GREEN PAPER

on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market

Answers by the University of Rome Tor Vergata Procurement Group, April 2011

UNIVERSITÀ degli STUDI di ROMA
TOR VERGATA

INTRODUCTION TO THE GREEN PAPER and MOTIVATION FOR PARTICIPATING

"The EU will propose changes to its public procurement rules by 2012. But first it wants to organise a consultation, to make sure that future legislation takes account of the views of all interested parties.

• As a first step, the European Commission has published a Green Paper containing its ideas for simplifying and updating the existing rules. Amongst other objectives, it aims to:

o make the awarding of public contracts easier and more flexible

o further facilitate access to public contracts on an EU-wide basis, especially for small and medium-sized businesses (SMEs)

o enable public contracts to be put to better use in support of other policies.

WHO WILL THIS HELP?

• Governments, local authorities and other public bodies – who have to abide by the EU rules when organising tendering procedures and awarding contracts

• Companies that tender for public contracts

• Anyone interested in the impact of public procurement (pressure groups, charities and other NGOs, taxpayers, the public)."

The following report has been written by a group of individuals belonging either to the University of Rome Tor Vergata in Italy, or working in close connection with it, with the purpose of helping the European Commission in its quest for knowledge regarding public procurement.

Tor Vergata University has been in the past 7 years at the heart of relevant research and teaching on procurement. It is the site of an increasing interdisciplinary debate that was started by an innovative group of researchers in the Italian Central Purchasing body, Consip Ltd. later migrated to Tor Vergata.

Tor Vergata now hosts the 1-year interdisciplinary program of Master in Procurement Management, has been the University organizing the 2006 IPPC Conference on Public Procurement and will host in June 2011 the First Interdisciplinary Symposium between lawyers and economists. Giancarlo Spagnolo and Gustavo Piga, economists at Tor Vergata, together with Nicola Dimitri, have edited the Handbook of Procurement published by Cambridge University Press.

At Tor Vergata we believe that procurement deficiencies are often rooted in incompetence and lack of accountability by those who write the rules of public procurement and those who monitor, supervise and manage it daily. We therefore are a group of optimists: "simply" by investing in competence-building institutions and in the collection of data regarding relative performance of Contracting Authorities that are shared with the largest possible public, we believe public procurement can be rapidly be made better without so many binding rules or internal controls.

Have a good reading.

No. It is quite clear as a definition.

♦ SECTION 1 – WHAT ARE THE PUBLIC PROCUREMENT RULES ABOUT?

Question n.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 difference between works, goods and services remains critical not so much at the selection stage but in the contractual phase, typically regulated by the national law rather than by European Directives. In such a phase the three different categories are characterized by very different types of interactions between the supplier and the public purchaser. Any temptation to simplify at the central level would lead to a need for the national legislator to differentiate once more, leading only to red tape and confusion.

Question n. 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?

Question n. 4

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

What is really the main point here? To maintain the strict distinction between A and B services or, rather, the crucial point is to give the Contracting Authority (CA) the possibility to choose among different procedures inducing the right "procedure selection" by the CA itself? Procedures among which the CA could choose should be different enough to highlight the trade-off between the benefit for the CA to have more flexibility and less administrative burden and the cost to carry out a stricter regulatory role in the contract execution.

Question n. 6

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

The greatest impact of raising the thresholds would be one of raising the discretionality of the C.A.. This,

in turn, is a welcome change, if and only if there is guarantee of greater competence on the part of the C.A. . It a pity that very little is suggested in this Green Paper regarding how to make the procurement body more professional. Several Expert Groups on Innovation[1] have argued in favor of an active policy by the EC based on fostering professionalism, requiring a standardized degree coordinated at the EU level and implemented by certified national institutions. Such educational system should be based on different levels of reachable knowledge and appropriate careers/salaries to be based on such qualifications. Why is this absent from the Green Paper?

Questions n. 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?

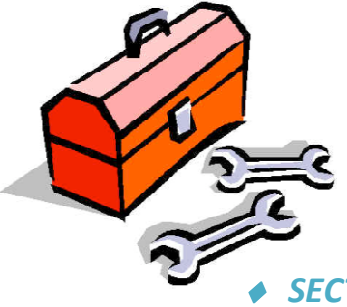
Yes they are appropriate, possibly one should however clarify the extension of the perimeter of exclusions. Especially welcome would be, both in terms of definition and of extent of exclusion, to know whether accessory services are included through a revision of directive n. 17/2004.

Questions n. 8

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

One could imagine to update some of exclusions, especially in the light of greater openness of some of the sectors, but since attention should be given to the different level of liberalization reached within each member state it would be better to work on the discipline of specialties so not within Directive 18/2004 but n. 17

[1] For example see the 2005 Group of Experts Report which recommended (n. 16) that "The Commission should report on the feasibility of creating a Union-wide curriculum and developing a 'Diploma of Strategic Supply' (or similar) to include modules on procurement for innovation, which are recognised in all Member States and supported by a pan-European curriculum and learning network." Nothing of the sort has been implemented to our knowledge.
http://ec.europa.eu/invest-in-research/pdf/download_en/edited_report_18112005_on_public_procurement_for_research_and_innovation.pdf



♦ SECTION 2 – IMPROVE THE TOOLBOX FOR CONTRACTING AUTHORITIES

Question n. 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?

