.

**Table 16): Summary table of preferred options (marked in grey)**

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

Finally, following the wider consultation of other DGs at the Commission, a proposal to set a target date for the adoption of the use of electronic means of communication for all CAEs has been put forward. This recognises the arguments presented in this impact assessment stating that the market is currently not ready for an immediate switchover, but suggests setting a deadline by which such action should be possible. In so doing, it builds on the phased approach adopted (CPBs must be ready to use electronic communication exclusively at the date of adoption; the phases for electronic notification and access to documents are made mandatory at the same point) and signals clearly to the markets and stakeholders the future direction.

## **7. MONITORING AND EVALUATION**

There are already certain obligations on Member States to provide annual statistical reports which are linked to their international obligations under the GPA. The quality and consistency of these reports has been improving over the last few years, but these obligations not provide all the information that would be needed to monitor closely the performance of EU public procurement markets. The Services of the Commission generate a certain number of indicators, derived from data provided to Eurostat and

from data contained in the procurement notices published in OJ/TED<sup>97</sup>. However it is often necessary to supplement this data.

In the recent evaluation of the Directives it was necessary to conduct a number of surveys, studies and interviews in order to provide sufficient data to allow detailed analysis of the extent to which the legislation was meeting its objectives<sup>98</sup>. Additional information about bidders was important to analyse the cross border activity and access of firms by size. In particular, it has proved useful to examine the how the Directives have been implemented by MS, not simply in terms of transposition, but to see how the different administrative structure and arrangements for procurement below and outside the scope of the Directives had affected the way in which goods and services were acquired in different MS.

Since the costs of collecting some of this information could involve an additional burden on CAEs, firms or Member States the detailed requirements may need to be investigated in more detail and combined with the data collection needs of Member States. If the preferred governance solutions were to be adopted, there would be clearer responsibility for conducting monitoring at Member States level and designated bodies which would interact with Commission Services to identify and define the content of annual performance reports. This should ensure greater consistency in reporting and enable a clear EU overview of progress, allowing a timely identification of potential problem areas. Such obligations could be further clarified and formalised through future implementing measures.

Areas for further consideration would include developing statistics and monitoring methodologies to appraise consistently and with the appropriate periodicity areas such as:

- The cost of conducting public procurement according to the EU rules, covering the costs for both CAEs and firms, including further measurement of administrative burdens;
- Integration and cross-border participation in procurement;
- The use and savings/costs associated with switching to e-procurement;
- The approaches, use and associated savings/costs of procedures which aim to integrate wider policy objectives into public procurement.

A commitment to evaluating the impacts of any new legislation, if proposed, would be included in the draft text.

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<sup>97</sup> See: sections 8.2.1 - 8.2.3.  
<sup>98</sup> See: the Evaluation Report.

## **8. ANNEXES**

### **8.1. ANNEX 1 – Procedural issues**

#### *8.1.1. Inter-service steering group*

List of Directorate Generals participating in the inter-service steering group:

- Directorate General Internal Market and Services,
- Secretariat General,
- Directorate General Regional Policy,
- Directorate General Economic and Financial Affairs,
- Directorate General Information Society and Media,
- Directorate General Environment,
- Directorate General for Employment, Social Affairs and Inclusion,
- European Commission European Anti-fraud Office (OLAF),
- Directorate General Competition,
- Directorate General Budget,
- Directorate General Energy,
- Legal Service,
- Directorate General Mobility and Transport,
- Directorate General Enterprise and Industry,
- Directorate General Trade,
- Directorate General Justice,
- Directorate General Home Affairs
- Directorate General Climate Action.

The Group met four times:

- 4 February 2011
- 10 April 2011
- 17 June 2011

- 26 July 2011

The minutes of meeting on 26.07.11 (where the draft Impact Assessment report circulated on 15.07.11 was discussed) are sent to the IAB in a separate document.

### 8.1.2. *External expertise*

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- EU Project on baseline measurement and reduction of administrative costs; *Final Report-Measurement data and analysis as specified in the specific contracts 5&6 on Modules 3&4 under the Framework Contract n° ENTR/ 06/61; Report on the Public Procurement Priority Area*, March 2009
- PricewaterhouseCoopers, London Economics and Ecorys (2011), *Public Procurement in Europe – Procedures and techniques – A study on the cost and*

effectiveness of procurement regulation, London 2011; available at: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/cost-effectiveness\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cost-effectiveness_en.pdf)

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- Rambøll (2007) DG Internal Market: Improving and automating the collection of statistical data concerning public procurement in Belgium, Denmark, France, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Spain and the UK, 2007; available at: <http://www.portal-vz.cz/Uploads/Mezinarodni-spoluprace/Improving-and-automatingthe-collection-of-statist>
- Rambøll (2011), Cross-border procurement above EU thresholds, May 2011; available at: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/cross-border-procurement\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf)

### 8.1.3. *Public consultations*

#### 8.1.3.1. The GP on the modernisation of EU public procurement policy

On 27 January 2011, the European Commission launched a public consultation on modernisation. The Commission services received 621 contributions. The consultation document, associated papers, synthesis report of the responses and the non-confidential contributions can be consulted on the Commission's website under the heading "Consultation on the modernisation of EU public procurement policy" ([http://ec.europa.eu/internal\\_market/publicprocurement/modernising\\_rules/consultations/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/consultations/index_en.htm)).

#### 8.1.3.2. The e-procurement GP

On 18 October 2010, the European Commission launched a consultation on the Green Paper on expanding the use of e-Procurement in the EU. The consultation contained fifteen questions. In all, 77 responses were received. These were provided by stakeholders in 21 MS, 12 European Organisations, 3 International Organisations and 1 EFTA State (Norway). 80% of the responses come from the two main user groups of e-Procurement: public authorities (48%) and businesses (32%).

The responses authorised for publication can be found at: [http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement/consultations/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement/consultations/index_en.htm)



## 8.2. ANNEX 2 – Additional information related to Section 2.2. Background

### 8.2.1. Total expenditure on works, goods and services

Table 17): Total expenditure on works, goods and services in 2005-2009 in billion € by EU MS

	2005	2006	2007	2008	2009
Belgium	49,75	46,94	48,67	51,95	55,91
Bulgaria	n/a	n/a	4,72	5,67	6,41
Czech Republic	20,39	30,21	32,14	37,54	36,50
Denmark	29,61	32,08	33,79	35,47	39,17
Germany	362,11	375,61	399,05	419,26	461,84
Estonia	2,10	2,27	2,67	2,92	2,60
Ireland	19,79	22,13	26,09	27,80	27,56
Greece	18,72	20,23	22,67	22,84	26,28
Spain	126,88	142,49	160,84	164,50	194,96
France	303,30	315,63	328,90	342,14	367,27
Italy	204,49	212,99	215,12	221,49	241,15
Cyprus	1,53	1,73	1,65	1,80	1,91
Latvia	2,11	2,68	3,38	3,62	3,15
Lithuania	2,81	3,98	5,05	5,62	4,69
Luxembourg	4,16	4,48	5,01	5,41	5,90
Hungary	16,33	19,41	21,98	21,09	20,77
Malta	0,76	0,76	0,76	0,87	0,80
Netherlands	123,65	136,92	146,20	156,09	176,85
Austria	45,35	44,46	49,45	54,81	60,89
Poland	39,03	50,33	56,66	67,65	56,43
Portugal	23,18	24,00	27,10	29,21	32,17
Romania	n/a	n/a	27,18	27,89	27,72

	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Slovenia	4,08	6,03	5,22	5,80	6,04
Slovakia	8,77	11,36	13,98	15,89	13,96
Finland	25,27	26,75	28,89	31,54	33,32
Sweden	51,32	55,43	59,08	60,74	59,28
United Kingdom	316,75	356,90	365,40	344,89	324,91
<b>Total EU 27</b>	<b>1 802,23</b>	<b>1 945,80</b>	<b>2 091,63</b>	<b>2 164,47</b>	<b>2 288,44</b>

Source: DG MARKT estimates

### 8.2.2. *The estimated value of tenders published in TED*

**Table 18): The estimated value of tenders published in TED in 2005-2009 in billion € by EU MS**

	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Belgium	6,94	7,65	10,56	12,35	13,53
Bulgaria	n/a	n/a	2,45	2,96	4,14
Czech Republic	2,68	5,86	5,21	7,90	7,11
Denmark	4,60	6,49	7,31	6,92	8,83
Germany	36,10	38,39	27,07	29,65	34,14
Estonia	0,79	0,97	1,13	1,32	1,15
Ireland	4,19	5,78	6,37	4,48	3,52
Greece	9,49	11,81	7,98	6,64	8,70
Spain	39,10	41,17	42,97	39,28	35,45
France	51,44	62,23	63,96	71,86	73,11
Italy	38,19	44,86	35,50	36,32	38,67
Cyprus	0,48	0,64	0,81	0,81	1,41
Latvia	1,27	2,22	2,61	2,21	1,59
Lithuania	0,74	1,16	1,20	1,17	1,29
Luxembourg	0,74	0,47	0,45	0,51	0,57

	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Hungary	6,02	6,14	4,57	5,45	5,86
Malta	0,05	0,09	0,11	0,07	0,40
Netherlands	8,23	12,44	10,19	11,13	11,60
Austria	4,86	4,31	4,55	6,86	6,40
Poland	18,63	14,24	18,13	25,95	25,54
Portugal	3,19	2,97	2,90	4,33	5,75
Romania	n/a	n/a	9,12	10,29	7,56
Slovenia	0,91	1,56	2,26	1,90	2,12
Slovakia	2,43	1,36	1,97	2,41	4,31
Finland	5,17	5,10	6,39	7,30	8,36
Sweden	9,41	9,62	10,24	11,82	12,43
United Kingdom	64,21	89,52	81,19	80,55	96,89
<b>Total EU 27</b>	<b>319,87</b>	<b>377,06</b>	<b>367,20</b>	<b>392,42</b>	<b>420,44</b>

Source: DG MARKT estimates based on OJ/TED data

### 8.2.3. Number of contract notices and contract award notices published in OJ/TED

**Table 19): Number of contract notices and contract award notices published in OJ/TED in 2005-2010 by EU MS**

	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Contract notices (CN)	126 897	133 147	142 025	150 282	153 783	161 733
Contract award notices (CAN)	77 813	88 915	115 738	127 347	138 021	143 782

Source: DG MARKT estimates based on OJ/TED data

### 8.2.4. Legal detail - overview of public procurement legislation

The Treaty on the Functioning of the European Union (TFEU), drawing on earlier treaties, lays down fundamental and general principles applicable to contracting

authorities in the context of public procurement<sup>99</sup>. However it was decided, that on their own, these prohibitions were not sufficient to establish a single market in this area. Differences between national rules and the absence of requirements to open up contracts to EU-wide competition often resulted in national markets being closed to foreign competitors. Secondary legislation was therefore needed to ensure this openness, as well as to make procedures more transparent. Since 1971, several Directives have been adopted to supplement the general provisions of the Treaty, based on three main principles:

- Community-wide advertising to foster cross-border competition;
- The prohibition of technical specifications liable to discriminate against potential foreign bidders; and
- Application of objective criteria for evaluation and award of public contracts.

Over the years new Directives were adopted both to expand the coverage of the Directives (eventually to works, supplies and services) and to exclude certain sectors (e.g. transport, energy, water and telecommunications). Other changes were necessary to integrate requirements related to GATT/WTO agreements and to address deficiencies of earlier legislation, such as national markets which were still not sufficiently open. The first Utilities Directive (90/531/EEC), in 1990 was based on the same principles as the previous Directives, and introduced a higher degree of flexibility for contracting entities. In April 2004 the Council adopted Directives 2004/18/EC and 2004/17/EC which replaced the previous Directives. They were intended to modernise and simplify public procurement procedures, and recognised for the first time in EU procurement law, the possibility of using electronic procedures. To ensure the rights given to firms by the EU-rules were observed everywhere in the EU, the first Remedies Directive (89/665/EEC) was introduced in 1989<sup>100</sup>. The Defence Directive was introduced in 2009 to cover the procurement of arms, munitions and war material for defence purposes<sup>101</sup>. The EU is also party to a range of international agreements, most importantly, the GPA<sup>102</sup>. In view of the

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<sup>99</sup> The provisions of the economic freedoms ban discriminatory measures and unfair treatment on grounds of nationality, in order to promote the internal market objective of removing barriers to trade and economic flows within the EU. The general ban on discrimination allows some flexibility in relation to security, health, environmental and consumer protection justifications, under certain conditions.

<sup>100</sup> The current Remedies Directive is 2007/66/EC. It gives all economic operators access to procedures to seek redress if they consider a contract has been unfairly awarded.

<sup>101</sup> Directive 2009/81/EC covers the rules for the procurement of arms, munitions and war material (plus related works and services) for defence purposes. As a result some procurement will continue to be excluded from the scope of all public procurement legislation pursuant to (the narrowly construed) Article 346 TFEU, but much will fall within the scope of the Defence Directive. Contracts awarded in the field of defence not involving military or sensitive equipment are subject to Directive 2004/18/EC.

<sup>102</sup> To date the GPA is the only legally binding agreement in the WTO focusing on the subject of government procurement. The version dates from the 1994 Uruguay Round and entered into force on 1 January 1996. It is a pluri-lateral treaty covering the WTO Members that are parties to the GPA, and thus have rights and obligations under the Agreement.

international rights and commitments devolving on the EU as a result of the acceptance of the GPA, CAEs must apply the provisions of this Agreement<sup>103</sup>.

Public procurement legislation is supplemented and complimented by rulings by the European Court of Justice (ECJ).

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<sup>103</sup> Council Decision 94/800/EC (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ L336, 23.12.1994, p.1.

Table 20): Overview of the main developments of secondary legislation

Directive	Who	What, from which threshold	Comments
<b>71/305/EEC</b>	Public sector	Works contracts, €1 million	Works concessions not covered, transport, water and energy sectors excluded
<b>77/62/EEC</b>	Public sector	Supplies contracts, €200,000	transport, water, energy and telecommunications sectors excluded
<b>80/767/EEC</b>	Public sector, central state authorities	Supplies contracts, €140,000	Amending Directive 77/62/EEC; mainly because of the 1979 GATT Agreement on Government procurement; transport, water, energy and telecommunications sectors excluded
<b>88/295/EEC</b>	Public sector	Supplies contracts, €130,000 (for central state authorities), otherwise €200,000	Amending Directive 77/62/EEC; i.a. because of the 1986 GATT Agreement on Government procurement; transport, water, energy and telecommunications sectors excluded
<b>89/440/EEC</b>	Public sector	Works contracts, works concessions contracts, works contracts awarded by concessionaires, subsidised works contracts, € 5,000,000	Amending Directive 71/305/EEC; Definition of contracting authorities broadened (bodies governed by public law), definition of works contracts broadened (execution and design, ... or the execution by whatever means ...) transport, water and energy sectors excluded
<b>90/531/EEC</b>	Utilities (water, energy, transport and telecommunications sectors)	Works and supplies contracts, € 5,000,000 for works, €400,000 – 600,000 for supplies	Works concessions contracts not covered, very broad definition of special or exclusive rights

Directive	Who	What, from which threshold	Comments
<b>92/50/EEC</b>	Public sector	Service contracts, subsidised contracts, design contests € 200,000	Two tier system, service concessions excluded; water, energy, transport and telecommunications sectors excluded.
<b>93/36/EEC</b>	Public sector	Supplies contracts, € 130,000 – 200,000 (central state authorities, others)	Codified Directive 77/62/EEC and its subsequent amendments and introduced substantial changes; Definition of contracting authority broadened (body governed by public law), water, energy, transport and telecommunications sectors excluded.
<b>93/37/EEC</b>	Public sector	Works contracts, works concessions contracts, works contracts awarded by concessionaires, subsidised works contracts, € 5,000,000	Purely a codification of Directive 71/305/EEC and its subsequent amendments; See remarks to 89/440/EC. Water, energy, transport and telecommunications sectors excluded.
<b>93/38/EEC</b>	Utilities (water, energy, transport and telecommunications sectors)	Works contracts, supplies contracts services contracts, design contests, € 5,000,000 for works, € 400,000 – 600,000 for supplies and services	Codification of Directive 90/531/EEC with the new provisions concerning service contracts; Two tier system for services, works and service concessions contracts not covered, very broad definition of special or exclusive rights
<b>97/52/EC &amp; 98/4/EC</b>	Public sector and Utilities	Changes to previous thresholds. € 5,000,000 / SDR 5,000,000 for works, SDR 130,000 - €600,000 for supplies and services contracts	Directive 97/52/EC amended Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, while Directive 98/4/EC amended Directive 93/38/EEC; mainly because of the 1994 WTO Agreement on Government procurement;

<b>Directive</b>	<b>Who</b>	<b>What, from which threshold</b>	<b>Comments</b>
<b>2004/17/EC</b>	Utilities (Water, energy, transport and postal sectors)	Works, supplies and services contracts, design contests, currently: € 4,845,000 for works contracts, € 387,000 for supplies and services.	Replaced Directive 93/38/EEC with its subsequent modifications; Two tier system for services, works and service concessions contracts not covered, narrower but refocused definition of special and exclusive rights. Postal sector added, telecommunications sector excluded. Provisions on e-procurement included.
<b>2004/18/EC</b>	Public sector	Works, supplies and services contracts, works concessions contracts, works contracts awarded by concessionaires, subsidised works and services contracts, design contests, currently € 4,845,000 for works contracts and works concessions, € 125,000 – 193,000 for supplies and services contracts	Replaced Directives 92/50/EEC, 93/36/EEC and 93/37/EEC with subsequent modifications; Two tier system for services, service concessions contracts not covered. Water, energy, transport, telecommunications and postal sectors excluded; Provisions on e-procurement included.



### 8.3. ANNEX 3 - Detailed description of problem drivers

#### 8.3.1. Problem drivers in Scope and coverage

##### PROBLEM DRIVER: Complexity of the rules on scope and coverage

Both contracting authorities and firms find that the current rules defining who and what is included and excluded from the scope and coverage of EU public procurement rules are too complex. At present, a detailed set of conditions need to be examined to decide whether a particular buyer or a particular transaction is covered. Depending on the individual procurement, basic treaty principles, part or all of the obligations stemming from the Directives may need to be applied. Often the jurisprudence of the ECJ also needs to be consulted as clarifications have been sought in relation to particular definitions e.g. "body governed by public law", "public undertaking"<sup>104</sup> and what constitutes a "public contract"<sup>105</sup>. The actual rules which apply depend on the type of purchaser, the actual purchase and its value. There are at least 10 possible "choices" based on the application of various threshold levels (see: Tables 13) and 14) below).

**Table 21): Rules for the determination of the applicable thresholds – basic thresholds types**

Applies to	Amount in [€.000]			
	125	193	387	4 845
All works contracts, all subsidised works contracts, all works concessions, all works contracts awarded by concessionaires				X
Supplies and service contracts awarded by Utilities; design contests organised by Utilities, supplies and services contracts falling within the scope of the Defence Directive			X	
Supplies and services contracts awarded by "sub-central" contracting authorities, subsidised service contracts, design contests organised by sub-central contracting authorities; all contracts and design contests concerning the services listed in Annex II B of Directive 2004/18/EEC; service contracts (and design contests) concerning certain telecommunications services and R&D services awarded by central government contracting authorities; supplies not listed in Annex V of Directive 2004/18/EC and awarded by contracting authorities operating in the field of defence.		X		

<sup>104</sup> See: judgement of 10.04.2008 in case C-393/06, Ing Aigner, [2008] ECR, I -2339.

<sup>105</sup> The current definition in the Directives of a public contract has been supplemented and completed by a number of important ECJ judgements e.g. Commission vs. Germany (C-126/03), Donau-Wald case (C-126/03) or Helmut Müller (C-451/08) and 15.07.10 Commission vs. Germany. This means that there is no longer one clear source of information for CAEs.

Applies to	Amount in [€.000]			
	125	193	387	4 845
All service contracts and design contests organised by central government authorities concerning services listed in Annex II A (except certain telecommunications services and R&D services); all supplies contracts awarded by central government authorities not operating in the field of defence; supplies contracts awarded by contracting authorities operating in the field of defence and concerning the products listed in Annex V of Directive 2004/18/EC	X			

Table 22): Rules for the determination of the applicable thresholds – grouped by the Directives, actors and transactions

Directive 2004/17/EC	All contracting entities, all sectors	Works contracts	€ 4,845,000	
		All supplies and services contracts, all design contests	€ 387,000	
Directive 2004/18/EC	Central Government authorities	Works contracts, works concessions contracts, subsidised works contracts	€ 4,845,000	
		All contracts concerning services listed in Annex II B, certain telecommunications services and R&D services; all design contests concerning these services and all subsidised services,	€ 193,000	
		All contracts and design contests concerning services listed in Annex II A <i>except</i> contracts and design contests concerning certain telecommunications services and R&D services	€ 125,000	
		All supplies contracts awarded by contracting authorities <i>not</i> operating in the field of defence	€ 125,000	
	Supplies contracts awarded by contracting authorities operating in the field of defence	Concerning products listed in Annex V	€ 125,000	
		Concerning other products	€ 193,000	
	Sub-central contracting authorities	Works contracts, works concessions contracts, subsidised works contracts	€ 4,845,000	
All service contracts, all design contests, subsidised service contracts, all supplies contracts		€ 193,000		

Since many public authorities do not launch such large contracts every year, they do not have the necessary knowledge or familiarity with these EU rules "at their finger tips".

#### 8.3.1.1. Identification of buyers covered

With very few exceptions, the first step in deciding whether the Directives apply or not, is to decide whether the procurement is being carried out by a relevant body (or on its behalf). For example, under the Classic Directive, purchases are generally made by bodies belonging to the public sector ("contracting authorities"). Concepts such as "State" and "local and regional authorities" are generally understood, but the definition of public sector also includes "bodies governed by public law"- a concept which has proved the source of some confusion and has resulted in a whole series of judgments by the ECJ<sup>106</sup>. The Utilities Directive applies to a wider group of purchasers, known as "contracting entities". This group includes not just the "contracting authorities", but also public undertakings and private undertakings, provided these latter exercise one of the relevant activities<sup>107</sup> on the basis of an exclusive or special right. In this context also there appear to be some confusions between the concept of "body governed by public law "and public undertaking", which was addressed by recent ECJ case law<sup>108</sup>. In approximately 30% of the contract notices published on OJ/TED, a CAE classifies itself as "other", reflecting either their confusion, or a potential desire to (knowingly) apply a more favourable (but incorrect) regime. This initial classification is critical to identifying which particular provisions of the Directives apply. Random checking conducted as part of the evaluation also identified a misclassification rate of around 5%.

A majority of respondents to the GP finds that the current approach to defining public procurers is appropriate; some legal experts, civil society organisations and public authorities would support some changes in this respect.<sup>109</sup> They also feel that the EU rules should be limited to actual purchases by CAEs.

#### 8.3.1.2. Identification of transactions covered

Another set of problems stems from the correct identification of transactions or activities that are covered by the procurement rules. Generally, the Directives are applicable if the envisaged arrangement constitutes a "public contract"<sup>110</sup>. Again, the current definition in the Directives of a public contract has been supplemented and

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<sup>106</sup> The proper application of the elements stated in the jurisprudence requires a detailed case-by-case analysis, taking into account factors such as the degree of competition in the marketplace and the question of whether the body is acting for profit and bears the losses and risks associated with its activity.

<sup>107</sup> I.e. the procurement concerned is made for the pursuit of activity in the water, energy, transport and the postal sectors.

<sup>108</sup> See: judgement of 10.04.2008 in case C-393/06, Ing Aigner,[2008]ECR, I -2339.

<sup>109</sup> Replies to question 9 to the GP.

<sup>110</sup> That is, "*contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services*". The concept of concessions has been the subject of separate initiative (i.e. concessions impact assessment).

completed by a number of important ECJ judgements<sup>111</sup> for example Commission vs. Germany, Donau-Wald case<sup>112</sup> or Helmut Müller case<sup>113</sup> meaning that there is no longer one clear source of information for CAEs.

Under the current legislation, the category of purchaser together with the type and value of the items being bought determine which procurement rules apply. Basically, the current Directives apply to the award of works, supplies and service contracts, whose estimated value, before V.A.T. equals or exceeds the relevant threshold<sup>114</sup>. Different thresholds apply according to the purchaser (i.e. central or sub-central contracting authorities or contracting entities) and the subject matter (goods, works or services). Many stakeholders call for the threshold values to be increased, thereby simplifying the process for CAE and enterprises by removing a number of transactions from the scope/application of the Directives. They also question why the thresholds for defence and utilities are higher (for supplies and services) than for purchases covered by the Classic Directive and/or why inflation has not been taken into account (the current thresholds date from the 1994 GPA). On the other hand, a limited number of stakeholders find the current "two-tier" system (where some procurement is subject to detailed EU rules and the remainder to EU treaty principles) as unnecessary complicated. For example, many developers of e-procurement platforms want to create one system which is used for all purchases – above and below thresholds.

#### 8.3.1.3. A/B-type services

Further complexity results from the different rules applicable to service contracts, (the so called A and B-type services)<sup>115</sup>. Recent research, comparing the Common Procurement Vocabulary (CPV) codes entered by a CAE against the A/B services classification which it also provides, identifies many errors and results in the wrong rules being applied. About 7% of transactions reported as A-type services had CPV codes that matched the B-type definition and 5% of notices reported as B-type had CPV codes matching A-type services (see: Figure 7). The latter example raises more concern, as it indicates contracts which should have followed the "full" procurement rules rather than the "simplified" regime. Given that on average €160 billion per annum are spent via service contracts (around 38% of the total EU public procurement market), these errors could be having a significant impact. Approximately 74% of services contracts value refers to A-type group.

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<sup>111</sup> Whereby it was clarified that the concept of public contract requires the works, supplies and services which are the subject of the contract are carried out for the immediate benefit of the contracting authority.

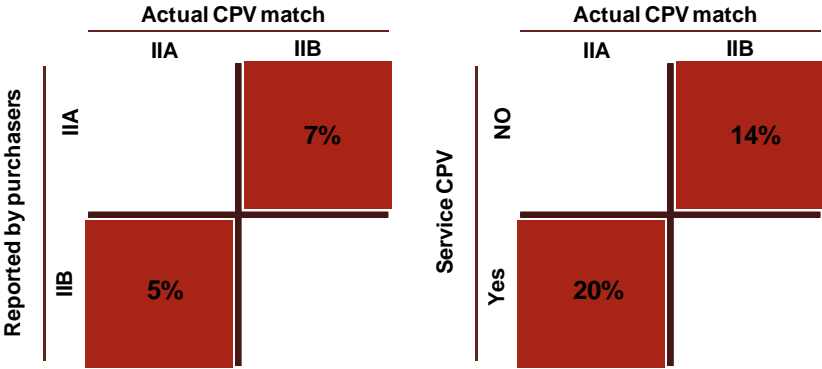
<sup>112</sup> See: judgment of 18.11.2004 in Case C-126/03 Commission v Germany, paragraph 18.

<sup>113</sup> See: judgments of 25.3.2010 in Case C-451/08 Helmut Müller GmbH, paragraphs 47-54, and of 15 July 2010 Commission v Germany, paragraph 75.

<sup>114</sup> The thresholds are revised each two years. The current thresholds, applicable for the next two years as of 1.1.2010 and established through Commission Regulation (EC) N°1177/2009 reach from € 4 845 000 for works contracts to €125,000, €193,000 and €387,000 for supplies and services.

<sup>115</sup> When procuring A-type services, all procedural rules have to be taken into account, as well as Treaty principles. These rules support the entire procurement process from the content of a call for tenders through the selection of the procurement procedure to the contract award for both contracting authorities and economic operators. For B-type services the process has been "simplified" –the only requirements which must be met are the provision of: a CAN (and which the CAE can indicate whether it may or may not be published in OJ/TED); and technical specifications.

