



Contributions to GREEN PAPER

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procurement policy

Towards a more efficient European Procurement Market
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Introductory Remarks

These contributions have been prepared by lawyers of CMS Hasche Sigle (Germany) and CMS Reich-Rohrwig Hainz (Austria) specializing in procurement law with many years of experience in advising public procurers as well as bidders in connection with tender proceedings in the EU-market. They cover nearly all questions raised by the Commission in the Green Paper on the modernisation of EU public procurement policy with the exception of questions 34 - 38, 97, 111 - 112.

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

The scope of the Public Procurement Directives should be limited to scenarios where the state operates in the market as a buyer, i.e. seeks to purchase goods and services to cover its immediate requirements. The procurement of construction services, goods and supplies as an objective and economic procurement criterion should therefore be interpreted narrowly. Experience such as the “Ahlhorn” case law of the Düsseldorf Higher Regional Court (*Oberlandesgericht Düsseldorf*) and its correction by the ECJ has taught us that any broadening of the interpretation of procurement can trigger considerable legal uncertainty and an unjustified limitation of the sovereign powers and functions conferred by statute on the Member States. There does not appear to be any indication that an understanding of the term procurement which goes beyond simply satisfying the economic needs of the state, a political understanding, as it were, can serve the policy objective of creating an innovative environmentally friendly and non-discriminatory European single market and other Community policies. Nor – in the event that this were the case – is there any indication of how it would be achieved.

In our view, the criterion of “immediate economic benefit” of a public contract to the public authority, as established by the ECJ and set out in its judgment of 25.03.2010 in case no. C-451/08, is therefore the correct point of departure for defining the scope of European public procurement law. A good or service can only be deemed as being procured for a public contracting entity if the state needs it as a means of fulfilling tasks which are in the general interest and if in this connection there is an immediate economic benefit or advantage to be derived from use of that good or service. The ECJ’s case law in the above decision has already established a series of criteria which can, in our view, be used by the practitioner for interpreting the distinction between services which satisfy an immediate economic need of the state and services which have only an indirect positive effect on targets of the general good. In future these distinction criteria will have to be further defined by case law.

In our view, this narrower definition of procurement should be enshrined in the wording of the Public Procurement Directives. It should be confined to the criterion of the immediate economic benefit because each additional criterion or alternative concept could give the “error” of the Düsseldorf Higher Regional Court’s Ahlhorn case law an unwanted permanency and respectability.

In our view the only area in which it would be advisable to move away from the criterion of immediate satisfaction of public sector needs is the area of (building) concessions, the reason being that frequently the citizens themselves are the recipients.

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

The division is appropriate. Therefore no changes are required. If changes are made nonetheless, these should aim at making the procedure more uniform for the different types of contracts. A further distinction between the different types of contracts should be avoided.

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

The definition of “works contract” should be reviewed under two aspects:

1. Clarification in the definition of “works contracts” under what circumstances the sale of property in conjunction with the construction of a building is subject to EC procurement law (see ECJ of 25.03.2010 in Case C-451/08 *Müller vs. Bundesanstalt für Immobilienaufgaben*).
2. Precise classification of “works contract” and the other two types of contracts. Supply and service contracts are also necessary for the construction of a building or civil engineering works. The Directive provides the following definition of “supply contracts”:

“Public supply contracts’ are public contracts other than those referred to in (b) [‘public works contracts’] having as their object the purchase, lease, rental or hire purchase, with or without option to buy, of products.”

The ECJ holds the view that when a contract contains both elements relating to a public works contract and elements relating to another type of contract, it is the main purpose of the contract that determines which regulations have to be applied in principle (see ECJ of 21.02.2008 in Case C-412/04 *Commission vs. Italian Republic*).

If a contracting authority buys building material or furnishing and equipment, it is not clear whether those contracts are supply contracts or works contracts, especially if equipment or systems are replaced in an existing building.

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

From our practical experience we do not share the assessment that most services are awarded under part B. Category 27 does not play any role in practice. The distinction between “A” and “B” services should however be reviewed.

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

There should be a review of which services from categories 17 to 26 should fully fall under the public procurement directives. At least those services which do not (cannot) have any cross-border elements should remain under part B, in particular legal advice, which requires in-depth knowledge of the respective national law.

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

In our view there is no need to alter the EU thresholds despite the associated consequences in the form of requests for compensation. The proportion of contracts above the EU thresholds is already extremely low and amounts to only 10–15 % of all contracts awarded by public procurers.

In our view it is important to distinguish between the thresholds for building contracts and those for supplies and services. Although there is almost certainly a cross-border interest in an award procedure with a building contract which is above the EU threshold of currently almost EUR 5 million, which is why the procedure for such contracts should include the Single Market, this may not always be the case with the very different EU threshold for supplies and services, which is generally EUR 193,000.00. However, we cannot see any urgent need to raise the threshold.

It is also evident that the requirement to invite tenders from throughout the EU contributes to a rational procurement process – for instance by providing potential bidders with weighted award criteria and the possibility of having decisions reviewed by a tribunal – irrespective of whether and how many non-EU bidders there are. In this respect the EU procurement procedure contributes to ensuring that procurement procedures comply with the law and reinforce public awareness of the issues involved.

After all, a modernisation of EU procurement law should focus on the procedural work involved in implementing the procedure and not the number of EU-wide procurement procedures. Raising the thresholds would run counter to the central aim of the Europe 2020 strategy: to achieve an optimum economic outcome by means of efficient procurement procedures using the EU-wide procurement markets.

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

In our view the current provisions for excluded contracts are for the most part appropriate.

One could however consider stating the exclusions regarding services (Art. 17 and 18 Directive 2004/18 EC) under the service contracts.

Moreover, Art. 14 Directive 2004/18 EC could be reworded or updated taking into consideration Directive 2009/81 EC (Directive on the Coordination of procedures for the award of certain works contracts, supply contracts and service contracts in the fields of defence, security and amending the Directives 2004/17/EC and 2004/18/EC). The current wording suggests that contracts awarded in the security sector are excluded from the procurement procedure although Directive 2009/81 EC contains its own provisions on this.

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

See Question 7 above. The exclusions in the area of service contracts (Art. 17 and Art. 18 Directive 2004/17 EC) could follow the provision regarding the material scope in Art. 1 (2) d Directive 2004/18 EC, or be included in the provision. Moreover, the wording could be simplified. In our view, Art. 1 (2) d Directive 2004/18 EC could be amended as follows:

“Public service contracts are public contracts for rendering services within the meaning of Annex II, which are not service concessions, public works contracts, or supply agreements.

A public contract which includes goods as well as services within the meaning of Annex II shall be deemed a public service contract if the value of the services in question exceeds that of the products covered by the contract.