Once competence is achieved and rewarded in the family of procurers, something this Green Paper does not push at all for, discretionality could be greater. Discretionality pushes for less detail where today there is an excess of. In most cases, too much detail can be found not so much in the Directives but, rather, in the national legislation. For example, at that point it would be helpful to force member states to leave only Guidances for the below-threshold tenders and not add more details.

In general, as a principle, such discretionality should be encouraged by the Directives by

only forbidding what is clearly not acceptable for clear reasons – possibly backed up by rigorous empirical evidence - and allowing all else.

Question n. 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?

No. A lot could be done to reduce costs in implementing procedures. Larger parts of the procedures could be pushed to be done through IT application forms. Countries should be forced to have Central Purchasing Bodies and Ministries of Works regularly update standard tenders for each work/service/good that would be used as non-mandatory benchmarks where CAs that opt out in specific parts have to explain publicly on the web of their institution why they departed from that specific part.

Also, facilities for financing contracting authorities (CAs) to avoid late payments to SMEs in tenders seem to be necessary/mandatory to ensure fair and non discriminatory access with respect to small firms vs. large ones. The experience of Korea in this regard is quite illustrative and should be imposed to member states. Large firms

should be excluded from such financing.

Question n. 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?

Second-price auctions, Anglo-Dutch (price-descending auctions where a last offer sealed bid is possible for the best "n" remaining of the initial "x" participants (n < x)), ending rules for electronic auctions, two winners in the case of Framework Agreements, Dynamic Acquisition systems with binding initial offers (like electronic markets), dual sourcing, combinatorial auctions, are all methods that allow greater efficiency, less potential collusion, more participation, less risk of lock-in by single suppliers, better risk-management. Why are they yet to allowed?

Again, why not specifically forbid what has been clearly proved to be wrong by theory and data and instead allow everything else?

Question n. 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?

For PPP project the Least Present Value Auction should also be considered and losing projects should be reimbursed expenses of participating.

Question n. 18

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

The accelerated procedure is a form of flexibility and it could bring important efficiency (through rapid execution of the contract) in public procurement contracting. However, corruption and favoritism are the risk which can affect accelerated procedures. To

reduce such risk, the points i) - ii) - iii) below (see answer to question 19) should be activated. In particular, for the accelerated procedure the transparency requirement is particularly relevant to ensure external controls to penalize corruption and favoritism.

country, like the Scoreboard for state aid.
In steady state the EC should standardize and coordinate data collection on performance and on execution of Procurement contracts and release these data publicly so that independent evaluations can be carried out by researchers.

Question n. 19

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

Yes, more negotiation (and flexibility) in public procurement would be fine, under some constraints: i) existence of greater transparency on the CA-firm negotiation (i.e.: electronic publication of the info about the contract which is going to be awarded; electronic publication of the awarded contract; electronic publication of the resulting final execution costs/time); ii) existence of some reputation features on the firm's past performance at work; iii) existence of proof of the CA ability to manage contractual execution with knowledge and

capacity, possibly by obtaining a degree of competence awarded by certified institutions. Point i) could lead to a sort of register of the accelerated procedures - adopted for large contracts - in every EU

Question n. 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?

All those for which ex post data collection would be made available, so that possible poor performance linked to accountability problems could be reduced through ex post auditing.

Question n. 21

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

Public data on performance, if well collected and made available in a 'machine readable' way will be the best safeguard, as it will allow independent researchers to perform comparative analysis that can uncover abuses that neither the EC nor national authorities are able to perform.

The EC Green Paper is particularly poor in its emphasis of data collection and availability to the public, the more so surprising that the EC itself could play a key role in the data collection, maintenance, standardization and diffusion.

Question n. 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?

The length of the administrative process should be shortened considerably, electronic publication and circulation of the calls allowing to substantially reduce the time span. Base price should be set at a level only slightly above or equal to market price.

Question n. 23

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

Not necessarily. The tender structure would change dramatically. For one, I would participate to a tender without knowing in advance if a "speculative" and tentatively "overbidding" player (admitted) would then be excluded if the firm with the highest number of points could lead me to abandon or to become in turn overaggressive, compared to a situation where I know I compete only against "serious" firms. Also, at a legal and psychological level, to exclude a firm that has been declared winner on the basis of the award criteria could be more problematic than excluding it before all firms have been evaluated on the basis of award criteria like today: wouldn't it be tougher to exclude a firm that, for example, practices for the community the lowest price (even though after it might run the risk of defaulting)?

Questions n. 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?

It is hard to understand how the Commission could think that treating very different firms as if they were equal could get anywhere close to the objective of fairness and objectivity. The characteristics of the firm always impact the quality of their work, hence should ALWAYS be included in the evaluation. The important thing is that this is made in a transparent way, announcing it ex ante, and that there are ex post accountability and performance checks through performance data. Such an approach should by the norm not the exception.

But is the European Commission in this Green Paper focused on making firms accountable for their contract execution? It does not seem to us.

Question n. 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?

Past performance evaluations, if competently performed and analyzed, are a very good predictor of future performance. So all the information available on bidders past performance should be collected and made available to each Contracting authority that should be encouraged to use it as a selection parameter, as is done in the USA. The Commission should set up a coordinated and standardized system for the collection, summary and distribution on past performance information on all European public suppliers, as is done by the US Federal Government, and provide guidelines to contracting authorities on how much weight should be given to past performance indicators in new tenders depending on the characteristics of the procurement market.