**Figure 7): Share of services by classification (left-hand side graph) and the share of "category 27" services by classification (right-hand side graph)**



Source: PwC study

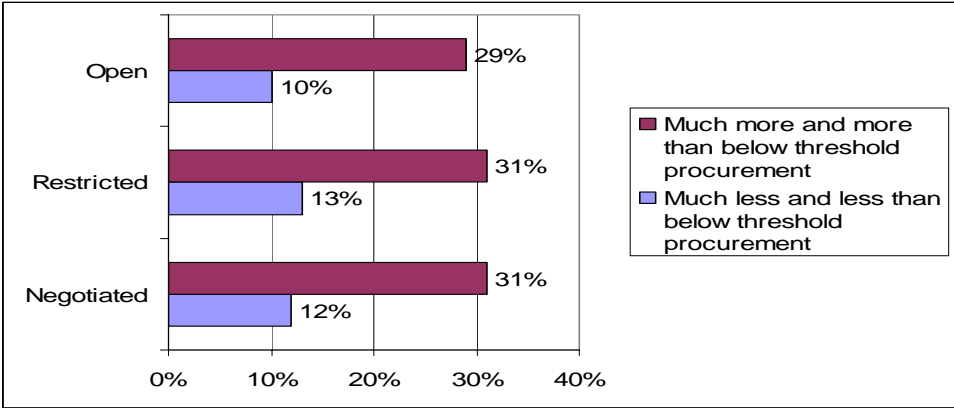
Category 27 within B-type services is even more prone to misclassification – as much as 20% of notices in this category had CPV codes that refer to A-types services. There is also some evidence that the A/B lists may not be capturing the correct services. When this split was made, the A list included services where it was felt that a certain degree of cross-border trade could be expected; the B list were assumed to be less open to cross-border purchasing. However the evaluation found that some of the services on the B list exhibit a high degree of cross-border trade and vice versa. Replies to the GP consultation did not indicate a clear consensus about how the distinction between A/B services should be handled, although overall a slight majority felt it should be reviewed.

8.3.1.4. Legal uncertainty

This complexity is one source of the legal uncertainty identified by many stakeholders. It represents the perceived risk of complaints and litigation among public purchasers and firms<sup>116</sup>.

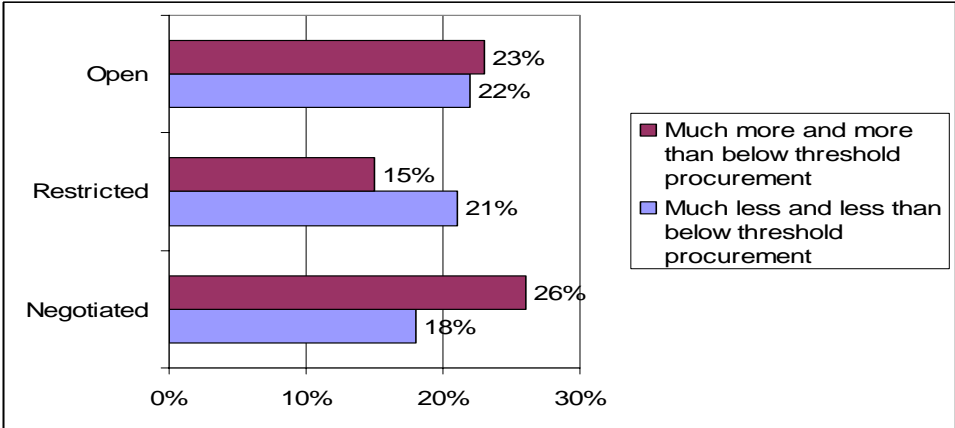
<sup>116</sup> Based on a survey among 5,500 CAEs (who have recently carried out public procurement process above EU threshold that ended up in a valid contract award published on OJ/TED) and 1,800 firms (who have recently won a procurement contract above EU thresholds), source: PwC study, page 117.

**Figure 8): Perceived risk of complaints and litigation among public purchasers (compared – above EU threshold public procurement versus below EU threshold public procurement)**



Source: PwC study

**Figure 9): Perceived risk of complaints and litigation among firms (compared – above EU threshold public procurement versus below EU threshold public procurement)**



Source: PwC study

Such legal uncertainty translates, on the part of many CAEs, into a fear of making errors during the public procurement process and as a result, being subject to litigation. This fear of litigation can then generate additional transaction costs to cover general legal assistance and advice throughout the procurement process, as well as, in the case where litigation occurs, assistance in court proceedings. The costs associated with pre-empting or addressing litigation are important elements in the calculation of cost efficiency of procurement. A recent survey<sup>117</sup>, estimates that around 25% of the purchasers responding incurred some litigation costs when concluding contracts with values above the EU thresholds. On average, this 25% reported that eight person-days of costs were assigned to what can be classified as litigation and the cost of complaints. This implies an average for the full population

<sup>117</sup> See: PwC study, page 80.

of government authorities of around 2.6 person-days per transaction or about 350.000 person-days annually across Europe for managing complaints and litigation<sup>118</sup>.

As a result, CAEs may adopt a risk averse approach, preferring to follow the full (more costly) procedures rather than a potentially simpler regime which should apply, in order to avoid the risk of future problems e.g. an enterprise which challenges the use of the simplified regime – even if the CAE is sure that it has followed the right procedure, it can still be costly and time consuming to reply to the challenge of the enterprise. The above estimate of cost of litigation (in terms of time spent) and the possible additional costs incurred by following the “safer” procedure leads to questions about how appropriate, proportional and cost-effective the current design and definition of the scope and coverage of the EU public procurement rules is.

#### 8.3.1.5. Conclusions

To summarise, the current rules are complex and not always available in one place, leading to legal uncertainty on the scope and coverage of the Directives, particularly for CAE. The correct identification of actors and transactions covered by the EU rules might be beyond the capacities of many purchasers, particularly if they do not need to apply these rules frequently e.g. smaller local authorities. The current lack of clarity with regards of the scope of the Directives has resulted in a number of legal cases and judgments in this area. As a result, high-level legal analysis can be necessary to define the scope of the Directives and the correct application of those rules (especially in border-line cases). Legal uncertainty generated by the current rules also leads to additional costs of legal assistance and might result in risk averse behaviours of CAEs to avoid litigation.

#### 8.3.2. *Problem drivers in Procedures*

##### PROBLEM DRIVER: Disproportionate and inflexible procedures

Stakeholders frequently raise issues about the disproportionate nature of procedures / processes that need to be followed in order to procure works, goods or services by public authorities. They complain that public procurement costs too much, both in the time it takes and the resources it uses. In a recent survey, respondents were asked to compare public and private purchasing. 57% of firms concluding contracts following the most used procedure (the open procedure) found that it was cheaper or much cheaper to sell to the private sector, compared to 17%, who thought the opposite; 59% agreed that the private sector process is less or much less time consuming, compared with 18% who found private procurement to be more or much more expensive. Similar results were found for the other procedures – negotiated and restricted<sup>119</sup>.

<sup>118</sup> See: PwC study, page 80.

<sup>119</sup> See: section 8.8.2.

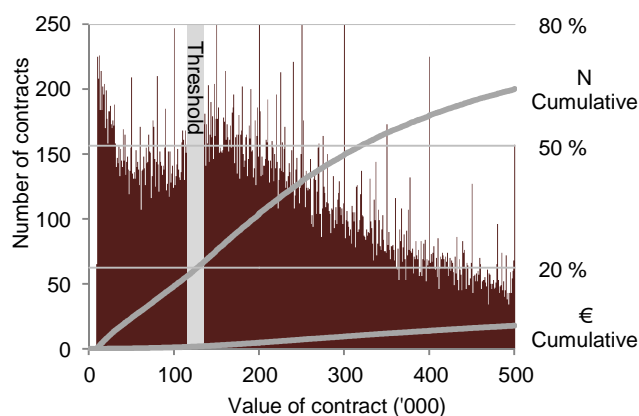
### 8.3.2.1. Disproportionate costs of procedures for low value contracts

The typical procurement procedure costs for all participants can be estimated at nearly €28,000<sup>120</sup>. This cost is split between CAEs, who typically pay €5,500 per call for tender launched) and firms, which pay €3,800 per offer submitted<sup>121</sup>. The total cost for all procedures covered by the threshold is some €5.6 billion per annum or 1.3% of the total value of contracts published<sup>122</sup>.

The cost of the procurement process can, particularly for contracts nearer the lower thresholds, account for quite a high percentage of the total value of a contract. Currently many transactions having values below thresholds are published in OJ/TED, meaning that most probably many CAEs follow EU rules and publish notices in OJ/TED although they are not obliged to do so. This implies that significant and potentially disproportionate costs of following above threshold procedures are being incurred by these CAEs either voluntarily or in order to avoid the possibility of falling foul of the rules if by any chance the contract turned out to exceed the relevant threshold.

As seen on Figure 10), 18 % of supplies and services contracts concluded by central government are below € 125,000 euro threshold. The total value of the contracts below threshold is minimal, only accounting for half a percentage of the total values for all contracts in the threshold category. In the range above the threshold level, the number of contracts accumulates quickly while the values accumulate much more slowly. Two thirds of all central government services/supplies contracts under the scope of the threshold are below the € 500,000 level. The total value is much less, in total only 10 % is found at that level.

**Figure 10): Supply and service contracts published by central authorities**



Source: PwC study

<sup>120</sup> To arrive at the above mentioned total cost of €28,000, the cost borne by businesses need to be multiplied by the number of bids submitted per procedure (a weighted average of 5.9 bids per procedure).

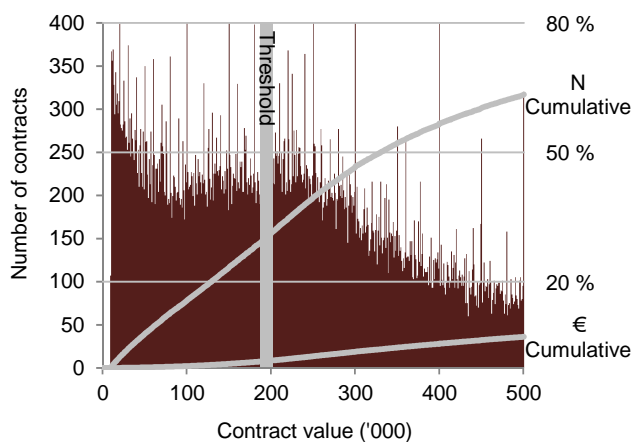
<sup>121</sup> PwC study, page 88.

<sup>122</sup> PwC study, page 89.



In the sub-central threshold category nearly 30 % of contracts recorded have values below the threshold (see: Figure 10).

**Figure 11): Supply and service contracts published by sub-central authorities**

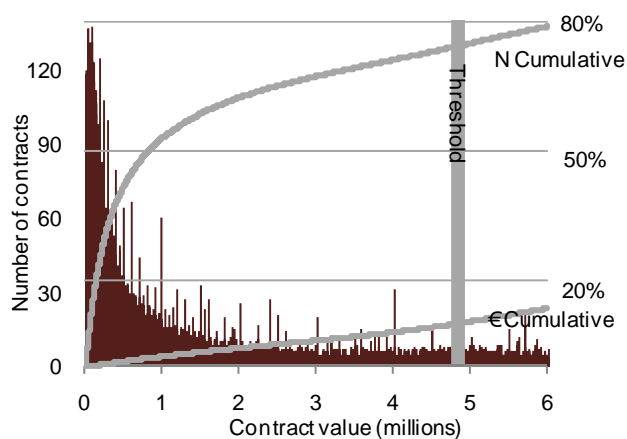


Source: Pwc study

The cumulative value of these is about 1.6% (2.2% for open procedure). The accumulation of contracts and values match very closely the central government patterns.

Whereas the works threshold is concerned, as much as 70% of works contracts concluded are below € 4.85 million (see: Figure 12).

**Figure 12): Works contracts (by all types of authorities)**



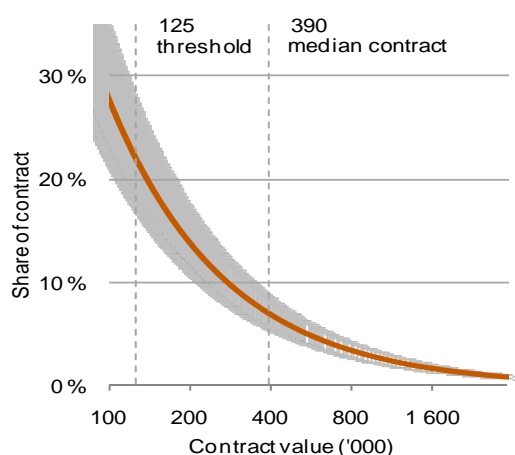
Source: Pwc study

The above data confirm that many below threshold contracts are published in OJ/TED. This may be due to the fact that many CAEs “voluntarily” publish notices at the EU level. Whilst some of these contracts are published in compliance with EU provisions stating that individual contracts which form part of a larger project must be published if the sum total exceeds the appropriate threshold, this does not fully explain the phenomenon.

There is some evidence that CAEs publish CNs with no cross-border interest, as they find OJ/TED to be a well-functioning, toll-free portal that is regularly accessed and monitored by their domestic firms (especially, if no similar platform exist at the national level). Finally, some CAEs presumably follow the EU rules because of a lack of knowledge and misunderstanding of what is and is not covered by the Directives.

For these smaller value contracts, the cost of following the rules set out in the Directives constitutes a significant proportion of the contract value itself. At the lowest threshold in the Directives, € 125'000, total costs of purchase can amount to between 18 and 29 % of the contract value. At € 390'000, the median contract value, costs reach between 6 and 9 %. Although the cost for each participant is lower than this total (about 1/6), these shares are significant.

**Figure 13): Total procurement cost (CAE and firms) as share of contract values (HiLo estimates)**



Source: PwC study

These findings are clearly influenced by the fact that many of the contracts published are well below EU threshold. This may occur for a variety of reasons, a positive example being the case where as a result of the competition from following the Directives, the final price is reduced to a point below the original estimate, which was above the EU thresholds. However, as mentioned above, it may also be the case that uncertainty about what rules to apply, linked also to a fear of litigation, causing a CAE to follow the stricter rules required under the Directives. Some contracts are also published individually, but which form part of one single project where the total costs is higher than the thresholds<sup>123</sup>. Nonetheless, the above mentioned costs of procedure and their share in the total final value of the contract concerned mean that for the low-value contracts these costs seem to be disproportionate.

### 8.3.2.2. Complexity of the rules on procedures

Despite the savings identified by various studies and the changes introduced in 2004, there are some calls for the current legislation to be further reviewed and simplified.

<sup>123</sup> See: article 9 of Directive 2004/18/EC.

In 2009<sup>124</sup>, the High Level Group investigating administrative burden concluded that this burden accounted for €216 million of the €234 million identified as the total administrative costs resulting from EU public procurement rules (i.e. over 92%).

A broad majority of respondents to the GP consider that the procurement rules are too detailed, although most MS and business representatives disagreed with this opinion. This difference is not so surprising when one considers that it is essentially CAEs, rather than firms, which have to understand and follow the rules, while MS representatives will often be those who have drafted the appropriate legislation in the first place. The perceived complexity is usually driven the detailed character of rules defining the procedures (for example, the technical specifications, strict division between the selection and award stage of the evaluation, etc.).

Similarly to the legal uncertainty referred to in Scope, uncertainty with regards to procedures results in fear of litigation that might lead to sup-optimal (risk averse) choices being made by authorities in order to avoid litigation. This perception is widely shared among stakeholders although the available evidence in this respect is rather anecdotal. For example, in a recent survey run by the Local Government Association in the UK, the fear of litigation is identified as one of the most common themes, with respondents stating for example: "*the biggest fear facing my own staff is always regarding the risk of legal challenge [...]. This fear leads to cautious, risk averse procurement procedures that stifle innovation and the chance to deliver cashable savings*"<sup>125</sup>

### 8.3.2.3. Insufficient flexibility

The current rules are also accused of lacking flexibility and preventing CAE from achieving the best possible outcomes; in particular many respondents to the GP call for more flexibility in the conduct of the procedure<sup>126</sup>. Initiatives where more flexibility could be permitted include: the opportunity to negotiate with bidders and the setting of time-limits; the organisation and sequence for examining selection and award criteria; allowing CAEs, in exceptional circumstances, to take account of criteria pertaining to the bidder himself; and more generally to take into account previous experience with one or several bidders. In particular, contracting authorities operating under the framework of the Classic Directive complain that their ability to negotiate with enterprises is too limited and ask for more flexibility<sup>127</sup> – or at least the same flexibility permitted by the Utilities directive.

Data from the last five years show growing use of the competitive dialogue (a procedure which permits negotiation both on the substance of the contract and the content of a bidder's reply) which was introduced in 2004. Although this procedure is the least frequently used, amounting to less than one percent of contracts, the total

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<sup>124</sup> Report available at: [http://ec.europa.eu/enterprise/policies/smart-regulation/files/abst09\\_pubproct\\_en.pdf](http://ec.europa.eu/enterprise/policies/smart-regulation/files/abst09_pubproct_en.pdf)

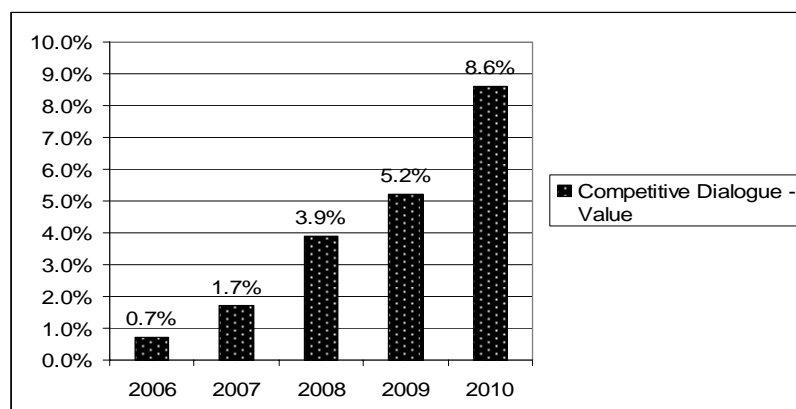
<sup>125</sup> "The impact of EU procurement legislation on councils", Local Government Group, December 2010, page 12.

<sup>126</sup> Responses to question 15 of the GP.

<sup>127</sup> In the Classic sector, the negotiated procedure with publication accounts for 8% of contract award notices and 14% of the total value, with an average contract size of €6.6 million.

value involved is significantly higher – up to 8.6% of total value of contracts awarded in 2010 (5.2% in 2009), with a mean contract value of €40 million.

**Figure 14): The use of competitive dialogue over time (2006-2010)**



Source: PwC study

The rapid take-up of the competitive dialogue procedure since its introduction, suggests that there was a need for a procedure that allowed for more negotiation or dialogue also in the Classic Directive. However, use of this procedure is limited to very complex projects and hence does not fully meet the needs of contracting authorities.

Finally, the perceived lack of flexibility of the current procedures is also a source of missed opportunities for society, preventing CAEs from responding effectively to strategic goals. The previously quoted survey of local authorities in the UK also points out that lack of flexibility of the procedures emerged as a challenge experienced in relation to EU procurement rules: "*such a rigid regime stops local authorities from being able to take advantage of innovative commercial offers that do not fit with the agreed evaluation criteria*"<sup>128</sup>.

#### 8.3.2.4. E-procurement

Some of the existing provisions and tools specified in the current Directives are not being used to their full potential. This is particularly the case for some of the electronic procurement (or e-procurement) solutions which could improve transparency and simplicity and generate significant cost savings<sup>129</sup>. Recent figures from Deutsche Bank Research estimate that suggests "that a full switch to e-procurement may save between € 50 to 75 billion on public procurement in the EU per year". As such, this lack of uptake represents a missed opportunity. Although much work has been undertaken to introduce e-procurement systems since the concept was introduced in 2004, the availability of a system has not yet translated into widespread use. The evaluation of the 2004 Action Plan for e-procurement estimated that even in the first mover countries, e-procurement accounts for less than 5% by value of total procurement. The exceptions are seen in countries which have

<sup>128</sup> "The impact of EU procurement legislation on councils", Local Government Group, December 2010, page 13.

<sup>129</sup> See: the evaluation of the 2004 Action Plan for e-procurement.

mandated the use of e-procurement e.g. Portugal (all procurement) and Lithuania. Equally the systems which are being developed differ significantly from country to country and even region to region, creating a risk of market fragmentation and increasing costs for suppliers who have to invest time in understanding how to use the different systems as they move between different CAEs.

There is certain inertia on the part of CAE and, to a lesser extent, businesses to move towards using e-procurement. The evaluation highlighted a number of key challenges facing e-procurement which need to be addressed if greater take-up is to be achieved and risks to fragmenting the EU public procurement market are to be addressed.

Authentication and integrity measures also differ significantly between systems. Here there are particular issues relating to the very technical measures which were initially promoted at EU level. Some MS have adopted these solutions which at present are very often national solutions, creating barriers to non-domestic firms trying to bid in another country and creating a conflict/tension with the ability of e-procurement to actually open up markets by over-coming distance barriers to bidding. Others have adopted less technical approaches which could be less secure (although there is no hard evidence available to support this belief at present) but which are more open to a wider range of bidders.

Sometimes the problem stems from over specification – for example, the DPS, a purely electronic tool introduced in 2004 to create an open repetitive purchasing system is specified in great detail but does not seem to work in its current form. 22 out of 27 MS have transposed the provisions for this option into their legislation, but many have also felt it necessary to add further clarification and despite these good intentions, only one MS has currently implemented a working system. Given the growing use of framework agreements, another form of repetitive purchasing albeit a closed system, and the interest shown by the transposition of the option, this points to problems in the system design which should be addressed.

Equally some problems are due to a lack of detail – for example electronic catalogues, a powerful tool for standardising and simplifying bid responses are only mentioned in a recital. Standards which could have reduced the emergence of technical barriers and aided in the integration of certain features are only now beginning to emerge.

#### 8.3.2.5. Aggregation of demand

Other examples of tools provided for in the Directives and not used to its full potential are instruments that facilitate aggregation of demand (for example CPBs or a tool frequently used by CPBs i.e. framework agreements).

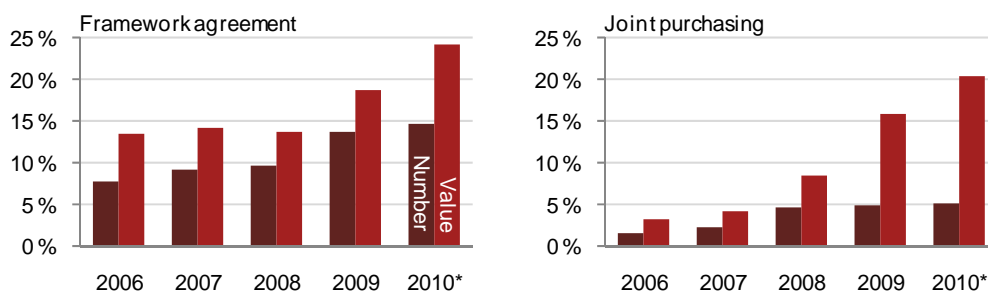
In the recent years, an increase in the use of framework agreements and joint purchasing<sup>130</sup> has been observed. The values over time show large changes. For joint purchasing, there has been a considerable development - from constituting a few

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<sup>130</sup> While using the term "joint purchasing", we refer to data collected from notices published in OJ/TED, where CAE reported that they "purchase on behalf of other contracting authorities". The definitions and interpretation of this concept may therefore include both centralized purchasing bodies and other joint purchasing arrangements,(for example purchases made by several local authorities).

percent of total values to reaching about 22% in 2010. The values involved in framework agreements are also increasing and reached even higher levels - at about 25 % in 2010. About €85 billion of framework agreements were concluded in 2010.

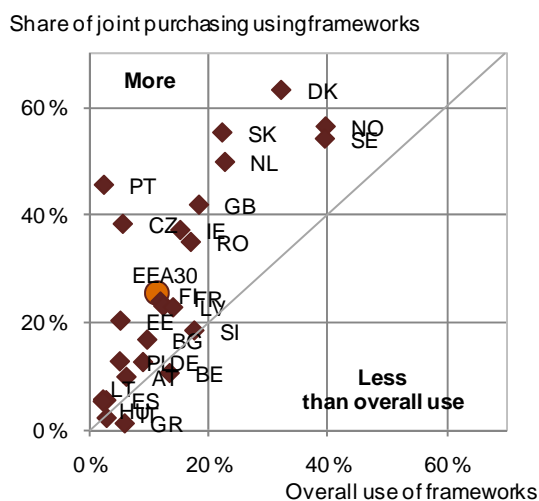
**Figure 15): Use and values of techniques over time as share of total**



Source: PwC study

Both these techniques are frequently used together - joint purchasers tend to use frameworks more extensively than the general population (i.e. the share in number of notices rises from 11% in the overall use to 25% when joint purchasing is used, see: Figure 16).

**Figure 16): Share of joint purchasing using frameworks**



Source: PwC study

The key problems related to the observed trends towards the aggregation of demand are two-fold – on the one hand, weakly or improperly regulated aggregation may be the source of threats to competitiveness as it may foreclose the markets (over time and in value terms). However, the recent evaluation suggest that the current rules are not sufficiently equipped with mechanisms that ensure fair competition when contracts are aggregated (e.g. for example by framework agreements<sup>131</sup>).

Secondly, wise use of instruments aggregating demand might generate economies of scale and give MS leverage to conduct strategic procurement policies more

<sup>131</sup> Source: PwC study, page 114.

efficiently than without aggregation. At this moment, there is no indication that it is really happening and the society loses opportunities and gains that could have been generated through professional, strategic purchasing conducted by CPBs.

#### 8.3.2.6. Conclusions

In summary, problems relating to a certain lack of flexibility and disproportionate nature of the current procedures hamper efficient responsiveness to structural changes in the markets and create cost inefficiencies. They also create missed opportunities for society and together result in the best value for money and society not being achieved.

#### 8.3.3. *Problem drivers in Strategic public procurement*

**PROBLEM DRIVER:** Uncertainty and insufficient provisions with regards to integration of other policy goals in public procurement

The prime aim of the current rules is to ensure that when the public sector purchases goods, services or works in the market place, it does so in a transparent manner, treating all potential suppliers or service providers equally and seeking the offer that provides the best, or most appropriate, quality at the best price.

##### 8.3.3.1. Insufficient provisions with regards to the integration of strategic goals

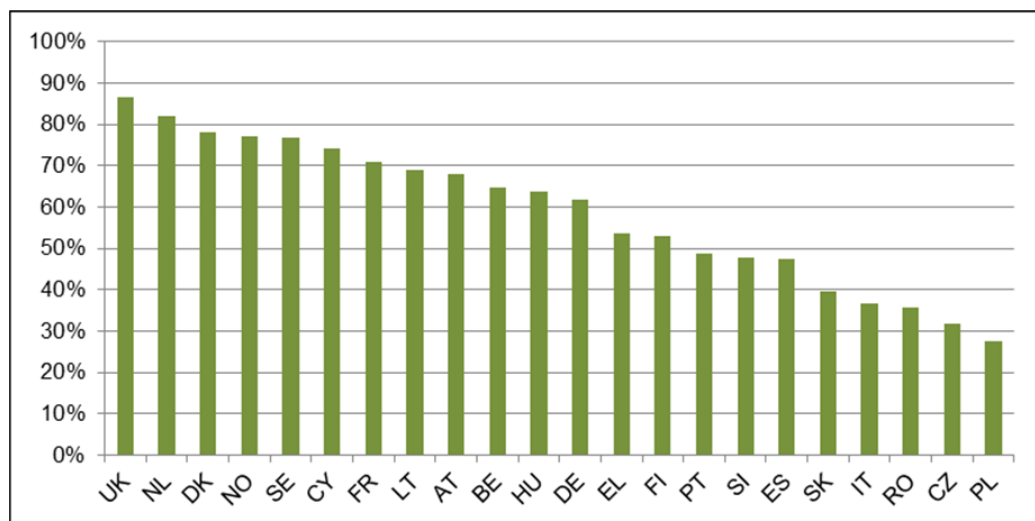
Given the significant and influential role of public procurement in the economy, it is clear that it has the potential to impact on other policies (EU2020 objectives). The most frequently mentioned main areas for future strengthening of the rules are: environmental sustainability; respect for certain social conditions; and supporting innovation. In response to demands to be able to use public procurement rules to support other strategic goals, changes were introduced in 2004 to help CAEs achieve the aims of "*sustainable and non-inflationary growth respecting the environment*" and "*a high level of employment and of social protection*". The Commission has published a handbook on environmental public procurement and most recently a Guide to taking account of social Considerations in Public Procurement.<sup>132</sup> These guidelines explain the extent to which environmental and social considerations can be taken into account within the existing legal framework and according to existing case law from the Court of Justice of the European Union. They provide general rules and examples of various ways in which environmental or social considerations can and cannot be taken into account in different parts of the procurement process.