A public contract having as its object services within the meaning of Annex II and including activities within the meaning of Annex I that are only incidental to the principal object of the contract shall be considered to be a public service

contract.

In contrast, the Directive shall not apply to service contracts which are awarded between one or more contracting authorities on the basis of exclusive rights which the public authority enjoys pursuant to a published law, regulation or provision which is compatible with the contract.”

In our view, Art. 14 of Directive 2004/18 EC could be amended as follows:

“This Directive shall not apply to contracts in the defence or security sectors which fall under Directive 2009/81 EC, which are declared to be secret or when their performance....”

Art. 18 of Directive 2004/18 EC could be more specific in clarifying the meaning of “exclusive rights”. Examples should be stated.

See also our answer to Question 11.

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

We consider the current approach in defining public procurers as appropriate. It has proved to be successful for many years. The terms used in the definition of Article 1 No. 9 Directive 2004/18/EC are based on preceding directives and to a large extent have already been interpreted by the ECJ. The general concept of defining public procurers and the concept of a “body governed by public law” should therefore not be changed. In particular, in order to keep the concept easily understandable it appears to be not appropriate to add new elements to the definition following the ECJ case-law.

However, we would recommend harmonising the definition of public procurers with the concept of in-house cooperation. According to the Teckal case-law of the ECJ (cf. judgment of 18 November 1999, Case C-107/98), in-house cooperation does not qualify as a public contract. Such in-house cooperation is defined as “a contract between a public purchaser, on the one hand, and a person legally distinct from that public purchaser if the public purchaser exercises over the person concerned a control which is similar to that which it exercises over its own departments and, at the same time, that person carries out the essential part of its activities' with the controlling local authority or authorities”. If these criteria are met the public purchaser is therefore entitled to enter into the contract without having conducted a prior public procurement procedure. On the other hand subcontracting by the public purchaser’s contractual partner appears to necessarily fall within public procurement requirements. Against this background, the definition of public procurers should, by way of clarification, cover contractual partners of in-house cooperations.

With respect to the concept of “body governed by public law”, the current definition element “specific purpose of establishment” (cf. Article 1 No. 9 Sentence 2 (a) Directive 2004/18/EC) carries no weight anymore. According to the case-law of the ECJ, a body can qualify as a “body governed by public law” if it meets general needs in reality, even if it was not the specific purpose of the body’s establishment (ECJ, decision of 12 December 2002 – case 470/99 *Universale-Bau AG*). In addition, the ECJ held that it is irrelevant whether the body’s tasks do not exclusively include meeting general needs (ECJ, decision of 15 January 1998 case 44/965 *Mannesmann Anlagenbau Austria AG*).

Accordingly, we think the definition of “body governed by public law” should be modified as follows:

Current version:

“A ‘body governed by public law’ means anybody:

(a) established for the specific purpose of meeting needs in the general interest, e.g. in in-house cooperation, not having an industrial or commercial character;

(...)”

New version:

“A ‘body governed by public law’ means anybody:

(a) acting exclusively or partly in the general interest, not having an industrial or commercial character;

(...)”

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

In our view there is still a need for EU rules on public procurement with respect to the sectors covered by EU directive 2004/17/EC not being exposed to sufficient competition. The existence of EU rules on public procurement in the sectors referred therein is generally justified by the fact that providers of services requiring certain infrastructures and/or being subject of special or exclusive (public) rights to carry out certain tasks are usually not exposed to extensive competition. The lack of competition on the sectors covered by EU directive 2004/17/EC triggers the risk of providers abusing their monopolist market position both to prevent new market entries and to establish non-commercially driven procurement practices; the partial failure of liberalisation processes throughout the EU on markets covered by EU directive

2004/17/EC is a strong indication thereof. Public procurement legislation appears to be an efficient instrument for addressing and mitigating this risk.

In addition, Directive 2004/17/EC privileges public undertakings which otherwise would fall across the board within the scope of Directive 2004/18/EC.

10.1 If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions?

We do not think that more sectors should fall within the EU rules on public procurement nor do we consider that certain sectors that are currently covered should be excluded.

Generally speaking, it is our view that sector-specific public procurement rules should only apply to sectors/markets which are difficult for new competitors to access.

11. Currently, the scope of the Directive is defined on the basis of the activities that the entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. Do you consider these criteria to be relevant or should other criteria be used? Please give reasons for your answer.

In general, we consider these criteria to be relevant. However, the defining elements “special or exclusive rights” could be defined in more detail. In practice there is considerable uncertainty on whether or not a private company has been granted such special or exclusive right.

12. Can the profit-seeking or commercial ethos of private companies be presumed to be sufficient to guarantee objective and fair procurement by those entities (even where they operate on the basis of special or exclusive rights)?

As pointed out in our answer to Question 10 already one of the typical features of the sectors/markets covered by EU directive 2004/17/EC is that these are often dominated by monopolists. Since monopolists are not exposed to serious competition the commercial rules usually applying on free markets and forcing private companies to practice objective, non-discriminatory and fair procurement do not necessarily apply in such sectors/markets.

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

Art. 30 of EU directive 2004/17/EC has only quite recently been transposed to German law. Therefore, there is no substantial practical experience so far for assessing whether Art 30 of the Directive constitutes an effective way of adapting the scope of Directive to changing patterns of regulation and competition in the relevant markets.

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

The current level of detail is appropriate. If any amendments are made, they should not make the Directives more detailed.

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

The contracting authorities should be free to choose the type of procedure (as is already the case in Directive 2004/17 EC). In addition, the contracting authorities should have freedom to use electronic forms of communication (internet, e-mail, virtual data rooms, etc.). Automation of some of the steps of the procurement procedure (e.g. automatic review and valuation of offers) should be permitted provided such procedures are not discriminatory.

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

No. See question 15 above.

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

Since these procedures and tools serve to facilitate and speed the public procurement process they should be maintained.

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

The possibility of shortening the deadlines should be kept. This makes it possible to meet needs at short notice and enables flexible responses. Experience in 2009-2010 has shown that the contracting authorities make frequent use of the option to use accelerated procedures and that no discernible losses have been suffered in terms of quality of the procurement procedure or the offers.

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

No, we would not be in favour of more negotiations in public procurement procedures. Although this provides greater flexibility in many situations such as subsequent project changes or adaptation to bidder's innovations, we would nonetheless give preference to open and closed bidding because the risk of manipulation is lower.

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

As our answer to the previous question was "no", a reply to this question is superfluous. We will discuss further ways of optimising negotiated procedures under Question 113.

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

It is certainly true that widespread use of negotiated procedures would entail greater risk of manipulation and discrimination. However, in our view general rules are not the best way of handling the respective situation.