It should be kept in mind that reputational mechanisms are not against free-entry. Reputational mechanisms can be designed that favor, if desired, non-incumbents, by fixing a number of points that are given to all new entrants and those firms that work (the "incumbent") will be penalized by being subtracted points if they

work badly. In such a system "new entrants" are favored over incumbents.

At a minimum reputational-based MEAT criteria should be allowed to be experimented with an initial maximum weight of 10%. Also, minimal considerations would be to exclude those with past bad past performance. Moving towards a larger application of firm's reputational elements, it could be investigated how and where past experience could be evaluated in the aim to reduce discriminatory effects on new firms.

Auditing and ex-post controls, not enough mentioned by the Green Paper, are however a pre-requisite for this logic to be pushed forward. CAs that have proven their capacity to measure performance could be allowed to use such mechanisms more largely.

Question n. 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 recognise the specific character of utilities procurement?

Yes. We would take this chance however to leave more flexibility on the eighth of Directive 2004/17/CE relative to technical dialogue. The latter should be allowed to be activated in any procedure, obviously reinforcing at the same time transparency and attention to participation. As CAs are typically captured because of their lower lack of knowledge this phase could actually reduce asymmetries.

In addition, here too, reputational criteria should be allowed both at the qualification level and at the MEAT criteria moment.

Question n. 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.

The regime is not adequate for small contracting authorities (CA). Cooperation among CAs should be given incentives, in particular among large and small CAs to reduce the costs for the latter in implementing the procedures. Moreover, small CAs can be affected by a lower bargaining power and a lower enforcement strength more often than the large CA, which does not encourage making negotiations more available (unless, once more, this is conditioned to the formal acquisition of competences). These features should be

considered in the design of a procurement regime for small CA.

One way to reduce costs would be to either collaborate with Central Purchasing Bodies or use their tenders and adapt them to local needs (and explain the reason for the adaptation publicly to ensure transparency).

Question n. 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?

A more simplified regime should be conditioned on the proof of acquired competences and audit capacity during the contract management phase, which might prove many times equally if not more costly.

Question n. 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, to avoid the creation of parallel markets not under the rule of public procurement.

Question n. 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?

Given the large amount of types of cooperation between public administrations (and the different elaboration of the phenomena given by the Court of Justice) we suggest to elaborate on the concept "excluded public to public cooperation". Such exclusions could be linked to the type of interest pursued, on the non-prevalently commercial nature of the activities and the goals pursued; on the absence of private participation to the capital of the Body.

One should also distinguish among different types of cooperation (internal and horizontal): for internal cooperation it is important to regulate the notion of "analogous control". For excluding not only any sort of private participation to capital, but also limiting the possibilities of association so to avoid any intrusion in management outside of the public sphere (e.g. perpetual ban to sell shares etc.).

It could be helpful in that sense that Member States were authorized to grant to independent bodies control and

supervision powers over the forms of internal cooperation that are excluded. As for horizontal cooperation it may be useful to cast in a law the principle of cooperation between public authorities through agreements among collaborating entities and on the other hand service level agreements with suppliers.

Question n. 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.

In order to adjust the rules according to the peculiarities of the various forms of cooperation, there might be distinguished on the basis of the European Court of Justice, three forms of cooperation: vertical, horizontal, translational (even if problems could arise depending on the organizational models chosen within each MS). The essential characteristics may be, respectively: the joint availment of a controlled entity (respecting the notion of "analogous control"), the joint or coordinated fulfillment of one or more functions, without recourse to other bodies while using own resources, transfer of functions and responsibilities (the later hypothesis facing the risks described above). It would then be needed a proper definition of the following concepts: parent entity, controlled entity and their reciprocal relationships; assumptions and forms of joint performance; size and limits of the assumptions of transfer and consequences of the eventual inaccurate, partial or lacking performance.

Question n. 33

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

As already mentioned, the transfer of competences could be covered for both the detection of limits (functions excluded from the transfer), the regulation of the essential elements of the relationship between the involved entities and, finally, for the definition of the relative spheres of responsibility. One should however keep in mind the organisational problems related to the transfer of functions and to the difficulties of giving rise to the translation of responsibilities.

Question n. 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?

Aggregation of demand is *already* on the rise. Stronger would thus mean "even stronger". Aggregation is also widely different across countries and so are the accompanying mechanisms (like mandatory vs. non mandatory purchases from CPB), any general comparison is thus non meaningful.

What is well known is that this growing trend is putting under more stress small and medium enterprises compared to a world without greater aggregation. If such aggregation is to continue what one really needs is concrete mechanisms to protect participation by smaller firms, like in the Usa, Brazil, Korea, South Africa etc.

Question n. 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?

While there few doubts about the savings that are often achieved by CPBs [2], little do we know on the final quality of what is purchased by aggregating demand. In Italy there is ample evidence that quality is often lacking due to weak incentives to monitor the contract. Aggregation of contract management should be prescribed for contracts signed by CPB to align incentives and raise the bargaining power of monitors during the audit and performance measurement moment, not leaving it to those smaller CAs that buy from frame contracts of the CPB.

Question n. 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?

An efficient aggregation mechanism is one that not only does not decrease participation but that encourages firm to participate, given that new entrant firms are often discouraged from participating in the first place. Lower business turnover requirements are incapable of

[2] See for example Bandiera, Prat and Valletti, *American Economic Review* (2009).

stimulating such participation in bundled contracts as those remain higher than what a truly small firm can prove to have. For the same reasons more lots in CPBs are typically irrelevant for SMEs and often only encourage cartels. Even if a CPB were to ideate a tender with thousands of lots (a truly administrative burden for it!) it would lack the informational knowledge to design the tender to the local needs of the small administration, more easily satisfied by local firms.