Findings of a recent survey of CAEs indicate that the majority have incorporated environmental considerations in their procurement strategies, although there is still quite a difference between the frontrunners and those lagging behind in the Green Public Procurement (hereafter: GPP) stakes. It is not clear to what extent the European Commission Guidelines have been effective in clarifying the situation, particularly for social considerations where the relevant guidelines will not yet have been available.

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<sup>132</sup> European Commission, *Buying green! A handbook on environmental public procurement*, Luxembourg 2004 and European Commission, *Buying Social, A Guide to taking account of social Considerations in Public Procurement*, Luxembourg 2010.

**Figure 17): Uptake of GPP policies by MS**



Source: Adelphi, study

Stimulation of innovation through the wider use of variants does not appear to be a widespread choice at present. In fact, there is a universal trend over the last few years in all MS towards allowing variants in fewer cases<sup>133</sup>. Some measures or incentives may be needed if it were considered desirable to reverse this trend.

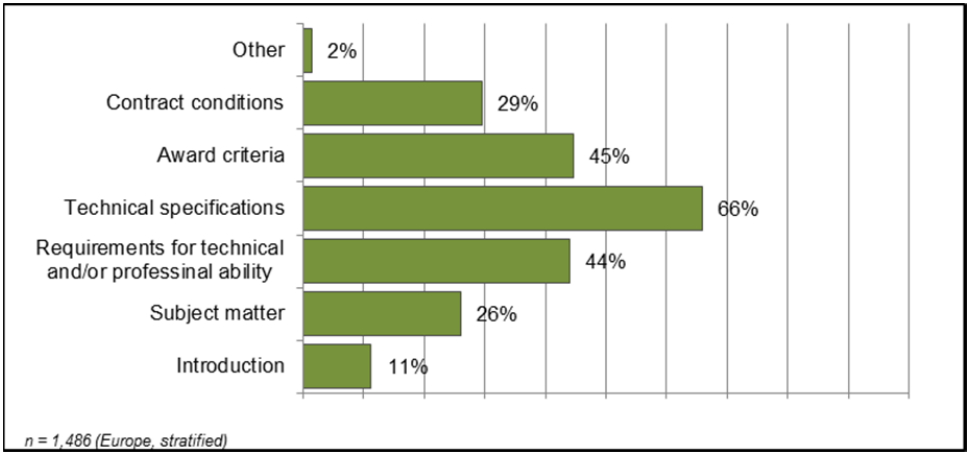
As the current rules are non-prescriptive and leave plenty of leeway to the CAE, the Commission has also published a number of communications<sup>134</sup> intended to clarify the practicalities of how to integrate other policy objectives whilst still remaining compliant with the public procurement regime. As Figure 17) shows, the most common means of incorporating environmental considerations is in the technical specifications, although the use of award criteria and requiring specific technical or professional qualifications are also relatively frequent.

<sup>133</sup> Except for Ireland, see: the Evaluation Report, pages 104-5.

<sup>134</sup> An interpretative communication explaining how environmental considerations could be integrated within procurement practice (2001); The Commission Communication on Integrated Product Policy (2003); A handbook on environmental public procurement (2004); The Commission Communication on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan (2008).



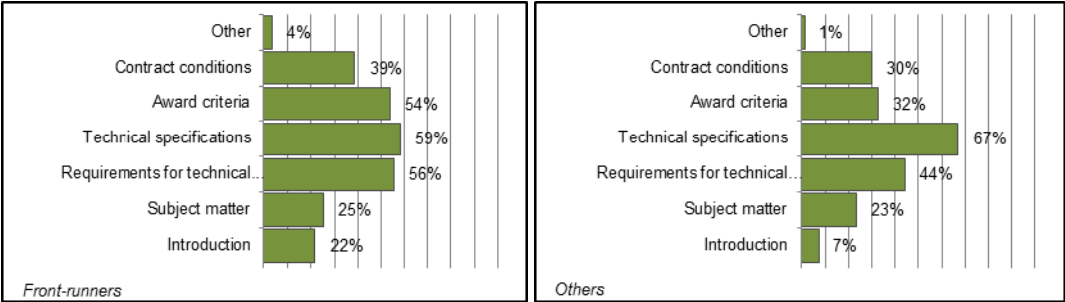
**Figure 18): Where do you address environmental objectives in your tender documents?**



Source: Adelphi study

These figures are based on the results from the European level that uses the stratified results from 30 EEA MS whereas the comparison of the front-runners (Denmark, the Netherlands, Norway, Sweden, and the UK), is based on the average percentages of 22 MS. The frontrunners use more sections and also use them more often than the other MS.

**Figure 19): Frontrunners compared with other MS**



Source: Adelphi study

However, various stakeholders find that problems remain - both in practical terms of how to apply the rules correctly and because they feel that not enough weight has been given within the public procurement regime to achieving these strategic aspects.

There is also the possibility that pursuing such strategic objectives may ultimately lead to a fragmentation of these different procurement markets across the EU. Many MS have undertaken various initiatives on national or regional level to give effect to further integration of other policies in public procurement. 27 out of 30 EEA countries have adopted national action plans to support green procurement, often involving the setting of targets in terms of proportion of spend on products or services having greener characteristics. Approximately half of MS have implemented action plans to support integration of social objectives. Two counties have established strategies for innovative procurement<sup>135</sup>. It seems that even when similar

<sup>135</sup> Adelphi study, page 53.

objectives have been identified, they are being implemented through different commitments / means and to different extent across MS.

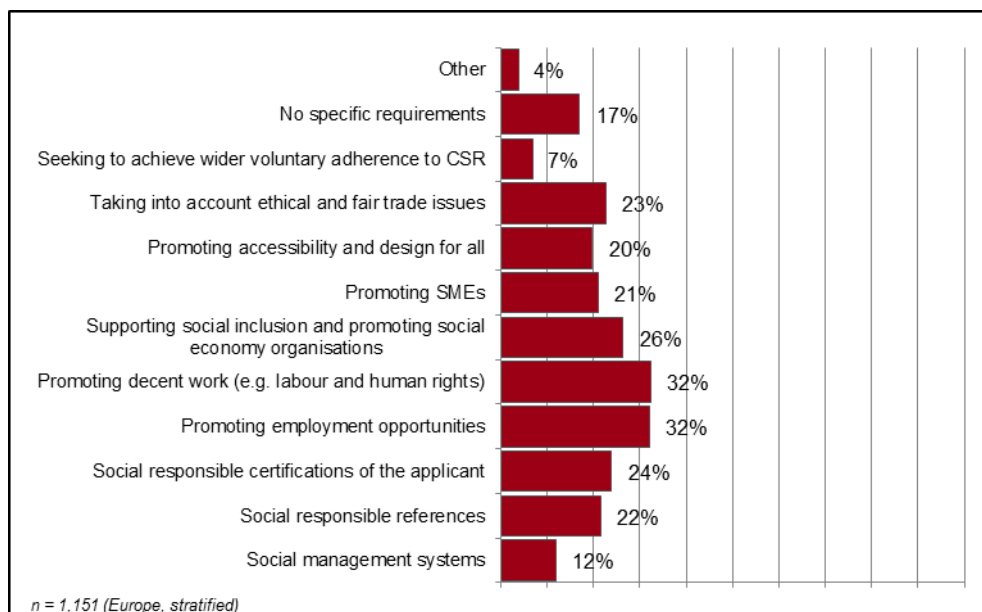
#### 8.3.3.2. Uncertainty with regards to extent of integration of strategic goals

Even with the existing guidance, CAE are unsure how far they can go in integrating these other strategic goals. Some of this uncertainty stems from a lack of specialist knowledge and competence – sometimes in a given strategic area, sometimes in terms of adapting their public procurement practices to absorb these wider strategic issues, whilst remaining compliant with the Directives. The problems encountered by many CAE relating to the complexity of the current EU rules can only be magnified when they are also asked to integrate and often police other policy goals when procuring a particular item. Equally, for many of these policy areas, the evaluation found that there is a lack of appropriate national guidance setting strategic objectives and linking them to public procurement in particular, meaning that individual CAE need to identify targets and take responsibility for policy areas where they themselves may have little experience and expertise. In certain areas, particularly in relation to innovative purchases, the resultant uncertainty and risk/fear of non-compliance appears to be proving too great, deterring many CAEs from using public procurement to support and achieve these strategic goals.

Several stakeholders make the argument that the current system rewards compliance with the Directives. They find that no incentives are built into the existing public procurement regime to incentivise CAEs to use their procurement to support these wider strategic objectives. Rather, they feel “hamstrung” by the current rules, which restrict their freedom by insisting that any selection/award/performance criteria show a clear link with the subject of the contract. Hence they are not able to add the specifications they would like. A commonly used example is the inability of/difficulty incurred by CAEs wishing to support for example Fair Trade objectives, fair employment conditions, etc.

However, results from the survey shows that while CAEs use social responsibility considerations most frequently as requirements for promoting employment opportunities and decent working conditions, fair trade and accessibility objectives are also actively pursued by some CAEs.

**Figure 20): What kind of specific requirements do you set with regard to socially responsibility objectives in your tender documents?**



Source: Adelphi study

It is worth noting that 20% of those who do not include any specific social considerations in their requirements nonetheless say that they do take social considerations into account in procurement. These CAEs may be including social issues in their contract terms and conditions or by reference to national legislation or International Labour Organisation (ILO) standards.

The GP responses on the issue of using public procurement in support of other policies show a division in opinions between businesses and contracting authorities on the one side and civil society on the other. A majority of businesses and contracting authorities considers the current rules on technical specifications as sufficient. A large majority of civil society organisations have a less positive opinion.<sup>136</sup> A majority of respondents is against introducing obligations on "what to buy" in the EU public procurement rules. Only civil society organisations are in favour of this idea.<sup>137</sup>

Whilst a majority of stakeholders, notably majority of contracting authorities, civil society organisations and MS, agree that the Directives should be clearer on how to include environmental and social criteria in the award phase, there is low overall support for allowing public procurers to choose bidders on factors which are not related to the subject-matter of the contract, although the responses were quite varied.<sup>138</sup> The Network for Sustainable Development in Public Procurement Network, for example, consisting of trade unions and non governmental

<sup>136</sup> Responses to question 62 of the GP.

<sup>137</sup> Responses to question 83 of the GP.

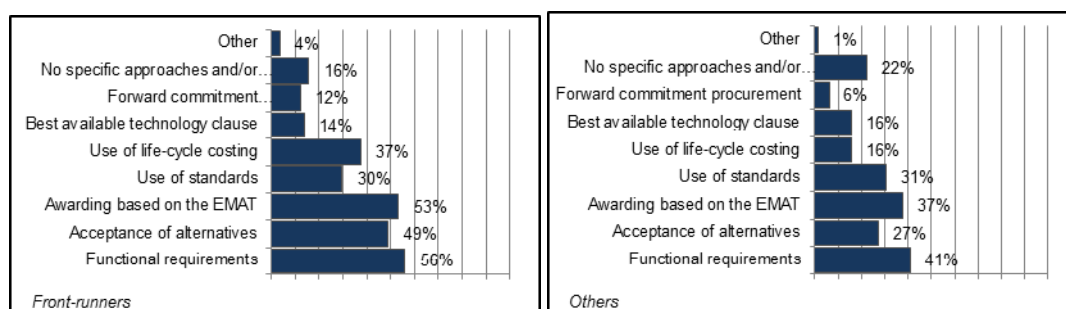
<sup>138</sup> Responses to question 79 of the GP.

organisations with social and environmental interests, emphasised that best value in public contracting is not simply the lowest price but must take account of social, ethical and environmental benefits<sup>139</sup>.

Stakeholders from all groups want to see further promotion and stimulation of innovation through public procurement. A majority of business and public authorities shares the view that additional measures are needed in order to strengthen the innovation capacity of SMEs.<sup>140</sup>

Most MS have put in place some measures to encourage the procurement of greener, more sustainable and socially responsible products and services as well as making public contracting more open and accessible to SME and innovative solutions. However the degree to which contracting entities actually put these policies into practise varies widely both across and within MS. As a result suppliers are potentially faced with a variety of technical specifications, citing different standards, certificates or labels in different MS.

**Figure 21): Front-runners in encouraging innovation compared with the other MS**



Source: Adelphi study

The MS which are frontrunners in terms of encouraging innovation (Finland, the UK and the Netherlands) refer to the use of EMAT criteria more frequently than other MS as a way to encourage innovation, along with functional requirements, acceptance of variants and life-cycle costing.

The relative importance of the use of life-cycle costing as a means to encourage innovation by the frontrunners compared with other MS may show how innovation and sustainability may be interlinked.

### 8.3.3.3. Conclusions

In summary, some stakeholders feel that the current rules do not respond sufficiently to the demand to support wider strategic goals and that CAEs are prevented from achieving these wider objectives by the complexity of the existing public procurement rules. Also, the different approaches introduced across the EU, may be creating national rather than Europe-wide markets. This may present a lost opportunity to create a sufficient public sector demand for these strategic purchases within the internal market and enable them to compete effectively with more

<sup>139</sup> In practice 70% of all contracts are awarded on the basis of EMAT rather than on lowest price.  
<sup>140</sup> Responses to questions 91 and 97 of the GP.

traditional products offering lower levels of sustainability e.g. lower environmental protection, less social improvement.

### 8.3.4. Problem drivers in Access

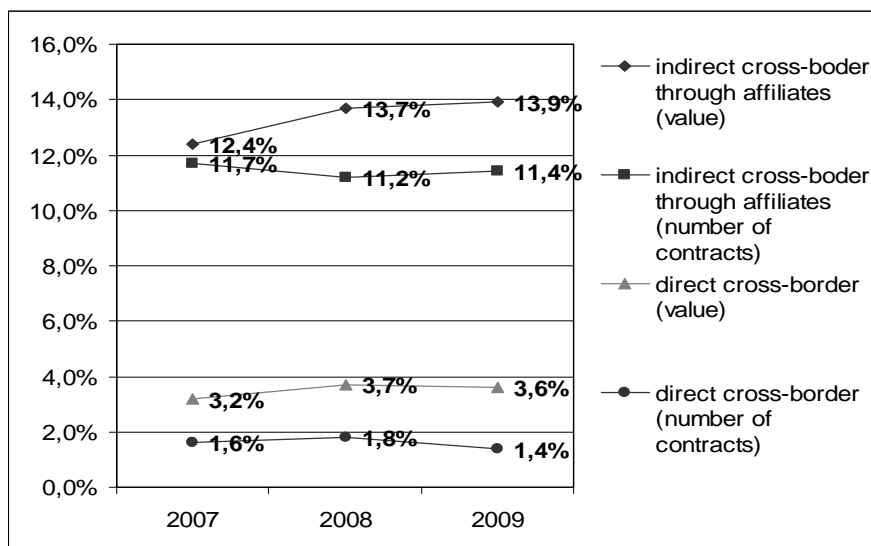
#### PROBLEM DRIVER: Market access barriers

One of the key objectives of public procurement policy has always been the open and free access of all European undertakings to public contracts in Europe. Fragmented national procurement markets were considered to be economically inefficient. Discriminatory procurement, where it occurred, would constitute a barrier to trade and reduce trade flows.

#### 8.3.4.1. Low cross-border procurement

Although cross-border access is facilitated by the high transparency created by the Directives, this has not translated into particularly high levels of actual cross-border trade. Direct cross-border procurement<sup>141</sup> accounts for 1.6% of awards or roughly 3.5% of the total value of contract awards published in TED during 2006-9. In addition to direct cross-border procurement, there is a considerable volume of indirect cross-border procurement<sup>142</sup>. This channel accounted for 11.4% of awards published in TED and 13.4% by value during 2006-9. As the above figures suggest, the dominant role in cross-border procurement is played by purchases from local affiliates of foreign companies and not by direct purchases (i.e. not by the channel that is directly influenced and governed by the Directives).

**Figure 22): Direct cross-border procurement and indirect cross-border through affiliates 2006-2009**



Source: Rambøll study

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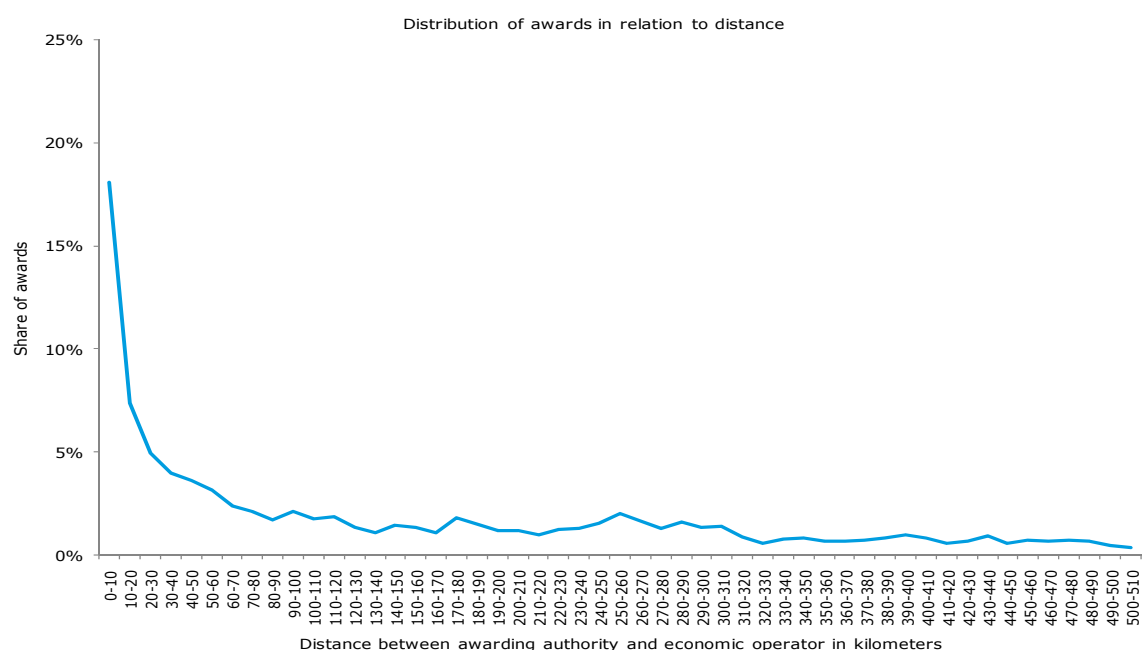
I.e. when firms tendering from their home market win contracts in another MS.

<sup>142</sup>

I.e. when firms bid for contracts in another MS through their foreign affiliates or subsidiaries.

38% of contracts above EU thresholds are awarded within the distance<sup>143</sup> of 50 km and 50% of contracts within the distance of 100 km<sup>144</sup> (see: Figure 23).

**Figure 23): Cumulative shares of awarded contracts in relation to distance (2007-2009)**



Source: Rambøll study

The above data shows that half of awarded contracts are concluded within geographic proximity. An average distance for each type of contract (i.e. goods, works and services) is different and confirms that supply contracts are the most tradable, as the average distance between the buyer and seller is 232 km (i.e. significantly more than 102 km for works and 123 km for services).

#### 8.3.4.2. Import penetration lower than in the private sector

At the macroeconomic level, public sector import penetration can be influenced by various structural factors determining overall intensity of its cross-border purchases (trade flows). Using estimates based on the analysis of national accounts data from the five-yearly symmetric input-output tables collected it appears that total import penetration<sup>145</sup>, has increased from 14.1% in 1995 to 17.4% in 2005. This would indicate a general trend towards more cross border trade in the overall economy and also more cross border sourcing of inputs by public sector.

<sup>143</sup> Distance between a CAE and a winning firm.

<sup>144</sup> Rambøll study, page 81.

<sup>145</sup> Understood as the proportion of imports to the total use (of selected sectors or total economy).

**Table 23): Import penetration of public and private sectors in 1995, 2000 and 2005**

Year	Import penetration of public sector	Import penetration of private sector	Import penetration of total economy	Gap between public and private (percentage points)
2005	7.5%	19.1%	17.4%	11.6
2000	6.5%	18.7%	17.1%	12.2
1995	5.1%	15.6%	14.1%	10.5

Source: Rambøll study

However this data also shows that import penetration in the public sector is significantly lower than in the private sector, suggesting that the public sector is less open and integrated in the general economy as than the private sector. There are both supply and demand side explanations. Looking at the demand side, this difference in import penetration can be partially explained by the differences in the kinds of purchase made by government authorities as compared to private companies. The differences in the structure of purchases by these two sectors was pointed out in an earlier evaluation study by Europe Economics<sup>146</sup> as a potential reason for differences in public and private import shares.

In 2005 60% of public sector demand was due to three main product groups: public administration (25.3%); health and social services (21.2%) and education (14.3%). Their joint import penetration ratio is close to zero (0.1%), reflecting perhaps that in general they are locally provided services and by their very nature, less tradable services than supplies. This has a significant affect on the public sector's propensity to import - the three largest sectors are not fully exposed to competition due to either exclusions, exemptions or other regulatory arrangements, such as reimbursement through statutory health insurance, that place them outside of the full scope of application of EU public procurement rules (or even the rules governing the procurement of B-type services).

Finally, although there seem to be reasons to explain lower levels of import penetration in terms of the structural differences between the two sectors, the scale of the gap observed may still raise concerns about the existence of discriminatory practices on the side of public purchasers. In this context, Trionfetti (2000) argues that *"if the import share of government is persistently and substantially lower than the import share of the private economy, it is likely that it is the result of a discriminatory procurement practice (implicit or explicit)"*<sup>147</sup>.

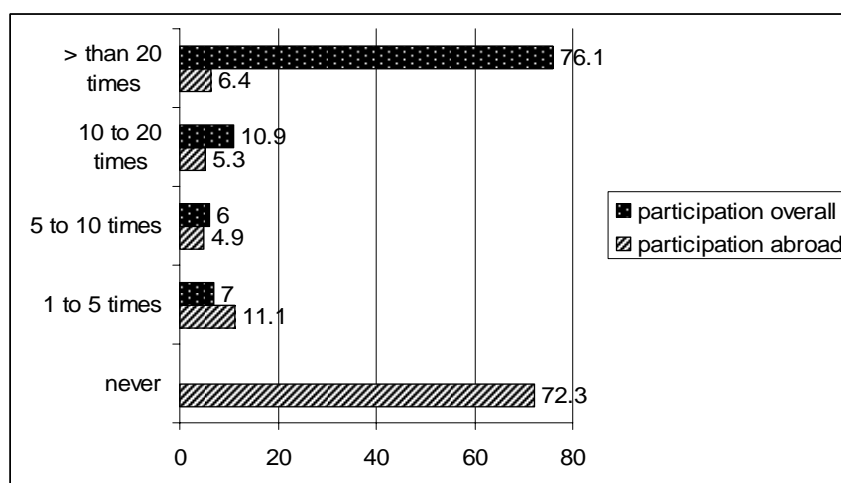
<sup>146</sup> Europe Economics (2006), Evaluation of Public Procurement Directives, London 2006, page 106.

<sup>147</sup> *"Trade effects of discriminatory public procurement: a guide to measuring the degree of discrimination and associated budget costs"*, Federico Trionfetti, Centre for Economic Performance, The London School of Economics and Political Science, Paper prepared for the International Trade Centre (February, 2000).

### 8.3.4.3. Reluctance to bid cross-border amongst firms

As mentioned previously, procurement contracts awarded directly across borders are still limited (3.5% in value terms and 1.6% in the number of transactions). This can be explained by both supply and demand factors. Previous section explained that low levels of import penetration may be due to the composition of public demand, which is dominated by services that are sourced locally. On the supply side, recent survey data shows that companies are also reluctant to tender cross-border. In a recent large scale survey around 73% of firms, otherwise active in public procurement, said that they have not made any cross-border tenders in the last three years (ref. Figure 24). The fact that the average success rate when bidding abroad is lower than when bidding at home may go some way to explain this behaviour.

**Figure 24): Participation in cross-border tenders – survey of firms**



Source: Rambøll study

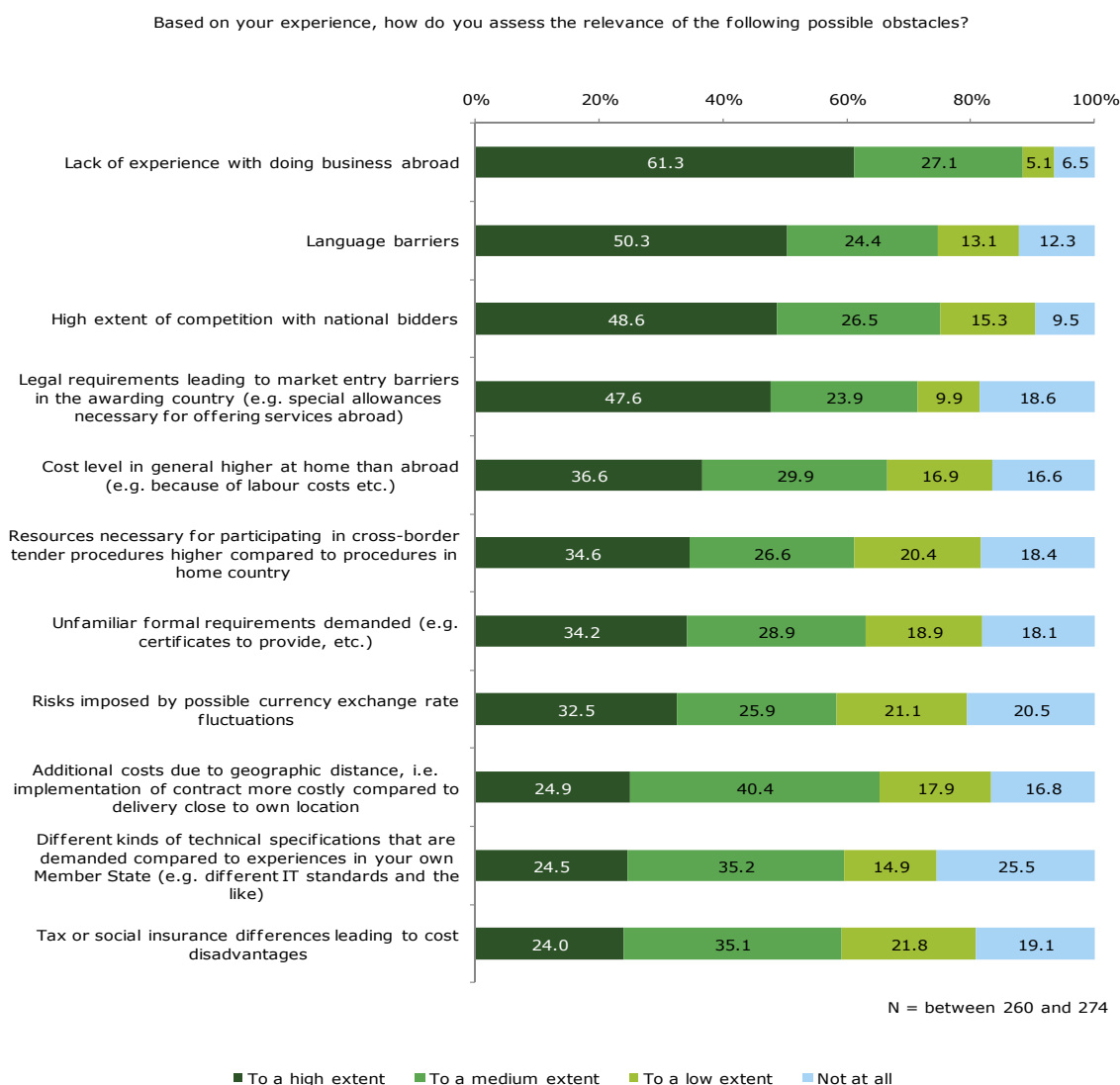
Asked about the reasons for this low level of participation in cross-border procurement, the major reason given appears to be simple inertia: 61% of respondents identified their general lack of experience in doing business abroad. It would appear that most firms do not bid for cross border procurement opportunities simply because they have not done so before (see: Figure 25) below). The second major obstacle identified was language barriers. Further confirmation that language matters, comes from the analysis of contract awards by country. An econometric analysis of contracts awarded between 2007 - 2009 shows a relationship between the existence of common language borders and the chance of awarding a contract to a foreign firm i.e. confirming that the probability of direct cross-border procurement award in a country that shares a language with another MS is significantly higher than in MS with a different language (by 21.3%). Indeed, the analysis of contracts published in OJ/ TED confirms that common language helps, as 75% of the contracts awarded directly cross-border by Irish authorities are awarded to firms from the UK. 84% of direct cross-border awards made by Austrian authorities are concluded with businesses from Germany<sup>148</sup>. Legal requirements leading to market entry barriers

<sup>148</sup> Rambøll study, page 79.



were named as the fourth most important obstacle (only 28% of firms do not rank this problem high).