Also, the current Directives already contain a rule restricting the contracting authority's latitude, which in our view has not been successful in practice. Article 30 para 4 of the EU Coordination Directive states that a contracting authority can hold several rounds of negotiations and successively reduce the number of bids, in which case it is required to indicate this in the contract notice (there is a special box for this on the contract notice form). This rule is not particularly helpful because a decision on whether there should be one or more rounds of negotiation cannot be taken until the bids have been received. If, for example, there are a number of potentially promising bids which do not differ greatly in terms of content and price, it makes sense to negotiate with several bidders and to make a selection by a process of elimination. However, if there is only one realistic bid there is no point in a negotiated procedure. But the contracting authority cannot form an opinion on this until the bids have been examined, and certainly not at the time of the contract notice.

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

To introduce a further procedure in addition to the existing one would lead to an unnecessary complication of public procurement law. In addition, difficulties would arise in distinguishing those products and services which are not intended to fall under the simplified procedure. The purpose of public procurement law is economic procurement and transparency. Both principles apply fully to the mentioned goods and services, which is why a distinction would not be appropriate.

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

In our opinion it makes sense to establish recommended guidelines of the procurement procedure as dispositive law. These guidelines should apply unless the contracting authorities stipulate different conditions for the tender. However, the public procurer should have the possibility to deviate herefrom if this is deemed fit.

In open procedures with many bidders it makes more sense to make an initial brief review of the suitability and completeness of each offer and only then to conduct the thorough suitability test for each bidder leading to the ultimate award. This would normally be the three or at least two best offers. In this context, it would also be helpful to define precisely the term “real chance”. It would appear sensible to accord a “real chance” to the bidders with the best three offers. These bidders should also be tested before making the award regarding their suitability: in the event of review proceedings this would then prevent the purchaser objecting to a claimant who had not already been eliminated on the grounds that the claimant’s offer should have been rejected and the claimant is not entitled to appeal against the award, (and possibly to seek damages) in review proceedings.

However, in the two-stage procedure the suitability and selection criteria must be examined in the first stage. The first stage should only entail an examination of those applicants whose bids qualify for consideration in the second stage on the basis of the selection criteria. There would be little point in inviting bidders who are unsuitable or whose suitability has not been tested in the second stage of a two-stage procedure.

This concept is already used in Austria where the purchaser may assume that the bidder’s self-declaration is correct and only needs to test the suitability of the best bidder before awarding the contract. This simplifies the administration of open procedures.

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

With public service contracts it is often desirable to be able to establish award criteria which address the quality of the service provider and which support applications from the teams which fulfil these quality requirements.

It would therefore appear advisable to judge the tenderer’s (undertaking’s) suitability and its references (i.e. tenderer’s potential) both in terms of its suitability and the selection criteria. In a given case an award should be made according to the abilities, education, knowledge, personal references, presentation or a short preparation task carried out by the bidding teams, particularly according to key functions (e.g. project leaders).

If the same reference is provided for the company and for the project leader, this does not mean that suitability and award criteria are blurred. This is because on the one hand the tenderer's overall potential is judged, whereas on the other the quality of that team with whom the tenderer has ultimately made its offer. The system must be organised to ensure that the project team in question is not judged according to the suitability and selection criteria in the first phase. There must be a clear distinction between the suitability and selection criteria considered in the first phase and the award criteria in the second phase. The purchaser should be able to penalise a service provider which does not ultimately deploy the team originally promised.

25. Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?

The Directives should explicitly allow previous experience with one or several bidders to be taken into account. Practice has shown that sometimes a bidder must be awarded the contract "in full cognizance", even though the awarding entity considers it to be unreliable based on previous experience. To avoid discrimination, the burden of proof that the bidder is unlikely to properly fulfil the contract will have to remain with the awarding entity. The awarding entity must and should be able to rely on (negative) references from other awarding entities.

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

Yes, we consider that specific rules are needed for procurement by utilities operators. The different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement. However, one could consider whether the specific procedural tools under Directive 2004/17/EC (qualification system pursuant Article 53 and periodic indicative notices pursuant Article 42 paragraph 3) should be duplicated into Directive 2004/18/EC.

It is our understanding that the purpose behind Question 26 is to challenge the justification of the qualification system stipulated under the Utilities Directive. In our view the qualification system is a valuable and sustainable instrument to allow providers of complex and voluminous products/services to decrease their procurement procedural efforts on the one hand while providing for sufficient and fair competition on the other hand.

The only concern to be taken into account in this context is that new market-entries might be impeded or delayed by the pre-qualification of experienced and renowned companies. In our view this consideration does not countervail competition to an extent requiring different regulation because the nature of utilities procurement is such that it addresses standard and high-volume products/services which are not subject to quick or sudden new market-entries. In our view, the current utilities procurement regulation recognises the specific character and needs of utilities procurement sufficiently.

27. Do you think that the full public procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.

Overall, we consider the full public procurement regime to be appropriate for the needs of smaller contracting authorities.

In practice procurement has become so complex and formalised that small purchasers are often overstrained. The enormous expenses for the processing of the tendering procedure often deter smaller and medium-sized businesses from submitting a bid. Simplification and greater flexibility is therefore desirable, not just for smaller contracting entities.

The precept of transparency, fair competition and non-discrimination is however essential. Upholding these basic principles is also reasonable for smaller purchasers, especially as they are free to cooperate with other purchasers or bigger regional authorities in the event of a rarer act of procurement.

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

Please see our answer to Question 27. In our view it would be reasonable to modify the threshold values to allow smaller contracting authorities to award smaller contracts which do not qualify as constructions works subject to simplified conditions.

Despite simplifications being possible and desirable in the upper threshold range, simplified and flexible regulations are particularly suitable below the threshold, for non-priority public services, for the award of concessions and PPP-projects and to a certain degree in the utility sector. The adherence to procurement law principles is also essential for such simplified rules, namely transparency (ex ante announcement), equal treatment and non-discrimination as well as the guarantee of free and fair competition. Bidders should also have access to efficient, quick and cheap legal protection with simplified procedure.

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

In our view, ECJ case law on whether tender procedures are necessary for contracts below the EU thresholds, as explained in the Commission Interpretative Communication, has caused legal uncertainty and reduced the value of the thresholds as a constructive means of deciding whether a tender procedure is or is not necessary in a given case. Practical experience has shown that even when there is an EU-wide call for tenders response rate is relatively low, particularly in the construction sector: in our experience between 0 and 10 %. This would indicate that companies in Europe clearly have no interest in more information.

Although the Commission Interpretative Communication does make it easier to understand ECJ case law, it does not resolve the issue of the procedure to be adopted with contracts which are below the thresholds. For example: a call for tenders is issued in Germany for a cleaning contract to a value of EUR 80,000. As companies in Poland might conceivably be interested in bidding, does this mean that Poland does or does not have to be included? Examples such as these show that in this field extensive activities of European institutions have created unnecessary legal uncertainty. Also, the basic assumption that in this field under the basic freedoms there is a legal requirement for publication to be transparent and tender procedures to be carried out does not appear convincing. This is because the Coordination Directive and the regular Regulation adjusting the thresholds is a European manifestation of the basic freedoms on the one hand and the European principle of subsidiarity on the other. This well-balanced system of competition loses its equilibrium if “secondary procurement law” is created which is based on primary law; this is also inconsistent with the European principle of democracy.