It is necessary either to: a) reserve shares for primary contracts for SMEs like the Usa do or b) allow tenders with a handicap in favor of SMEs. As the Treaty does not allow discrimination on the basis of nationality such quotas should be reserved to EU SMEs at large. A modification of the Directives based on the current lack of equal treatment for SMEs - who suffer from huge unitary costs differences due to similar (compared to large firms) fixed costs that are due in procurement – is by now largely due and seems coherent with the Treaty principles.

To say the least we would welcome the mandatory presence in every single large bundling administration of an external evaluator in charge of evaluating the potential economic damage that bundling may bring. This institution exists in the USA, an employee of the Small Business Administration being present in each large CA, having veto power on the publication of a tender that could be done better for SMEs without damaging the efficiency of the procurement outcome for the CA.

Question n. 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.

Those where economies of scale are strong. Even in this case however one should bear in mind to keep the principle of dual or multi-sourcing, so as not to make a competition today a monopoly tomorrow.

Question n. 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?

Yes. The case-law should provide more clear conditions as to when a new procedure is needed. The condition should be based on observable and verifiable elements (e.g. the size of the amendment compared to the initial contract value), leaving little discretion to the authority to decide whether the amendment is material or not. Similarly a greater level of uniformity across member states

legislation on the changes during the contractual life of the work would be welcome.

Question n. 40

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

No need of a more flexible procedure.

Question n. 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?

Yes, an EU-level rule is needed and missed, also taking into account the wide variety of situations in different member states. However, one should bear in mind that "explicit obligations" to change the supplier might be the cause of delays and costly changes for citizens and a "right to change the supplier/terminate the contract" would be preferable, giving the option of continuing with the original faulty supplier and asking compensation to the same supplier for his inefficient work, including a penalization in the reputation indicators of that firm were we to move toward greater monitoring and measuring of performance indicators. Procedures to identify the new supplier are already available. Please keep in mind that in long-term contracts such as those for public private partnerships, changes in the contract are frequent. Ex post changes occur in a situation where the contractor is locked-in and there is less transparency compared to the award stage. Clear rules should be set up to provide for changes initiated by the government or by the supplier. Authorities should have more influence on replacement of subcontractors by the firm or any other major change in the firm composition/structure. Specific procedures must be chosen.

Question n. 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, it would complicate matters for national member states' situation.

Question n. 43

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

The law against criminal organization interference and all those issues related to litigation: including amendments, suspension of works…

Guidance policies should be provided on the definition of incentives (bonus/penalties) for contract execution, especially relating incentive schemes to payment or fines for early/late delivery.

Finally, data on contract execution evidence should be collected, analyzed and shared by the EC so as to allow the measurement of performance of firms and the creation of reputation indicators.

Question n. 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?

Absolutely yes, subcontracting is a classic method of splitting collusive gains, and often reduces quality relative to capacity of the original contractor. Forbidding subcontracting between firms that participate to the tender, mandating the release of the name of the subcontractor in the offer. Furthermore, in the evaluation ex-post of performance how well the sub-contractor did should appear explicitly and constitute information useful for the measurement of the subcontractor reputation.

♦ SECTION 3 – A MORE ACCESSIBLE EUROPEAN PROCUREMENT MARKET

Question n. 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, the cumbersome procedures required by PP Laws to 'guarantee equal treatment' are the reason why foreign suppliers do not participate to tenders abroad, though they do sell abroad to the Private Buyers that are not subject to such cumbersome regulators. As in the private markets one should reduce the focus on rules ahead of the tender and be very specific and invest plenty of resources in controlling credibly and massively the contractual performance, where corruption and incompetence show their current strength. This involves: 1) making an investment in competence-building, uniform across the EU, with a "buyer-diploma" upgraded according to the skills reached and 2) a data gathering huge exercise which allows for monitoring performance and which produces data that – in a machine readable way – are left to the community of citizens to discuss and debate. Judges, journalists, advocates and civil passion will make the rest: non administration will like to resist the social stigma that comes with procuring badly and will converge to the best practices. The best practices, in turn, will do better because non hampered by rules that reduce their capacity to reach the effective outcome and the lack of trust that these rules imply.

Questions nn. 46, 47, 48, 49, 50, 51 and 52

Do you think that the EU public procurement rules and policy are already sufficient 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.

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)?

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?

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

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?

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?

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?

The administrative burden scares SMEs as well as foreign suppliers. Small firms are truly much smaller than what we think is small. They live out of under threshold contracts. Their chances of winning above threshold tenders is low to begin with. It becomes abysmal with the current rules that treat equally two situations that are structurally different. This is been understood by most market economies, not us. We should worry about protectionism not protection. We protect small children to have a better future that will be of help to all the economy and society, why not small firms?

It is ironic that the lack of interest of the EC to small firms has affected also translators of the Green Paper. In the English version one reads “One idea, for instance, might be to set targets for SME shares in overall procurement”, p. 29 and on the Italian version one reads “Si potrebbero fissare obiettivi di partecipazione delle PMI al complesso degli appalti” (see also the French version for a similar translation). Do we want to set targets for shares or for participating? There is quite a difference!

The Code does not help, whether compulsory or not and, as we have said, more lots help cartels not small firms (unless you have in mind smaller large firms!). In most cases lowering turnover requirements is useless for firms. Nor do Temporary Consortia help, since SMEs are against them.