**Figure 25): Business' view on several possible obstacles to cross-border bidding**



Source: Rambøll study

Although risks related with currency exchange rates are only ranked as the sixth most important obstacle, their general importance should not be overlooked. Participation in the Euro area has been identified, in a separate exercise, as an important factor facilitating direct cross-border procurement (being a member of the euro area enhances the chances of a contract to be concluded cross-border by 97.1%<sup>149</sup>). This shows that a common currency matters even more than a common language.

In order to investigate the issue of reluctance to bid cross border in greater detail the Commission conducted a separate survey using the European Business Test Panel (EBTP)<sup>150</sup>. This (smaller) complementary survey concentrated on the reasons why

<sup>149</sup>

Rambøll study, page 79.

<sup>150</sup>

[http://ec.europa.eu/yourvoice/ebtp/consultations/2011/cross-border-public-procurement/index\\_en.htm](http://ec.europa.eu/yourvoice/ebtp/consultations/2011/cross-border-public-procurement/index_en.htm)

firms did not bid cross border and shows that administrative obstacles have a major negative impact on firms (43% of firms which had competed for cross border public contracts found that country-specific formal requirements were a major obstacle in cross-border procurement).

The results of the evaluation confirm that direct cross-border participation on public procurement markets remains low. As a result, the direct cross-border success rate is also low. This is driven by various entry barriers that still exist on the markets and deter firms from participating in invitations to tender in other MS. The identified entry barriers can be principally grouped into natural ones (such as languages or geographic distance, the very nature of public sector markets) and regulatory. Within the regulatory barriers mentioned by companies, some of them stem from the Directives, but many other are driven by legal provisions stemming from other legal acts (such as tax or social security insurance differences leading to cost disadvantages). A frequently repeated regulatory barrier is linked to the mutual recognition of standards or certificates (including certificates or documents that need to be provided while submitting offers).

#### 8.3.4.4. Market access barriers (SMEs in particular)

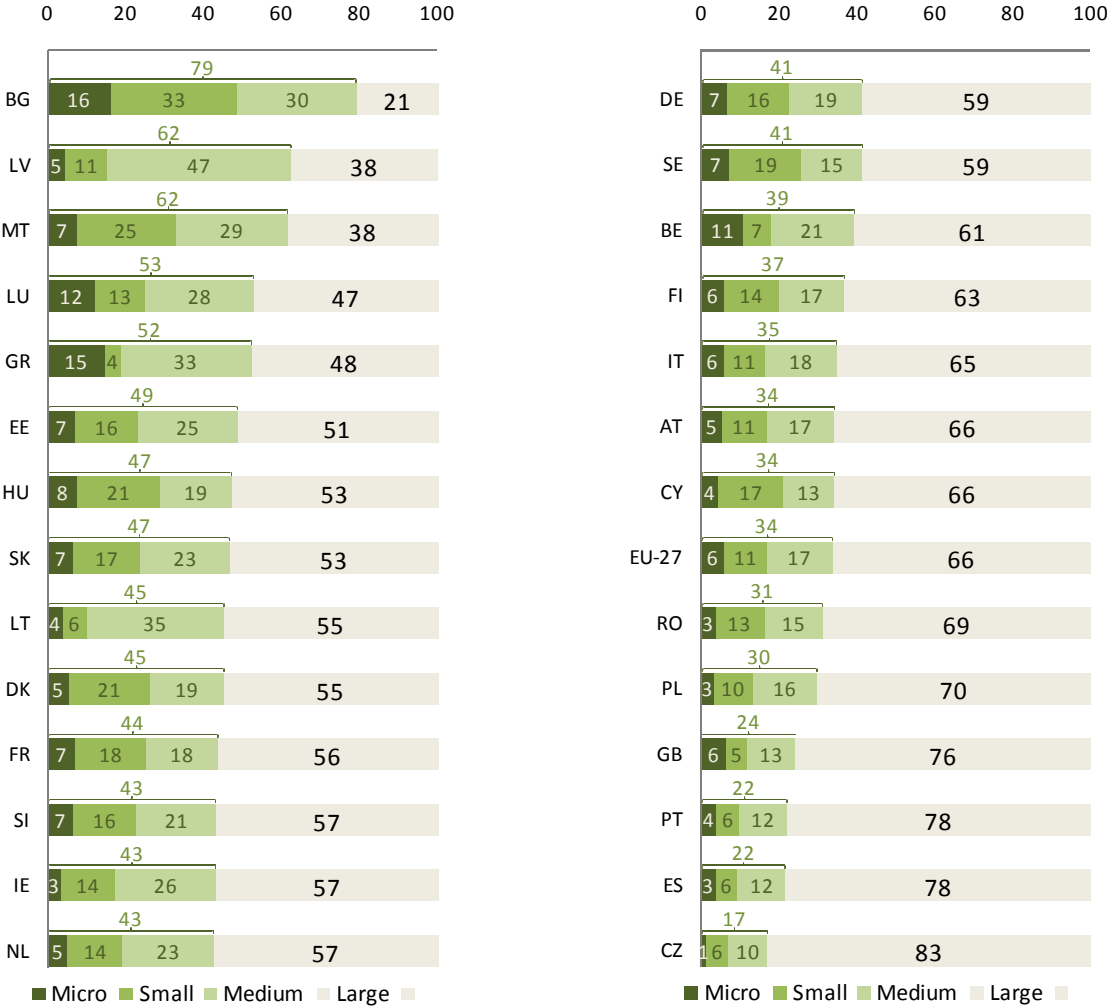
Questions are frequently asked about the proportion of public procurement which is awarded to SMEs. A recent study estimated that between 2006 and 2008, SMEs won between 58% and 61% of above threshold public contracts, representing between 31% and 38% of the total value of all contracts<sup>151</sup>. There is a significant variation across MS, ranging from countries where SMEs won 79% of contracts (in value terms) to MS where this proportion is 17%<sup>152</sup> (ref. Figure 26 below).

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<sup>151</sup> Source: GHK study, page 22.

<sup>152</sup> The results reveal structural differences across MS – as a general trend SMEs are more dominant in smaller countries. 7 of the 8 MS with populations below 5 million are positioned in the top half of the table when arranged by the share SMEs win. From amongst the six largest MS, only France falls into this category.

**Figure 26): Share of SMEs in the total value of contracts awarded, by MS (total for 2006-2008)**



Source: GHK

The study concluded that overall the share of SMEs in winning public procurement contracts has not changed significantly, since 2002, although it noted an increase in the proportion of successful SMEs in 2008.

The size of contracts is the major barrier to SMEs participation: they do not have access to the resources or capacity to bid for or fulfil large public contracts. Contracts above €300,000 appear to be generally beyond their capacity. However it is also clear that when larger procurement projects are subdivided into smaller lots, SMEs are more likely to win contracts for the individual lots.

Without judging whether or not the SMEs are or are not disadvantaged in above EU threshold public procurement, the same study points out however that SMEs face a number of barriers in accessing public procurement markets.

Replies from a recent survey of 887 companies from 19 MS shows that the most frequently encountered barrier is the over-emphasis on price (54% of companies experienced it ‘always’ or ‘often’). This is followed by unfavourable (i.e. too long) payment terms (40%) and late payments (38%). And excessive administrative burden

is also seen as an often-occurring problem (34% of companies experienced it 'always' or 'often'), and many companies also complain about unclear requirements set out by public authorities (30%). The least frequently mentioned obstacles to procurement are too large contract values (7%) and that joint fulfilment of requirements by members of the consortium is not allowed by the procurer (5%)<sup>153</sup>.

**Table 24): Problems faced by bidders in accessing public procurement markets, by company size class (proportion of companies using the source 'always' or 'often', in percentage)**

<b>Potential problems</b>	<b>Micro</b>	<b>Small</b>	<b>Medium</b>	<b>Large</b>	<b>Total</b>
Over-emphasis on price	58	55	51	55	54
Long payment terms	52	42	38	36	40
Late payments	47	36	39	35	38
No debriefing	43	36	33	36	36
Administrative burden	45	34	35	30	34
Lack of clarity	38	28	29	28	<b>30</b>
Limited options for interaction	30	23	19	22	<b>23</b>
Disproportionate financial criteria	34	21	18	17	<b>20</b>
Insufficient time to bid	27	23	14	20	<b>20</b>
Lack of information on opportunities	23	22	18	17	<b>19</b>
Tenders not evaluated fairly	16	14	26	30	<b>19</b>
Disproportionate technical criteria	18	18	14	13	<b>15</b>
Large contract value	22	15	5	1	<b>7</b>
Joint fulfilment of criteria not allowed	8	5	6	4	<b>5</b>

Source: GHK study

<sup>153</sup> GHK study, page 50.

### 8.3.4.5. Conclusions

To summarise, the current data reveal that the full potential for opening-up public procurement to EU-wide competition is not being realised as the direct cross-border procurement remains at relatively low levels and SMEs participation remains lower than their importance in the economy. This means that public procurement markets remain serviced mainly by national or large-size suppliers and that important market entry barriers remain despite the existence of the Directives.

### 8.3.5. Problem drivers in Governance

PROBLEM DRIVER: Different administrative models across MS leading to different public procurement capacities in the EU and different capabilities of CAEs

In their current form, the public procurement directives do not contain any instructions to MS on how to organise their individual public procurement capacity and resources. This has, quite naturally, led to a range of very different set-ups and abilities being developed. Administration is often organised in several layers – sometimes reflecting the national/regional/local divisions, other times devolving responsibilities across different (generally central) government departments. Most MS have a national central body dealing with procurement which is responsible for managing public procurement. As the evaluation notes: *"The national legal basis for these bodies, the hierarchical lines of subordination and the functions that such bodies are empowered with vary considerably across MS."*

#### 8.3.5.1. Differences in national organisation of public procurement

According to a 2007 Sigma paper<sup>154</sup> (no. 40) the main public procurement functions can be grouped under the following headings: drafting legislation (implementing relevant EU Directives and in some instances, national legislation related to areas not covered by said EU legislation); monitoring; control; international relations; guidance and support; publication; information provision. Sometimes these functions may overlap, again depending on the set-up that has been put in place. Generally these functions are held by the national central body dealing with procurement but they could also be located in other institutions (e.g. the Ministry of Economy, Ministry of Finance, etc).

The same study grouped MS subject to the study into three categories: centralised, semi-centralised and decentralised, depending on the concentration of procurement functions held by their respective institutions. MS with a centralised procurement structure<sup>155</sup> have their procurement functions allocated to one or two central institutions. MS with a semi-centralised structure<sup>156</sup> are characterised by a mixed concentration of procurement functions allocated to a limited range of institutions placed at various levels in the administration. Finally, the MS with a decentralised

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<sup>154</sup> Central Public Procurement Structures and Capacity in Member States of the European Union, 01 Jan 2007, No.:40, available at: <http://www.oecd-ilibrary.org/docserver/download/fulltext/5kml60qdqq0n.pdf?expires=1312366990&id=id&accname=guest&checksum=E536400B8F5226F16E6CCEB01EFE79F3>

<sup>155</sup> Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia.

<sup>156</sup> Austria, France, Germany, Ireland, Italy, Luxembourg, Slovenia, Sweden, the United Kingdom.

procurement structure<sup>157</sup> have a dispersed concentration of procurement functions allocated to several institutions at various levels in their administrations.

At least eight countries<sup>158</sup> have also introduced additional supporting bodies which provide guidance and support relating to national public procurement policy and processes. Many MS also have distinct internal or external structures tasked with supervising and/or controlling the public procurement system. Most of the time, control is exercised by a national audit body (i.e. Court of Auditors or State Audit Office). Some of the newer MS have created specialised bodies within government to oversee supervision and control. Only Italy has taken advantage of the provisions contained in Article 81 of the Classic Directive and Article 72 of the Utilities Directive and established an independent Authority for the Supervision of Public Contracts (covering central and sub-central procurement).

Differences in organisation of public procurement across MS are present in many areas. For example the CPB was included in the 2004 Directives as an option, which with few exceptions<sup>159</sup> most MS have implemented. As with e-procurement, the implementation of a legal option does not always lead to availability and use<sup>160</sup>. On the other hand, other different arrangements for buying on behalf of other CAE have also been put in place, which are not necessarily considered CPBs in the sense of the Directives<sup>161</sup>.

Moreover, while most MS have established CPBs, it is only the central government authorities' administrations which are obliged to use it. Other bodies may also be encouraged to use it but they are also permitted to establish other purchasing agreements. There is also a problem of insufficient coordination of centralised purchasing at the MS level.

The risks of this situation are perhaps best summarised by the 2010 OECD policy roundtable on Collusion and Corruption in Public Procurement<sup>162</sup>: *"Public procurement frequently involves large, high value, projects, which present attractive opportunities for collusion and corruption. Regulatory requirements dictating particular procurement procedures can render the process excessively predictable, creating opportunities for collusion. [...] Finally the sheer quantity of goods and services that are contracted by the State creates monitoring difficulties and increases the likelihood that the public procurement process may fall prey to collusion or corruption."*

#### 8.3.5.2. Different capabilities of CAEs

The Commission estimates that there are 250,000 plus CAEs conducting public procurement, with extremely varied budgets at their disposal and very different

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<sup>157</sup> Finland, Portugal.

<sup>158</sup> Belgium, Germany, France, the Netherlands, Austria, Portugal, Spain, Finland.

<sup>159</sup> Belgium, Germany, Estonia, Luxembourg.

<sup>160</sup> Bulgaria, Greece, Cyprus, Latvia, Luxembourg, the Netherlands, Poland, Romania, Slovenia, Slovakia and Finland do not have a CPB established. Romania and Slovenia have however a CPB planned.

<sup>161</sup> BE, DE, EE, LU do not opt to transpose the CPB in their national legislation, however, more than 5% of the CN published indicate purchasing on behalf of others.

<sup>162</sup> See: Policy Roundtables, Collusion and corruption in public procurement, 2010, OECD paper <http://www.oecd.org/dataoecd/35/16/46235399.pdf>

levels of buying experience. These range from very large, centralised buyers to procurers for small towns or fire stations who rarely, if ever need to make purchases which fall under the EU rules. Often procurers for these organisations are not professionals – they have limited training and experience and procurement is but one of several tasks they fulfil. Procurement rules are generally set out in guidance documents, and often practitioners will not know where the rules originate. They will not necessarily know about the EU or national legislation but when they do, they are often driven to adopt risk averse procedures, which may lead to sub-optimal outcomes, out of fear of the consequences of non-compliance. As mentioned earlier, the costs associated with pre-empting or addressing litigation are important elements in the calculation of cost efficiency of procurement. A recent survey, estimates that around 25% of the purchasers responding incurred some litigation costs when concluding contracts with values above the EU thresholds.

Confronted with the complex challenges implied by public procurement policy, some (generally smaller and newer) MS (e.g. Slovenia, Lithuania, Portugal) have established well resourced central procurement organisations, able to provide training and advice to individual CAEs. Other Member States have dispersed responsibility for the organisation of public procurement procedures across myriad CAEs who are often poorly resourced. This context is ripe for administrative error, and inconstant application of the principles and provisions of EU law. The limited of professional procurement training and advice in many countries may have resulted in errors, an increased risk of fraud and a less than optimal management of resources, which would leave considerable scope for further cost efficiency savings. Recent audits of projects funded by community funds have found around 40% error rates due to the wrong application of public procurement rules and in some instances, the incorrect transposition of the Directives into national legislation. According to the European Court of Auditors' annual report for the financial year 2009

*"The non-respect of public procurement rules alone accounts for 43% of all quantifiable errors and makes up for approximately three quarters of the estimated error rate [for the Structural Funds]"*.

#### 8.3.5.3. Risks of errors in application

Recent audits of public procurement projects financed at least in part by community funds e.g. European Regional Development Funds (ERDF), Cohesion Funds (CF) or Structural Funds (SF) have found significant error rates due to the wrong application of public procurement rules and in some instances, the incorrect transposition of EU Directives into national legislation. Such errors account for around 40% of the audit findings for ERDF and CF projects (based on DG REGIO audits in the programming periods 2000-2006 and 2007-2013) and makes up for approximately three quarters of the estimated error rate for the SF (2009 annual report of European Court of Auditors). As a result, over half the decisions enforcing financial corrections refer to public procurement. The budgets for these funds are significant: €347 billion has been allocated to regional and cohesion policy over 2007-13. This represents nearly 36% of the total EU budget for that period and averages out at around €49 billion per year. Since all cohesion policy programmes are co-financed by the member countries, total available funding is nearer €700 billion – much of which will be allocated via public procurement procedures.

In the context of structural funds, according to the applicable rules<sup>163</sup> the MS receiving the funds have to set up a dedicated administrative structure for management, monitoring and controls. Having a compliant administrative structure in place is a pre-condition for receiving actual payments from the EU budget. The structure is composed of a *managing authority* which is the body designated to manage the operational programme; a *certifying authority*, which has the responsibility to certify statements of expenditure and applications for payment before they are sent to the Commission; and an *audit authority* which is a body independent of the first two and is responsible for verifying the effective functioning of the management and control system. Given that operating under these strict conditions, the error rate due to the misapplication of public procurement rules was 40%, it could be argued that the error rate would be even higher in the absence of such structures, as is frequently the case for the majority of public procurement contracts<sup>164</sup>. For example a quick analysis of the contract award notices published in TED in 2009 showed that 21% of all notices did not include price information (an obligatory field) and hence were non compliant, while for EU funded projects only 5% of notices were non-compliant from this point of view. Similar figures are observed for 2010 (22% of all contract award notices were non compliant, while in case of EU funded projects the figure was 6%).

Three major groups of weaknesses were identified by the DG REGIO audits:

- Inadequate assessment of bids;
- Absence of tendering or award of contract based on inappropriate tendering procedure and award of supplementary contracts without competition; and
- Non-compliance with publication requirements.

An analysis of the infringement procedures launched by the Commission from 2005 onwards<sup>165</sup> also identifies the same range of issues and errors regarding implementation of procurement policy. Apart for the general provisions on infringements proceedings and the control of transpositions the Commission (DG MARKET) has no specific legal basis for other systematic controls of implementation (like DG REGIO has in relation to Structural Funds implementation or DG COMP has to undertake market investigations in relation to merger controls and antitrust policy).

In conclusion, certain areas have been identified where it is clear that there are problems in the national application of public procurement law and existing controls are not sufficient to address them. The evidence from Commission audits and analysis of infringements shows that these are not one-off incidents but occur repeatedly. Whilst it is not possible to estimate the error rates across the wider population of public procurement contracts, it is extremely unlikely that the errors

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<sup>163</sup> Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210, 31/07/2006 p. 0025 – 0078.

<sup>164</sup> Unfortunately the different number and nature of audit results make any useful statistical comparison of MS difficult.

<sup>165</sup> See: the Evaluation Report, pages 50-52.



and high error rates identified by the Commission's audits are limited only to the application of cohesion policy projects. The analysis of infringements, which covered this wider population, showed similar problems.

#### 8.3.5.4. Difference in monitoring arrangements

Other aspects of the evaluation showed that it is often difficult to assess whether particular public procurement or wider strategic goals are being achieved, since there is no systematic or consistent monitoring of these actions at national level. Monitoring at both national and EU level is important as it allows policy makers to track progress against objectives and either identify areas for further action in a timely manner, before a problem becomes severe or to identify areas of good practice and success which could be shared with other interested parties. Although the current Directives require MS to provide certain information to the Commission annually, this information is limited in scope and does not cover all the relevant policy areas. The expected uptake of e-procurement, which could systematically improve monitoring and audibility capacities due to the automatic registration of key data for all transactions has not yet occurred. Monitoring arrangements differ widely from country to country.

#### 8.3.5.5. Integrity of public procurement

All stakeholder groups replying to the GP recognise that procurement markets are exposed to risks of favouritism and corruption. However, most stakeholders (excluding academic/legal experts) believe that the integrity of procurement should be addressed through national rather than EU legislation.

At present the EU rules do not cover the issue of conflicts of interest<sup>166</sup>. However, as pointed out by ECJ case law conflict of interests constitutes objectively and by itself serious irregularities regardless of the parties involved and whether they were acting in good or bad faith<sup>167</sup>. Again, CAE and MS considering that national legislation in this area is sufficient. A majority of business, civil society and legal experts would support a common European definition of "conflict of interest" and the introduction of certain minimum safeguards.<sup>168</sup>

MS and the general public (Eurobarometer, 2011) recognise that the current EU public procurement directives have done much to address and limit the occurrence of collusion and corruption. However, this is no reason to be complacent – there is significant room to improve the current systems put in place to monitor application, enforce the rules and control for errors when conducting public procurement.

Several overall estimates, as well as specific studies covering certain corruption in certain MS or certain sectors are available; however, the exact cost of corruption in public procurement cannot be easily calculated or extrapolated across EU.

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<sup>166</sup> The notion of conflict of interest is the situation where persons involved in the contract award decision have competing professional or personal obligations or personal or financial interests which would make it difficult for them to fulfil their duties fairly and impartially, or where a person is in a position to influence the decision making of the contracting authority, in order to fulfil its own interest.

<sup>167</sup> See: judgement of 16.6.1999, Case T-277:97Ismeri Europa Srl v Courts of Auditors.

<sup>168</sup> Responses to questions 98-103 of the GP.

In a recent impact assessment carried out by DG HOME for the EU anticorruption package estimated that although globally the cost of corruption is estimated at 5% of GDP: "[...] *it has been estimated that the costs of corruption in the EU amount to around 1% of EU GDP*".

It is clear that only a small percentage can be attributed to public procurement, however, the same impact assessment stated that in Bulgaria: "*It is thus estimated that the cost of organised public procurement corruption in terms of fiscal and public welfare loss ranges between 25 – 30% of the public procurement market. This suggests 0.7 billion euro losses due to public procurement misappropriations in 2007–2008*".

Addressing these errors and the risk of fraud is important – the evaluation has shown that following the rules and principles set out by the EU Directives translates into savings for the procurer – which will be foregone under the practices identified above. Not only does public procurement become more expensive and inefficient, resulting in an immediate cost to society, but there may be other missed opportunities as the possibility to address other strategic issues and progress towards wider societal goals is also negatively affected.

#### 8.3.5.6. Conclusions

Significant differences in the administrative organisation put in place by MS have led to inconsistent application, control and monitoring across the EU. This has resulted in errors, an increased risk of fraud and a less than optimal management of resources.

### 8.4. ANNEX 4 – Summary table linking objectives with problems

The table presented overleaf shows the mapping between the problems and objectives identified for this impact assessment. In particular, it shows that the problem of missed opportunities can be linked to the drivers for all five problem areas, whilst the insufficient cost efficiency is related to the problem drivers for governance, scope and procedures (cells in table bordered by a dotted line). The national markets are being caused by drivers linked to the areas of governance, strategic and access (cells shaded in grey).

**General problem/result:** The internal market is not achieving its full potential for public procurement

**General objectives:**

- Promote EU-wide competition for contracts (i.e. fair, non-discriminatory and level playing field for all suppliers, ensuring EU markets accessible to all EU firms)
- Deliver best value for money whilst achieving the best possible procurement outcomes for society (and hence, ultimately, making best use of tax payers' money)
- Aid the fight against corruption

Problems : Specific objective	Operational objectives	Problem drivers	
<p><b>Problem</b> = Missed opportunities for society</p> <p><b>Specific objective</b> = Take full advantage of all opportunities to deliver the best possible outcomes for society</p>	<p><b>Problem</b> = Sub-optimal cost efficiency of public procurement leading to best value for money not being achieved</p>	<p><i>Scope:</i> Complex rules defining scope and coverage</p>	
	<p><b>Specific objective</b> = Improve the cost-efficiency of EU public procurement rules and procedures</p>	<p>a) streamline and simplify procurement procedures to (i) reduce operational costs (ii) ensure proportionality and (iii) provide for more legal certainty</p> <p>b) improve the flexibility of procedures to better respond to purchasing needs of authorities</p>	<p><i>Procedures:</i> Disproportionate and inflexible procedures</p>
	<p><b>Problem</b> = National rather than EU public procurement markets</p>	<p>a) ensure consistent application, controls and monitoring of public procurement policy and outcomes across MS</p> <p>b) reduce errors and problems in complying with EU public procurement rules</p>	<p><i>Governance:</i> Different administrative models and capacities across EU</p>
		<p><b>Specific objective</b> = Create European rather than national markets for procurement</p>	<p>a) help public procurers to use public procurement to support other policy objectives in a legally compliant and fair manner</p>
	<p><b>Specific objective</b> = Create European rather than national markets for procurement</p>	<p>a) simplify the rules and introduce instruments to increase the transparency of EU public procurement, opening up markets to more cross-border competition</p> <p>b) ensure that the rules promote and support SME participation</p>	<p><i>Access:</i> Market access barriers: natural and regulatory</p>

**8.5. ANNEX 5 – Long list of proposals considered before defining Options<sup>169</sup>**

<b>Action</b>	<b>Economic magnitude<sup>170</sup></b>	<b>Ability to improve the functioning of the public procurement market (Hi, Med, Lo)</b>	<b>Stakeholder views</b>	<b>Link to problem driver(s)</b>	<b>Option action assigned to</b>
Introduction of additional measures to foster SME participation in public procurement through increased use of lots under certain circumstances	3	Hi	Opinions divided	Market access barriers; Disproportionate procedures	ACC.LEGI.FACILIT
Alleviation of administrative burdens through self-declarations with regard to evidence for exclusion and selection criteria; winning bidder then provides evidence	4	Hi	Everybody in favour	Disproportionate procedures; Inflexible procedures; Market access barriers	ACC.LEGI.FACILIT

<sup>169</sup> During the drafting of proposals and internal consultation processes, several of the actions originally identified in this table were discarded. Where these actions fall within the options which form the preferred solution presented under this IA, they are highlighted in italics.

