



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

***Ms Kristin SCHREIBER***  
***Deputy Head of cabinet of Commissioner Barnier***

*NB: The information contained in this presentation is not binding for the European Commission and does not present an official position of the European Commission*



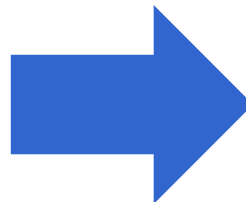
## Rationale for Single Market Act II

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

## Single Market Act II

### 12 levers

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



### 4 drivers

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



## Delivery of SMA Actions

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

## Public procurement in figures

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



# Preparatory works

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

# Objectives of the Reform

**1. Simpler /  
more flexible  
procedures**

**2. Strategic use**

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

**4. Sound  
procedures**

**5. Governance / Professionalisation of procurement**





# 1. Simplification

*Measures proposed by the Commission:*

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



## 2. Strategic use of public procurement (a)

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



## 2. Strategic use of public procurement (b)

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



### 3. Better access to SMEs

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

*SMEs will benefit from:*

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

*In addition:*

- **Reporting on the success of SMEs**

## 4. Sound procedures

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



## 5. Governance

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



## State of play

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



# Proposal for a Directive on the award of concession contracts

## What are concessions?

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

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








## Why concessions are important?

- Important share of the economic activity in the EU

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

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




## Current EU regime on concessions

Finding investment opportunities:   
Competing on equal footing   
Reviewing unlawful practices 

Works concessions (Dir. 2004/18)

how to publish notices for such contracts

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

Finding investment opportunities   
Competing on equal footing   
Reviewing unlawful practices 

Services concessions (EU Treaty principles)

???  
???  
???

## Why a directive on concession contracts?

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

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



## Therefore rules are needed

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



## Content of the Proposal – main elements

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



# International Procurement Instrument

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



## Economical context

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



## Overarching problems

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





## Objectives

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



## Public procurement in the EU

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



## Proposed regulation: clarification of rules

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



# 1st tool: article 6

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



## 2nd tool: article 8-10

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



# Additional tool (Article 7): abnormally low tenders

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