To establish an handicap in auctions (and other procedures) in favor of small firms that can win if their price si (say) 5% higher, like in Brazil, is an excellent idea, a sit pusher also large firms to become more aggressive in their bidding. This mechanism, like setting targets for shares (not participation!): a) does not reduce transparency, does not involve discrimination if applied to all EU SMEs and c) does not affect quality, which depends on unrelated factors that should be pushed ahead anyway, the emphasis on monitoring quality and publishing the data of such monitoring so as to build reputation indicators of single firms.

Submission and verification of evidence only by short-listed candidates/ the winning bidder might help reducing costs of participation, but what happens if a firm is declared winner and then one finds it did not have the requisite documentation? A very high fine (and a lower score for reputation purposes) should be set to discourage such possibilities (the same is true with self-declarations). However account should taken of the fact that changing the number of participants ex-post might change the scoring of all other players (if points are based on relative performance) and that awarding the contract to a bidder with a higher price might make the CA more resistant to finding at guilt the firm that has won the competition providing the inadequate documentation.

Subcontracting is only feasible in some industries and may prevent small firms participation, is not the best instruments to foster SMEs participation, though it may be the only possibility if the burdensome procedural rules are not cut down substantially and replaced by an ex post performance and accountability system based on data collection and publication.

Question n. 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?

Anticompetitive structures are the business of Antitrust Authorities. They are a given for CAs. All what a CA can do is to make its own tender strategies such that they raise slightly the cost of colluding among firms and not make the cartel easier. To do so one mostly requires competence, again

stressing what the Green Paper does not stress.

Questions n. 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?

A possibility would be the one of forbidding sub-contracting and Temporary Groupings among those firms that can potentially participate on their own to that tender. Another one is to allow the price-descending auction to stop when a subset of participants is left (and not wait until only one is) and allow them to make a last sealed-bid offer.

Questions nn. 55, 56 and 57

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.

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?

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?

No to all three questions.

Question n. 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?

It is very well known how to prevent the formation on dominant suppliers, the literature on dual sourcing is old and established. In practice this means dividing in more lots and setting adjudication limits. But it is not always optimal to prevent a very efficient firm from becoming dominant. Procedures that allow to verify the quality of the work done during the life of the contract and that permit the "entry" of a guy on the bench (second available supplier) in the case of poor performance would go a long way to put pressure on a dominant player to perform.

Question n. 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?

Corruption and collusion often go hand in hand, reinforcing each other (they are, often, "strategic complements"). To favor the fight against both of them by introducing a public procurement whistleblower program where witnesses and participants denounce firms and public officials involved in fraudulent schemes, partially excluding firms from public tenders and imagining penalties equal to the value of the contract, would go a long way to give back to citizens what was stolen to them.

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

Not clear. Exclusive rights typically come from IPRs, which are awarded to the first inventor, who has been competing with any other potential inventors…. It is not clear who else is awarding such rights, nor why PP directives should enter into these issues.

It would not be sufficient to require a transparent awarding procedure to have taken place. In most cases these tenders are for imperfect substitutes of the object with explicit rights, that allows to avoid a negotiated procedure.

Questions n. 60 and 61

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

♦ SECTION 4 – STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

Question n. 62

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

Not the equal treatment of small firms compared to large ones nor foreign firms compared to national ones.

Question n. 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?

We certainly share the view. And we certainly would not make them mandatory as it is not always the best thing to do.

Question n. 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?

Competitive dialogue could be the ideal procedure for CAs to learn. But it is also necessary that it does not become an instrument for capture of the CA or of collusion between firms and CAs.

Question n. 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?

It would be essential to work toward greater acquisition of skills and competences through education. In such an environment

it would be easier to pinpoint and discuss the discretionary space available to the CA and how to best take advantage of it.

Question n. 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?

Certainly. Take the case of using work skills that are not easily reproducible away from the local environment. Think for example to the City of Venice that needs to procure for the construction of 5 gondole per year: nowadays there are only 4-5 "squeri" capable of doing the job properly. Other firms outside of Florence could do it, maybe also at a lower price, but closing down the squeri would amount to a grave cultural loss.

Question n. 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?

There is no doubt that negotiation would make selection on the basis of policy-related considerations much easier. Again, if performance is anyway measured and revealed to the public and used to reward firms in future tenders that would be OK and discrimination risks reduced.
However in the case of innovation one should think about using other instruments, like precommercial procurement because you cannot penalize a firm that tries to innovate as innovation often does not materialize.

Question n. 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;

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

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?

An effort should be made first of all, to abolish the habit of pricing points to the financial offer of firm A on the basis of a relative criterion, looking at the minimum price offered by firm B (if firm A is the one with the minimum price firm A is awarded the maximum number of points to its financial offer). With this criterion not only the firm does not know how to measure its performance in terms of points awarded to price before the tender (raising uncertainty), but also it can be proven that such interdependent formulae make collusion easier.[3]

Secondly special monitoring should be done, during the contract life, to verify that those qualitative criteria that were promised by the winner are truly delivered. Could the EC set rules on this, requiring CAs to publicly and regularly disclose information on the contractual status of promised quality in MEAT criteria vs. effective quality?
As for green factors, an effort led by the EC to standardize at least partially what to reward would make this green global good emerge with greater certainty.