<sup>170</sup> 1 = low market size and low transaction impact; 5 = high market size and high transaction impact.

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Revise standard forms to reduce information requirements on CAEs	5	Hi	General support	Disproportionate procedures; Market access barriers; Inflexible procedures	ACC.LEGI.FACILIT
<i>(Optional) instruments to encourage pro-competitive procurement strategies</i>	2	<i>Med</i>	<i>Mixed opinions, business slightly in favour, CAEs slightly against</i>	<i>Inflexible procedures; Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Legal uncertainty</i>	<i>ACC.LEGI.FACILIT (discarded)</i>
Improve mutual recognition of certificates, e.g. through greater use of e-Certis	3	Hi	Support	Disproportionate procedures; Market access barriers; Lack of clarity; Legal uncertainty	ACC.LEGI.FACILIT

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Measures to foster the innovation capacity of SMEs	2	Med	Some support, but solutions proposed often outside public procurement legislation (e.g. financial support through subsidies)	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	ACC.LEGI.FACILIT
Legislative rules limiting excessively strict turnover requirements for proving financial capacity (to facilitate SMEs access)	2	Med	Vast majority agrees that excessively strict turnover requirements are a problem for SMEs. Less unanimous reaction to EU level turnover cap.	Disproportionate procedures; Inflexible procedures; Market access barriers	ACC.LEGI.FACILIT

<b>Action</b>	<b>Economic magnitude<sup>170</sup></b>	<b>Ability to improve the functioning of the public procurement market (Hi, Med, Lo)</b>	<b>Stakeholder views</b>	<b>Link to problem driver(s)</b>	<b>Option action assigned to</b>
Introduction of a European public procurement passport	4	Hi	Generally positive	Market access barriers	ACC.LEGI.FACILIT
List of possible requirements for selection of candidates made exhaustive	3	Med	Neutral	Market access barriers	ACC.LEGI.FACILIT
Introduction of additional measures to foster SME participation in public procurement through use of quotas	3	Hi	(Question of quotas not explicitly asked in Green Paper because of doubts if legally possible)	Market access barriers; Disproportionate procedures	ACC.LEGI.ENFORC
Impose mandatory use of lots for all contracts	5	Med	Generally against	Market access barriers	ACC.LEGI.ENFORC

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Obligation to subcontract a certain share of the main contract to third parties	3	Med	Mixed opinions	Inflexible procedures; market access barriers;	ACC.LEGI.ENFORC
Obligation to draw up tender specifications for high-value contracts in a second language	2	Lo	Strong opposition from stakeholders	Market access barriers	ACC.LEGI.ENFORC
Instruments to prevent the development of dominant suppliers (e.g. obligation to annul the procedure if only one or two valid bids received)	2	Med	(Green Paper replies not conclusive)	Market access barriers	ACC.LEGI.ENFORC
EU definition of conflict of interest in public procurement	2	Med	Mixed opinions	Complex rules defining scope and coverage; Different models across Member States	GOV.LEGI.TARGET



Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
New organisation of CPBs	4	Hi	Neutral; tempered by concerns for SMES	Different models leading to different public procurement capabilities being developed across Member States; Disproportionate procedures	GOV.LEGI.TARGET
Safeguards to prevent, identify and resolve conflict-of-interest situations	2	Med	Support notably from business and Civil Society for minimum standards at EU level, contracting authorities and MS more sceptical	Complex rules defining scope and coverage	GOV.LEGI.TARGET
Require Member States to improve knowledge sharing tools, assistance to CAEs and business, notably in cross-border context (use of IMI)	3	Hi	Stakeholders strongly in favour of professionalizing public procurement	Different models leading to different public procurement capabilities being developed across Member States; Disproportionate procedures	GOV.LEGI.TARGET

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Additional instruments to tackle organised crime in public procurement	2	Med	No support for very dense and coercive rules w.r.t anti-corruption safeguards, most stakeholders think this should be left to MS legislation	Lack of consistent application, controls and monitoring of public procurement outcomes across Member States	GOV.LEGLENHANC
Designation of national bodies to control, monitor and supervise public procurement practice in Member States (with the tasks of monitoring structural problems + liaise with the Commission on this point + deal with problems in individual procedures/ complaints where necessary + annual implementation report)	5	Hi	No specific question asked in the GP, but in general strong overall support for professionalizing public procurement.	Different models leading to different public procurement capabilities being developed across Member States;	GOV.LEGLENHANC

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
<i>Introduction of criminal sanctions for certain violations of public procurement rules</i>	2	Med	<i>Stakeholders against</i>	<i>Different models leading to different public procurement capabilities being developed across Member States;</i>	GOV.LEGI.ENHAN (discarded)
Modify procedures by shortening time-limits	4	Med	Broad support from CAEs; business sceptical	Disproportionate procedures; Inflexible procedures	PRO.LEGI.DESIGN
Modify procedures to alleviate publication requirements (DPS, PIN)	3	Hi	Some support	Disproportionate procedures; Inflexible procedures	PRO.LEGI.DESIGN
More flexible approach to the organisation and sequence of the examination of selection and award criteria, including allowing experience of staff to be taken into account in the award phase	3	Med	Quite broad support	Inflexible procedures	PRO.LEGI.DESIGN

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Allowing negative previous experience with one or several bidders to be taken into account.	3	Med	Broad support	Inflexible procedures	PRO.LEGI.DESIGN
New rules to improve functioning of repetitive purchasing and aggregation techniques and structures (framework agreements, DPS, CPBs)	3	Hi	Some support, tempered by concerns for SMES	Disproportionate procedures; Inflexible procedures; Market access barriers	PRO.LEGI.DESIGN
Regulating the issue of substantial modifications of a contract while it is still in force	3	Med	Support for codification of case-law	Lack of clarity	PRO.LEGI.DESIGN

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Introduce a rule that contracting authorities must have the possibility to terminate a contract e.g. after a ECJ judgement in an infringement case	2	Med	Slight majority in favour	Lack of clarity; Legal uncertainty	PRO.LEGI.DESIGN
Stronger safeguards against anti-competitive behaviours in tender procedures, e.g. obligation to exclude bidders because of attempt of bid-rigging in the procedure in question	2	Med	Mixed opinions	Lack of clarity; Legal uncertainty; Market access barriers	PRO.LEGI.DESIGN
<i>Rules concerning attribution of exclusive rights</i>	2	<i>Lo</i>	<i>Replies to GP not entirely conclusive, but for majority the attribution of exclusive rights can jeopardize fair competition</i>	<i>Market access barriers</i>	<i>PRO.LEGI.DESIGN (discarded)</i>

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Rules concerning the attribution of contracts on the basis of exclusive rights	2	Lo	Support from stakeholders	Market access barriers	PRO.LEGI.DESIGN
Safeguards to tackle advantages of certain bidders because of their prior association with the design of the project	2	Med	Mixed opinions	Disproportionate procedures; Inflexible procedures; Uncertainty and insufficient provisions w.r.t. integration of strategic goals	PRO.LEGI.DESIGN
Mandatory e-transmission of notices	3	Med	Already used at 93% - general acceptance	Disproportionate procedures	PRO.LEGI.DESIGN
Full electronic availability of tender documents from the moment of publication of notice	3	Med	General acceptance	Disproportionate procedures	PRO.LEGI.DESIGN

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Allow Member States to go further in imposing e-communication (clarify Member States ability to impose mandatory use)	4	Hi	General support	Disproportionate procedures; Lack of certainty; Lack of clarity	PRO.LEGI.DESIGN
Clarify appropriate authentication and identification solutions – ensuring minimum standards and accessibility - for e-procurement	3	Hi	General support	Disproportionate procedures; Lack of certainty; Lack of convergence	PRO.LEGI.DESIGN
Fully electronic communication imposed for all (above threshold) procurement	5	Hi	Slight majority in favour, but with caveats w.r.t. readiness and need to address existing challenge	Disproportionate procedures	PRO.LEGI.FLEXIB
Generalise negotiated procedure	3	Hi	Broad support	Inflexible procedures	PRO.LEGI.FLEXIB

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Specific rules for procurement by sub-central authorities (publication facilities: PIN)	4	Hi	Some support	Complex rules defining scope and coverage; Disproportionate procedures;	PRO.LEGI.FLEXIB
<i>Elimination of the lowest price only criterion</i>	4	Lo	<i>Support from NGOs; CAs and MS strongly against</i>	<i>Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Market access barriers</i>	<i>PRO.LEGI.FLEXIB (discarded)</i>
<i>Elimination of the lowest price only criterion for certain services</i>	3	Lo	<i>Some support from NGOs with regard to social services, other stakeholders rather sceptical</i>	<i>Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Market access barriers</i>	<i>PRO.LEGI.FLEXIB (discarded)</i>



Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Allow MS to eliminate the lowest price only criterion for social services	3	Lo	Questions not explicitly asked in the GP (see: above)	Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Market access barriers	PRO.LEGI.FLEXIB
Fully electronic communication imposed on CPBs	3	Hi	Not discussed	Disproportionate procedures	PRO.LEGI.FLEXIB
Modifications to the distinction between A and B services.	4	Med	(Some in favour, but diverging on what exactly they want)	Complex rules defining scope and coverage	SCO.LEGI.TARGET

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Modifications to certain exclusions (update, clarify).	3	Lo	Majority in favour of keeping main concepts; some support for clarification according to case-law	Complex rules defining scope and coverage	SCO.LEGI.TARGET
Clarifications to definitions of certain procurers	4	Lo	Majority in favour of keeping main concepts; some support for clarification according to case-law	Complex rules defining scope and coverage	SCO.LEGI.TARGET
Legislative rules at EU level regarding the scope and criteria for exemption of public-public cooperation.	2	Med	Support for codifying case-law	Lack of clarity; Complex rules defining scope and coverage	SCO.LEGI.TARGET

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
<i>Regulate other aspects of contract execution (e.g. issues of guarantees, liability, ..)</i>	3	Med	<i>No support from stakeholders – should be left to national contract law</i>	<i>Lack of clarity; Complex rules defining scope and coverage; Inflexible procedures</i>	SCO.LEGI.TARGET <i>(discarded)</i>
Specific features of social services taken more fully into account in EU public procurement legislation	4	Hi	Support from CAEs, civil Society and social service providers in favour of taking into account specificities; business rather against <sup>171</sup> .	Uncertainty and insufficient provisions w.r.t. integration of strategic goals  Disproportionate procedures;  Complex rules defining scope and coverage	SCO.LEGI.TARGET

<sup>171</sup> General line of those stakeholders in favour of special regime: they claim 1. more flexibility + 2. possibility for CAEs to give stronger focus on quality criteria (enabling approach)

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Specific features of social services taken more fully into account in EU public procurement legislation - higher threshold	4	Hi	Question of new threshold for social services not discussed in the GP	Uncertainty and insufficient provisions w.r.t. integration of strategic goals Disproportionate procedures; Complex rules defining scope and coverage	SCO.LEGI.TARGET
Specific features of social services taken more fully into account in EU public procurement legislation - very flexible procedures, leaving MS to define the procedures they think are useful, in full respect of principles of transparency and non-discrimination	4	Hi	Support from those stakeholders that are in favour of a specific regime for social services, see comment in general social services line	Uncertainty and insufficient provisions w.r.t. integration of strategic goals Disproportionate procedures; Complex rules defining scope and coverage	SCO.LEGI.TARGET

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Clarification of the exemptions for intra-group and joint-venture procurement	2	Med	Opinions divided	Complex rules defining scope and coverage;  Lack of clarity	SCO.LEGI.TARGET
Clarification and simplification of the procedure for examining requests for exemption for contracts awarded in sufficiently competitive markets (the current "Art. 30 Decisions")	2	Med	General support	Complex rules defining scope and coverage;  Lack of clarity	SCO.LEGI.TARGET

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Targeted exclusion of procurement made for the purpose of exploring for oil and gas	3	Med	Generally supported	Complex rules defining scope and coverage	SCO.LEGI.TARGET
Specific features of social services taken more fully into account in EU public procurement legislation - ensure that CAEs can choose the service provider on the basis of quality criteria	4	Hi	Support from those stakeholders that are in favour of a specific regime for social services, see comment in general social services line	Uncertainty and insufficient provisions w.r.t. integration of strategic goals Disproportionate procedures;  Complex rules defining scope and coverage	SCO.LEGI.TARGET

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
<i>Specific features of social services taken more fully into account in EU public procurement legislation - impose on CA the taking into account of quality criteria</i>	4	Hi	<i>Question not asked in that detail in the Green Paper, but in general, strong opposition from CAEs and MS as regards mandatory EU obligations with regard to societal issues</i>	<i>Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Disproportionate procedures; Complex rules defining scope and coverage</i>	SCO.LEGI.TARGET <i>(discarded)</i>
Obligation for MS to allow cross-border joint procurement and develop a conflict of laws rule to determine the applicable law and jurisdiction	2	Med	Broad support	Inflexible procedures; Market access barriers; Uncertainty & insufficient provisions w.r.t. integration of strategic goals	SCO.LEGI.TARGET
Radically modify the structure of the Directives by abandoning division into works /goods / services	5	Med	Mostly against	Complex rules defining scope and coverage	SCO.LEGI.REDUCE

<b>Action</b>	<b>Economic magnitude<sup>170</sup></b>	<b>Ability to improve the functioning of the public procurement market (Hi, Med, Lo)</b>	<b>Stakeholder views</b>	<b>Link to problem driver(s)</b>	<b>Option action assigned to</b>
Radically modify the material scope of the Directives by excluding sub-central authorities	4	Med	Mostly against	Complex rules defining scope and coverage	SCO.LEGI.REDUCE
Radically modify the material scope of the Directives by exclusion of B services.	4	Med	(Mostly against)	Complex rules defining scope and coverage	SCO.LEGI.REDUCE
Raise the thresholds	5	Med	Some strongly in favour (notably CAEs), others against (majority of business). MS divided.	Complex rules defining scope and coverage	SCO.LEGI.REDUCE
Include the utilities in the Classic Directive	4	Med	No support	Complex rules defining scope and coverage; Disproportionate procedures;	SCO.LEGI.REDUCE



<b>Action</b>	<b>Economic magnitude<sup>170</sup></b>	<b>Ability to improve the functioning of the public procurement market (Hi, Med, Lo)</b>	<b>Stakeholder views</b>	<b>Link to problem driver(s)</b>	<b>Option action assigned to</b>
Exclude the utilities from procurement rules altogether	4	Lo	No support	Complex rules defining scope and coverage; Disproportionate procedures;	SCO.LEGI.REDUCE
Extending scope to below thresholds procurement	4	Med	No support	Complex rules defining scope and coverage; Disproportionate procedures;	SCO.LEGI.REDUCE
Clarify the concept of LCC and explicitly allow the use	4	Hi	Favourable opinion on concept of LCC from a lot of stakeholders; opinions split as to how far this should be mandatory	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.FACILIT
<i>Allow obligations on "what to buy" to be imposed at national level</i>	3	<i>Med</i>	<i>Opposition from CAEs and business</i>	<i>Uncertainty and insufficient provisions w.r.t. integration of strategic goals</i>	<i>STR.LEGI.FACILIT (discarded)</i>

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Incentives/measures to further promote and stimulate innovation through public procurement - Promote increased use of performance related technical specifications	3	Med	Stakeholders sceptical	Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Inflexible procedures	STR.LEGI.FACILIT
Incentives/measures to further promote and stimulate innovation through public procurement - Promote increased use of variants	2	Med	Question not explicitly asked in Green Paper - no statistics available	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.FACILIT

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
New procedure to support/foster use of innovation (Innovation partnership)	4	Med	Probably quite broad support (Question not asked, but stakeholders have identified a need for improving innovation-friendliness, support for the elements resembled in the new procedure can be deducted from replies to the GP)	Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Inflexible procedures	STR.LEGI.FACILIT
Improve functioning of competitive dialogue notably through better protection of creative solutions	3	Med	Strong support from business	Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Inflexible procedures	STR.LEGI.FACILIT

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Possibility for contracting authorities to explicitly require certain labels (certification schemes), but safeguard that equivalent labels must also be accepted	2	Med	Question not explicitly asked in Green Paper - no statistics available	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.FACILIT
Violation of obligations from EU environmental or social law or from certain international labour law provisions = ground for exclusion of bidders	2	Med	Question not explicitly asked in Green Paper - no statistics available (some support)	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.FACILIT
Tenders which are abnormally low because of non-compliance with obligations from EU environmental or social law, including throughout the supply chain, must be rejected	2	Med	Question not explicitly asked in Green Paper - no statistics available (some support)	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.FACILIT

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Allow inclusion of factors directly linked to production processes in award criteria and technical specifications	3	Med	Stakeholders opinions mixed	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.FACILIT
Require CAEs to use certain defined award criteria and / or technical specifications	3	Med	Opposition notably from businesses and MS	Different Member States models; Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.ENFORC
Permitting restriction to local or regional suppliers - in specific cases	3	Lo	Support from CAEs, opposition from business	Different Member States models; Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.ENFORC

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Mandatory use of life-cycle costing when determining the economically most advantageous offer	4	Med	Favourable opinion on concept of LCC from a lot of stakeholders; opinions split as to how far this should be mandatory	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.ENFORC
Dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract	4	Lo	Strong opposition notably from businesses and MS	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.ENFORC
EU level quotas in public procurement legislation to impose consideration of green, social etc. factors	4	Lo	Strong opposition from all stakeholder groups except NGOs.	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.ENFORC

Action	Economic magnitude <sup>170</sup>	Ability to improve the functioning of the public procurement market (Hi, Med, Lo)	Stakeholder views	Link to problem driver(s)	Option action assigned to
Obligations on "what to buy" at EU level enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc)	4	Lo	Stakeholders opinions mixed.	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.ENFORC
Incentives/measures to further promote and stimulate innovation through public procurement - Obligatory use of performance related technical specifications	3	Lo	Stakeholders sceptical	Uncertainty and insufficient provisions w.r.t. integration of strategic goals; Inflexible procedures	STR.LEGI.ENFORC
Incentives/measures to further promote and stimulate innovation through public procurement - Obligatory use of variants	2	Lo	Question not explicitly asked in the GP - no statistics available	Uncertainty and insufficient provisions w.r.t. integration of strategic goals	STR.LEGI.ENFORC

## 8.6. ANNEX 6 – Detailed description of Headline actions

Table 25): Detailed description of Headline Actions under each legislative option

Option	Headline Action	Description of the headline action
SCO.LEGI.TARGET	Higher threshold for social services , with a special regime for social services above this threshold	There would be no change in basic thresholds, but higher threshold for social services , with a special regime for social services above this threshold. Above this threshold, special light regime, with an obligation of ex-ante publication of a notice would be introduced as compensation for the higher thresholds. CAEs would be allowed to choose the service provider on the basis of considerations linked to the specificities of social services, in particular to the quality of the service.
SCO.LEGI.TARGET	Inclusion of all former B-services (except for social services) in the regular regime	All former B-services (except for social services for which the directive provides a special regime, see below under strategic) would be covered by the regular regime. In practice, this would mean the abolition of B-regime as such (and a replacement of a complicated two-tier structure by a simpler one i.e. based on a special regime for social services- see: above).
SCO.LEGI.REDUCE	Raise the thresholds	All currently applicable thresholds would be raised; Three possible scenarios would be analysed – a raise by 20%, by 50% and doubling the thresholds.
PRO.LEGI.DESIGN	Improve tools for repetitive purchasing (DPS, framework agreements, e-Catalogues).	The functioning of DPS would be considerably improved and simplified e.g. the need for individual notice and indicative tenders before each individual procurement under the system would be abolished. Conditions for use of framework agreements would be clarified, notably the use of FRA by contracting authorities which are not party to the agreement.



Option	Headline Action	Description of the headline action
		Coherent rules for the use of e-catalogues would be provided. The commission would be empowered to issue interoperability standards through comitology.
PRO.LEGI.DESIGN	Increase use of electronic communications tools (e-procurement)	The use of e-procurement tools would be promoted, for example thought: mandatory transmission of notices in electronic form, mandatory electronic availability of tender documents, CPBs would be bound to use fully electronic communication tools. CAEs would have to have access to DPS. MS would be allowed to make mandatory electronic communication where it is not yet mandatory by virtue of the Directive.
PRO.LEGI.FLEXIB	Greater freedom for CAEs to use negotiated procedure	The use of the negotiated procedure with prior publication would be available for all contracts with certain safeguards (notably: documentation obligations, etc.)
PRO.LEGI.FLEXIB	New lighter publication regime for sub-central authorities	Sub-central contracting authorities would enjoy new lighter publication regime, by taking the advantage of leeway allowed by the GPA. For example, they would enjoy the possibility to use the prior information notice as a means of calling for competition and the possibility to set certain time limits in mutual agreement with candidates.
STR.LEGI.FACILIT	Allow consideration of entire life-cycle costs in award criteria	Consideration of entire life-cycle costs would be allowed in award criteria, both in the context of the EMAT and in the second criterion. "Price only" criterion would become "cost", which can be, at the choice of a CAE, price only as currently, or overall costs including life-cycle cost. Life-cycle costing could explicitly include transport costs and externalities linked to transport such as CO2 emissions (where they could be monetised). The

Option	Headline Action	Description of the headline action
		use of common EU methodology would be mandatory whenever established.
STR.LEGI.FACILIT	Allow inclusion of factors directly linked to production processes in award criteria and technical specifications	Factors directly linked relating to production processes would be allowed in award criteria and technical specifications. This would include socially disadvantaged people involved in the production process to support the Social Business Initiative. However, such approach would exclude requirements too far away from the production process, such as requirement for the economic operator to build schools for the children of workers in the country of origin of the supplies (Fair Trade Premium) or general Corporate Social Responsibility.
STR.LEGI.FACILIT	Introduce the "Innovation partnership" (a new, special procedure for purchases not yet available on the market)	Special procedure for purchases which are not yet available on the market: competitive procedure to choose the developer, who would develop the product in cooperation with the contracting authority. To have an incentive to invest the supplier would also be allowed to directly supply the product/service, if the contracting authority is satisfied with the product/service developed
STR.LEGI.ENFORC	Introduce obligations on "what to buy" (quotas)	Quotas setting criteria for a percentage of contracts awarded in selected categories of purchases would be defined in the Directives (e.g. 20% of procured electricity would have to come from renewable sources).
STR.LEGI.ENFORC	Require CAEs to use certain defined award criteria	CAEs would be obliged to evaluate offers according to certain criteria defined by the EU. For example, they might have to use the life cycle cost methodology defined in the Directive, thereby, allowing factors relating to energy consumption to influence the final award.

<b>Option</b>	<b>Headline Action</b>	<b>Description of the headline action</b>
ACC.LEGI.FACILIT	Mandatory acceptance of self-declarations as prima-facie evidence for selection	CAEs would be obliged to accept self-declarations as preliminary evidence submitted by bidders. Only once a successful bidder is selected, the CAE would require the winner to submit original documentation and / or to clarify the certificates and documents which were presented in the offer.
ACC.LEGI.FACILIT	Introduction of a European Procurement passport	EU public procurement passport could become a tool for further simplification of the procedures. EU public procurement passport would take the form of a standard document validated at the MS level, confirming that a bidder is compliant with certain frequently requested criteria e.g. certification that the firm has not been the subject of a conviction by final judgment or is subject of insolvency or winding-up proceedings, that the firm pays social and fiscal tax, etc. The Passport would have a limited validity of for example several months.
ACC.LEGI.ENFORC	Impose mandatory use of lots for all above threshold contracts	All contracts above the EU thresholds would have to be split into lots in order to facilitate the access of SMEs to public procurement markets. The proposed model would not foresee any possibility to waive such obligation, even if such compulsory subdivision into lots was technically difficult, expensive or for other economic reasons.
ACC.LEGI.ENFORC	Introduce quotas for share of procurement contracts / budget awarded to SMEs	Fixed quotas with regards to contracts awarded to SMEs would be defined in the Directives.
GOV.LEGI.TARGET	Establish clear rules for purchases made through CPBs	Clear rules for purchases through Central purchasing bodies, including "safe haven" concept. Introduction of provisions that would permit small contracting authorities to transfer responsibility for procurement to CPBs.

Option	Headline Action	Description of the headline action
GOV.LEGI.ENHANC	Obligatory designation of central national oversight body by Member States, with clear obligations on monitoring, enforcement and reporting	New provisions that would aim at stronger ownership of MS in enforcement of EU public procurement rules, notably through obligation to identify appropriate structures. Also a direct answer to the IAS Audit Report asking for more ownership by MS in the application of EU procurement law. This national oversight body would have obligations on monitoring, enforcement and reporting. The annual reports of the oversight body could for example include reporting on SME success in public tenders. The oversight body could also be responsible for ensuring better assistance to CAEs and businesses in order to improve professionalisation of procurement, better knowledge sharing / knowledge management (e.g. via "knowledge centres"), although this role could also be fulfilled by a different body. Administrative cooperation between MS could be improved through the use of IMI for information exchange.

## 8.7. ANNEX 7 – Detailed analysis of impacts of selected Headline actions

### 8.7.1. *SCO.LEGI.TARGET* - New regime for all services and a lighter treatment for social services

Currently, the Directives make a distinction between so called A-type and B-type services. While A-type services are subject to the full procedures of the Directives, contract awards for B-type services have only to comply with the provisions on technical specifications and on the transmission of a notice of the results of the award procedure<sup>172</sup>. B-type services are also subject to the basic principles of EU law, such as non-discrimination and transparency<sup>173</sup>. The two tier structure was established as a compromise that was meant to mirror cross-border interest of certain sectors (A-type categories) and lack of such interest of other sectors (basically, all B-type services).

Service contracts tend to represent around 38% of the total volume of public procurement published in OJ/TED (i.e. in 2009 around € 160 billion). This total is

<sup>172</sup> Which they may / may not permit to be published.

<sup>173</sup> As different from contracts below the thresholds, which are only subject to the basic principles of EU law - such as non-discrimination and transparency - if they present a cross-border interest.

split into A-type and B-type services (74% and 26% respectively in value terms and 70%/30% in terms of the number of CANs).

The abolition of the current A/B distinction in service (a two-tier structure) could basically mean that one of four approaches is chosen:

- (i) the distinction into A- or B- type services is abolished and all services are subject to the “full” regime (i.e. all services would become A-type ),
- (ii) the distinction into A- or B- type services is abolished and all services are subject to the “light” regime enjoyed currently by B-type services,
- (iii) service contracts would be entirely excluded from the Directives.

Ad.(i): The first proposal, where all services would be subject to the "full" regime (using the current terminology, all services would become A-type services), would expand the scope of the “full” regime by around €41 billion. This move could however pose significant difficulties, as part of the current B-type services have little or even no cross-frontier interest, therefore expanding full provisions of the Directives to those selected services could be perceived as too burdensome and not adapted to services that are not tradable (e.g. so-called "services to the person").

Ad. (ii): Bringing all services to B-type status would be detrimental to those A-type services that are successful in cross-border procurement. Recent research shows that many of A-type services are relatively successful in cross-border procurement (e.g. Category 11:Management consulting services and related services with 10.4% direct cross-border ratio in volume terms in 2007-2009).

Ad. (iii): The impact of the fourth approach aimed at abolishing the two-tier structure by the exclusion of all service contracts from the scope of the Directives would mean downsizing EU public procurement market by roughly €160 billion each year. Although a theoretical possibility, this measure should be ruled out immediately, as it cannot be regarded as a serious alternative - it is not supported by the stakeholders, would trigger important losses in transparency and undermine EU's credibility on the international level (including potential penalties under the GPA). Finally, the third proposal is not sustainable given the findings of the evaluation (i.e. that the benefits of the Directives outweigh its costs). As a consequence, the above measure will not be considered further.

A compromise solution between the two remaining possibilities ((i) and (ii)) would be to move only some types of services to the full regime (i.e. modify the allocation of services to A-type/ B-type list) and possibly – improve the design of these rules.