The resultant legal uncertainty cannot be tolerated because under the revised Remedies Directive failure to comply with the requirement to call for tenders now carries strict sanctions such as invalidity of the contract (cf § 101b German Act against Restraints of Competition). This raises the complex question of whether the same applies to contracts which have been awarded directly but which are below the thresholds.

We therefore consider that in legislative terms it would be helpful to state that the EU Directive on the coordination of award procedures and the thresholds is “final” with regard to the applicability of procurement law. If the Commission advocates extending EU procurement law to contracts below the thresholds it would, in our view, be better to lower the thresholds.

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

Yes, codification and rounding off of existing in-house judicature would help legal security and clarity. Cooperation between contracting authorities in forming and implementing procurement should be simplified. An award from one contracting authority to another should also be possible where the two entities are 100 per cent part of one group but cannot exert direct influence on each other like a parent company on its subsidiary. That means that In-house procurement should apply also where the supplier is a stock company whose executives are not subject to directives from the company's stakeholders.

A similar scenario was the subject of ECJ judgment 10 September 2009, C-573/07, *Setco*, concerning the in-house awards to an Italian limited corporation (SpA). However, the board of directors cannot be granted the power to act independently to limited corporations in the same way in all jurisdictions.

ECJ judgment of 9 June 2009, C-480/06, *Stadtreinigung Hamburg*, also moves in this direction. This ruled that cooperation between public authorities does not undermine the principle objective of the Community rules on public procurement under the condition that implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest and the principle of equal treatment of the persons concerned is respected, so that no private undertaking is placed in a position of advantage vis-à-vis competitors.

It would be helpful to have a clear exception allowing cooperation among one or more independent local authorities, federal states, self-governing corporations (e.g. social insurance bodies, chambers) or outsourced legal entities for the purpose of procurement of services and the execution of tasks, provided that no private company is even partly involved (the judgment of ECJ of 11 January 2006, C-36/03, *Stadt Halle*, should be upheld) and the contracting authorities do not enter into competition with private companies. In such an event a subsidiary must also participate in a tender of its parent company, the contracting authority. However, it should not be excluded from the tender because it is affiliated with the contractor.

(Please note that answers to Questions 30 - 32 do not reflect the opinion of all but only of a majority of CMS procurement lawyers having contributed to our statement.)

31. Would you agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed? What would in your view be the important elements of such a concept?

Yes, see answer to question 30.

- 32. Or would you prefer specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation)? If so, please explain why and which rules they should be.**

We would recommend harmonising the definition of public procurers with the concept of in-house cooperation (cf. answer to question 9).

Codification and consideration of the key ideas of ECJ would probably be helpful.

- 33. Should EU rules also cover transfers of competences? Please explain the reasons why.**

The transfer of competences concerns the organisation of public administration of a member state and has nothing to do with procurement of goods or services in the sense of Question 1. Accordingly, EU rules should not cover such transfers which are allowed under the national law of EU Member States.

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

No comment

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

No comment

- 36. Do you think that a stronger aggregation of demand/joint procurement might involve certain risks in terms of restricting competition and hampering access to public contracts by SMEs? If so, how could possible risks be mitigated?**

No comment

- 37. Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.**

No comment

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

No comment

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

In our view, it is essential for the public procurement Directives to state when and under what conditions the modification or extension of an existing contract makes it necessary to re-issue a call for tenders. It does not matter whether the existing contract has or has not been awarded in a public procurement procedure. If the Public Procurement Directives do not contain a provision to this effect, case law in the Federal Republic of Germany applies a rule of thumb whereby a new call for tenders is necessary after a contract has been modified if the economic effects of those modifications are equivalent to awarding a new contract. The ECJ decision of 19.06.2008 in case C-454/06 provided some clarification in making this distinction, which in practice is very difficult. The ECJ also considered that a new call for tenders was necessary if the provisions of a public contract change during the term of the contract in a manner which is equivalent to awarding a new contract, i.e. if its “features differ substantially from those of the original contract” and hence indicate that the parties intend to renegotiate material provisions of the contract.

The three types of case referred to in the above decision in paras 35 ff in which there must be an assumption that there has been a material contractual amendment should, in our view, be included in the wording of the Directive. According to these criteria a reliable distinction can be made between material and immaterial contractual amendments in all material cases which are applicable in practice:

- if the scope of the services to be provided covers new services which were previously not included in the contract, this constitutes a material contractual amendment for which a new procurement procedure must be initiated,
- slight increases or reductions in the scope of the services to be provided under the contract or slight changes in the modalities for executing the contract do not constitute a material contractual amendment,
- price increases which are agreed subsequently are in principle a material contractual amendment; price reductions are not,

- replacement of one contractual partner by another must in principle be regarded as a material contractual amendment if the involvement of the third party was not anticipated in the original contract.

As far as extensions to the term of the contract are concerned, a distinction must be made between the following cases:

- if the invitation to tender and the contract concluded stipulate a fixed term, which is then extended, a new procurement procedure has to be initiated,
- if the service to be provided is by nature a fixed term, i.e. with a contract to produce a work, and if there is a delay, a new procurement procedure does not have to be initiated,
- if the contract is extended or the prices are adjusted and if the possibility of such extensions and price adjustments was provided for in the original contract, a new procurement procedure does not have to be initiated.

Although the provisions in the current Directives do not refer to the execution phase of contracts which have been awarded in a public procurement procedure, there is, in our view, no reason why this should have to be the case in the future. The Directives contain a series of provisions for the phase before the formal beginning of a procurement procedure to enable provision to be made for the phase after the formal conclusion of the procurement procedure to the extent that this contributes to greater legal certainty in the public procurement procedure.

40. Where a new competitive procedure has to be organized following an amendment of one or more essential conditions would the application of a more flexible procedure be justified? What procedure might this be?

One possibility would be to have an “annex procedure” which would follow on quickly and flexibly if there were a change to the services to be provided. This could mean that there would be no new contract notice and that only those bidders who proved suitable in the original procurement procedure would be directly involved. This could be justified on the grounds that an original EU-wide contract notice had already taken place, thereby establishing the necessary transparency.

Nonetheless, we do have reservations toward a simplified annex procedure. This is because the central idea behind the ECJ case law in case C-454/06 (judgment of 19.06.2008 – “*Pressetext*”) is precisely that if there is a change in the services to be provided a different group of bidders might have to be approached. Also, where there are successive extensions to the term of a contract there is a danger that an annex procedure would encourage the bypassing of competition.