[3] See *Handbook of Procurement*, 2006, Cambridge University Press edited by Nicola Dimitri, Gustavo Piga and Giancarlo Spagnolo.

Question n. 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?

Not necessarily, innovativeness or environmental-friendliness may be objectives much more important than savings in some environments. In this case one could think to 'fixed buget' tenders, where no discounts are allowed and competition takes place only in these other performance dimensions.

Different “green weights” anyway should be given to different tenders.

Question n. 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?

The Directive is very clear on this. The true problem is if those green points awarded to a firm translate truly into green advantages for citizens: both because they might not be fully delivered by the firm (see above n. 70 for a solution

mechanism) and because the CA might not be able to use them (imagine a photocopying machine bought for recycling paper better that does not make use of recycled paper).

Question n. 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?

Double yes. There are many methodologies for life cycle assessment and the choice should also be based on the project's goals and the weight given to the various qualitative aspects in the MEAT criterion.
A methodology elaborated by the EC would be a crucial focal point for major improvements in this direction.

Question n. 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.

Not necessarily. These clauses are mere promises that cannot always easily be credibly verified during the life of the contract. Better would it be to reward the reputation acquired over the life of the firm on employment and labor conditions and other factors. Again, this reputation on these specific items could be rewarded in MEAT criterion that rewards it. Evidence exists that those firms that have used it, for example to reward firms that have invested more in work-security conditions, obtain higher quality in their contracts. Firms can win tenders at a higher price than rivals if they have obtained a higher reputation for their past performance: investing in work-security is costly but is also rewarded.

Question n. 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?

Performance clauses are useful but are an ex-post device to obtain what desired. In addition, whether positive or negative clauses, they could lead to litigation and to an increase in costs if not properly verifiable.

Question n. 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?

The EC should allow CAs to reward those firms that prove to be respectful for workers' conditions by rewarding them in the next tenders through a reputation indicator to be used for qualification and/or award criteria.

Question n. 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?

It wouldn't hurt to study carefully the history of South-African Black Empowerment Legislation that rewards reputation also for white-owned firms that use a black supply chain.

Question n. 78

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

The definition of standardised regimes could be useful for the CAs but this should be done by a centralized entity. This missing, information from firms should be obtained in an electronic format.

Question n. 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?

South African public procurement supports firms that in turn support black empowerment. In the US it is the SMEs. In both countries behind this there is a more ample legislative framework that established the policy principles that justify intervention. If a EU member state were to enact such a reference law and the law specifically mentioned also public procurement why not make tenders in that country reward such a principle as long as it does not discriminate against other EU firms?

Question n. 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?

Let us turn this question around. How can discrimination be further reduced? In the USA there is an individual of the Small Business Administration, the Procurement Center Representative, in each large CA that monitors that tenders are not slanted in favor of large firms. Such an individual could be similarly stationed in large CA to check that the desired policy is effectively implemented across organizations (think for example of monitoring the respect of green oriented policies).

Question n. 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?

See our answers 79 and 80. Whether a procurement targeted share for EU SMEs or a handicap-rule in procedures helping SMEs, should be allowed within a larger National policy framework in favor of SMEs.

Question n. 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?

Question n. 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)?

Question n. 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.)?

Question n. 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)?

Question n. 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?

Question n. 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)?

If the policy that is favored in procurement is part of a wider National policy framework coherent with EU policies and that does not imply discrimination against other EU firms, yes. In particular, EU public procurement legislation should favor the development of corporate social responsibility. Companies do not have enough incentives for these aspects and time has come for a more socially-oriented procurement legislation.
However, such corporate responsibility (and other factors) should not be measured through certifications released ex-ante by certification bodies, that are typically costlier for small firms, but rather by ex-post measurement of performance on these dimensions.

Question n. 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.

It is likely to be an empirical matter backed by (good) theory.

Question n. 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?

Question n. 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?

If procurement is deemed to be the best way (to be demonstrated with the answer to question 83) we would suggest national level legislation with no discrimination against EU firms. If there is a need for a European standard, especially where network economies operate, EU level decision might be advisable.

Question n. 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?

No.

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

Ample, once EU or national general principles on what to buy (see questions 84 and 85) are respected.

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

Yes if there is a reason for mandatory requirements.

Question n. 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)?

Question n. 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?

Question n. 89

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

Focusing on output and needs requests and not on inputs.

Question n. 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?

It is hard to say, it would require empirical analysis of much better quality that available on the relative efficiency of PP relative to other innovation-enhancing policies. More and better data are needed.

Anyway procurement for innovation with no policy for greater competence-enabling programs is fruitless.

Question n. 92

Do you think that the competitive dialogue (CD) 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?

Question n. 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?

It depends entirely how CD is actually implemented, purchasing managers should be appropriately trained to use it. Important is how to manage IPRs on innovative solutions that arise from dialogue. This protection on IPRs should be specified clearly in the CD tender.

Question n. 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 precommercial procurement (PCP)?

There are large risks in the PreCommercial Procurement approach linked to the superior information of the private firms relative to public buyers and the risk of crowding out other R&D, but also potential benefits. IPR protection is rather rigidly set in favor of the CA (see com (2007), 799), which could discourage participation on the part of firms.

2 things remain almost as pre-conditions for the success: (a) procedures should foster an abundant and qualified participation and (b) the CA must maintain the control of the dialogue to avoid firms imposing their favorite solution to the CA.