As mentioned above, one of the "natural" candidates for a special and lighter treatment with respect to pp rules should be the "services to the person" or "social services". This is due to the fact that these services are characterised by very low tradability and generally the absence of cross-border interest. For example, the value of direct cross-border awards as a proportion of all awards in Category 25 ("Health and social services") was close to 0%. There was only one category under B-type services that showed lower percentage (22: Personnel placement and supply services), but the volume of transactions in Category 22 in absolute terms was much

less important<sup>174</sup> than Category 25, as the latter constituted around 1/3 of value of all B-type contracts awarded in 2007-2009.

**Table 26): Cross-border procurement – A and B services on the basis of contract value (2007-2009)**

<b>Service Category</b>	<b>Direct cross-border</b>	<b>Indirect cross-border through affiliates</b>
<i>A-type services</i>	<b>2.8%</b>	<b>16.2%</b>
<i>B-type services</i>	<b>1.2%</b>	<b>12.1%</b>
within B-type: 25: Health and social services	0.1%	0.6%
<b>Total</b>	<b>2.4%</b>	<b>14.6%</b>

Source: Rambøll study

As mentioned before, currently, social services are listed in Annexes B of the Directives therefore, when outsourcing social services via a public service contract, public authorities already enjoy considerable latitude with regard to the procedures to be followed. Nevertheless, some stakeholders claim that adaptations of the current rules are needed in order to take better account of the specificities of social services. There are in particular calls for higher thresholds for such services or a global exclusion of these services from the scope of the Directives.

According to estimations based on notices published in OJ/TED social services accounted for roughly € 18 billion in 2009<sup>175</sup> (see: Table 27).

**Table 27): Social services – the estimated value of public procurement published in OJ/TED in 2009 in € million and %**

<b>Service category</b>	<b>CPV codes</b>	<b>Value [€ million]</b>	<b>% of the total volume</b>
Category 24: Education and vocational education	From 80100000-5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1)	2,293.32	0.5%

<sup>174</sup> Contracts value in Category 22: Personnel placement and supply services was around 1/10 of Category 25: Health and social services.

<sup>175</sup> This figure was calculated on the basis of the notices published under following CPV codes: in category 24 Education and vocational education services (CPV codes from 80100000-5 to 80660000-8, except 80533000-9, 80533100-0, 80533200-1) and in category 25 Health and social services (CPV codes 79611000-0, and from 85000000-9 to 85323000-9, except 85321000-5 and 85322000-2).

Service category	CPV codes	Value [€ million]	% of the total volume
services			
Category 25: Health and social services	79611000-0, and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)	16,422.95	3.9%
	TOTAL	18,716.26	4.5%

Source: DG MARKT estimates based on OJ/TED data

While analysing the volume of transaction related to social services, it is equally important to notice that of the 6.11 % of GDP spent by governments on health social security and education<sup>176</sup>, only a marginal amount has been published in the OJ/TED. The comparison of public expenditure by functions of government with contracts advertised reveals that around 94% of expenditure in the health or social services sector is not spent through contracts advertised in OJ/TED. A similar issue arises in the education sector, where 83% of expenditure seems not to be advertised (see: Table 8 below).

**Table 28): Comparisons between expenditure on works, goods and services by functions of government (based on COFOG data) and the value of publications in OJ/TED grouped by activities, in 2008**

	COFOG expenditure [€million]	OJ/TED estimated publication [€million]	OJ/TED publications as % of expenditure
Health	563,884.20	36,316.12	6%
Education	129,784.80	21,556.80	17%
Social protection	153,859.10	4,516.12	3%

Source: Eurostat (COFOG) and DG MARKT estimates based on OJ/TED

The above data highlight that in the three sectors concerned: health, social protection services and education, the levels of publication are particularly low. This suggests that a vast majority of expenditure in these sectors is not carried out in line with the rules applicable to B-type services - partially, because the value of such contracts falls below EU thresholds, but also because of regulatory settings in those sectors that are established at the national level<sup>177</sup>. To summarise, the way in which

<sup>176</sup> See: the Evaluation Report, page 35.

<sup>177</sup> In general, for example, most expenditure on health services or pharmaceuticals are incurred by households and reimbursed by the state or statutory sickness insurance funds. In Germany statutory sickness insurance funds are considered to be contracting authorities (i.e. in the Oymanns judgment (case C-300/07, 11 June 2009), the ECJ confirmed that German statutory sickness insurance funds are contracting authorities under the procurement directive 2004/18/EC). In the Netherlands most health

education, health care and social protection services are delivered already seems to effectively place most expenditure on goods and services in these sectors outside the scope of the provisions of the Directives. As a result, the proposed changes could have only limited impact on the provision of these services, as the majority of public spending in these sectors is done without the use of public procurement rules defined in the Directives.

Finally, it is expected that more clarity with regards to the correct identification of the relevant service category could generally improve publication rates for services, especially for B-type services. Improving clarity and hence "user-friendliness" of the system would facilitate correct identification of these service types could rise the publication rates for services.

It is also worth mentioning that a slight majority of stakeholders support the idea of reviewing the distinction between A and B services<sup>178</sup>. Most frequently repeated arguments refer to the fact that some of the B-services might not merit differentiated/lighter treatment (for example restaurants, legal services). Stakeholders argued that the market in a number of sectors of B-type services is now developed and these should now be made A's (whilst new or emerging services could be classified as B, until the markets mature).

#### 8.7.2. *SCO.LEGI.REDUCE- General increase of EU thresholds*

In order to analyse the impacts of a general increase of EU thresholds we focus on the principal three threshold levels (the remaining thresholds have been ignored for the sake of clarity of this analysis):

- goods and services purchased by central government (€ 125,000),
- goods and services purchased by sub-central government (€ 193,000) and
- works contracts for all contracting authorities (€ 4.85 million).

The effects of raising the thresholds can be analysed in various terms – the impacts on procedures and the impacts on the size of market covered by the Directives (i.e. economic importance) have been judged as the two most important aspects. The outputs were based on three scenarios (i.e. increase by 20%, 50% and 100%) and are presented below<sup>179</sup>.

##### 8.7.2.1. Impacts on the use of procedures

The open procedure is most frequently used for lower value contracts and its use decreases as contract value increases (see: Figures 27 and 28).

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expenditure is now in principle made by statutory private health insurance bodies which do not consider themselves to be subject to the directives (although there is still public funding for children, the elderly and unemployed) and who provide services through public or private providers of primary and secondary health care. The situation in many other MS is not necessarily clear.

<sup>178</sup>

<sup>179</sup>

Q 4 of the GP: 53% of MS support this idea and 55% of CAE (but 80% of citizens)

The outputs are presented as annualized effects, calculated on the basis of 2009. Procurement volume (recorded in OJ/TED) has increased during 2010 and that might lead to more significant impacts than what has been found based upon the 2009 data; source: PwC study, page 71.



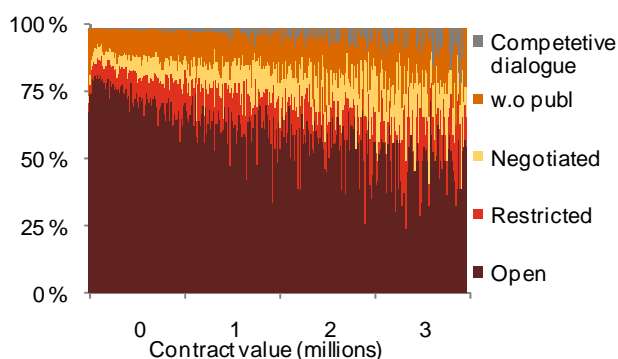
**Figure 27): Values by procedure, median and mean 2006-2010**

Procedure	Median	Mean
Restricted	693	8 287
Negotiated	712	6 672
<b>Total</b>	<b>390</b>	<b>3 141</b>
Accel. Restr.	496	3 045
Negot. w.o publ.	356	2 279
Accel. Negot.	360	2 218
Open	353	2 181

€(thousand)

Source: PwC study

**Figure 28): Distribution of procedures and contract value (thousand euro increments)**



Source: PwC study

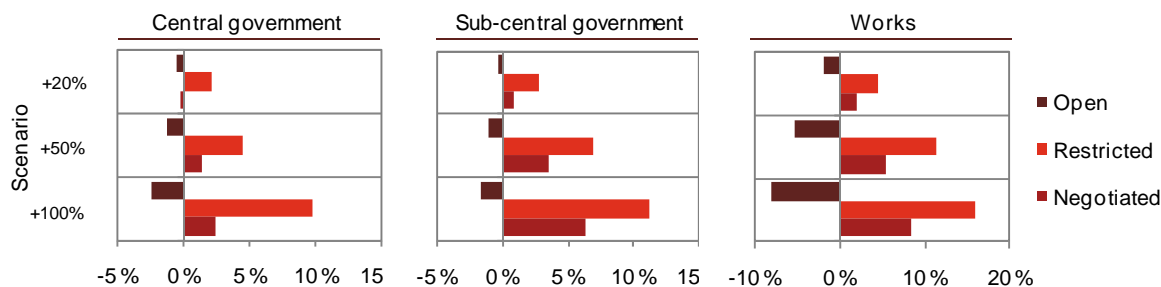
As a consequence, if thresholds were to be raised, the use of available procurement procedures would change, affecting most significantly the use of open procedure which is more frequent in the low end of the value range<sup>180</sup>.

The hypothesis that open contest would be mainly affected by this change is confirmed by a simulation, where potential raise in thresholds levels (three variants i.e. an increase by 20%, 50% and 100%) were modelled against the distribution of procedures. The results show that the open procedure would be used less frequently and will be mainly replaced by the use of restricted procedure. The use of negotiated procedure would also increase albeit at smaller levels. The effect would be the largest for works<sup>181</sup>. The effects of changed thresholds are shown in Figure 9) which analyses all three scenarios.

<sup>180</sup> Source: PwC study, page 71.

<sup>181</sup> Source: PwC study, page 71.

**Figure 29): Growth rates of use of procedures by increases in threshold levels (scenarios identified - increasing threshold levels by 20%, 50% and 100%)**



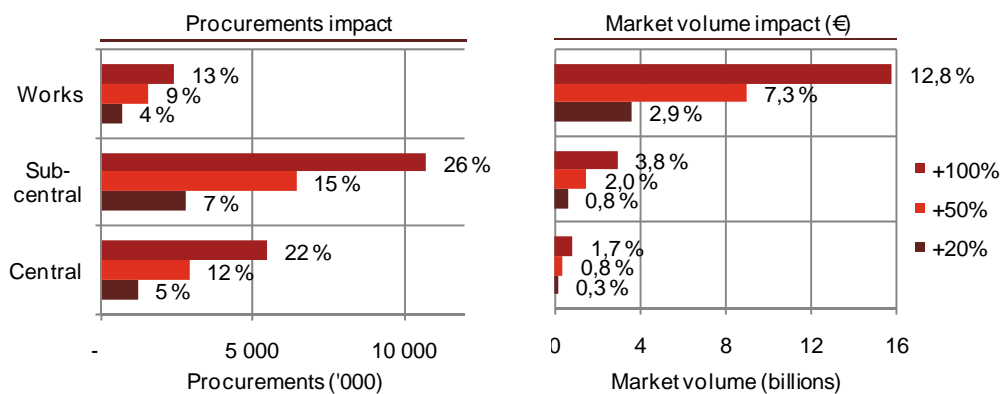
Source: PwC study

Less frequent use of open procedure might have negative impact on transparency of public procurement regime in general.

### 8.7.2.2. Impacts on the number and volume of transactions no longer covered

The effects of raising the thresholds can also be calculated in terms of the number of transactions carried out under the Directives, and the market volume covered by these rules. The outputs based on the three scenarios (i.e. increase by 20%, 50% and 100%) as presented below<sup>182</sup>.

**Figure 30): Impact on number of transactions and market volume by raising threshold levels (2009 est.) rates in percent levels (scenarios identified - increasing threshold levels by 20%, 50% and 100%)**



Source: PwC study

The above findings show that market impact of increasing thresholds could be quite significant, especially for works, reaching € 8 billion annually (if the threshold was increased by 50 %) or almost € 16 billion (if the threshold was to be doubled).

In numbers, the sub-central government category sees the most significant impact – 26% less notices would be published in the OJ/TED if this threshold was to be

<sup>182</sup>

The outputs are presented as annualized effects, calculated on the basis of 2009. Procurement volume (recorded in OJ/TED) has increased during 2010 and that might lead to more significant impacts than what has been found based upon the 2009 data; source: PwC study, page 71.

doubled and 15% less notices in case of a 50% rise. As far as central government supply and services contracts are concerned, raising this threshold by 50% and 100% would decrease the number of notices published by respectively 12% and 22%.

To summarise, the above analysis shows that raising thresholds would reduce the size of the market covered by EU public procurement rules (by up to approx. €20 billion, if all thresholds were to be doubled).

### 8.7.3. *PRO.LEGI.DESIGN - Increase in the use of e-procurement*

As presented in the 2010 Evaluation of the e-procurement Action Plan, the Commission supports the transition from paper-based to on-line procurement because it sees the following advantages:

- Benefits for individual procedures: compared to paper based systems, e-procurement can help contracting authorities and economic operators to reduce administrative costs and speed up individual procurement procedures. In the current financial climate, such efficiencies could be very welcome, maximising the potential which can be obtained from limited resources.
- Benefits in terms of more efficient procurement administration: the development of CPBs, often making extensive use of electronic procedures, can help to centralise costly procurement back-office functions and reap scale economies in procurement administration.
- Greater transparency and better monitoring of procurement: by automating and centralising the flow of information about individual tender opportunities, e-procurement can also enhance the transparency and overall efficiency of public procurement, opening up markets to more competition and deepening the pool of competing suppliers, whilst at the same time improving spend management and overall planning.
- Potential for integration of EU procurement markets: e-procurement reduces distance barriers and information gaps which could have reduced or discouraged cross-border participation in paper-based procedures. It should be underlined that, while e-procurement can overcome distance-related costs to participation in the procurement procedure itself, it will not change the relevance of distance or physical proximity in the actual performance of the underlying business transaction. An increasing number of procurements, for example the provision of services such as software, design competitions and helpdesks, can be provided from another country and e-procurement should be well suited to publicise, exploit and ultimately realise such opportunities.
- Administrative modernisation and simplification, encouraging the integration of various administrative processes as well as diffusion of ICT in government and society.

In terms of benefits delivered by operations ran across the EU, there were great expectations relating to the savings which could be realised as a result of the introduction of e- procurement.

The potential to reduce costs was promoted as a key incentive to encourage the switch to electronic procedures. Certain MS have turned it into an objective of their national strategy, such as Ireland where five of the quantitative targets of their national action plan were focused on costs.

Due to the lack of appropriate data, it is not possible at this stage to evaluate the reduction of costs of single procedures in the MS. E-procurement is expected to have initially increased the costs due to the necessary spending for the creation of platforms, but a dramatic decrease of costs was expected, once the structural costs had been absorbed. There is however a small but growing body of proof that savings are being realised as a result of e-procurement use (see: Box 3) below). Wider anecdotal evidence suggests that many contracting authorities and economic operators have made the switch-over to e-procurement and would not contemplate a return to paper based procedures. The ePractice<sup>183</sup> website gathers case studies showing examples of MS (such as Austria, Spain, France or Romania) where the savings made through e-procurement exceed the investment and running costs. (for more detail see Annex VIII of report, which gives a broad overview of the situation by MS in terms of savings.)

#### **Examples of savings and improvements**

- Italian Emilia Romagna's agency Intercent ER offers e-procurement services including e- Marketplace, e-Catalogues and e-Auctions and is now the reference point for 539 administrations (90% of local agencies). In 2008 it processed transactions amounting to some € 419 million, delivering efficiency benefits of € 67.5 million and time savings of 45 man-years.
- The Austrian Federal Procurement Agency centralises purchases for federal authorities through e-procurement functionalities. In 2008 it reported savings of €178 million against a procurement volume of €830 million. Benefits seem to significantly outweigh the annual maintenance costs of €5 million, which are less than 3% of the savings.
- As of 1 February 2005, all contracting authorities in Denmark may only accept electronic invoices. This reform affects approximately 15 million invoices a year, and applies to the entire public sector, from ministries to nursery schools. The use of e-Invoicing is expected to save the public €100 million every year, on top of savings in internal administrative processes.
- In Norway, the Ehandel platform is helping authorities to achieve 20-40% reductions in the time taken to handle orders, receipt of goods and invoicing and delivering price savings in the region of 2-10%.
- In the UK, the Buying Solutions website reported in its 2008/09 annual report that it had facilitated sales of over £5 billion, delivering £732 million in savings. The UK also reported savings frequently exceeding 10% (and even up to 45%) through the use of e- Auctions and recently announced plans to use e-Auctions to save the taxpayer up to £270 million by the end of 2011.
- A Portuguese study compared the best bids for public works contracted by 50 Portuguese public hospitals in 2009 (using paper based systems) and 2010 (using e-procurement). It concluded that a cost reduction of 18% had been achieved in 2010, due to the increase in competition generated by e-procurement.

Source: DG MARKT, based on ePractice, national e-procurement sites and MS presentations

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<sup>183</sup> <http://www.epractice.eu/>

#### 8.7.4. *PRO.LEGI.DESIGN - Improve tools for repetitive purchasing*

Repetitive purchasing is used by contracting authorities to make purchases, repeatedly, over a certain period of time. It aims at streamlining and improving the timeliness and the effectiveness of the process of acquiring the goods/services/works needed. There are two main repetitive purchasing procedures foreseen by the Directives: framework agreements and the DPS.

A ‘framework agreement’ is an agreement between one or more contracting authorities and one or more economic operators. Its purpose is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

A DPS is a completely electronic process for making repetitive purchases, limited in duration and open throughout its validity to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.

In addition to these two procedures, e-catalogues (electronic catalogues), are also a useful tool in the context of repetitive purchasing. An e-catalogue is an electronic document established by a supplier describing goods and services and their prices. It can constitute a tender, under certain conditions. In the context of repetitive purchasing, e-catalogues can be very useful as they allow suppliers to rapidly prepare an offer, while allowing contracting authorities to evaluate offers in a standard format.

The Directives could improve/simplify the use of repetitive purchasing procedures/tools by increasing clarity when running these procedures, by making them more proportionate and suited to contracting authorities' needs and by addressing their current shortcomings (risk of market closure for framework agreements, complex rules for running the DPS etc.). Simplifying and improving the use of these procedures would in turn optimise the use of repetitive purchasing, generating additional benefits for both contracting authorities and suppliers.

Repetitive purchasing and issues of aggregation are inevitably evoked in the context of CPBs since the reason to establish them is usually to provide smaller contracting authorities with the benefits of economies of scale. According to the Evaluation of the Public Procurement Directives, in 2009, over 40% of the value of contracts published by central or joint purchasing bodies was through framework agreement contracts (page 10 of the summary of the Evaluation report). However a single contracting authority can also, via repetitive purchasing, aggregate procurement needs previously met by dispersed procurement entities within its own organisation, to provide flexibility over time and across departments. Thus, repetitive purchasing can generate economies of scale.

Moreover, repetitive purchasing is particularly suited for the use of e-procurement, as a repetitive purchase is a more standardised process, which can more easily be processed via electronic means. Combining electronic means and repetitive purchasing can trigger high transactional savings, can increase transparency and can improve monitoring capabilities.

However, repetitive purchasing can increase the risk of market closure and concentration, if repetitive purchasing procedures favour the participation of a limited number of participants or the use of long term contracts. Repetitive purchasing can also restrict SME participation in public tenders if the value of the contracts is too high for SMEs to be able to compete.

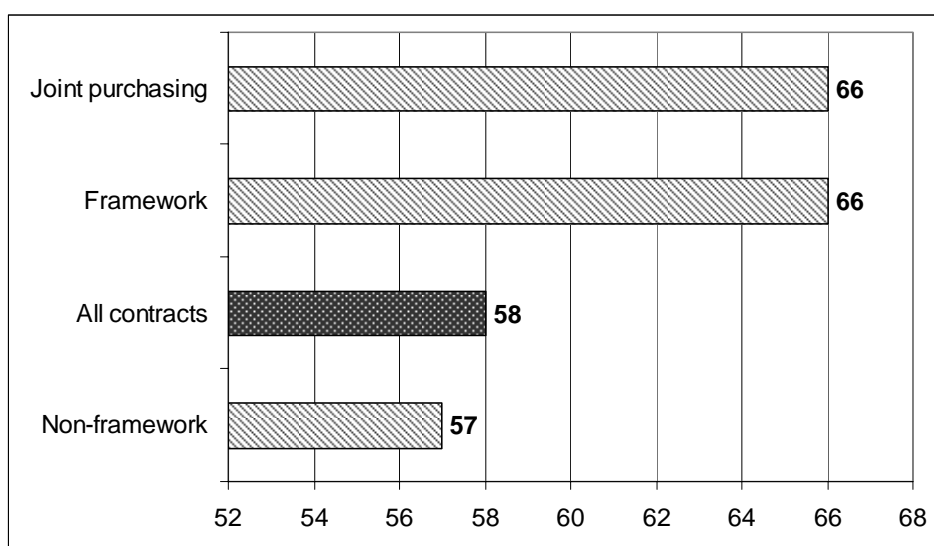
#### 8.7.4.1. Impacts of using framework contracts

Framework agreements prove to have lower costs than other procurement procedures; thus, increasing their use could reduce the average cost of running procurement procedures. According to the Evaluation "framework contracts have lower costs per contract than any other form of procurement. There are savings in frameworks for both authorities and for firms. CAEs costs are about 75% of the average procedure; firms' costs are about 83% of the average". Lower transaction costs are one of the reasons why the use of framework agreements has increased rapidly. Between 2006 and 2009 the number of framework contracts has increased by almost a factor of four<sup>184</sup>. According to the Evaluation, framework agreements also perform better than other procurement procedures in terms of the number of bids that they attract.

The lower transaction costs and the higher level of competition when setting up a framework agreement should be balanced against the much lower level of competition that exists at the time of each contract under the framework.

Table below summarises compares the duration of the award stage of procurement procedures (i.e. the number of calendar days from the deadline for the receipt of tenders to award of a contract). As Figure 31) shows, aggregated procedures are usually more time consuming than those which do not use the below mentioned techniques.

**Figure 31): Duration of procedures in calendar days (award stage) by aggregation techniques**



Source: PwC study

<sup>184</sup> The Evaluation report, page 10

The GP responses and the Evaluation show that many stakeholders and MS are concerned that framework agreements may close particular markets to competition for significant periods of time and that the size of the contracts may put them well beyond the ability of SMEs to bid for them. Indeed, the evaluation shows that framework contracts are twice the value of regular purchases, increasing the risk of low SME participation.

Thus, the use or the design of framework agreements should be amended to prevent more effectively the potential risk of market closure and to increase competition and SME participation.

#### 8.7.4.2. Impacts of increasing the use of the DPS

As a fully electronic procedure for repetitive purchasing, the DPS can reduce transaction costs and increase transparency for contract award. Moreover, the DPS, contrary to the framework agreement, is open to new participants throughout its duration, which increases competition and favours SME participation. Thus, increasing the use of DPS can increase the openness of particular markets to competition, while providing the advantages of repetitive purchasing described above.

However, the costs of running a DPS are high. According to the Evaluation running a DPS is the most expensive procurement procedure<sup>185</sup>. Moreover, almost 40% of the respondents to the Green Paper on e-procurement perceive the current provisions on DPS as complex and not adapted to contracting authorities' and suppliers' needs. They call for clearer provisions on the DPS and simpler rules for running it.

The Evaluation shows that so far the actual use of the DPS has been marginal. This low use also seems to demonstrate a misunderstanding of the provisions. So far, 10 MS have added further provisions, clarifying the conceptual framework, the different stages and scope of a DPS, which may actually show that there was indeed some lack of clarity in the original provisions on DPS.

Thus, in order to capitalise on the advantages of the DPS, the procedure should be clarified, simplified and made more flexible as to increase its attractiveness and to reduce the costs of running it.

#### 8.7.4.3. Impacts of using e-catalogues

E-catalogues provide various advantages to suppliers and contracting authorities. They have improved reliability, allowing for quick up-dates of relevant product information. They can reduce the time needed to input product data and can generate cost reductions for data processing operations (these have not been quantified). Moreover, in the context of repetitive purchasing they allow quicker submissions of offers for suppliers and improved ordering procedures for contracting authorities. The impact assessment on the 2004 action plan, noted that e-Catalogues appear to be used mostly by central purchasing bodies for ordering under framework agreements, using ad-hoc e-Catalogues.

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<sup>185</sup> The Evaluation report, page 19

There are a number of providers of e-catalogue systems, but the underlying data or structures are not interoperable or easily interchangeable between these systems (cf. page 108 of the Evaluation). This can complicate the task of suppliers who have to use different e-catalogue formats. Moreover, if contracting authorities do not make available the format of e-catalogues for their suppliers or if the cost of establishing an e-catalogue is too high, SME participation in e-procurement can be restricted<sup>186</sup>.

Thus, European legislation should clearly define e-catalogues, the conditions under which they may be used and possibly common formats to be applied to ensure interoperability and easy access by suppliers.

#### 8.7.5. *PRO.LEGI.FLEXIB - Permit more negotiations*

One of the headline actions identified under PRO.LEGI.FLEXIB option would be to permit more negotiations, for example by putting the negotiated procedure with publication on equal footing with other procedures in the Classic Directive. Impacts of such proposal would be significant, as until now the use of negotiated procedure was an exceptional method of awarding a contract which could be used exclusively under specific circumstances (i.e. a list of these circumstances was enumerated in Art. 30 of the Classic Directive).

Greater freedom to use negotiations was basically supported by the majority of respondents to the GP, across all stakeholders groups<sup>187</sup>. The main argument presented in the GP consultation was that negotiation would permit the needs of CAEs to be addressed more efficiently<sup>188</sup>. This possibility is also compatible with the GPA.

##### 8.7.5.1. Impact on the costs of procedures

The negotiated procedure is less expensive than open and restricted procedures, as it attracts less competition (so the global costs are lower due to lower costs for businesses). The total cost of a typical negotiated procedure is around €26'000 compared with around a thousand euro more in the open contests and almost €42'000 cost of running the restricted procedure.

The positive cost effectiveness of this legislative proposal would also be driven by increased simplification of the legislative framework. The current rules are complex, as each time negotiated procedure with publication is used, a CAEs need to justify the use of such procedure. If the negotiated procedure with publication was more easily available, there could be less incentive to circumvent the Directives (e.g. by direct awards) and again, this could result in more effective use of public funds.

However, the overall cost-effectiveness of the negotiated procedure may be negatively affected by the fact that the negotiated procedure is less efficient in generating savings than the open and restricted procedures<sup>189</sup>. As a result, CAEs may

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<sup>186</sup> The Evaluation report, page 108

<sup>187</sup> Replies to question 19 of the GP.

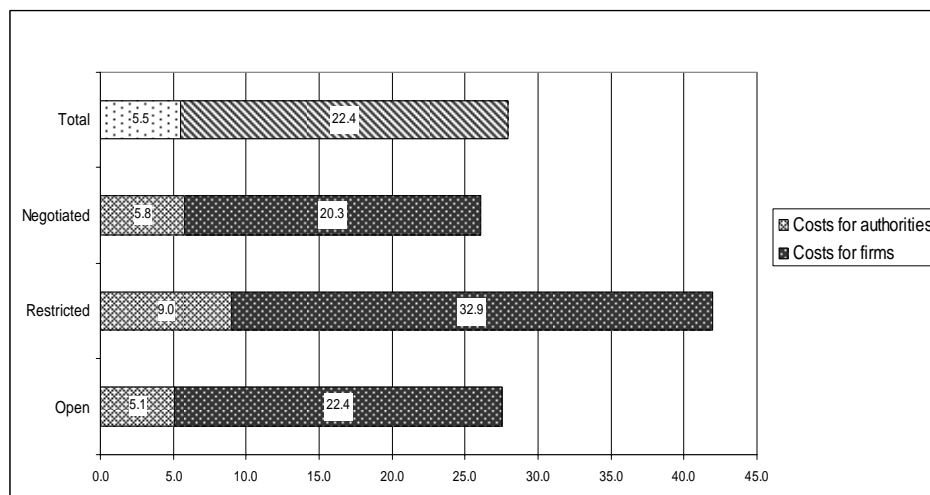
<sup>188</sup> Replies to question 19 of the GP.