We therefore advocate setting the preconditions for initiating a new award procedure relatively high, as suggested in our response to Question 39, and then applying the regular procurement procedure to contracts resulting from changes in the services to be provided above that threshold. Otherwise there is a danger that the procedure will become more complex and legally fragmented.

- 41. Do you think that EU rules on changes in the context of the contract execution would have an added value? If so, what would be the added value of EU-level rules? In particular, should the EU rules make provision for the explicit obligation or right of contracting authorities to change the supplier/terminate the contract in certain circumstances? If so, in which circumstances? Should the EU also lay down specific procedures on how the new supplier must/may be chosen?**

We think that EU rules providing the possibility for contracting authorities to change the supplier have an added value. Circumstances for such a change can be bankruptcy of the supplier or termination due to material breach of contract. For such cases, there should be a simple and swift procedure for choosing the new supplier.

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

No, the EU public procurement Directives need not provide such rules. We think that each national law has its own rules for cancellation of any contract in case the ECJ declares that said contract has been awarded in breach of public procurement law.

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

We think that regulations at EU level are not necessary.

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

We believe that contracting authorities should not exert more influence on subcontracting. There may be a risk of the supplier being obliged to deploy a subcontractor against his own wish.

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

No comment

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

In general, we agree with the general policy of the EU not to support certain categories of bidders. The focus should be on reducing disadvantages for SMEs, in particular. For details see 48 et seq.

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

No. The public procurer should be free to decide which services it intends to procure and how it structures contracts provided the modalities are fair. In particular, the public procurer should not be forced to subdivide the contract into lots. This would hamper structures such as PPP or EPC contracts which are often appropriate to meet the demands of the public procurer.

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

Rules relating to the choice of bidders may be a disproportionate burden for SMEs. Bidders must have sufficient time to collect the required evidence. The rules should allow bidder or applicants to provide the required evidence after expiration of the time-limit. This would not jeopardise the principle of non-discrimination if the evidence concerned facts which could not be changed afterwards. Self-declarations might be appropriate, see 50.

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

Yes, this can be an appropriate way to alleviate burdens for SMEs. But this should always be combined with corresponding self-declaration, see 50.

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

Yes, we think that self-declarations are an appropriate way of showing the qualifications of a bidder. To have sufficient incentive that no false declarations are submitted, the tender documentation should make it clear that the bidder would not only be excluded from the procurement procedure, but also obliged to compensate the additional costs of the public procurer and, where appropriate, pay liquidated damages (contractual penalties). The winning bidder should be obliged to provide the evidence or the procuring authority must at least have the right to demand evidence.

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

Yes, we agree. It might be appropriate to have a maximum ratio to be calculated as a multiple of the contract value. But, in certain cases, higher requirements might be appropriate and should be allowed. This should be justified by the procuring entity and such justification should be documented.

- 52. What are the advantages and disadvantages of an option for Member States to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties?**

Disadvantages of such requirements are: excessive formalities for supervising compliance with such requirements; not the best bidder wins the contract; quality of services / delivery might suffer; foreign bidders are discriminated against.

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

Yes, especially in markets where the public sector is the only or predominant procurer. The procurements should not encourage or enforce anti-competitive market structures. But it should not be the aim of procurement to regulate a market. We see that in some markets where there are only very few public procurers, these procurers set unfair contractual terms or do not comply with procurement principles. As there are only very few procurers, bidders do not complain to avoid discrimination in future procurements.

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

We would suggest an obligation to set fair contractual terms which ensure that public procurers do not abuse their dominant market position to the detriment of a competitive market with many market players.

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

Certificates and other evidence for qualification should be allowed in other languages. Translations could be required only if necessary in a later stage. In larger projects tenders in a second language are certainly helpful.

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

We would be in favour of a European-wide prequalification system. But, public procurers should nevertheless be allowed to require language skills to ensure appropriate communication and avoid problems during execution.

- 57. How would you propose to tackle the issue of language barriers? Do you take the view that contracting authorities should be obliged to draw up tender specifications for high-value contracts in a second language or to accept tenders in foreign languages?**

Such obligation would impose a disproportionate burden to public procurers where there is a competitive market. The public procurer should only be forced to draw up tender specifications in a second language or accept tenders in a second language in countries where there is no competitive market for the services / products in question.

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

See under Questions 53 to 56. As we have learned from our experience it cannot be taken as a matter of fact that contracting authorities generally are suffering under the power of dominant suppliers. On the contrary, a dominant supplier sometimes is welcome by the public procurer to protect the national market against foreign competitors.

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

Only bidders complying with competition law should be admitted in public procurement procedures. The bidders should have the right to challenge anti-competitive practices by other bidders.

- 60. In your view, can the attribution of exclusive rights jeopardize fair competition in procurement markets?**

Yes, the attribution of exclusive rights may jeopardise fair competition. But the main focus should be on ensuring that the exclusive rights are granted in a fair and non-discriminatory procedure. Such exclusive rights are only justified if the provision of the service requires an extraordinary investment in infrastructure so that the service provider must be in the position to refinance its investment, for example, in connection with the development of network infrastructures. There should be efficient supervision of the attribution of such exclusive rights, including sufficient right of competitors to complain against discriminatory practices in a judicial procedure.

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

Main focus should be on efficient control of the attribution of exclusive rights. See 60. This should include appropriate procedures on the transfer of infrastructure from one operator to the other in case of a change of service provider. If exclusive rights are justified and a bidder is awarded exclusive rights in a legal way, it should be in a position to benefit from these exclusive rights. If national regulatory law provides for exclusive rights without sufficient justification or does not grant them in a transparent and non-discriminatory procedure, the economic operator should not benefit from the exclusive right if it contributed to this situation or knew or should have known about it. If it was granted the exclusive right in an unlawful procedure contracts based on such exclusive right should only be awarded if he was in good faith and trusted in the exclusive right granted to him.

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

We think that the rules on technical specifications make sufficient allowance for environmental aspects. The rules on technical specifications give the contracting authorities the possibility to lay down environmental characteristics in terms of performance or functional requirements. The regulations also allow reference to eco-labels.

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

The possibility of defining technical specifications in terms of performance or functional requirements may be reasonable depending on the object to be achieved. Proposals for solutions which could not have been made in case of reference to the technical specification may be submitted to the contracting authorities. These possibilities are already provided for in Article 23 of Directive 2004/18/EC.

There should not be a general obligation to comply with defining technical specifications in terms of performance or functional requirements since strict detailed technical requirements based on standards are often required.

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

Article 23 of Directive 2004/28/EC allows the contracting authorities to define criteria concerning the accessibility for persons with disabilities. If these criteria are not considered sufficiently in applying the Directive, the persons applying the Directive should be trained accordingly.