Question n. 95

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

Recognize them a pecuniary amount to reimburse them of the cost of participating to the CD or PCP, leaving open the question as to whether reimburse all SMEs or only the best ones.

Question n. 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?

Measurement can change over time and especially over the procurement object. In general, one should choose indicators that can potentially testify that specific functions have improved over time, like costs, satisfaction etc… Also it could be useful to measure the degree of penetration of innovative solutions inside and outside the public sector and how these have affected other innovations.

Question n. 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?

Surely not, there are already way too many limits to the ability to procure decently, better to encourage some methods, not limit others.

Question n. 97.1.2

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

Question n. 97.1.3

Loosening the award criteria or reserving contracts to certain types of organizations 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?

What disadvantage do these firms have? We see no competitive issue here, nor a specific goal per se, unless these are small firms then they should be helped as such.

Question n. 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 justification.

SECTION 5 – ENSURING SOUND PROCEDURES

Question n. 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, mostly distinguishing between real and potential conflict of interest (COI). And being careful on how to define it! We disagree with the Green Paper when it states that "a conflict of interest constitutes, objectively and on itself a serious irregularity regardless of the intentions of the parties concerned and whether they were acting in good or bad faith". It is worth clarifying that what is seriously irregular is not managing a COI, whether or not its non management is damaging. If a COI is a serious irregularity how can I ask the one that has it to communicate it? In the COI literature a COI is never considered an irregularity.

Having said this, all instances that can generate a COI (real, apparent, potentials) must be tackled. Normally, COI policies are focused on financial interests. This is because: a) financial interests generate often sizeable economic gains; b) they are more objectively measurable and quantifiable than other COIs and can therefore usually be regulated in a more efficient and impartial way. Still, non financial interests can affect heavily individual's choice (imagine helping a family or a friend). Both types of COI are particularly damaging when they can affect the reputation of a whole organization.

Question n. 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?

Again, the question is to re-phrased. COI is first identified then, according to its seriousness, you decide if to prevent it or resolve it. I can't prevent what I have yet to identify.

In some situation it is worth preventing COI in others accepting its presence and manage it appropriately (for example through disclosure).The choice often depends on the severity of the COI.

Preventing COI allows to avoid not only real and potential COI but also the apparent one. The incompatibility of roles, for example, can be included within such situations of a COI that has

been prevented. Indeed, not only interference of a private interest is avoided but also the individual, to the eye of the external examiner, is considered credible and reliable in its expression of will.

As for disclosure, it is worth mentioning those situations in which it would be mandatory to declare the existence of private interests that potentially or apparently could interfere with the decision to award the contract (i.e. create a list of correlated parties); situations in which it would be mandatory to declare the existence of private interests that could interfere with the duties of the tender awarders during the evaluation; situations in which it would be mandatory to declare the existence of private interests that in reality or even only apparently would tend to interfere with the duties of the contracting parties during the life of the contract.

One would need to select an independent body that could decide as to whether, in a situation of declared conflict, to maintain or excuse the individual in charge of making the decision. Such situations should anyway be sent to the EC in above threshold tenders, together with the communication of the remedies adopted or the reason not to have adopted any. Information to the EC should include all that is relevant to establish the value and the dimension of the interests involved for the decision-making party.

It would also be worthwhile adopting a decaloguies at the EU level of what is a COI in procurement, even when the situations involved are not to be declared, so a sto make anyway all parties more conscious of the issues at stake. Such a decalogue should be made mandatory reading for all parties involved (suppliers, procurers, awarders etc…) and signed before becoming an active party to the procurement procedure.

One should also consider the establishment of rules as to when to accept gifts or other goods and for how much at most.

Most of all what is necessary is training so as to make COI's definition clear in procurement. Such training should at least describe apparent, potential and real COI, illustrate risky situations and appropriate risk management. Without training there are no chance to win this battle for integrity. The EC should be the central coordinator of this effort.

Question n. 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?

Yes. Especially there where there are cartels and mafias (organized crime). Support coming from EU institutions, especially if not reducing the discretionality of the CA, could be very useful. Reducing

further discretionality of CA could only be harmful as more rules do not fight corruption.

Question n. 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)?

It is definitely better not to separate the various stages of procurement since corruption is often an agreement "signed" before the tender takes place (through favoritism) and that is concluded during the contractual phase of procurement when lower quality is delivered.

The existence on non-binding standards for TORs or tenders – from which to deviate only justifying publicly why – are facilitated by the existence of Central Purchasing Bodies or large CAs that offer tenders of high quality (even if the quality delivered is not always so good). This would reduce the risks of corruption and favoritism,e specially if deviations from standards are to be communicated openly.

Cartels and corruption are often strategic complements that go hand in hand. The number of lots with respect to the number of firms, the presence of Temporary Consortia, the length of the contract, the base price, the existence of sub-contracting are all elements that can favor cartels and thus, more easily, a corrupt agreement. All these aspects, therefore, should be communicated the National Antitrust Authority and benchmarked across types of goods and services nationally and, through the EC, Europe- wide. They should be published on their website with machine-readable data downloadable by researchers and the public so as to acquire visibility and put pressure on CA to perform correctly.

During contract execution the true quality of performance should be revealed. This can happen, ad for favoritism, encouraging and protecting whistleblowers and creating, for the tender phase, performance indicators that will be verified by external stakeholders (such KPIs could be determined by Procurement Authorities ex-ante and ex-post verified and published on the Authority website). How to encourage whistleblowers? With money and physical protection, as well-experimented in the USA with the False Claim Act against fraud and corruption, and in Antitrust policies against cartels.