<sup>189</sup> "Using the open procedure is associated with benefits of a 3 % lower award value when compared to cases where non-standard procedures were used", source: Europe Economics study, page 52.



pay higher prices per purchase and the previously mentioned benefits of lower transaction costs may level off (to some extent).

**Figure 32): Typical cost of a procedure [in '000]**

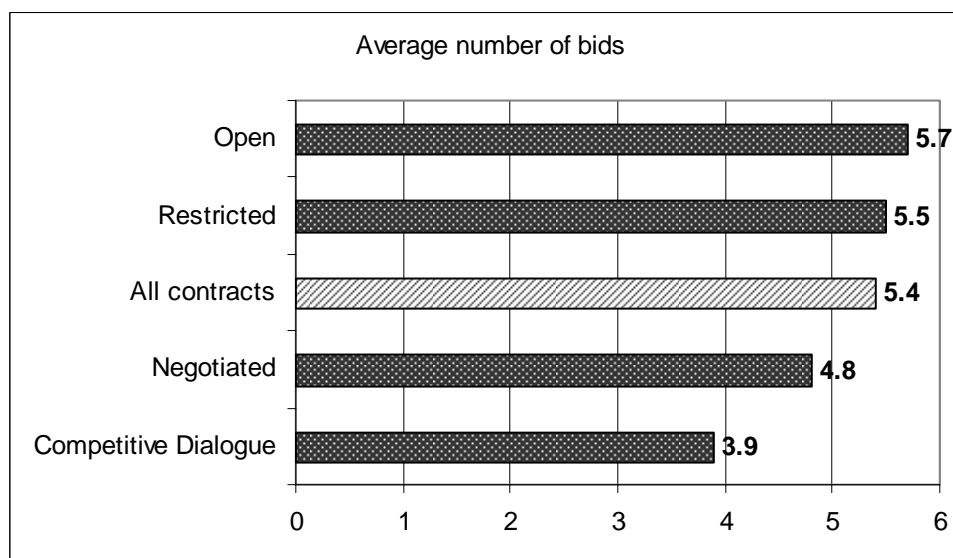


Source: PwC study

### 8.7.5.2. Impacts on competition

If negotiated procedure becomes more frequently used due to the introduction of legislative changes foreseen under option PRO.LEGIFLEXIB, this might have negative impact on competition as the typical negotiated procedure attracts fewer tenders than the corresponding open procedure.

**Figure 33): Number of bids received by procedure and technique (mean)**

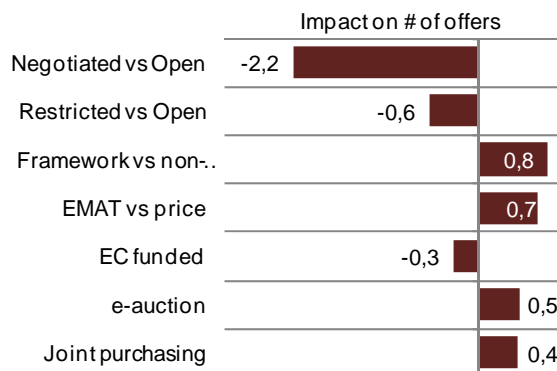


Source: PwC study

Additionally, an econometric analysis using a number of variables that could contribute to the variation in the number of bids that a call for tenders receives has confirmed some of the results of the descriptive analysis presented above but also

highlighted other effects. The econometric analysis thus investigated which effects can be uniquely attributed to each explanatory variable and showed that negotiated procedures would, holding all else equal, receive less offers than the open procedure (by roughly 2.2%). The results of the regression are presented on Figure 34) below.

**Figure 34): Estimated impact of type of procedure on number of offers**

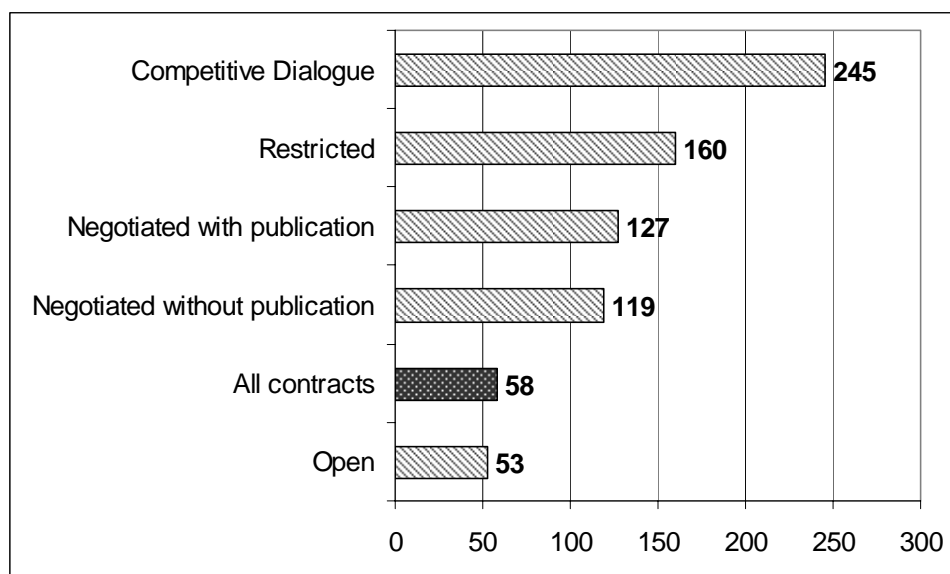


Source: PwC study

### 8.7.5.3. Impacts on the duration of the award stage

While analysing economic impacts the introduction of unlimited right to use the negotiated procedure with publication, we should mention a draw-back concerning its lower time-efficiency when compared with the open procedure.

**Figure 35): Time from the deadline for the receipt of tenders to award of a contract in days, by procedure**



Source: PwC study

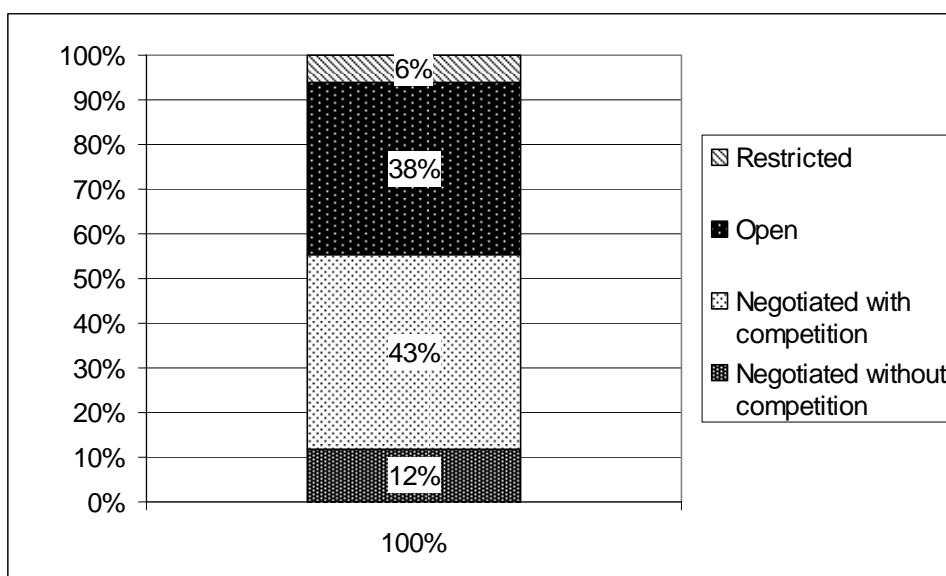
As the above figure shows, the negotiated procedure with publication takes much more time to award (usually 127 days) than the open procedure (typically 53 days). The time that elapses until the award of a contract is especially problematic for the firms for whom this 1/3 of a year spent on decision-making means additional

business uncertainty (as they have invested resources in bidding and do not know if they were successful or not).

#### 8.7.5.4. Impacts on the costs of procedures

In 2009, in the utilities sectors the negotiated procedure with publication (which under the Utilities Directive is a standard procedure) was used in 43% of awarded contracts (see: Figure 36).

**Figure 36): The use of procedures in the utilities sector in 2009 (based on the number of CANs)**



Source: DG MARKT based on OJ/TED data

In the same year, this procedure was used only in 4% of notices published in the classical sector. If we assume, that after the proposed legislative revision the use of negotiated procedure with publication in the classical sector would become similar to the utilities sector (i.e. it would rise from 4% to 43%), this would mean that for around 47,000 transactions yearly, costs of public procurement procedures would be lower by € 1,200, hence the global costs would diminish by roughly € 56 million per year.

Another source of savings in the costs of procedure would come from the fact that the negotiated procedure attracts less competition and therefore the global costs of procedures would drop, because less offers in total would be prepared by businesses.

#### 8.7.5.5. Impacts on cross-border trade

More frequent recourse to the negotiated procedure could improve cross-border penetration of public procurement markets as contracts awarded under this procedure are more frequently awarded to foreign suppliers (see: Table 29 below).

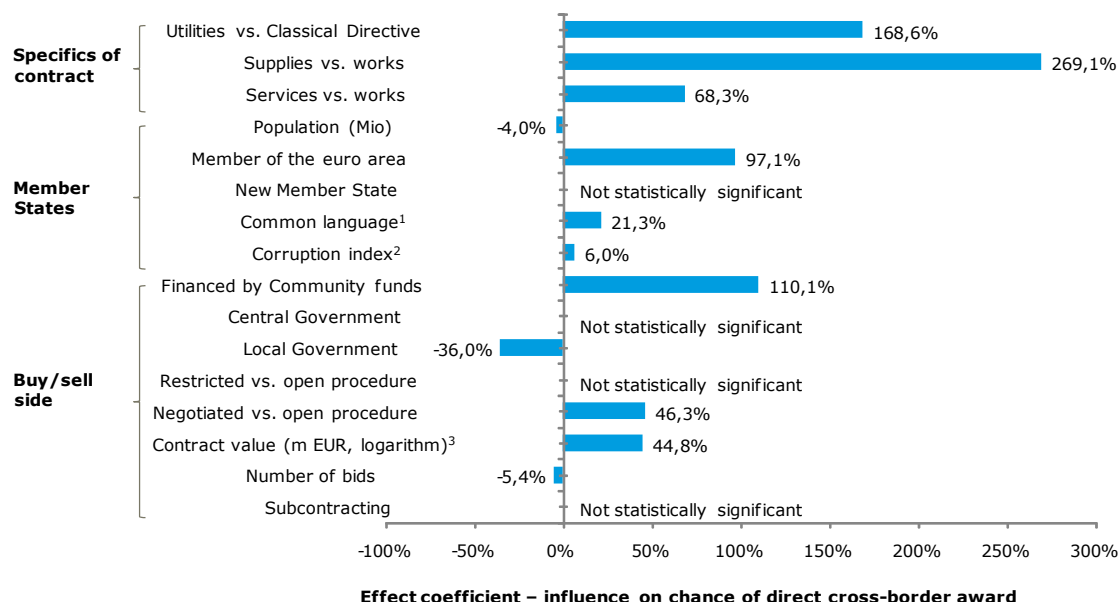
**Table 29): Value of direct cross-border procurement by procedure [in %] in 2007-2009**

Procedure	Direct cross-border [%] – Classic Directive	Direct cross-border [%] - Utilities Directive
Open	2%	5%
Restricted	4%	2%
Negotiated with publication	4%	10%
Negotiated without publication	6%	11%
Accelerated restricted	3%	-
Accelerated negotiated	23%	-
Competitive dialogue	1%	-

Source: Rambøll study

The use of negotiated procedure was also identified as a significant factor having positive influence on direct cross-border procurement. In a model that was analysing factors from the buy and sell side, the effect coefficient of the use of the negotiated procedure as compared with the open procedure was estimated at 46.3% (i.e. the chance of direct cross-border award if the negotiated procedure is used are 46.3% higher than if the open contests was used), see: Figure 37) below.

**Figure 37) Factors with influence on direct cross-border procurement**



<sup>1</sup> I.e. shares a language with another Member State

<sup>2</sup> The higher the index, the lower the perceived level of corruption

<sup>3</sup> Due to logarithm not directly interpretable

Source: Rambøll study

If the above relationship is sustained after the introductions of legislative changes in the Directives, unlimited right to use the negotiated procedure with publication should positively influence cross-border penetration in public procurement markets.

#### 8.7.6. *PRO.LEGI.FLEXIB - New lighter regime for sub-central authorities*

In direct response to concerns that current procedural requirements impose disproportionate costs on CAEs and suppliers, efforts could be made to design a lighter procedure based on periodic announcements of planned procedures or a constantly updated poster-board of current procedures. Such approaches could also maintain some common element of transparency to sustain wide supplier involvement, competition and improved procurement outcomes. Designing a procedure that delivers meaningful procedural benefits while meeting existing international requirements would be challenging. One area where there is still some room to manoeuvre in terms of the "fit" between the current GPA requirements and the current EU rules, is the regime applied to sub-central authorities – a market representing around 33% of CANs (approx. 45,000 p.a.) and worth some €116 billion p.a. (28% of total).

**Table 30): Economic importance of sub-central authorities procurement**

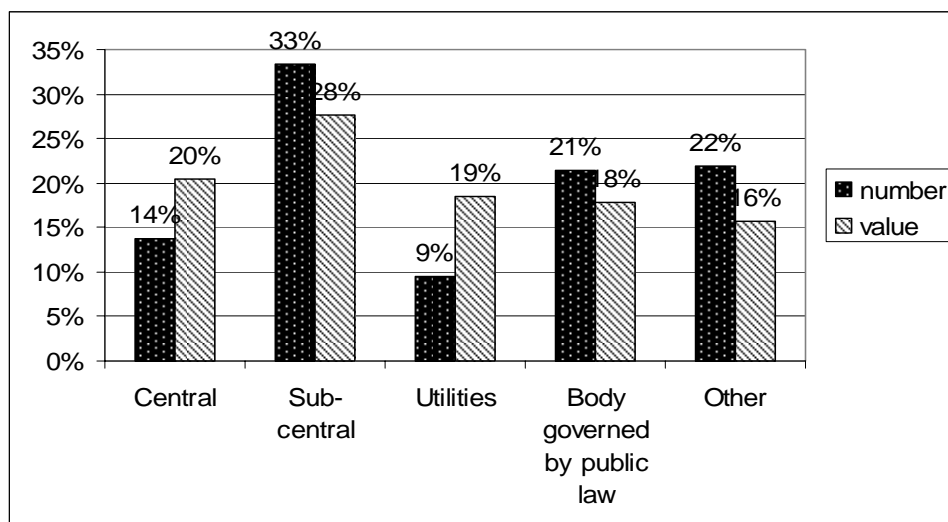
	<b>Number of CANs removed (% of CANs )</b>	<b>Value of CANs removed (% of total value)</b>	<b>Internat. conse quences</b>	<b>Comments</b>
Sub-central authorities	45,000 (33%)	€116 billion (28% )	Yes	Could be more – "other" or "bodies governed by public law" not counted

Source: DG MARKT estimates based on OJ/TED data

Due to limited room to manoeuvre in terms of the "fit" between the current GPA requirements and the current EU rules, the new lighter regime would be available to sub-central authorities only i.e. a market representing around 33% of CANs (approx. 45,000 p.a.) and worth some €116 billion p.a. (28% of total) based on 2009 data (see overleaf).

This estimated global figure could be significantly higher as sub-central authorities very frequently publish their notices as “bodies governed by public law” or "other".

**Figure 38): Shares in the number of CANs and value of procurement published in OJ/TED in 2009 by type of authority [in %]**



Source: DG MARKT estimates based on OJ/TED data

#### 8.7.7. *STR.LEGI.FACILIT - Directly linked externalities taken into account*

If the need for selection and award criteria to have a strong, objective link to the object of contract purchase were to be weakened it would be necessary to ensure safeguards to avoid the imposition of discriminatory criteria and uphold treaty principles. For example one could use sustainable criteria that are not related to the physical characteristics of the product but only to the process by which it had been produced. Such criteria might however increase the costs and time taken for CAEs, particularly in the tasks of drafting specifications and evaluation of offers. Again, they might need to invest in additional training, or the use of experts, to achieve the required level of knowledge.

26 of the 30 EEA MS have targeted specific product groups (in general, some or all of the product groups for which the Commission has established criteria) in their action plans. Construction and transport are among the most common product groups. These, together with Office IT equipment, make up a considerable proportion of the total value of contracts awarded above the thresholds amounting to more than € 100 billion. Construction and transport have been identified in the 2011 European Energy Efficiency Plan as having the greatest energy saving potentials. They are thus in a strong position to meet national targets.

Examples of the benefits of GPP (taken from the Buying Green Handbook 2011):

- The City of Vienna saved €44.4 million and over 100,000 tonnes of CO<sub>2</sub> between 2004 and 2007, through its EcoBuy programme.
- 3 million tonnes of CO<sub>2</sub> would be saved in the Netherlands alone if all Dutch public authorities applied the national Sustainable Public Procurement criteria, which include green criteria. Public sector energy consumption would be reduced by 10%.

- If all IT purchases in Europe followed the example of Copenhagen City Council and the Swedish Administrative Development Agency, energy consumption would be cut by around 30 terawatthours – roughly the equivalent of four nuclear reactors.
- £40.7 million (€47.2 million) could be saved in the UK if the proposed Government Buying Standards (GPP criteria) are applied by all central government departments and executive agencies, according to a cost-benefit analysis which monetised the potential impacts.
- CO2 emissions would be cut by 15 million tonnes per year if the whole EU adopted the same environmental criteria for lighting and office equipment as the City of Turku, Finland – reducing electricity consumption by 50%.

#### 8.7.8. *STR.LEGI.FACILIT - Innovation partnership*

Pre-commercial procurement is considered as a well-suited instrument for promoting innovation by a large majority of respondents to the Green Paper consultation. Most stakeholders are also clearly in favour of further measures to promote and stimulate innovation through public procurement and have suggested that more widespread use of the competitive dialogue, design contest and in particular the negotiated procedure, as well as a wider allowance of variants and performance requirements in technical specifications could be helpful.

According to a recent survey of contracting authorities, 48% seek innovative products, solutions or services in their tender documents on at least some occasions; 7% indicate that they aim to do this as much as possible and 10% indicate that they do so regularly<sup>190</sup>.

Procurement officers have to be particularly experienced in order to encourage innovative solutions without restricting competition. The difficulty comes from the need to evaluate and compare different solutions or products at an early stage, while they are still far from entering volume production. Of the survey participants 55% believe the procurement procedure to be more complex if innovation-promoting requirements are included in calls for tenders.

Simply allowing for variants or alternative solutions does not signal to potential suppliers that the contracting authority is looking for an innovative solution. The aim of the new innovative partnership procedure would allow CAE to clearly indicate their interest in such proposals, while retaining broad competition and ensuring that the procedure could be conducted in stages and reviewed as the solution approached full scale production to enable the partnership to be terminated and a normal call for tenders initiated.

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<sup>190</sup> Adelphi study page 82, for complexity (below) see page 140.

#### 8.7.9. *STR.LEGI.ENFORC - Quotas in strategic procurement*

Most stakeholder groups, including businesses, public authorities and Member States, which responded to the GP consultation are against introducing obligations on "what to buy" in EU public procurement rules.

Most frequently raised arguments against such obligations are the fear of too much interference from the EU in the decisions of public purchasers, increased complexity of the legal framework, the risk of affecting contracting authorities' ability to adapt their purchasing decisions to their specific needs, risks of price increases and of disproportionate administrative costs for public purchasers and businesses, particularly SMEs.

MS have already established national action plans (NAP) in order to set a (generally non obligatory) targets for increased levels of green public procurement within certain groups of products. These NAPs have not yet been evaluated in most MS and it is not clear whether they are having a significant impact on contracting authorities' behaviour. Establishing mandatory quotas would seem premature while the effectiveness of voluntary measures has not yet been assessed.

Imposing the use of criteria for strategic goals such as environmentally sustainable or socially responsible procurement for a certain percentage of purchases would provide no incentive for contracting authorities to consider which of their purchases could make the greatest contribution to achieving a particular strategic goal at least cost to society.

#### 8.7.10. *ACC.LEGI.FACILIT - European public procurement passport*

The European public procurement passport may be defined as a "certificate of certificates" issued by a trusted agency in a MS which includes in one single document a statement for each piece of evidence commonly required of an economic operator wishing to participate in a call for tenders.

For ease of presentation, each line of the Passport Certificate could be seen as replacing a traditional evidentiary document or statement that is issued by a specific (national or local) public body in a MS to certify a particular status of a given firm (e.g. "absence of conviction for the representatives of a company", or "statement of compliance with Social Security obligations").

An economic operator wishing to respond to a call for tender would no longer be requested to include in the tendering package all the certificates and statements demanded by the CAE, but would simply attach its own passport certificate instead, which incorporates all the statements in one single document.

The passport is issued by a public agency in the MS, from now on referred to as the Passport Agency (PA), upon request from an economic operator. In the application, the firm spells out all the evidentiary elements that the passport certificate has to contain and the firm has to attach to it all the original certificates and statements providing said evidence. The PA verifies the original statements and certificates and draws up the passport certificate, providing:



- a binary positive or negative mark (e.g. Y or N) for all those statements that certify the presence or absence of a given requirement (e.g. "statement of compliance with Social Security obligations");
- structured information to document specific data for all the certificates that describe more complex situations (e.g. the total annual turnover in a balance sheet).

A passport certificate has a validity limited in time. Any CAE in the EU has to accept in procurement a passport certificate issued by any EU PA as long as the certificate is not expired.

#### 8.7.10.1. Implications

The Passport model is essentially a new administrative concept and business model rather than an e-procurement application. In fact, it can entirely be enforced using traditional paper and mail communication.

However, it simplifies to a very large extent the automation scenario because it lays the foundation for a business document (the Passport Certificate) that is structured in a consistent manner and that is issued by one specific body in each MS that everybody knows and has access to. This simplifies to a very large extent the networking concerns.

In addition, by decoupling the evidentiary procedure within procurement and the actual request of traditional certificates from the National issuers (which remains indispensable), the EU-level automation scenario is freed from the nightmare of a CAE having to collect electronic evidence from the National issuers, which has proved extremely unrealistic so far (and probably will be so for many years to come.)

As pre-requisite for the model to work effectively EU law needs to define unequivocally the evidence that CAEs may ask for. e-Certis would form the basis for this.

#### 8.7.10.2. Advantages and disadvantages

Advantages:

1. the economic operator asks for the statements and certificates from the National issuers only once within the established validity period of the Passport Certificate and uses the Passport Certificate an unlimited number of times within the validity period;
2. the Passport Certificate is very easy to standardise in an EU (language-independent) format, thereby enabling automated processing (evaluation) of the information at the receiving point (i.e. the CAE e-procurement system). 27 national PA, under various possible arrangements, can easily be asked to collaborate over IT solutions;
3. other technical issues inherent to cross-border e-procurement, such as authentication of the evidentiary document, would also greatly be simplified due to the simplification of the networking model;

4. Cross-border recognition of certificates and attestation would no longer be an issue because CAEs are bound to accept the Passport Certificate coming from EU recognised bodies (i.e. the PA);

5. The model would be implemented supporting any National infrastructure as is. The EU regulatory / legislative jurisdiction is just limited to the relationship between a CAE and a PA, leaving with the MS the responsibility to define the model for requesting, documenting and obtaining a Passport, as well as to define rules to set up and run the national PA. Countries that have implemented e-Certificates and e-Attestation solutions (e.g. VCD-based) would take on board all their own established assets. (The task of collecting certificates and attestations issued within a country is shifted from the contracting authority to the PA that will use all the mechanisms and infrastructure already in place to do so). This would enable to seamlessly support in cross-border applications very different maturity models - MS that are more advanced in the "dematerialisation" of certificates will apply very efficiently the business model without being affected by the delay that may occur in other MS.

Downsides of the solution:

1. MS are requested to set up a new public service (the PA) either as an entirely new body or as a specific division of an existing body;
2. The workload for the PA would be quite significant, receiving a great deal of applications to be examined plus renewals each time the passport certificates expire.

#### 8.7.11. *GOV.LEGI.TARGET - New organisation of CPBs*

Through the aggregation of demand CPBs could significantly diminish costs of procedures. As mentioned before, one for of aggregated purchasing – running a framework agreements is associated with lower cost than running "standard" restricted or negotiated procedures<sup>191</sup>. However, procurement techniques that involve aggregation usually take longer to award than non-aggregated procurement processes<sup>192</sup>.

CPBs would improve the professionalisation of procurement as they would have the specialised skills and expertise in running procurement transactions. CPBs are also better resourced to carry out procurement involving pursue of strategic objectives (e.g. CPBs would have the expertise to evaluate complex or sophisticated tenders regarding new, innovative or eco-innovative products and services).

While impacts of the expected growing importance of CPBs are to be evaluated, it is important to notice that aggregation of demand as such could have some negative impacts on transparency and competition.

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<sup>191</sup> The costs per procedure for CAEs are €5,400 in the case of a framework agreement, whereas it is €9,000 for the restricted and €5,800 for the negotiated procedures, although the framework contracts are still slightly more expensive for CAEs than the open procedure, which typically costs €5,100 per transaction; for more details see: section 8.8.4.

<sup>192</sup> 66 calendar days in case of framework agreements and joint purchasing, compared with an average of 58 days for all procurement or 53 days for non-framework contracts; see: section 8.7.4.1.

8.7.12. *GOV.LEGI.ENHANC – Oblige Member States to identify national authority in charge of implementation, control and monitoring of public procurement which reports annually on performance*

8.7.12.1. Current situation

All MS have an audit system on public procurement and contracting authorities. Audits are not necessarily focussed on the proper application of EU public procurement rules, but include in most cases a check list on the respect of public procurement national rules. In many MS this ex-post control is already flanked by ex-ante control or advice. However this is not always done in a structured and similar way in all MS.

Consultations with the Member States <sup>193</sup> show that Member States consider that their own surveillance of their CAEs is currently too weak. Many Member States admit that there are still too many failures which could have been avoided if the structural weakness had been addressed in advance.

According to the most recent overview conducted in 2010 by the PPN and including institutional aspects, at least 17 MS already have a body in charge of legal oversight, legal advice or technical advice to CAEs. The establishment of this type of supporting body, endowed with greater or lesser powers depending on the local situation, has already been expanding across MS on their own initiative, demonstrating the strong demand for consistent advice, ex-ante control of respect of public procurement rules (at least at national level) and for independent and objective opinion on the functioning and performance of procurement policies.

Currently, as discussed in the problem statement, insufficient expertise in the preparation of public procurement contracts leads to the bad drafting of calls for tender and inefficient management of the various phases of the procurement procedure. Whilst the 2011 evaluation stated that litigation costs are overall a minor part of procurement costs, there is wide agreement that litigation, and the fear of incurring it is a major factor influencing the behaviour and choices made by CAEs and businesses.

8.7.12.2. Reporting obligations:

The oversight body could also take over the responsibility of meeting the statistical obligations of the existing Directives which are currently addressed to MS, without stipulating which body in a MS needs to collect and compile the statistics. Some adaptations would be needed because of the expected introduction of new rules, compared to the previous regime.

Moreover the existing monitoring of the social and environmental framework is currently unsatisfactory and should be extended as MS are currently unable to monitor and supervise the effect of their own national specific policies or to ensure that there is no conflict of interest.