- 65. Do you think that some of the procedures provided under the current Directives (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?**

We think that the procedures provided under the current Directives are suitable for taking into account environmental, social, accessibility and innovation policies. The contracting authorities may define technical specifications in terms of performance or functional requirements. So it is possible to take into account environmental, social, accessibility and innovation objectives. As a result, it is not a matter of the procedure but of the object's description in the contract documentation.

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

We think that innovative information and communication technologies can improve the awarding of contracts. Particularly during negotiated procedures, competitive dialogue and design contests communication between the contracting authorities and the tenderers can help in pursuing Europe 2020 objectives, because it is conceivable that the contracting authorities may not have considered all possible ways to reach the aims. Tenderers may find a better solution which had not been anticipated. But this means that the contracting authority must be able to change the technical specification if it realises that the specifications were too narrow or superfluous. This possibility would increase the risk of discrimination and restriction of competition. So a balance between the different objectives would need to be found.

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

We hold the view that all legitimate and objective reasons could justify restriction to local or regional suppliers. In the end, all such reasons could be based on economic considerations. In particular in long-term contracts and as regards warranty, the contracting authorities may have justified interests in having a contact person on site.

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

In a negotiated procedure, it is easier for the tenderer and the contracting authority to implement policy objectives. Both in open procedure and in restrictive procedure, setting requirements unilaterally may mean that no or only a small number of tenderers comply with such requirements. In contrast, negotiated procedures make give rise to new solutions that had not been initially anticipated by the contracting authority.

The price of this freedom is greater risk of discrimination and restriction of competition. In the end, a balance between the two objectives needs to be found.

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

No comment

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

70.1.1 to eliminate the criterion of the lowest price only;

It does not appear necessary or appropriate to deny public contracting entities the possibility of judging the economic viability of a bid solely according to the lowest-price criterion. Whilst it generally makes sense to judge whether a bid is economically advantageous on the basis of value-for-money, i.e. a combination of price and non-price criteria, in practice there are a series of significant applications which form exceptions. If procurement is for a straightforward standard product (catalogue goods) or a standard service which is available on the market from different sources with essentially the same quality or if the required quality can be described in sufficient detail it would be artificial to make a price-based distinction. In such cases it makes sense to make a decision based solely on the price.

70.1.2 to limit the use of the price criterion or the weight which contracting authorities can give to the price;

For the same reason, there is no reason, in our view, to restrict the extent to which public contracting entities can base their award decision on the price criterion. In principle, in judging value-for-money the contracting authority should be at liberty to decide what weight to ascribe to the price as it sees fit. If it is necessary to restrict the criteria, the aggregate weighting of non-price criteria, for example, should not normally exceed 70 %, to ensure that in judging value for money the price factor is not marginalised in a manner which could potentially give rise to a decision devoid of economic reason.

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

We see no benefit in introducing a third category of award criteria in addition to lowest price and economically most advantageous offer. This would only be necessary if one were to define public procurement law as being more than just the sum of public procurement rules, i.e. as also being a means of pursuing other policy objectives (see our response to Question 1 for arguments against this). Introducing another category would further complicate the process of establishing award criteria which are both objective and suited to the nature of the services to be procured. In our view it would create a new source of disputes between bidders and contracting authorities.

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

We have observed cases where ecological factors have been used with manipulative intent (for example, a waste disposal contract where the transport distance was rated so highly that only local/regional bidders had a realistic chance of securing the contract). We would therefore recommend limiting ecological, social or other macro-economic criteria to 30 % on aggregate.

Further, in our view the provision for award criteria in the form of margins, as provided for in Article 53 of the Coordination Directive (2004/18/EC), can be deleted. This clause gives rise to great uncertainty among both bidders and contracting authorities on how the final weighting should take place. In our view a lenient approach is hardly compatible with the otherwise very strict ECJ case-law on proper publication of the weighting of the award criteria including any secondary criteria. The same goes for the provision in Article 53 of the Coordination Directive which allows the criteria to be stated in descending order of importance. This also generates great uncertainty and potential for manipulation and has very little practical significance. In our view, the exception provisions could therefore be dispensed with.

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

In our experience, all major public contracting authorities are aware of social and environmental criteria and know that they can be used in tender procedures. However, in practice this should be left to the discretion of the contracting authority and not subject to explicit regulations. Irrespective of this, non-binding guidelines issued by the European Commission on this could be a useful source of guidance.

In our view, there is uncertainty as to whether social or environmental criteria on the one hand can be used as suitability and/or award criteria on the other. Greater clarity on this would be desirable.

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

It is, in principle, helpful to take account of life-cycle costs with big projects. However, we consider that making life-cycle costs a binding award criterion is too great an interference in the contracting entity's freedom. In Germany life-cycle costs are frequently already taken into account in determining the economically most advantageous offer with big projects or are incorporated in some other form such as via the statutory definition of energy standards (in Germany through the German Energy Saving Regulation (*Energieeinsparverordnung*) or certification of buildings. We anticipate that this factor will in any case become increasingly widespread in the foreseeable future and would therefore not advocate making it mandatory.

Nonetheless we do feel it would be helpful for the Commission to provide guidelines on calculating life-cycle costs and to compile various instruments and standards for energy-saving at EU level (regulations, certifications, etc.).

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

Social considerations have nothing to do with the tender procedure and should as a rule not play a role in the procurement procedure. If they are included nevertheless, then we agree with your view that the clauses for contract performance are the most appropriate place.

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

Contract fulfilment clauses.

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

No, see question 74. The case law of the European Court of Justice on this issue is sufficient.

- 77. Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?**

As option for the contracting authorities. By no means should mandatory verification of the requirements be introduced. The development of standardised assessment schemes which you suggest in question 78, and the documentation and labels to assess conformity could facilitate the work of the contracting authority.

- 78. How could contracting authorities best be helped to verify the requirements? Would the development of “standardized” conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimize administrative burdens?**

The suggested measures could limit the administrative costs of the contracting authorities. However, they should not be mandatory, but only introduced as an option for the contracting authorities.

- 79. Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?**

From a theoretical or political standpoint a softening of the obligatory linking of the requirements to the subject matter of the contract would certainly be desirable in particular cases. However this would entail the risk of requirements being imposed which are no longer objectively appropriate and also not sufficiently verifiable. In particular it might mean that highly specialised companies could no longer participate in certain tender procedures although they were absolutely suited for the procurement.

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

A loosening would lead to uncertainty which in turn could only be reduced through vague requirements and correction measures. The result would be jurisprudence of the courts specific to individual cases and legal uncertainty for the structuring of public procurement procedures.

- 81. Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?**

SME's would likely have problems with complying with requirements which are not directly linked to the subject matter of the contract. This would conflict with the efforts to better involve the SME's on contract awards (e.g. partial awards).