Question n. 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)?

Mandatory checks by Antitrust authorities that need to examine the data received by CAs that are more likely to generate sustainable cartels. Mandatory KPIs by Procurement Authorities to determine performance, monitor it, publish data on it.

Question n. 103

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

Surely yes for controls on subcontracting, to prevent cartels besides organized crime. Another important issue is Whistleblower - protection regulation.

Question n. 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 mechanisms would you propose?

Exclusion is a good sanction for these serious infringements.

Question n. 105

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

Using National Anticorruption agencies to circulate data on corruption convictions by final judgment and mandating exclusion from public procurement for a given period.

Question n. *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?

Self-cleaning measures often discriminate against SMEs as they involve greater unitary costs for them. They should be avoided.

Question n. 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. One possibility is to allow the firm involved in the design of the

project to name its price for realizing the project, before the tender for the project realization takes place. Then that price can be used as reserve price in the tender, in which the firm is excluded. In this way, the firm's information is transmitted to the other bidders via its price offer, and the firm has a chance to be awarded the contract. But there is no undue competition.

Question n. 110

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

If there are incumbent procurement is not the right instrument to implement industrial policy: if the market is monopolized just do direct negotiation (but are we sure is it really a monopoly if we really open up such tenders to foreign players?).

♦ SECTION 6 – ACCESS OF THIRD COUNTRY SUPPLIERS TO THE EU MARKET

Question n. 111

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

While the degree of openness of the European Public Procurement Market for Public utilities is wider than the one guaranteed by other agreements (e.g. GPA), the mechanisms provided by both articles 58 and 59 of Directives 2004/17/CE are sufficient instruments to guarantee enough space to competition for firms of Third countries when necessary.

Question n. 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?

The provisions could be further improved in two ways.

First of all, defining more accurately what is meant by the expression "conditions for participation in public procurement which are just as favorable as those reserved for", "comparable and effective access for Community Undertakings" and "the same competitive opportunities". Secondly, One could imagine to require a preliminary necessary agreement on the objective parameters for evaluation and comparison of the possibilities of access to the relevant markets.

In general, the extension of the perimeter of application of such dispositions beyond procurement of public utilities services is not advisable since we are dealing with exceptions to the principle of competition established in the Treaty on the Functioning of the European Union and to the specific procedural relevance that it considers for the related procurement.

Potential exceptions should anyway be justified in relation to objective and material conditions and within well predetermined limits.

Question n. 112

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

The necessity of an ex-ante detailed definition of the conditions of concrete reciprocity in the access to procurement market in agreements (specific or of free trade, bilateral and multilateral) with interested third countries could constitute a requisite that Directives express, referred only to relevant cases. It should anyway concern appropriate mechanisms to encourage international competition (coherently with GPA) and the

removal of obstacles to its presence in Third countries and derogatory mechanisms, i.e. Incapable of precluding the pro-competitive interpretation of the set of EU procurement laws.

Question n. 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?

Where is the focus on acquiring and rewarding competences in this Green paper? And where the space for discretion with accountability? And the quest for machine-readable data to be publicly delivered to citizens? We have found none of these **three structural issues.**

Question n. 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. **Competence-building across procurers and supervision authorities and rewarding those competences;**
2. **Accountability of procurers through data availability on procurement performance;**
3. **Rewarding reputation of firms in tenders;**
4. **Fighting corruption and collusion jointly with credible severe punishments and encouraging whistleblowers to emerge;**
5. **Making EU small firms compete on an equal footing in the procurement market by favoring explicitly and directly their participation in EU tenders;**
6. **Forbidding with the Directives what has clearly been proven not to be optimal while leaving otherwise ample discretion to public procurers to test new procedures and new ways to procure.**

THE TEAM

Prof. Gustavo Piga

Professor of Economics - *University of Rome Tor Vergata* - **Project Coordinator**

Prof. Giancarlo Spagnolo

Professor of Economics - *University of Rome Tor Vergata*

Prof. Paola Valbonesi

Associate Professor of Economics - *University of Padova*

Prof. Elisabetta Iossa

Professor of Economics - *University of Rome Tor Vergata*

Prof. Nicola Dimitri

Professor of Economics - *University of Siena*

Dr. Emiliano Di Carlo

Assistant Professor of Economics - *University of Rome Tor Vergata*

Dr. Mariangela Zoli

Assistant Professor - *University of Rome Tor Vergata*

Dr. Alessio D'Amato

Assistant Professor in Public Economics - *University of Rome Tor Vergata*

Dott. Francesco Sperandini

ACEA S.p.A.

Prof. Aristide Police

Professor of Law - *University of Rome Tor Vergata*

Prof. Arturo Cancrini

Professor of Law - *University of Rome Tor Vergata*

Prof. Stefano Vinti

Professor of Law - *University of Rome La Sapienza*

Prof. Biancamaria Raganelli

Professor of Law - *University of Rome Vergata*

Prof. Martina Conticelli

Professor of Law - *University of Rome Tor Vergata*

Prof. Nino Paolantonio

University of Rome Tor Vergata

Prof. Giacinto Della Cananea

University of Rome, Tor Vergata

Prof. Donatella Morana

Professor of Law - *University of Rome Tor Vergata*

Prof. Hilde Caroli Casavola

Professor of Law - *University of Molise*

Thanks to

Dr. Elena Innocenzi

University of Rome Tor Vergata