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<sup>193</sup> During the ACPC meeting in May 2011, following the presentation of DG REGIO report.

### 8.7.12.3. Technical support

To-date technical support is provided by either the existing oversight bodies or by other public bodies with a specific sectoral mission. In this area there is a need to systematise and better structure legal advice and expertise.

An OECD study on centralised purchase confirms the added value of CPBs in providing additional and robust legal expertise, economic advice and detailed market knowledge. For instance, Consip has a research department which can consider the strategic importance of the evolution of markets for IT products and services in the procurement field. This study also notes that public procurement must become more professional; not only because of the changing legal environment, but because of the increasing number of policy objectives it is being used to serve in the current context. In principle, such advice could equally be provided via the "knowledge centres" being proposed or by the national oversight body.

CAEs constantly face the need to respond to evolving markets and procurement can require specialised skills either from an economic or from a technical or legal point of view. Some forms of procurements which serve to satisfy modern society needs are very sophisticated (e.g. Competitive dialogue or PPPs). A 2008 UN study ("Guidebook on promoting good governance in PPPs") demonstrated the need for sound governance for PPPs and insisted that such contracts are challenging because of the skills needed all along across life (from preparation to negotiation to management of the project). The study found that the vast majority of the CAs have no such skills and need private consultants, which may generate considerable costs.

It is interesting to consider the example provided by Finland during a CCMP discussion (May 2011) where it mentioned a hot-line intended to provide assistance in the context of EU co-financed contracts. Finland indicated that a small help-desk unit costs to the state €200.000 (according to the minutes of the meeting), showing that structures delivering positive impacts can be put in place without incurring major cost.

The financial burden of such services is shared in different ways in different Member States. Either CPB services are financed by a specific government budget line or they can be paid for on a fee basis (with, for example a charge based on a certain the percentage of the contract value, e.g. 0.6%).

Support to businesses is already provided through existing networks such as the single points of contact used for the services directive, or chambers of commerce, which currently advise business on public procurement issues in a large number of MS. In this case it may only require some adaptation to the type of advice, such as providing better training in order to upgrade existing expertise and provide a clear legal framework at national level.

### 8.7.12.4. Conclusions

Whilst many Member States have some oversight and reporting structures in place, they vary considerably. Several publications and discussions point to a need for increased consistency of application and monitoring. However the actual structures

put in place would need to be adapted to individual circumstances and existing provision. It would not be proportionate to dictate a "one size fits all" solution.

#### 8.7.12.5. Possible impact of creating oversight bodies (back of the envelope calculations)

An initiative to establish oversight bodies in all MS would have the most significant impact on those MS that are currently without any centralised body carrying out such oversight. For Member States where such bodies already exist, the impact would be limited, consisting mainly of adjustment of an institutional nature due to the need to adapt and probably complete the range of activities and powers or to ensure independence, from a tutelary ministry.

Little information is publicly available on the costs incurred by MS with a body or department specifically in charge of public procurement. It would appear that the staff involved at present ranges from 25 to 200 people according to the exact tasks and size of the MS concerned (e.g. 20 people in small units like SE or BE or 200+ in bigger structures).

The number of staff involved in the largest CPBs (which also function as knowledge centres ranges from 100 to 900 people (with a rough average of 250 people). Assuming that MS will adopt a centralised structure to ensure technical assistance to CAs, financial and administrative burden would be probably equal to a medium-size CPB. Here we assume that implies an additional staff of around 150.

Based on an average monthly cost of labour of €2,266<sup>194</sup> (Eurostat), and assuming that all Member States will set up completely new structures for an oversight body, containing 150 staff, with an additional 50% to cover overhead costs, the estimated total cost would be around €165 million per year across EU. These figures are very rough, and could be easily criticised - the staff cost is low and does not assume any management structure, but the number of staff is perhaps high – so there may be some "netting out".

However, such oversight bodies should generate savings and benefits<sup>195</sup> which would, ultimately, enhance compliance and reduce errors. A recent study<sup>196</sup> showed that publishing an Invitation to Tender (ITT) is associated with 1% reduction in award value of the contract, (compared to the initial estimated value) and that the use of an open procedure increases estimated savings by 3%. Hence, the total effect for using an open procedure and publishing a contract notice is about 4%.

During the audits carried out by DG REGIO in the context of structural funds implementation, an average of 40% of irregularities detected were attributable to public procurement<sup>197</sup>. The most frequent weaknesses related to: an inadequate

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<sup>194</sup> Eurostat, Monthly labour costs in 2005 (based on table "tps00174")

<sup>195</sup> The National Audit Office in UK, scrutinising public spending on behalf of Parliament states that "*Our work leads to savings and other efficiency gains worth many millions of pounds: at least £9 for every £1 spent running the Office.*"

<sup>196</sup> Europe Economics, Estimating the benefits from the Procurement Directives", London 2011, see page vi.

<sup>197</sup> In 2009 Report, of the European Court of Auditors found that 43% of errors are attributable to public procurement, and this represent three quarters of the estimated error rate which was estimated by the court as being 5%.

assessment of bids (40%); absence of tendering or awards based on inappropriate tendering procedures and award of supplementary contracts without competition (34%); and non-compliance with publication requirements (22%). The same audit identified the causes of errors to be the weak management and control systems at the level of managing authorities/intermediate bodies and the lack of administrative capacity and knowledge of the public procurement rules, both at the level of the managing authorities and at the level of contracting authorities. Similar findings were confirmed by the European Court of Auditors, in its 2009 Report. 43% of errors were attributable to public procurement, which represented three quarters of the total estimated error rate of 5%. This would imply that the error rate corresponding to public procurement irregularities is of 3.75%.

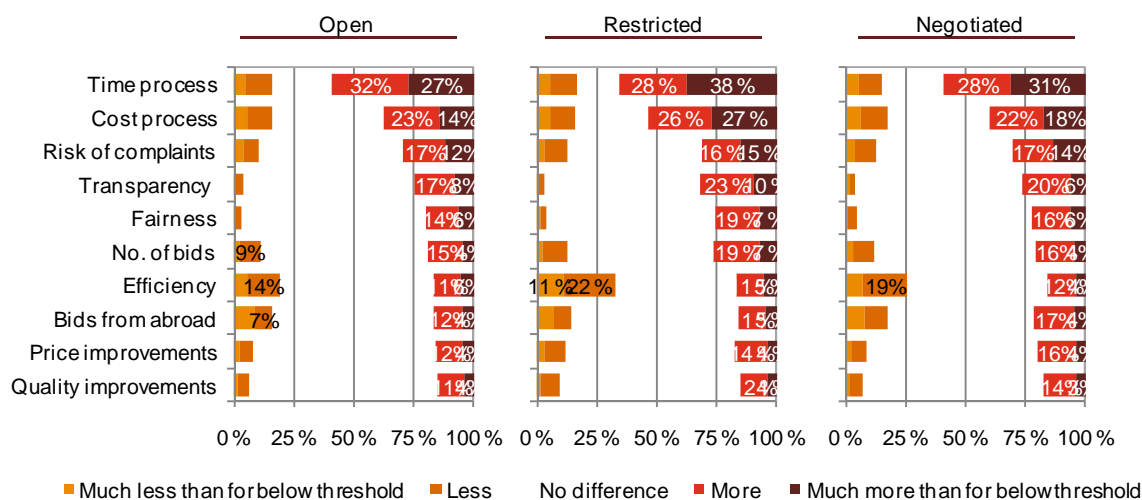
Considering that the oversight body should reduce at least the errors due to the wrong choice of procedure and inadequate publication, a rough estimate of savings would be around €360 million<sup>198</sup> across EU. Compared to the costs of setting up and running the structures, estimated at €165 million, this would result in a net saving of around €200 million. A reduction in errors and a potentially increased compliance rate could also lead to a reduction in the number of infringements, which would generate further savings.

## 8.8. ANNEX 8 – Background data to support the analysis of impacts

### 8.8.1. Comparison between above and below EU-thresholds procurement

In a recent survey, CAE have been asked about perceptions concerning comparisons between above and below EU-threshold procurement. Most purchasers have seen time and costs as being higher in above-threshold procurement (see: Figure 39).

Figure 39): Comparison of above versus below EU threshold procurement (replies by CAEs)



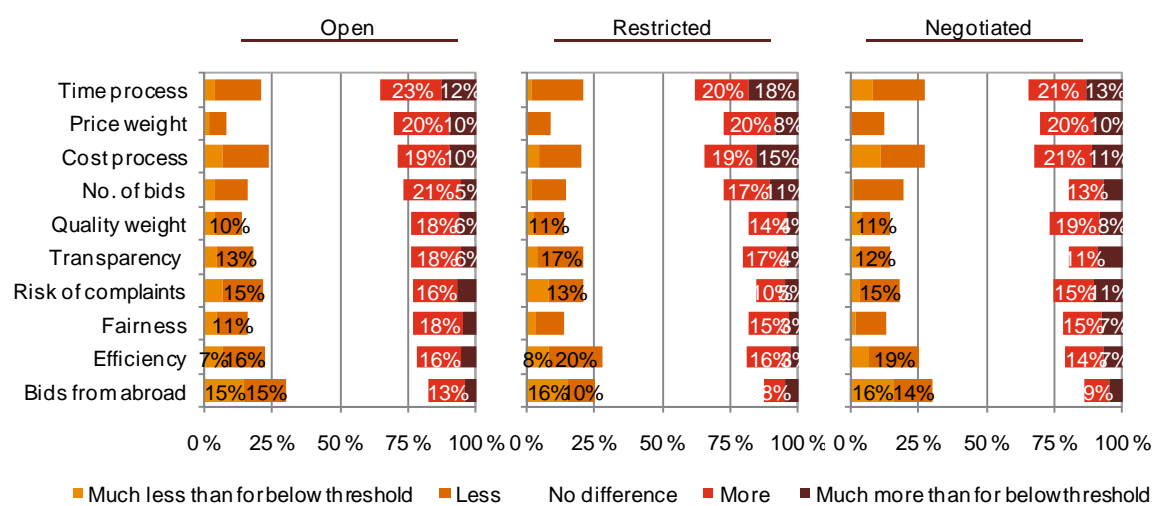
Source: PwC study

<sup>198</sup> Out of 5% error rate estimated by ECA, we took only 3.75% attributable to public procurement and we considered a 4% savings on these contracts.

Overall, authorities consider that the above threshold procedures are more or much more costly than below thresholds (e.g. 37% in the open procedure versus 13% who responded that below threshold were more costly). A large majority of respondents consider that the above threshold procedures take longer to complete (e.g. between 59% in the open procedure and 66% in case of the restricted procedure).

Whereas firms are concerned, their perceptions of the differences between above and below threshold procedures are more attenuated, however still more respondents see the latter as less time consuming. Most firms find the cost of procedures similar (see: Figure 40).

**Figure 40): Comparison of above versus below EU threshold procurement (replies by firms)**



Source: PwC study

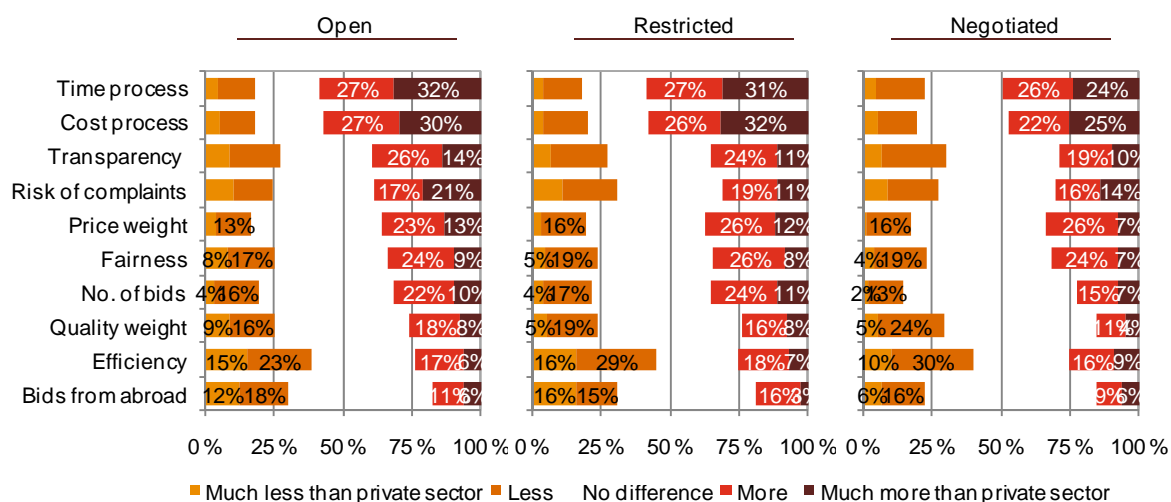
Perceptions of higher level of competition in above EU thresholds can be observed across both types of respondents (CAE and businesses).

### 8.8.2. Comparison between above EU-thresholds procurement and private procurement

While comparing public procurement with private procurement, a clear observation emerges that the costs of public procurement are higher or much higher. Efficiency of private sector procurement is also rated higher than for public procurement. On the other hand, fairness and transparency are rated higher in public procurement.

The results below were based on a survey of about 1,500 (out of the 1,800 firms in the sample) who reported having experience with private sector procurement (i.e. sell side).

**Figure 41): Perceived timing and cost of above EU threshold public procurement compared with private procurement – survey among firms**



Source: PwC study

### 8.8.3. Litigation costs

According to a recent study, about 350'000 person days is spent annually across Europe on managing complaints and litigation for government authorities<sup>199</sup>. Multiplying the above estimate by average daily labour costs<sup>200</sup> provided by Eurostat, we arrive at around € 54 million of cost per year.

It is important to notice, that these costs refer to the CAE only. Much higher costs can be incurred by firms, which frequently seek legal assistance and finally make a decision not to lodge a claim against CAE (as they take into account reputational risks linked to such action). These costs are very difficult to track as they do not appear in statistics on number of legal cases opened / closed, etc. To estimate such cost we base our calculation on input data of an average number of bids submitted per invitation to tender (i.e. typically 5.4 bids). Apart from the winner, we assume that the remaining 4 plus unsuccessful bidders may seek legal advice to decide whether or not the award decision is worth contesting. If we assume the worst-case scenario i.e. that in all CANs<sup>201</sup> unsuccessful bidders<sup>202</sup> did so spending one person day on legal assistance, we would arrive at another €85 million<sup>203</sup> of costs for legal advice (for firms). The above estimate is of course rough, as not all firms who lost a procurement contract would seek legal advice. On the other hand, we can suspect that for those firms which do so, costs incurred may be higher than €154 (i.e. take more time than one person day) and that labour costs in legal counselling are much higher than an average for the whole economy.

<sup>199</sup> Source: PwC study, page 80.

<sup>200</sup> Eurostat, Monthly labour costs in 2005 (based on table "tps00174"): €2,266, divided by 20 working days, plus 9% inflation (2005-2009) and 25% uplift, equals €154 of daily labour cost.

<sup>201</sup> 138'000 CANs in 2009.

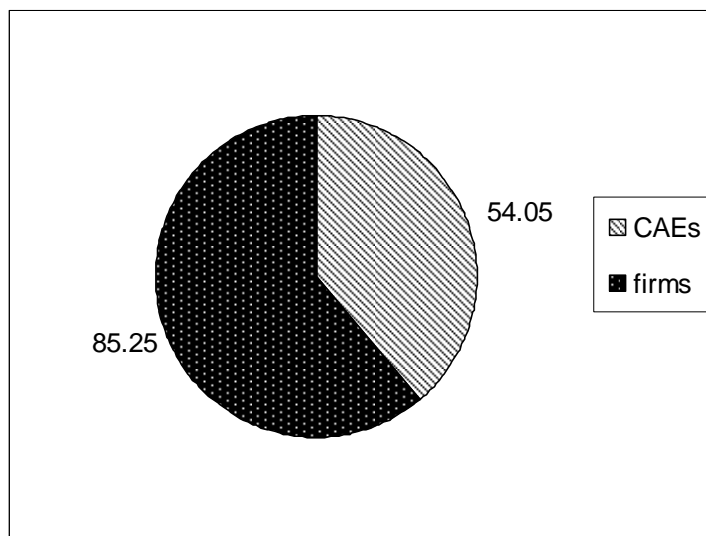
<sup>202</sup> An average of 5.4 bidders per contract means that at least 4 of them were unsuccessful and might have sought legal advice.

<sup>203</sup> 138'000 contracts \* 4 unsuccessful bidders \* € 154 of average labour cost per day.



To summarise, if public procurement regime was simplified with regards to rules defining its scope, up to around € 140 million of litigation and legal advice costs could be saved per year by both CAEs and firms (see: Figure 42).

**Figure 42): Estimated annual costs of litigation and/or legal advice in million €**



Source: DG MARKT estimates

As far as public authorities are concerned, diminished costs of legal assistance associated with avoiding (perceived) legal uncertainty, reducing risk and dealing with legal challenges could in principle have certain positive budgetary consequences (i.e. generate budgetary savings).

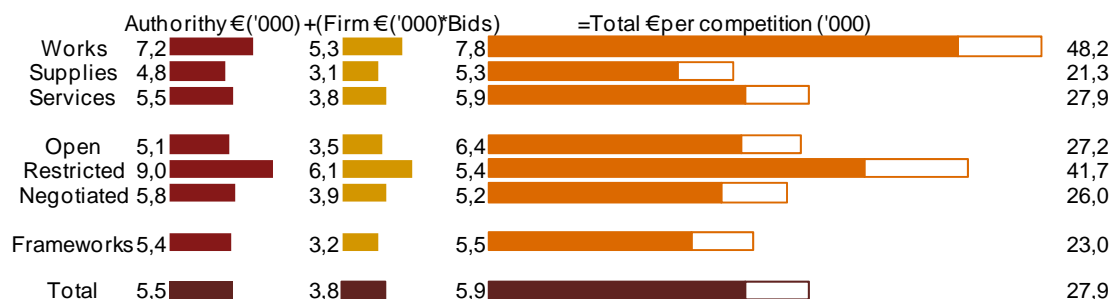
#### 8.8.4. *Costs of procedures*

The introduction of unlimited right to use the negotiated procedure with publication of a CN could generate some savings in terms of cost-efficiency of procedures, as the negotiated procedure is globally cheaper than the open procedure (respectively € 26'000, compared to € 27'200 per procedure, see: Figure 43 below). It is however necessary to underline that the global lower cost for the negotiated procedure is driven by the fact that it attracts less competition<sup>204</sup> (5.2 bids per tender is usually submitted in the negotiated procedure, compared to 6.4 bids per tender in the open procedure).

<sup>204</sup>

If the factors of the above multiplications were to be analysed separately (i.e. costs of procedures for CEAs and costs for firms, without taking into account competition), one could point out that the negotiated procedure may actually be more expensive, as it has higher unit costs per participant: costs in the open procedure are € 5'100 for CAE and € 3'500 firms; costs in the negotiated procedure are € 5'800 for CAE and € 3'900 firms. [reasons why we included competition]

**Figure 43): Typical cost of competition**



Source: PwC, Ecorys, LE

If we look at the global calculation (knowing that the negotiated procedure typically attracts less bids), it seems that a general permission to use the negotiated procedure could generate savings in the total costs of procedures.

#### 8.8.5. SMEs impacts

As has been discussed above, the role of SMEs in public procurement is very important. Throughout the course of this Impact Assessment and the various supporting studies, care has been paid to identify issues of particular importance to SMEs. In particular, a specific study was conducted in 2010 that focused on SMEs' access to public procurement markets<sup>205</sup>. The GP consultation asked a number of questions addressing issues affecting SMEs and start-ups and responses were received from several SME organisations. Similarly the e-procurement GP asked "What further steps might be taken to improve the access of all interested parties, particularly SMEs, to e-Procurement systems?". Two SME organisations replied, as did seven chambers of commerce whose members would be likely to include SMEs.

The Commission has made a clear commitment to support and promote the interests of SMEs. The importance of this policy and the desire to make sure that these objectives are met is echoed in the general objectives of public procurement policy, which set out to ensure a fair and level playing field, where markets are opened to all in a non-discriminatory manner. In addition, one of the operational objectives set to resolve issues of access clearly states the intention to facilitate participation by SMEs in public procurement markets. The options proposed under ACC.LEGI.ENFORC and ACC.LEGI.FACILIT would promote different ways of increasing SME access, whilst ACC.SOFT could consider complimentary guidance and training programmes, ensuring SMEs are "tooled up" for any new changes.

#### 8.8.6. Administrative burden

Public procurement was identified as one of the 13 priority areas for consideration under the "EU project on baseline measurement and administrative costs". Using the Standard Cost Model (SCM) methodology, the administrative costs and burdens falling on economic operators as a result of the Directives were measured. The main findings are summarised in the box below.

<sup>205</sup> I.e. GHK study.

**Main findings in the Public Procurement Priority Area:**

- 1) On the basis of two Directives and one Regulation, a total of seven EU Information Obligations (IO) and Possibilities Stated in the EU Legal Acts were identified. Commission Regulation (EC) No 1564/2005 does not include Information Obligations.
- 2) The seven EU IOs resulted in 194 national IOs (including 26 Possibilities stated in the EU Act and three Possibilities not stated in the EU Act) across the 27 MS.
- 3) The total administrative cost of these seven IOs is estimated at a total of €234 million EU-wide.
- 4) Of the €234 million of administrative cost, 92.35% (€216 million) have been classified as administrative burden. The remaining costs are considered to cover activities which can be classified as "business as usual".

*Source: Final report on public procurement baseline measurement*

This report noted that the most burdensome IOs related to the submission of documents related to selection and exclusion criteria. Together these IOs accounted for €211.5 million (98%) of the administrative burden on firms.

## 8.9. ANNEX 9 – Glossary

**ACPC** (Advisory Committee for Public Contracts)

**Agreement, the:** reference equivalent to the GPA (see below)

**A-type services:** Categories of services (1-16) mentioned in annex II A of the Classic Directive and annex XVII A of the Utilities Directive, for which the full set of rules stemming from the Directives apply; the remaining services are referred to as B-type services

**B-type services:** Categories of services (17-27) mentioned in annex II B of the Classic Directive and annex XVII B of the Utilities Directive, for which the Directives provide only a limited set of obligations (i.e. observance of the provisions on technical specifications and an obligation to inform the Commission of contract awards)

**CAE** (Contracting Authorities and Entities)

**CAN** (Contract Award Notice)

**Classic Directive, the:** Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114

**CN** (Contract Notice)

**CPB** (Central Purchasing Body): CPBs are contracting authorities which either act as wholesalers (i.e. buy, stock and sell on to other contracting authorities) or as intermediaries (i.e. award contracts or conclude framework agreements that will be used by other contracting authorities)

**CPV** (Common Procurement Vocabulary): CPV establishes a single classification system for public procurement aimed at standardising the references used by contracting authorities and entities to describe the subject of procurement contracts

**Defence Directive, the:** Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76

**Deutsche Bank Research:** Deutsche Bank Research paper published in February 2011 available at: [http://www.dbresearch.de/PROD/DBR\\_INTERNET\\_DE-PROD/PROD0000000000269867.PDF](http://www.dbresearch.de/PROD/DBR_INTERNET_DE-PROD/PROD0000000000269867.PDF)

**Directives, the:** in this context, the legislation referred to is 2004/17/EC and 2004/18/EC

**ECJ** (European Court of Justice)

**E-procurement:** a public procurement procedure initiated, conducted and/or concluded using electronic means, i.e. using electronic equipment for the processing and storage of data, in particular through the Internet

**E-procurement GP (Green Paper):** Green Paper on expanding the use of e-procurement in the EU, Brussels, 18.10.2010, COM(2010) 571 final, SEC(2010) 1214, documents available at: [http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement/consultations/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement/consultations/index_en.htm)

**e-procurement Report, the:** Commission Staff Working Document, Evaluation of the 2004 Action Plan for e-procurement, Brussels, 18.10.2010 SEC(2010) 1214 final, available at: [http://ec.europa.eu/internal\\_market/consultations/docs/2010/e-procurement/evaluation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/e-procurement/evaluation-report_en.pdf)

**e-Certis:** the European Commission information system that helps identifying different certificates and attestations frequently requested in procurement procedures across the 27 MS, two Candidate Countries (Turkey and Croatia) and the three EEA countries (Iceland, Liechtenstein and Norway). e-Certis is a free, on-line information tool providing companies and contracting authorities with information on the different documents required when tendering for a public contract in another country. At present, e-Certis only covers the most frequently requested documents and the data provided is maintained on a voluntary basis by MS. For more information see: [http://ec.europa.eu/internal\\_market/publicprocurement/e-procurement/e-certis/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/e-procurement/e-certis/index_en.htm)

**EMAT (Economically Most Advantageous Tender):** one of the contract award criteria on which the award of a (public) contract shall be based

**EP Report:** Report of the European Parliament Committee on the Internal Market and Consumer Protection on the new developments in public procurement (2009/2175(INI)), A7-0151/2010, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2010-0151+0+DOC+PDF+V0//EN>

**Eurobarometer:** large surveys based on in-depth thematic studies carried out for various services of the European Commission or other EU Institutions

**Europe 2020:** Communication from the Commission on smart sustainable and inclusive growth, COM(2010)2020 of 03.03.2010; report and related initiatives available at: [http://ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm)

**Evaluation Report, the:** Report summarising the 2011 evaluation of public procurement, available at: [http://ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/evaluation-report\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/evaluation-report_en.pdf)

**FRA / Framework agreement:** framework agreements are defined as agreements between one or more CAE and one or more firms, with the purpose to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged

**GDP (Gross Domestic Product):** a measure of a country's overall economic output. It is the market value of all final goods and services made within the borders of a country in a year

**GP (Green Paper):** Green Paper on the modernisation of EU public procurement policy, towards a more efficient European Procurement Market, Brussels, 27.1.2011, COM(2011)15, report available at:

[http://ec.europa.eu/internal\\_market/consultations/docs/2011/public\\_procurement/synthesis\\_document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf)

**GPA** (Government Procurement Agreement): The GPA is the main international agreement relating to public procurement. The current version, which was negotiated in parallel with the Uruguay Round in 1994 and entered into force on 1 January 1996, The GPA establishes a set of rules which (a) govern the procurement activities of its Parties and (b) enable the Agreement to function as an international one

**GPP** (Green Public Procurement)

**IM** (Internal Market)

**IO** (Information Obligation): term used to estimate administrative burden

**ITT** (Invitation to tender): also known as a Contract Notice (CN)

**LCC** (life-cycle costing)

**Mario Monti's report:** A New Strategy for the Single Market - at the service of Europe's economy and society, Report to the President of the European Commission José Manuel Barroso by Mario Monti, 9 May 2010, available at: [http://ec.europa.eu/bepa/pdf/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf)

**MS** (Member States): the 27 Member States of the European Union

**OJ/TED** (Tenders Electronic Daily): TED is the online version of the 'Supplement to the Official Journal of the European Union', dedicated to European public procurement

**PIN** (Prior Information Notice)

**PP** (Public procurement): A procedure initiated by a contracting authority or contracting entity with a view of acquiring goods, services or works for the fulfilment of its tasks

**Remedies Directive, the:** Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007, p. 31

**Utilities Directive, the:** Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1

**SMA** (Single Market Act): Communication from the Commission COM /2011/0206 final – Single Market Act – Twelve levers to boost growth and strengthen confidence " Working together to create new growth", 13.04.2011, report and related initiatives available at: [http://ec.europa.eu/internal\\_market/smact/index\\_en.htm](http://ec.europa.eu/internal_market/smact/index_en.htm)

**SME** (Small and Medium-sized Enterprises): the category of micro, small and medium-sized enterprises is made up of enterprises which employ fewer than 250 persons and have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million EUR

**TFEU (The Treaty on the Functioning of the European Union)**