- 82. If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?**

Although a loosening of the link with the subject matter of the contract might be desirable in particular cases, it is not verifiable and would lead to unpredictable legal uncertainty. We therefore think that this Pandora's box should not be opened. Procurement law is not suitable as a remedy to level off all economic imbalances or as a cure for all the world's social diseases.

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

No, see Question 82.

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

No, see Question 82.

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

No, see Question 82.

82.3.1 Award criteria other than the lowest price / the economically most advantageous tender / criteria not linked to the subject-matter of the contract might separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

We share this concern. This is a further reason to refrain from any attempts to loosen the award criteria from the subject matter of the contract.

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

No, see Question 82.

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

In our view the legal codification of obligations on “what to buy” would of course be an efficient instrument to implement Europe 2020 objectives such as protection of environment, reduction of energy consumption and improvement of social conditions.

The advantage of such measures is that binding obligations partly determining the features of procured goods and services qualify as strict and mandatory conditions; non-compliance with such obligations would prohibit public authorities from procuring respective goods and services. The disadvantage of such measures is that the scope of products and services to be procured is reduced significantly as many potential bidders will not be able to submit commercially reasonable offers if high environmental and/or social criteria apply; this would most likely lead to a decrease in competition and higher prices.

We cannot identify specific product or service areas for which specific obligations on “what to buy” would be useful. Generally speaking, in our view it would make sense to impose such obligations on markets/sectors/industries only which by the nature of their products and services should carry special responsibility for the efficient implementation of Europe 2020 objectives. When identifying such markets/sectors/industries it is important to consider what effects such obligations will have on current competition and prospective market-entry opportunities.

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

From a systematic point of view it appears more plausible to implement obligations on “what to buy” under general EU public procurement legislation in order to avoid further fragmentation of public procurement legislation.

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

We do not think that obligations on “what to buy” should be imposed at national level as this would put at risk cross-border competition and the free market. If obligations are imposed which potentially limit competition such obligations must be imposed EU-wide in order to avoid discrimination. In our view the only efficient way to mitigate the risk referred to above is to make use of EU legislative competences to implement obligations on “what to buy”.

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

In our view, if obligations on “what to buy” are imposed there should be extensive flexibility on how to comply with such obligations. Contracting authorities should not be confined any further than necessary to design their tender conditions according to the needs and particularities of the market they are procuring from. This purpose would probably best be served by applying the Europe 2020-related criteria which are among the many factors to be used in evaluating bids.

- 86.1 What room for manoeuvre should be left to contracting authorities when making purchasing decisions?**

See our answer to Question 86.

- 86.2 Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?**

We see no reason to prevent contracting authorities from setting more ambitious requirements and priorities with regard to Europe 2020 objectives. Contracting authorities operating in fields of special environmental or social responsibility might feel a political urge to do so.

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

In our view the best instrument for dealing with technology development with regard to the Europe 2020 objectives would be to motivate or oblige contracting authorities to award environmentally protective and low-energy consumption features when evaluating offers. Provision must be made for technical advance to be defined inter alia by features reflecting objectives as set out in the Europe 2020 paper.

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

See our answers to Question 83, 85 and 86. To avoid eliminating competition provision should be made for EU-wide obligations and for such obligations to be regulated in a manner which allows contracting authorities flexibility on how to implement them. Also, during the drafting process of such obligations it is important to consider carefully the commercial implications of their content and to distinguish not only between markets/sectors/ industries but also between market conditions in different EU Member States.

- 89. Do you consider that imposing obligations on “what to buy” would increase the administrative burden, particularly for small business? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?**

Imposing obligations on “what to buy” is likely to increase the administrative burden, particularly on small businesses which do not have sufficient staff to handle such increases. For example, social obligations may limit a business’s freedom of choice on which employees to assign certain tasks and services to; especially small businesses with little or no choice in this regard.

In order to mitigate this adverse effect on small businesses one could consider imposing obligations allowing flexibility depending on the size and volume of a business.

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

As pointed out in our answer to Question 83, the principal advantage of “what to buy” obligations is that they allow for legally binding EU-wide imposition of Europe 2020 objectives. The disadvantages have been referred to and discussed in our answers to Questions 83 to 89. “Softer” measures such as recommendations would be no doubt be “appropriate”, but at they lack the effectiveness and power of binding obligations. Ultimately, how to implement the Europe 2020 objectives is a political rather than a legal question.

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

See 92 et seq.

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

As described in the Green Paper, it is general practice of public procurers to require consent of the participants to disclosure of their solutions. IP rights are not sufficiently protected.

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

We prefer the negotiated procedure, which is more flexible. The criteria for such procedures should be less strict if structured in a transparent and non-discriminatory way: prequalification – indicative offer – negotiation – best and final offer. The negotiation procedure should allow amendments the technical specifications as well as in contractual terms. The technical specifications should define functional requirements for the desired output. During negotiations bidders should be allowed to ask to extend or modify technical framework requirements without disclosing their technical solution.

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

We agree that it is important to find adequate procedures to integrate R&D work in procurements of services and products. We therefore support the efforts to develop rules and methods for pre-commercial procurement. Procurement law should also ensure that public procurers do not use their dominant market position to merely take advantage from R&D while not ensuring that the contractor sells a single product, for example, by framework contracts requiring development of products in order to be able to deliver according to the technical specification and within the set time-limits.

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

Bidders should receive appropriate compensation / remuneration for preparing offers requiring development of solutions.

- 96. What kind of performance measures would you suggest to monitor progress and impact of innovative public procurement? What data would be required for this performance measures and how it can be collected without creating an additional burden on contracting authorities and/or economic operators?**

See Question 94.

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

No comment

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

No comment

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

No comment

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

No comment

97.1.3 Loosening the award criteria or reserving contracts to certain type of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services “at least cost to the community” and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?

No comment

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

No comment

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

Yes, we would be in favour of introducing an EU definition of conflict of interest in the public procurement directives. The Council Regulation 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Commission gives reasons which could potentially cause a conflict of interest. Article 52 of the Regulation reads:

“1. All financial actors and any other person involved in budget implementation, management, audit or control shall be prohibited from taking any action which may bring their own interests into conflict with those of the Communities. Should such a case arise, the person in question must refrain from such actions and refer the matter to the competent authority.

2. There is a conflict of interests where the impartial and objective exercise of the functions of a financial actor or other person, as referred to in paragraph 1, is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary.”

This regulation can be used as blueprint for a respective regulation within EU public procurement law.

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

Yes, there is a need for safeguards to prevent, identify and resolve conflicts of interest situations at EU level. We would recommend that public procurers disclose the names of the members of the evaluation committee at least to the tenderers in the course of the procurement procedure.

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

Procurement markets are, not only in Austria, highly exposed to the risk of corruption and favouritism. EU action in this field, including not least the EU Procurement Directives, would be useful because there is often little national motivation to prevent local preferences.

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

The main areas for the preference of certain tenderers are (i) specifications with incorrect quantity and mass data, the publication of insider information to individual tenderers about the de facto expected quantities and masses, (ii) suitability criteria that are difficult to fulfil, particularly concerning specific reference requirements, (iii) discriminatory technical specifications which are “tailored” to certain products or tenderers, (iv) award criteria which are open to a large scope of discretion and are used unobjectively and (v) an arbitrary examination of the offer whereby unwanted tenderers are examined thoroughly until some formal fault can be identified which is not picked up with the other tenderers.

Offers from any bidders who detect errors in quantity and speculate on this should be rejected on the grounds that their prices are economically unviable (offering a low price for positions that are not expected to be performed, a high price for positions that are expected to be performed in a much higher quantity than indicated in the tender in order to make the cheapest bid and bill highly). However, in practice not all tenderers are examined to the same degree of thoroughness.

Also, reducing the possibility of contracts being awarded directly contributes to fighting corruption. Transparency is particularly important. The requirement for tenders to be announced ex-ante should therefore be as extensive as possible. Transparent access to awarded public contracts, as is the case in Poland, would also be very helpful. Information on which tenderers have been frequently awarded by one and the same contracting entity would also be helpful to identify a valuable source of information in order to identify possible restraints on competition.

Since unwanted tenderers are often squeezed out by means of very high reference requests, the references of the best tenderers are treated as secret business, the scope for testing such conduct in an objective examination is very limited.

102. Which of the identified risks should, in your opinion, be addressed by introducing more specific/additional rules in the EU public procurement Directives, and how (which rules/safeguards)?

In order to check discrimination at the level of the suitability criteria, it would be helpful to make available public contracts that have been awarded earlier. This could be done by an EU institution because the award of contracts has to be notified anyway.

The use of integrity clauses would also be worth considering. This would make it easy to prove deception on the part of the contracting authority. An act of this type would be treated as fraud and would have a higher deterrence.

In order to increase the quality of the specifications, we would recommend that for planning services competition should be predominantly based on quality criteria and not on price. This would reduce the risk of planning services to be rendered under publicly awarded contracts being of poor quality and it would also reduce the temptation to pass on information on changes in quantities to bidders in exchange for payment.

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

Transparency concerning who applies for public procurement awards, who obtains them and finally who – even as subcontractor – carries them out is certainly an effective way to fight corruption. In this respect control would appear to be an effective means of ensuring that work is only carried out by those subcontractors who were named as subcontractor in the original offer of the best tenderer and did not act as competing bidder in the tender process.

In view of the significant successes regarding the disclosure of cartels through leniency applications, a similar ruling for submission cartels would appear useful because it increases the risk of cartel participants of being one day called to account. There are often several criminal offences including bribery, accepting benefits by a public official, betrayal of secrets, arrangements concerning competition restrictions during the awarding of contracts.

A clear separation between contracting authorities and controlling institutions would certainly be helpful. The fact that the tribunals of a given province are competent to control the awards in that specific province is not ideal. If there were a Federal Administration Court of first instance in Austria which could examine all awards, i.e. de facto independent from the government and free of any competence disputes, this would also be useful in tackling corruption. Good equipment and training of the anti-corruption state prosecution would also definitely be helpful.

A complaints office at EU level to pursue the handling of such cases with certain pressure would also be worth considering.

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

The regulations of Article 45 of Directive 2004/18/EC are a suitable mechanism for sanctioning unsound business behaviours.

105. How could the cooperation among contracting authorities in obtaining the information on the personal situation of candidates and tenderers be strengthened?

Exchange of information among the contracting authorities bears the risk that subjective experience leads to objective assessment of the tenderer. Therefore, all tenderers should have the opportunity to inspect, and be heard on, the information exchanged.

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

The possibility of self-cleaning measures should be enshrined in law. Exclusion from the procurement procedure due to unsound business behaviour has serious adverse effects on enterprises which conduct the major part of their business with public authorities. Therefore, there should be a way to rule out further unsound business behaviour by fundamental self-cleaning measures. The rules of the self-cleaning measures should be addressed in the Directive to obtain uniform requirements in all Member States.

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

Not applicable

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

We do not think that there is need for regulation in this respect.

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

Yes, we would appreciate specific rules at EU level to address the issue of advantages of certain tenderers. We would prefer these tenderers to be barred from bidding. A more moderate way would be to compensate the advantage of the specific tenderer in the course of the procurement procedure. In this context, for example, the following instruments could safeguard equal treatment of all bidders: sufficient deadlines for the submission of the tenders; adequate disclosure of comprehensive information gathered by a tenderer due to its prior association with the project.

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

No. Natural advantages of incumbent bidders are inherent in free competition and no compensation should therefore be awarded.

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

No comment

- 111.1 Should these provisions be further improved? If so, how? Could it be appropriate to expand the scope of these provisions beyond the area of utilities procurement?**

No comment

- 112. What other mechanism would you propose to achieve improved symmetry in access to procurement markets?**

No comment

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

One area which the Coordination Directive does not resolve satisfactorily is the dividing line between a negotiated procedure with and without EU contract notice. The relevant access requirements contained in Articles 30 and 31 of the Coordination Directive lack clarity (especially nos. 1 a in each case) and are not well aligned to each other. This has had a knock-on effect in national law, making § 3a VOB/A and § 3a VOL/A very unclear, particularly with regard to Article 30 (1a) 2nd sub-paragraph of the Coordination Directive, which waives the contract notice although this scenario is in fact covered by Article 31 of the Coordination Directive.

It is not always helpful for a public contracting entity to be able to switch to a negotiated procedure and at the same time to have to make a further EU contract notice and ultimately repeat a complete award procedure. In our view it would therefore be preferable if – where an open and closed procedure have been unsuccessful – the public contracting entity could generally switch to a negotiated procedure without making a new contract notice as long as any bids are available, whatever shortcomings these may contain and provided the contracting authority invites these bidders to take part in negotiations. This would make the award procedure considerably more efficient. It would also be consistent with competition principles as the tender procedure was EU wide and the prospective bidders were duly determined. Finally, the access criteria for negotiated procedures could be simplified and defined more precisely.

114. Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

1. What are public procurement rules about? (No. 1 of the Green Paper)
2. Ensuring sound procedures (No. 5 of the Green Paper)
3. A more accessible European procurement market (No. 3 of the Green Paper)
4. Improve the toolbox for contracting authorities, especially modernise procedures (No. 2 of the Green Paper)
5. Strategic use of public procurement in response to new challenges (No. 4 of the Green Paper)
6. Access of third-country suppliers to the EU market (No. 6 of the Green Paper)

The issues should be tackled in the above ranking.

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